IN THE HIGH COURT OF TANZANIA

IN THE DISTRICT REGISTRY

AT MWANZA

HC. CRIMINAL APPEAL NO. 60 OF 2020

(Original Criminal Case No. 105 of 2018 of the District Court of Nyamagana District at Mwanza)

ENOS NZUMBI @ NYERERE .....APPELLANT

VERSUS

THE REPUBLIC .....RESPONDENT

JUDGMENT

05 & 13/10/2020

RUMANYIKA, J.:

Having had been arraigned, charged and convicted on 01/11/2018 for preventing a school girl from attending school regularly (1st count) and rape (2nd count) respectively Contrary to Rule 4 (2) of the Primary School Compulsory Enrolment and Attendance Rules, 2002 read together with Section 35(3) (4) of the Education Act Cap 353 R.E. 2002 and Sections 130(1) (2) (e) and 131(1) of the Penal Code Cap 16 R.E. 2019, Enos Nzumbi @ Nyerere (the appellant) is not satisfied hence the appeal.

The four (4) grounds of appeal revolve around points as under:-

(1) The prosecution case wasn't beyond reasonable doubts proved.

(2) The victim was not proved as being under age.

(3) The trial court improperly evaluated the evidence.

(4) Without **Vore Dire** examination being carried out the evidence of Pw1 was improperly taken.

The appellant appeared in person. Ms. Lilian Meli learned state attorney appeared for the respondent Republic.

In a nut shell but additional to his memorandum of appeal the appellant submitted: **(a)** he was not fairly heard by the trial court **(b)** the purported victim was only tutored **(c)** he was not proved to be the responsible father much as the child was already born **(d)** the victim's mother should have intervened if at all the school girl had been impregnated by him **(e)** only for reasons known to neighbour, the latter had just fixed the appellant. That is it.

Ms. Meli learned state attorney submitted: **(i)** that with regard to right to be heard, the records also had it that the appellant was sufficiently heard and the alleged neighbour hadn't even testified in court **(ii)** whether or not with respect to the child the appellant was the responsible father DNA analysis and report was uncalled for **(iii)** through evidence of pw3 at P.11 of the typed judgment the victim was proved underage and **Vore Dire** examination was no longer a legal requirement because already the victim was above 14 years.

A brief account of the evidence on record reads as follows:-

Pw1 EN (name not real) Kisesa resident she stated that for the reason of pregnancy she was class V drop out of Nundu Primary school having had been two times consummated by appellant her boyfriend.

Pw2 Charles Nguka the Head Teacher of Nundu Primary school stated that having been tested pregnant on that ground the victim school girl she dropped out (copy of the attendance register-Exhibit P1).

Pw3 Stella Pastory of Kisesa area Mwanza stated that the victim was her 1st born of 22/02/2003.

Pw4 Rozimary Kasanga the local WEO Mecco-Nyakato area Mwanza, she stated that as she was on duty and the case having been reported to her on 02/05/2018 morning times and the school girl was found pregnant she named appellant the responsible father.

Pw5 G.4937 DC. Erick of CID Kirumba Police station in town he stated that as he was on duty and at work on 03/05/2018 and the case was reported to him, he on that basis interrogated him but the appellant denied the charges.

Pw6 Dr. Masoud a medical doctor of Buzuruga Health Centre stated that as he was on 03/05/2018 on duty and at work, among others he attended the victim (pw1) who tested four (4) months pregnant (copy of the PF3 – Exhibit P2).

The appellant (himself the sole defence witness) he just denied the charges. That is it.

The issue is whether the prosecution case was proved beyond reasonable doubts.

Laying the foundation for conviction, the learned trial resident magistrate is on record in his words having said:-

> **"...The prosecution brought in a court a total number of six (6)** witnesses plus exhibit to establish their case **...Having heard the evidence of both parties indispute which I will not reproduce ...The evidential of Pw1 - Pw6 plus exhibit P1 – P2 collective its seems that an accused involvement in the committed an offences for the 1st and 2nd counts for very weightful evidence rather than Defence case Dw1 which could be weakness evidence**

(poor by)....from above(s) reasons, it is well established that the prosecution side succeed to prove its case on the 1st and 2nd count beyond reasonable doubt acquired against an accused person their thus so...".

Literally meaning that having found it meaningless to reproduce the evidence adduced, but the prosecution evidence having weighed heavier than that of the appellant which also was weak and poor (if at all I understood the learned resident magistrate correctly), the latter proceeded to convicting the appellant. With greatest respect to the learned magistrate he mistook the criminal case for a civil matter and therefore misapprehend the required degree of proof leave alone as it would seem to be, instead, and contrary to the cardinal principle the court convicted him on "weak and poor" account of the appellant's defence case suffices the ground to dispose of the entire appeal. Ground 1 of the appeal succeeds.

Without prejudice to the foregoing, with regard to age of the victim (pw1) the prosecution case missed the very essential ingredient. It is trite law that unlike in ordinary charges of rape where only consent of an adult victim counted, in statutory rape charges consent of the child victim it was immaterial provided the latter was beyond reasonable doubts proved under age. Pw1's mother (pw3) and probably pw2 may have stated age of the victim yes, but as essential as it was the ingredient, the trial court should have further inquired it with a view to the witness producing tangible evidence namely a birth certificate, baptismal certificate or an affidavit in lieu of, or a school card as the case maybe. It is very unfortunate that the trial court skipped the crucial part of evidence both logic and wisdom therefore allowed that where age of the child victim was not sufficiently

proved, safe if the court cleared the doubts in favour of the accused then assume that the victim was an adult. Grounds 2 and 3 of the appeal succeed.

Even if the appellant had carnal knowledge of pw1, that one was no proof of the offence in the 1st count because. I think not every school girls who had done sexual intercourse only on that account simply they dropped out of schools much as the basis for conviction on the 1st count was pw1's pregnancy for which, as the appellant argued he was not scientifically proved the responsible father.

Now that all is said and, in my considered opinion therefore ground 4 of the appeal would be discussed only for academic exercise, I would rest the appeal there.

The appeal is allowed. The conviction and sentence are quashed and set aside respectively. Unless he was legally further held, the appellant be released immediately from prison. It is so ordered.

Right of appeal explained.

THE HIGH COURT OF TANZANIA
MWANZA

S. M. RUMANYIKA
JUDGE
08/10/2020

The judgment is delivered under my hand and seal of the court in chambers this 13/10/2020 in the presence of the appellant and Ms. Subira Mwandambo state attorney.

J. M. KARAYEMAHA
DEPUTY REGISTRAR
13/10/2020