IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(SUMBAWANGA DISTRICT REGISTRY)

AT SUMBAWANGA

DC. CRIMINAL APPEAL NO. 50 OF 2020

(C/O Criminal Case No. 146 of 2018 Mpanda District Court)

(Luoga, B. G, RM)

JOFREY S/O DAVID ..... APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

09/11 & 14/12/2021

JUDGMENT

Nkwabi, J.:

He who fights and runs, leaves to fight tomorrow. This is true of the appellant. After enduring the confrontation with three prosecution witnesses during the trial, the appellant stopped appearing in court to defend his innocence if any, till he was arrested. The trial court having heard another witness in the appellant's absence, convicted and sentenced him in absentia. When he was re-arrested, he pleaded with the court that he was sick and was getting treatment at an herbalist. That plea did not convince the court, which ultimately threw him into prison for two thirty years terms for rape contrary to section 130(1)(2)(e) and section 131(2)(a) of the Penal Code

Cap 16 R.E. 2002 and impregnating a school girl contrary to section 60A (3) of the Education Act, Cap 353 R.E. 2002 respectively. It was unclear whether the sentences in both counts would run concurrently or consecutively, as the trial court's record is silent on that aspect.

The appellant is evidently resentful of the decision of Mpanda district court. To express his grief with it, he drew up a petition of appeal comprising four provocations of appeal. He ultimately filed the same in this court. The justifications of the appeal by the appellant are, **firstly**, the case was not proved beyond reasonable doubt. **Secondly,** his guilty was proved without DNA test between himself and the victim illegally. **Thirdly,** the age of the victim was not proved documentarily or otherwise. **Fourthly,** his conviction in absentia was wrong as he did not jump bail rather, he was precluded from appearing in court by sickness, which he reported (sent an information) and **fifthly,** the trial court erred in relying on a caution statement while the appellant was tortured during interrogation.

In the trial court, it was the prosecution's case that the appellant tried to seduce PW1, a school girl, on two occasions in vain. On the third incidence, the appellant coaxed her to escort him to his home, whereas she gave in to

that request. At the appellant's home, the appellant raped her. She stayed there for three days in which she would have sexual intercourse with the appellant. On the 4th day, they paid a visit to his parents at Karema village in view of introducing her to his parents. Her mother went there with a police officer hence the matter was reported at Karema police station. He was later prosecuted. PW2 confirmed to have medically examined PW1 and tendered the PF3 as exhibit P1 to that effect. PW3 Philbert confirmed PW1 to be a form II student at Shanwe secondary school where he is a teacher. He tendered the admission register as exhibit P3. PW4 tendered the caution statement of the appellant as exhibit P4. It is due to these pieces of evidence that the trial court was satisfied beyond reasonable doubt that the two offences were proved beyond reasonable doubt and convicted and sentenced the appellant as shown above.

When re-arrested the appellant claimed to have been sick, but his father, according to the record of 21/01/2019, claimed to have not known that the appellant was sick.

Meanwhile, the appellant appeared in person to argue this appeal, while, the respondent Republic was duly represented by Ms. Safi Kashindi, learned

State Attorney. The appellant preferred the respondent to submit on the appeal and he left for himself the opportunity to rejoin if there would be a need to.

Ms. Safi Kashindi, learned State Attorney, for the respondent was quick to support the appeal urging that the charge was not proved beyond reasonable doubt. The offence was rape of a girl under 18 years, the important witness is the victim as per **Seleman Makumba's** Case.

The victim testified in court at Page 10 – 11 of the proceeding on how she was raped. They proved penetration, she urged.

The 2nd ground is about DNA test and results. In our jurisdiction, it is unnecessary as per **Seleman Makumba's** case and **Robert Andondile Criminal Appeal No. 465/2017** at page 15, she maintained.

The 3rd ground is on the age of the victim. She agreed that the same was not proved. No witness testified as to the age of the victim. Since this is a statutory rape, age ought to have been proved. They offended **Isaya Renatus V.R. Criminal Appeal No. 45/2015** at Page 8 and 9, Ms. Kashindi conceded.

For the above reasons, she stated, they supported the appeal. She prayed the appeal be allowed and the appellant be set free.

Appellant had nothing useful in rejoinder, he be released.

I start my consideration with the complaint in respect of his conviction in absentia. On this lamentation, the appellant maintained that his conviction in absentia was wrong as he did not jump bail, rather, he was precluded from appearing in court by sickness, which he reported (sent an information).

The record reveals that on the next date the case was fixed for hearing, which was on 25/02/2019, the appellant failed to appear. No report as to his whereabouts, be it by his surety, as such an arrest warrant was issued against him. It was not until 27th March 2019 when the matter proceeded with hearing in his absence. That was after three adjournments in his absence. I have scanned the whole trial court's record and I have found no such information. In fact, his father who stood surety for him said was unaware of such sickness. This grievance of the appellant is not a fresh

territory as it has been extensively and authoritatively discussed by the Court of Appeal of Tanzania in **Olonyo Lemuna & Lekitoni Lemuna V Republic 1994 TLR 54** it was held inter alia:

> *Section 226(2) of the Criminal Procedure Act 1985 makes provision for the court to set aside a conviction entered in the absence of the accused if it is satisfied that the absence was due to causes beyond the control of the accused; this accords to the accused person an opportunity to be heard;*
>
> ...
>
> *Only prior to the close of the prosecution case are the circumstances set out in s 226 of the Criminal Procedure Act 1985 applicable; after the close of the prosecution case, s 226 is inapplicable and s 227 takes over;*

In the circumstances like this, this ground is wanting in merits since the appellant was afforded the right to a hearing as to his non-appearance in the court, he failed to convince the court and the court rejected his reason for non-appearance, and correctly so. I dismiss this ground of appeal.

I now turn to discuss the appellant's complaint on lack of proof by DNA examination report. The prosecution did not attempt to prove by DNA test. I am of the firm view that the prosecution is aware that that is not a legal requirement as per **Christopher Kandidius @ Albino v Republic, Criminal Appeal No. 394/2015** CAT (unreported) and **Mussa Sebastiani v Republic, Criminal Appeal No. 406/2018** CAT (Unreported):

> *It is, we think, enough for us to say DNA test is not a popular means of proving rape in our jurisdiction, given its limitations, perhaps.*

The above complaint, therefore, is meritless and is dismissed.

Next, I consider the argument put forward by the appellant that the prosecution did not prove its case for the trial court erred in relying on a caution statement while the appellant was tortured during interrogation. This grievance by the appellant will not detain me much. This is because, firstly, the appellant jumped bail, he therefore denied the trial court the opportunity to hear him on it at his own choice. Secondly, the trial court did not heavily rely on it to ground conviction. Thirdly, the trial court too, took it as

corroborative evidence which means there was other sufficient evidence to prove the offence. For the above reasons, I hold that even if the caution statement is discounted, there is yet sufficient evidence to ground conviction as it will soon be obvious.

The next complaint for my consideration and determination is, that age of the victim of the offence was not proved. This, admittedly, is a trick matter especially when it comes to proving statutory rape. This foundation of appeal received a general concession by the learned State Attorney for the Respondent. While I accept that the prosecution did not establish statutory rape for failure to prove the age of the victim of the alleged statutory rape, on the contrary, there was sufficient evidence on the trial court's record that proved impregnating a school girl offence. The teacher of the victim (PW3) came to give oral evidence and tendered an authenticated copy of the student admission register in which the name of the victim of offence is indicated to have been admitted and assigned admission number 1237. PW2 and the PF3 (exhibit P1) corroborated the testimony of PW1 in respect of the pregnance. Unlike in the case of **Ahmed Said v Republic, Criminal Appeal No. 291/2015** CAT (unreported) where the alleged victim was a self-confessed liar:

In our view, the statement of principle equally befalls on a witness in the shoes of Yusra who withheld the details of the sexual occurrence for quite a while. To further complicate her non-disclosure and, as was correctly formulated by the learned Senior State Attorney, Yusra was a self-confessed liar. ...

In the case under my consideration, PW1 is not a self-confessed liar. It is trite law that every witness is entitled to credence unless there are sufficient reasons to decide otherwise. The PF3 which was admitted as exhibit P1 clearly indicated that the victim of the offence was pregnant. I have no doubt that the account of PW1 that it was the appellant who was responsible for the pregnancy is tenable and I hold as the trial court did that the 2nd count on the charge sheet was proved beyond reasonable doubt. The prosecution evidence is corroborated by the appellant's jumping bail and coming to tell lies to the court that he was sick, the fact which was unknown to his father who was his surety. This approach of mine is in accordance with **Paschal Kitigwa v. Republic Criminal Appeal No. 161 of 1991** (Unreported) (CAT) (MWANZA):

"...it is common ground that corroborative evidence may well be circumstantial or may be forthcoming from the conduct or words

of the accused. On this, numerous decisions have been made by the then court of Appeal for Eastern Africa- see ***R v Said Magombe (1946) EACA 1645*** *and* ***Migea Mbinga v. Uganda (1967) EA 71"***

Admittedly, and as per my discussion above, the 1st count on which the appellant was convicted and sentenced for rape, the respondent, nevertheless, subscribed to the appeal of the appellant and properly so, as the same was not proved to the required standard. The age of the victim of the alleged rape was not proved to the satisfaction in line with **Robert Andondile Komba v D.P.P, Criminal Appeal No. 465/2017:**

The law requires that in statutory rape cases, the age of the victim must be proved. ...

Therefore, it is our conclusion that there was no proof of PW1's age because what was indicated in the PF3, even if there was no any other defect, was not proof of her age as required by the law. ... our conclusion is that there was no proof of statutory rape because there was no proof of the victim's age. On that ground we allow the appeal.

Therefore, the appeal in respect of conviction on rape and sentence thereto has merit and is allowed.

Lastly, could this case be rightly claimed that the appellant was convicted and sentenced on a case that was not proved beyond reasonable doubt as he vigorously tries to maintain? I would agree with him in respect of the rape offence for failure to prove the age of the victim, just as rightly acceded to by the respondent. I have already done so. I do, however, diverge with him in respect of the impregnating a school girl offence since this offence does not require proof of the age of the girl but rather that the girl is a school girl as envisaged by the law. That she was a school girl at the time she was impregnated is clear on the evidence in the trial court's record. As for the victim having being impregnated there is ample evidence on the record. There is oral as well as documentary evidence to the effect that the appellant impregnated the victim while the victim was still a school girl in form II.

I conclude by allowing the appeal in respect of statutory rape. I quash the conviction and set aside the sentence on the statutory rape the appellant was convicted and sentenced upon. However, I uphold the conviction and

sentence in respect of the 2nd count of impregnating a school girl. The appeal in respect of the 2nd count is therefore dismissed.

It is so ordered.

DATED at **SUMBAWANGA** this 14th day of December 2021.

J. F. Nkwabi

Judge

Court: Judgment delivered in chambers this 14th day of December, 2021 in the presence of Ms. Safi Kashindi, learned State Attorney for the Respondent (the Republic), but in the absence of the Appellant though, notice of Judgment was served to the prison officer.

J. F. Nkwabi

Judge

Court: Right of appeal is fully explained. The copy of the judgment to be supplied to the appellant the soonest as the same is typed already.

J. F. Nkwabi

Judge

14/12/2021