IN THE HIGH COURT OF TANZANIA
(IN THE DISTRICT REGISTRY)

AT MWANZA

HC: CRIMINAL APPEAL No. 45 OF 2020

(Original Criminal case No. 05 of 2019 of the District Court of Ilemela at Mwanza)

PETER LUCAS @ NGWAGAMIRHA ..... APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

JUDGMENT

Last Order: 26/02/2020
Judgment: 28/042020

A Z. MGEYEKWA, J

In the District Court of Ilemela at Mwanza, the appellant was arraigned and convicted of Rape c/s 130 (2) (e) and 131 (1) of the Penal Code Cap.16 [R.E 2019]. Upon conviction, he was handled down with the sentence of 30 years imprisonment. Aggrieved, the appellant appealed to

this court for both the conviction and sentence. The appellant presently seeks to impugn the decision of the District Court upon a petition of appeal comprised of 8 grounds. In the meantime, I deem it apposite to explore, albeit briefly, the factual background giving rise to this appeal.

As I have hinted upon, the case for the prosecution was built around the accusation of Rape as it was alleged that the accused one PETER LUCAS @NGWOGAMIRA was charged that, on 26th day of December 2018 at Shibula area within Ilemela District in Mwanza did have sexual intercourse with one YASINTA MUSSA a girl aged 17 years old.

Upon arraignment, before the trial court, the accused entered the plea of not guilty.

From the testimony of (4) prosecution witness, the accused was also afforded his defence before the trial court. The appellant refuted the prosecution accusations and protested his innocence.

As I have already narrated, the trial court ruled out that the prosecution case was established to hilt, hence this conviction and sentence. As I have, again, recited, the appellant appeal before this court is upon 3 grounds as follows:-

1. *That, the trial court had erred in law and facts by relying on PW1 evidence, regardless of the pre and post conduct of the alleged victim PW1 as she was rather a suspect witness whose evidence was unworthy of belief so un-cogent and unreliable*
2. *That the essential ingredients of rape i.e. penetration was lacking in the alleged victims' evidence, so the trial court had erroneously convicted the appellant on the charge which was not proved beyond reasonable doubts.*
3. *That the prosecution witnesses were not credible as to whether the PW1 was a schoolgirl or not, in thus the trial court should have hard approached their evidence with great cautions and even her (PW1) age was uncertain as not proved via documents.*

At the hearing, before this court, the appellant appeared in person and fended himself whereas the respondent had the service of Ms. Mwaseba learned State Attorney.

Submitting first, the appellant stated that he filed this appeal because he was dissatisfied with the decision of the lower court. He went on to pray this court to adopt his grounds of appeal. He further added that the prosecution did not manage to prove the case beyond doubts.

It was the appellant's further submission that the victim (PW1) evidence left doubts. Pointing it out, he went on that PW1 evidence that she slept with the appellant the whole night and went home was a lie as she never reported the matter and her mother and brother in law were not called to testify. He prays this court to find that PW1 evidence was untrue.

On her party, the learned State Attorney responded to the grounds of the appellants' appeal and ended supporting the conviction and sentence.

Submitting on the 1st ground of appeal, she avers that, PW1 evidence was credible as she narrated what transpires between PW1 and the appellant. She referred this court to page 3 of the court proceedings that PW1 narrated how the appellant communicated with the victim. He insisted that, in rape cases, the best evidence of rape comes from the victim herself and the trial court was able to examine at the demeanour of the victim thus it was satisfied that the appellant raped the victim. Shee, therefore, prays this ground to be disregarded.

On the 2nd ground of appeal, she submitted that penetration was proved. She referred this court to page 13-12 of the trial court

proceedings, that PW1 narrated how they made love. The learned State Attorney fortified his submission by referring this court to the case of JUMA **Shabani Mrondo v R** Criminal Appeal No. 282 of 2010. She went on to submit that the victim may not mention the word sex but narrate the incidence in other words to mean sex. She urged this court to disregard this ground of appeal.

Submitting on the 3rd ground of appeal, she stated that the victim proved her age and PW2 her father testified that she was born in 2002 that means she was below the age of majority and therefore this ground is a demerit. Finally, she prays this court to dismiss the appeal.

Rejoining, the appellant insisted that the case was not proved to hilt as PW4 examined the victim and found that she had lost her hymen and it was not established who did the same. He prays this court to set him free.

I have considered the submissions for and against the appeal, and I now intend to make my determination thereof. Before I determine the merits or otherwise of this appeal, based on the grounds so advanced by the appellant the issue to be determined is ***whether the prosecution***

managed to prove their case beyond reasonable doubt and the conviction was right as reached by the trial court.

This case at hand is founded on statutory rape, and for that reason, I find it overbearing to start with the 3rd ground of appeal which is to that extent. It was the appellant claim that the prosecution witnesses were not credible as to whether PW1 was a schoolgirl or not, thus the trial court should have hard approached their evidence with great cautions and even the age of the victim was uncertain as not proved via documents.

I went straight revisiting the laws, and it is crystal clear that for the offence of statutory rape to stick under section 130 (1),(2),(e) of the Penal Code Cap.16 [R.E 2019], one of the prime substance of the offence ought to be proved beyond shadows of doubts is the age of the victim of rape that she was, at the time of the rape, under eighteen years of age. This was also severely insisted as it was in the case of **Solomoni Mazala Vs The Republic**, Criminal Appeal No. 136 of 2012, the Court of Appeal of Tanzania, Dodoma (unreported). It was Ms. Mwaseba submission that the age of the victim was proved by the victim herself and the victim father (PW2) that the victim was below the age of majority. The appellant refuted

the submissions claiming that the age was not proved to establish that the victim was below the age. The issue here is whether the age of the victim was proved for the statutory rape to stand. My careful examination on record, I find it contradicting as to the clear age of the accused. PW2 the father of the victim testified that the victim was born on 23.02.2002 and to the time of the commission of the offence be it 26.12.2018, in simple mathematics; the victim was 16 years old. When the victim was examined by the clinical officer as shown in Exh.P1 on 15.01.2019, she registered to be 17 years old. To this mandatory requirement for the offence of statutory rape, however, slight the doubt of the age of the victim, it goes to the root of the case, and unless afforded clearance of doubt, the offence must collapse. For the avoidance of doubt, where the age of the victim is not clear between the victim and the parent, other evidence including the documentary evidence such as birth certificate ought to be tendered in court to remedy the situation before the verdict is made. For the circumstance of the case at hand, I agree with the appellant that there was a contradiction but the contradiction did not negate the fact that the victim was below the age of majority. I agree with the holding in the case of

Charles Hombo v R, Criminal Appeal No. 220 of 2006, Court of Appeal of Tanzania (unreported) held that:-

> " *Much care should be exercised by the court where the age stated be closer to 18 years".*

In the circumstances of this case, I agree with the holding that a parent is better positioned to know the age of his child as it was held in the case of **Salu Sosoma v R** Criminal Appeal No. 32 of 2006 (unreported). In my view, the age was established and proved by PW2. Therefore, this ground is demerit.

Confined under 3rd ground of appeal, it was the appellant's claim that the trial court failed to act cautiously with the evidence of PW1 considering the circumstance of the appeal. It was Ms. Mwaseba submission that the evidence of PW1 was credible. Taking the circumstance of this appeal, it was PW1 evidence that the conviction of the appellant was founded. I regret to point out very few instances that the inference can be drawn as to what extent the evidence of the victim was credible. At page 11 of the trial court proceedings, I have made an extract when PW1 was examined in chief by Mr. Morce SA, she responded as follows:-

... I am student, I am studying at Shibula Secondary, am in form three...

At page 11 she continued giving her evidence:-

...At one point, while at Shibula Peter come to me, he said he loved me. I told him he should wait until I finish up my form four exams. He agreed.

At page 11- 12, she went on that:-

As I finished my exams of Form Four on 16.11.2018 Peter came again. I agree to have finished my exams...

Again at page 12 she said:-

While sleeping we had sexual intercourse...

we had sexual intercourse again on the following day...

Unpleasantly, this is an extract, a summary from what she stated as evidence at the trial court. It should be known that the evidence of PW1 was the basis for the conviction thus it was required to be credible and reliable. I understand that the best evidence in sexual offences comes from the victim herself as it was held in the case of **Selemani Makunge v R**, Criminal Appeal No. 94 of 1999 (unreported), and **Ramadhani Samo v Republic**, Criminal Appeal No. 17 of 2008 (unreported). However, in the

instant appeal the victim's evidence was not reliable. It is on records that, on 1st January, April, 2019, when PW1 was examined, she testified to be a Form three student at Shibula Secondary School and she claimed to have finished her Form 4 examinations on 16th November, 2018, it is vivid that PW1 was not telling the truth but still the trial court proceeded to convict the appellant based on untrue evidence of PW1.

Additionally, I have revisited the lower court records and found that penetration which is an essential ingredient in rape cases was not proved. It was the duty of the prosecution to prove beyond a reasonable doubt that the accused took part in an act of sexual penetration with the victim. In the instant appeal, PW1 evidence does not reveal if she was penetrated with a blatant object, she was required to explain clearly how penetration took place. In the case of **Kayoka Charles v R** Criminal Appeal No. 325 of 2007 the Court of Appeal held that penetration is a key aspect and the victim must say in her evidence that there was a penetration of the male sexual organ in her sexual organ. Failure to that penetration is not proved.

I am trying to relate the ingredients of penetration in rape cases with the evidence on record, I find that it was not proved, PW4 (Clinical Officer)

on 8th Janauray, 2019 examined PW1 to find out if the alleged victim was raped and PW4 testified that the victim's vagina was well the same did not prove penetration. It is trite law that for the "offence of rape "*...there must be unshakeable evidence of penetration*." In the case of **Selemani Makumba v R** Criminal Appeal No. 94 of 1999 (unreported) the Court of Appeal considered whether or not the complainant had been raped by the appellant and observed: -

> " *True evidence of rape has to come from the victim, of an adult, that there was penetration and no consent, and* ***in the case of any other woman where consent is irrelevant, that there was penetration****..." [Emphasis added].*

I have carefully considered the circumstances surrounding this case and found that penetration was not proved, therefore, I found that the evidence was not watertight to convict the appellant for an offence of rape unless there is other evidence on record to support the offence of rape. For the stated reasons, I find PW1 evidence was not credible and therefore not worth relied upon, therefore, I proceed to expunge the same from the records.

As I proceed to examine the records of the trial court, I did not find other evidence that the trial court relied upon to form its conviction against the appellant as it was solely based on the evidence of PW1, the evidence which now does not form part of the records. For that reason, I find the other two grounds of appeal already absorbed in the cause, and for want of evidence this appeal succeeds.

Under the circumstances, I allow the appeal. I quash the conviction and set aside the sentence. I order the immediate release of the appellant from prison unless he is lawfully held for other lawful purposes.

Order accordingly.

DATED at Mwanza this 28th day of April, 2020.

A.Z.MGEYEKWA

JUDGE

28.04. 2020

Judgment delivered on this 28th day of April, 2020 through audio teleconferencing in remotely presence of both parties.

A.Z.MGEYEKWA

JUDGE

28.04.2020

Right to appeal full explained.