IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

BUKOBA SUB-REGISTRY

AT BUKOBA

CRIMINAL APPEAL NO. 3250 OF 2024

(Arising from Criminal Case No. 167 of 2022 District Court of Ngara)

ENOCK MABULA @ MASHAKA.....APPELLANT

VERSUS

THE REPUBLIC..... RESPONDENT

JUDGMENT

16th and 25th April, 2024

BANZI, J.:

On 12th December, 2022, the appellant, Enock Mabula @ Mashaka was arraigned before Ngara District Court charged with three counts namely, rape contrary to sections 130 (1) (2) (e) and 131 (1) of the Penal Code [Cap. 16 R.E. 2022] (the Penal Code), impregnating a school girl contrary to section 60A of the Education Act [Cap 353] as amended by section 22 of the Written Laws (Miscellaneous Amendments) Act, No. 2 of 2016 and supplying drugs to procure abortion contrary to section 152 of the Penal Code. All three offences were alleged to be committed by the appellant on 10th October, 2022 at Nyankende village within Ngara District in Kagera Region to a girl of 16 years of age whom I shall refer as the victim or PW1. The appellant denied

the charge levelled against him. In order to prove the charges against the appellant, the prosecution side summoned seven witnesses and tendered two exhibits, the PF3s.

The factual background reveals that, on the fateful day, 10th October, 2022 around 7:00 PM, the victim went to the appellant's home after being called by him. Upon reaching there, they ate and after that, the appellant took her to his bedroom where he undressed her clothes and he also undressed himself. Thereafter, he inserted his male organ into her genitals. Despite feeling pain because it was her first time to have sexual intercourse, she did not shout as the appellant promised to marry her. She slept there until the next morning when she left for her home. In November, 2022, she went again to his house and they started living as husband and wife. In that month of November, she did not get her menstrual cycle. When she informed the appellant, he gave her four tablets to procure abortion. After that, she got her period once and it stopped. Thereafter, she returned home and on 2nd December, 2022 she went back to the appellant and they lived together until 6th December, 2022 when she left after being given medicine by the appellant following an information that, the victim's parents were looking for her. Upon returning home, her mother, PW4 called her brother (PW3) and uncle and they took her to Rulenge Police Station. According to PW4, when

the victim returned home, she asked her where she had gone and she stated that, she was at the house of the appellant helping him with house chores. Having seen her condition, they took her to Rulenge Police Station where they were given PF3 and went to Rulenge Hospital. At the Hospital, she was examined by PW6 who found her with two months pregnancy. According to her testimony, the victim named the appellant as responsible person for the pregnancy. The appellant was apprehended on the next day and taken to Rulenge Police Station but he denied the charges against him. On 8th December, 2022, the victim got miscarriage and taken back to the hospital where she was admitted until 12th December, 2022.

In his defence, the appellant who was the head teacher of Nyankende primary school, denied to have committed the alleged offences. According to his testimony, on 6th December, 2022 he was telephoned by a Police Officer namely, Athuman from Rulenge police station requiring him to report at the station to answer the charge of impregnating the victim. When he arrived there, he was interrogated but denied to have impregnated her. Thereafter, he was taken to Ngara Police Station and then to court. He admitted to know the victim as his pupil at the said school. He further testified that, although at the time of the incident, his wife (DW2) had gone to Kahama for delivery, he was living with two girls who were working for

him and Remigius Nicholaus (DW4) who was working in a barber shop. He also stated that, previously, the victim with other girls used to go to work for him in agricultural activities and house chores. According to him, the case was planted due to grudges. His testimony was supported by his wife DW2, the victim's friend DW3 and DW4. DW3 stated that, she used to live at the appellant's house from October, 2022 together with DW4. She also stated that, she heard the victim saying that they will make sure they put the appellant into hard situation because he is hated by villagers. DW3 further stated that, the victim was given Tshs.55,000/= by women to victimize the appellant. According to her, the victim told her that, she had relationship with other three men.

At the end of the trial, the trial court convicted the appellant with the first and third counts but acquitted him on the second count. Consequently, the appellant was sentenced thirty years imprisonment for the first count and three years imprisonment for the third count. Aggrieved with his conviction and sentence, the appellant through the services of Bajosa Attorney Advocate lodged this appeal which comprises seven grounds thus:

1. *THAT, the trial court erred in law and facts by reaching its decision and convict the appellant on the 1st and 3rd counts without considering that the case was proved to*

the required standard of proof that is to say beyond reasonable doubt.

2. *THAT, the trial court erred in law and fact by failure to consider the strong, reasonable and compelling evidence given by the defence side as opposed to the respondent evidence.*
3. *THAT, the trial court erred in law and fact by reaching its decision without medical report submitted by doctor or any prove (sic) that, the victim was checked up and found raped and impregnated on 10th October, 2022.*
4. *THAT, the trial court erred in law and facts by reaching its decision by acquitting the appellant on the offence of impregnating a school girl and convicting the appellant on the offence of rape without considering and proving key ingredients for the offence of statutory rape as required by law.*
5. *THAT, the trial court erred in law and fact for failure to interpret and consider the evidence given by medical experts in relation to the charge the accused person was charged with.*
6. *THAT, the trial court erred in law and fact by convicting the Appellant while there was a long delay in reporting the rape offence from the victim.*
7. *THAT, the trial court erred in law and fact for convicting the appellant without making prior inquiry on the behaviour of the victim before the commission of the offence.*

At the hearing, the appellant had the legal services of Messrs. Baraka John Samula and Pauline Michael learned Advocates whereas, Mr. Erick Mabagala, learned State Attorney represented the respondent, Republic.

Submitting on the first ground, Mr. Samula stated that, the republic was duty bound to prove its case beyond reasonable doubt as it was stated in the case of **Hemed Said vs Republic** [1987] TLR 117 and **Nchangwa Marwa Wambura vs Republic** [2019] TZCA 459 TanzLII. According to him, in this case, there were many doubts on the credibility of witnesses' evidence in proving the case against the appellant. He contended that, the victim gave contradictory evidence and she was changing stories on important details which is a sign that, she was not credible and truthful witness. Explaining further, Mr. Samula argued that, the victim claimed to be given the medicine in December but during cross-examination, she said it was in November. Likewise, in the charge sheet it was stated that, the offence of supplying drugs to procure abortion was committed on 10th October, 2022 while in her evidence she claimed that she was given medicine in December. He cited the case of **Lucas Kapinga and 2 Others vs Republic** [2006] TLR 374 to support his submission. He further argued that, there was contradiction among the prosecution witnesses as such, while PW4, stated that in November the victim went to her friend, the victim stated

that, she went to the appellant on 10/10/2022 and on the other hand, PW3 stated that, the victim was permitted by PW4 to go to work for the appellant. According to him, this contradiction goes to the root of the case. By relying on the case of **Christopher Kandidius @ Albino vs Republic** [2016] TZCA 196 TanzLII, he added that, the evidence of PW3 and PW4 is nothing but hearsay which carries little value. He therefore urged this court to find that, the case against the appellant was not proved to the required standard.

Concerning the second ground, Mr. Samula blamed the trial magistrate for failure to analyse and consider the defence evidence as required by law. Such omission vitiates the judgment as it was held in the case of **Kaimu Said vs Republic** [2021] TZCA 273 TanzLII. Thus, he prayed for the judgment to be quashed. As far as the third and fifth grounds are concerned, it was his contention that, the PF3s that were tendered in court did not establish penetration as the victim was examined to verify the pregnancy. In that regard, the evidence of PW6 and PW7 failed to establish penetration in order to prove the offence of rape. To buttress his argument, he cited the case of **Akwino Mtavangu @ Baba Janeth vs Republic** [2024] TZCA 233 TanzLII.

Reverting to the fourth ground, he argued that, as the appellant was acquitted of the offence of impregnating a school girl, it was wrong to convict

him on rape because these offences are interconnected. According to him, after finding that the appellant was not the one who impregnated the victim, it goes without saying that, the offence of rape was not proved against him. He cited the case of **Joel Jones Mrutu vs Republic** [2021] TZHC 3608 TanzLII to support his point. In respect with the sixth ground, Mr. Samula stated that, although the offence of rape was alleged to be committed in October, the victim reported the incident and named the appellant on 6/12/2022. The victim withheld such information for so long which creates doubt on who is responsible for the pregnancy. Citing the case of **Yust Lala vs Republic** [2015] TZCA 328, TanzLII, Mr. Samula contended that, delay to report the rape incident and with no explanation given for such delay, creates reasonable doubt on her testimony. Concluding with the last ground, he argued that, the trial court failed to conduct inquiry on the prior behaviour of the victim which creates doubt on who is responsible for the pregnancy. He urged the court to find that the case was not proved against the appellant hence, this appeal be allowed by quashing the judgment, setting aside the sentence and releasing the appellant.

In response, Mr. Mabagala supported the conviction. Replying on the first and fourth grounds jointly, he stated that, in proving the offence of rape, the prosecution must prove penetration and the age of the victim as it

was stated in the case of **Wambura Kiginga vs Republic** [2022] TZCA 283 TanzLII and **Samwel Nyerere vs Republic** [2022] TZCA 103 TanzLII. He contended that, in this case, the age of the victim was proved by the victim herself as reflected at page 5 of the proceedings that she was born on 30/06/2006. In respect of proving penetration, the victim stated that they were in secret relationship and they had sexual intercourse more than twice. However, the victim withheld such information because the appellant promised to marry her. The secret was revealed when she was taken to hospital due to intended miscarriage and the appellant was arrested the next day. According to him, the victim was trustworthy because her evidence was coherent and consistent, and hence she was entitled to be believed as it was stated in the case of **Goodluck Kyando vs Republic** [2006] TLR 363.

Submitting on the complaint that there was contradiction between PW1 and PW4 concerning the date when PW1 conceived and when the appellant gave her pills for abortion, Mr. Mabagala contended that, there was no contradiction considering that the victim said that she went to the appellant in October, November and December. Thus, the estimates of PW6 concerning the age of pregnancy, falls within the same dates. However, he insisted that, such contradictions were very minor and they did not go to the root of the matter. He supported his point with the cases of **Ex-G.2434 PC.**

George vs Republic [2022] TZCA 609 TanzLII and **Swaibu Shaban vs Republic** [2023] TZCA 110 TanzLII. Concerning the date when the victim was given pills for abortion, Mr. Mabagala conceded that there was variance between the charge and evidence.

Returning to the second ground, Mr. Mabagala readily conceded that the trial court failed to consider the defence. However, he did not concede with the proposal made by Mr. Samula concerning the way forward. On his side, he submitted that, being the first appellate court, this court has a duty of re-evaluating the evidence of the trial court and come up with its own findings as it was stated in the case of **Sabas Kuziriwa vs Republic** Criminal Appeal No. 40 of 2019 CAT at Mbeya (unreported). Hence, he urged this court to step into the shoes of the trial court and consider the defence evidence.

Regarding third and fifth ground, Mr. Mabagala was of the view that, PW6 did not state about the issue of penetration because the PF3 itself required him to examine the victim if she was pregnant. Therefore, the fact that the PF3 did not state about penetration, it cannot corrode the evidence of the victim. He cited the case of **Ally Ngozi vs Republic** [2020] TZCA 1786 TanzLII where it was insisted that medical evidence does not prove rape but the best evidence is the credible evidence of the victim who is in a

better place to explain how she was raped and the person responsible. He added that, the accused person can be convicted even in the absence of PF3 as it was stated in the case of **Jaffary Salum @ Kikoti vs Republic** [2020] TZCA 221 TanzLII. On the seventh ground, the learned State Attorney contended that, there is no law that mandates the court to make prior inquiry on the behaviour to the victim. Basing on his submission, he prayed for the appeal to be dismissed for want of merit.

In their rejoinder, Mr. Michael submitted that, there was no proof that the victim was in relationship with the appellant as none among the witnesses, eye-witnessed the victim living with the appellant. According to him, the contradiction between PW1 and PW3 on when the victim began to live with the appellant is a clear proof that, the victim was a liar which in itself is the basis of her evidence not to be believed. He further contended that, the submission by the learned State Attorney that there was no contradiction on when the relationship began has no basis because the victim contradicted herself on this issue which casts doubt on her evidence. Likewise, the victim was not credible for having said that, in October she got her menstrual period but later she said she did not get her menstrual period in the said month. According to Mr. Michael, this contradiction touches her credibility and is a clear proof that the case was concocted.

Concerning delay to report the incident, referring to the case of **Marwa Wangiti Mwita and Another vs Republic** [2002] TLR 39, Mr. Michael was of the strong view that, as the victim remained silent for eight (8) weeks, her reliability and credibility are questionable. In respect of the failure to consider defence evidence, the learned advocate urged the court to enter into the shoes of the trial court and consider the evidence of DW3 which establishes that, the victim had more than three men. However, there is nothing establishing that the appellant had sexual relationship with the victim. According to him, with such discrepancies, he prayed for the court to find that the offence of rape against the appellant was not proved.

Having considered the rival submissions of both sides together with the evidence of the witnesses at the trial court, the issue for determination is whether the case against the appellant was proved to the required standard.

Starting with the second ground, it is undisputed that, the defence evidence was not considered at all by the trial magistrate. As it was rightly conceded by learned counsel for both sides, it is clear that, after a long journey of summarising the evidence of both sides, the trial magistrate never considered the defence evidence at all. In the case of **Leonard Mwanashoka vs Republic** [2015] TZCA 294 TanzLII, the Court of Appeal

faced with akin situation where the appellant complained that his evidence was not considered at all in evaluation of evidence, the Court stated that:

> *"It is one thing to summarize the evidence for both sides separately and another thing to subject the entire evidence to an objective evaluation in order to separate the chaff from the grain. Furthermore, it is one thing to consider evidence and then disregard it after a proper scrutiny or evaluation and another thing not to consider the evidence at all in the evaluation or analysis... Failure to evaluate or improper evaluation of the evidence inevitably leads to wrong and/or biased conclusion or inferences resulting in miscarriages of justice."*

In the instant case, after summarising the evidence, the learned magistrate raised three issues as guidelines for determination of the case, however, thereafter, she did not labour herself to separate the chaff from grain before reaching into a conclusion that, the case was proved to the required standard. What is depicted from her judgment, basing on the celebrated case of **Seleman Makumba vs Republic** [2006] TLR 379, without considering what was stated by the defence side, she directly believed the victim's evidence on the notion that the best evidence of rape comes from the victim herself. Nevertheless, although it is well known that, normally, the offence of rape is really witnessed by the victim and the

assailant whereas, other witnesses come to court to corroborate that evidence, it is also the trite law that, the word of the victim of sexual offence should not be taken as a gospel truth. In the case of **Mohamed Said vs Republic** [2019] TZCA 252 TanzLII, it was stated that:

> *"We think that **it was never intended that the word of the victim of the of sexual offence should be taken as gospel truth** but that her or his testimony should pass the test of truthfulness."* (Emphasis supplied).

Therefore, from the above holding, before believing the evidence of the victim, the adjudicator has to make sure that the victim's evidence is nothing but the truth. In my considered view, the learned magistrate was supposed to critically analyse the evidence of both sides before coming into conclusion that the prosecution side proved its case beyond reasonable doubt. Nonetheless, it is very unfortunate that, the learned magistrate escaped that duty.

Regarding the way forward, I am constrained to agree with Mr. Michael and Mr. Mabagala that, this court being the first appellate court, has duty of re-evaluating the evidence of the trial court and come up with its own findings, as it was stated in the case of **Sabas Kuziriwa** (*supra*). That is to say, the first appellate court is duty bound to step into the shoes of the trial

court and re-evaluate the evidence and where possible come up with its own findings. In another case of **Vuyo Jack vs The Director of Public Prosecution** [2018] TLR 387, it was stated that:

> *"... we are aware of a salutary principle of law that a first appeal is in the form of a re-hearing. Therefore, the first appellate court, has a duty to re-evaluate the entire evidence on record by reading it together and subjecting it to a critical scrutiny and if warranted arrive at its own conclusions of fact."*

That being the case, this court is duty bound to determine whether the prosecution evidence proved the offences levelled against the appellant and whether the defence evidence casted doubt on prosecution case. It is a settled principle of law that, the prosecution is duty bound to prove the charge against the accused beyond reasonable doubts and the accused has no duty to prove his innocence regardless weakness of his defence. In rape cases, the prosecution is duty bound to prove two ingredients; the age of the victim and penetration as it was stated in the cases of **Wambura Kiginga** (*supra*) that:

> *"In all categories of rape, the basic ingredient for the prosecution to prove is* ***penetration of the female genitals by the male sex organ.*** *When it comes to*

statutory rape, there is an additional burden of ***proof of age of the victim*** *in order to ascertain that at the time the offence was committed, she was below 18 years of age since birth."*(Emphasis added).

Starting with proof of age of the victim, it is a settled principle that, age of the victim can be proved by the victim herself, mother, father, medical practitioner, relative and where necessary by production of the birth certificate. In the case **Omary Rashid @ Milanzi vs Republic** [2023] TZCA 167 TanzLII, it was held that:

> *"It is a settled principle of law in this country that the age of the victim can be proved by the victim, relative, parent, medical practitioner, birth certificate, teacher, close friend or any other person who knows the victim."*

In the instant case, the victim contended that, she was born on 30/06/2006. Since PW1 was eligible person to prove her age which was not an issue in dispute, I am satisfied that the age of the victim was proved.

Coming to the second ingredient concerning proof of penetration, the court is enjoined to determine whether penetration was proved. In her evidence, the victim contended that, she had sexual intercourse with the appellant on diverse dates from 10/10/2022 and there was a time when they lived together as husband and wife. As a result of such relationship, in

November, she did not get her period, hence, suspected to be pregnant. Being informed of the situation, the appellant gave her four tablets to procure abortion, however, miscarriage did not succeed. On his side, the appellant denied to have sexual relationship with the victim contending that, by that time, his wife had gone to Kahama for delivery, and at his home, he was living with two girls and a boy working for his salon. This was supported by his wife (DW2).

Although as a matter of law, in sexual offences, the best evidence comes from the victim, as alluded above, it is also the principle of the law that, the word of such victim should not be taken as a gospel truth but that, her or his testimony should pass the test of truthfulness. Had the appellant living with the victim, there would be people with knowledge of their life because, normally, husband and wife cannot live secretly without being seen by other people. However, no one appeared before the court to prove that the victim was living with the appellant at his house. Conversely, there was evidence from the defence establishing that, at the time the appellant's wife left home for delivery, DW3 and DW4 were living at the appellant's house and none among them has ever seen the victim living together with the appellant as husband and wife as alleged by the victim. In addition, there

was no possibility of appellant and the victim living together as husband and wife in the presence of DW3 and DW4 without being noticed.

Apart from that, PW4, the victim's mother, said that, the victim left her home on 02/12/2022, contending that she was going to her friend. She did not say if the victim had ever left home prior to that date or if there was any suspicion of relationship between the victim and the appellant. Likewise, she did not say anything about the victim to have spent the night out of their home on the date of incident. Moreover, the evidence of PW4 contradicted with the evidence of the victim whose story was changing from time to time. At first, she claimed that, she was at the appellant's place from 03/10/2022. Later she claimed to start living there from November, 2022. Besides, the fact that the victim left her home to her friend's house as claimed by PW4 is not a proof that she had gone to the appellant, unless that assertion is supported with another evidence. Therefore, all these cast strong doubts on the truthfulness of the evidence of the victim that, on the date of the incident, she went to the appellant's house and the duo had sexual intercourse.

Furthermore, there is another complaint that, the victim delayed in naming the appellant as the one who raped her. According to the victim, she was raped on 10/10/2022 and on the next day, she returned home.

However, upon returning home, she did not say anything about being raped leave alone naming the appellant as her rapist. The victim remained quiet until 6th November, 2022. We cannot assume that; the victim did not name the suspect on the earliest dates due to the marriage promise as suggested by Mr. Mabagala, because, the victim herself did not state the reason of the delay in naming the appellant as her rapist. Besides, the fact about the victim naming the appellant as her rapist comes from PW3 and PW4. Nonetheless, the victim in her entire testimony did not state anything about naming the appellant as the one responsible for the alleged rape and pregnancy. This alone casts another doubt on the credibility of the victim. It is doubtful if at all, on 10th October, 2022, the appellant had sexual intercourse with the victim considering that, according to DW3, the victim herself told her that, she was in a relationship with three other men. This evidence of DW3 was not challenged by the prosecution during cross-examination. Under these circumstances, it cannot be concluded that, it was the appellant who raped the victim on the date alleged in the charge sheet.

Reverting to the third count of supplying medicine to procure abortion, I am inclined to agree with learned counsel for both sides that, there is variance between charge and evidence. The charge sheet indicates that, on 10th October, 2022, the appellant supplied drugs to the victim to procure the

abortion. However, the victim in her evidence contended that, it was in November when the appellant gave her tablets to procure abortion and she swallowed two tablets and the other two were inserted through her female genitals. She also contended that on 6th December, 2022 the appellant gave her another four tablets. Apart from such variance which flop the prosecution case on the third count, there was no evidence from the medical experts, PW6 and PW7 to establish that, the tablets alleged to be given to the victim could have procured the abortion. Hence, for such uncertainty and variance between charge and evidence, there was nothing to prove the third count.

Having said so, I am of the considered view that, the prosecution side had failed to prove the case against the appellant beyond reasonable doubt. In that regard, I allow the appeal by quashing the conviction and setting aside the sentence meted against the appellant. I order his immediate release from custody unless held for other lawful cause.

I. K. BANZI
JUDGE
25/04/2024

Delivered this 25th April, 2024 in the presence of Ms. Anisa Abdul, learned counsel for the appellant, Mr. Erick Mabagala, learned State Attorney for the respondent, the appellant, Mr. A.V. Kaizilege, Judge's Law Assistant and Ms. Mwashabani Bundala RMA. Right of appeal duly explained.

I. K. BANZI
JUDGE
25/04/2024