THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(MOSHI DISTRICT REGISTRY)

AT MOSHI

CRIMINAL APPEAL NO 25 OF 2019

(Appeal from the decision of the District Court of Same at Same (F.J. Kigingi, RM) dated 19th March, 2019, in Criminal Case No. 87 of 2018)

JOEL JONES MRUTU.....APPELLANT

VERSUS

THE REPUBLIC.....RESPONDENT

Date of last order: 07/06/2021

Date of judgment: 10/06/2021

JUDGMENT

MWENEMPAZI, J:

The appellant, Joel Jonnes Mrutu, was charged at the District Court of Same with three offences, namely: Rape, contrary to section 130 (1) and (2) (e) and 131 (1) of the Penal Code (Cap. 16 R.E. 2002), the second offence being Impregnating a school girl, contrary to section 60A (3) of the Education Act, CAP 353 R.E 2002 as amended by Act No. 2 of 2016 and the third offence being Unlawful Child Removal contrary to section 40 of the Law of the Child Act, 2009. He is alleged to have raped, impregnated and removed from lawful custody one Natujwa d/o Isack Hussein, a girl of 17 years of age and a student of Chanjagaa Secondary School on an unknown date and time at Muhezi Village within Same District in Kilimanjaro Region. He was found

guilty of all the offence charged which was followed by conviction and sentence of thirty (30) years imprisonment for the first count, two years for the second count and three months for the third count. Aggrieved by the conviction and sentence, he preferred this appeal relying on eleven (11) grounds. I will not reproduce all the grounds of appeal word to word but I will give highlight or summary of what each ground states as follows;

1. That the charge was not proved beyond reasonable doubt.
2. That Penetration being the essential ingredient of the offence of rape was not proved.
3. That the evidence of the victim (PW1) deferred from the facts read on the preliminary hearing.
4. That the age of the victim (PW1) was not proved at all in a standard way.
5. That failure by the victim to disclose the information about the sexual offence against her to her parents early does not attract confidence of her testimony before the court.
6. That the trial Magistrate erred in law and fat for failure to comply with the mandatory provisions of section 240(3) of the Criminal Procedure Act (CPA) cap 20 R.E 2002.
7. That it was not proved whether PW1 was a student at Chanjagaa Secondary School as the names mentioned in exhibit P2 were different.

8. That the prosecution did not summon the very essential witnesses so the court should have drawn an adverse inference.

9. That the trial magistrate erred by not considering the defence evidence.

10. That the prosecution evidence was weak, contradictory, inconsistent incredible and wholly unreliable.

11. That the trial magistrate erred by failing to assign on record the reasons as to his satisfaction on the credibility and truthfulness of the uncorroborated evidence of the victim and decided to rely on it in convicting him.

At the hearing of the appeal, the appellant appeared in person and unrepresented while the Respondent was represented by Ms. Agatha Pima, learned State Attorney who was absent on the day and so it was ordered that the appeal be heard by way of written submission. The appellant had already prepared his submission in support of the appeal and prayed for it to be adopted whereas the same was served to the respondent and 14 days were given to the respondent to file reply submission.

The appellant started his submission by stating that the offence of rape was not proved to the required standard of law because there was no proof of penetration of a male organ into the female organ. He argued that the contention by PW1 that she had love affairs with the appellant was too general. He was of the view that PW1 ought to have explained whether or not the appellant inserted his penis into her vagina and whether the penetration was

slight etc. He contended that the evidence of penetration was of utmost importance to prove that the offence was committed. Supporting his submission the appellant cited the case of ***Daniel Shambala vs. Republic, Criminal Appeal No. 183 of 2004*** CAT at Mwanza where the Court of Appeal held that:

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> *"...if PW1 was raped, she ought to have gone further to explain whether or not the appellant inserted his penis into her vagina, whether or not the penetration was slight etc."*

It was the appellant's prayer that in resolving this mater this court should amplify the findings in that case.

Submitting further the appellant criticized the trial court for relying on the evidence of PW1 to convict the appellant. He contended that PW1's credibility as a witness was questionable for the fact that she withheld the information about the occurrence of the alleged offence by not disclosing it to any person especially her parents at the earliest possible time. He argued that this should have not attracted confidence of her testimony before the trial court. The appellant backed up his point by referring to the Court of Appeal of Tanzania unreported case of ***Ahmed Said vs. Republic,*** **Criminal Appeal No.291 of 2015** annexed in his submission. In the light of the above cited case the appellant submitted that PW1 was not a credible witness as well as her evidence was not reliable.

In his further submission the appellant again criticized the trial court for not adhering to the provision of section 240(3) of the Criminal Procedure Act which requires the trial Magistrate to inform the accused person of a right to require

the person who made the report (medical practitioner) to be summoned for cross- examination. He submitted that this was in contravention of the law under section 240(3) of the Criminal Procedure Act, CAP 20 R.E. 2002. He therefore prayed for this court to expunge from record exhibit P3 and further argued that in absence of exhibit P3, the second count of impregnating a school girl would automatically crumble.

In his final point of submission, the appellant argued that the trial Magistrate erred by recording witnesses' testimonies in point form instead of narration form as required by law. He then prayed for this court to find merit in his appeal and allow the appeal by quashing conviction and set aside the sentence then set him at liberty.

Responding to the first issue concerning proof of penetration in the first count the learned state attorney submitted that the same was proved. He referred to page 6 of the typed trial court proceeding's where PW1 in her own words said that, *"the accused used to call me out and do the act of sexual intercourse"*. Mr. Nasir argued that from the wording of PW1's testimony, it is clear that she did explain what happened so this court should disregard the ground as it is false.

With respect to the issue of credibility of PW1 due to her failure to disclose the offence at the earliest opportunity, Mr. Nassir submitted that the principle is only applicable in situation where the failure is not explained. He argued that in the present case the record is very clear that the appellant removed the victim from lawful custody of her parents. He also added that from PW1's testimony that the appellant was using witchcraft to have an affair with her

implies that she was scared to tell people of the incidence. He thus stated that the ground lacks merit.

Submitting further with respect to the issue of non-compliance to the provision of section 240(3) of the CPA, Mr. Nassir argued that even if exhibit P3 is expunged from records for this reason, still the best evidence of rape comes from the victim. He argued further that the fact that PW1 was pregnant while she was still schooling, in itself proves that the author of her pregnancy is liable for the offence of impregnating a school girl.

Responding to the issue of proceeding's being recorded in a point form Mr. Nasir argued that this ground lacks merit because there is no law that has been violated so this ground should also be dismissed. The learned counsel finally prayed for the appeal to be dismissed for lack of merit.

I have gone through the trial court's records, grounds of appeal and submission from both parties. In determining the appeal before me, the issue for determination is whether the charges against the appellant were proved beyond reasonable doubt.

With respect to the first offence that is rape contrary to section 130 (1), (2) (e) and section 131 (1) of the Penal Code [CAP 16 R.E. 2002] the appellant submitted that penetration being an important element of the offence of rape was not proved because PW1 in her testimony did not describe penetration in clear words. It is my considered opinion that in a case like this one where the victim of the offence was found pregnant there is no need to prove penetration like in a common rape case because the fact that the victim was impregnated is enough proof that it was through sexual

intercourse that led to the Victim's pregnancy. Therefore, what was necessary to be proved in this case was whether the appellant was the one responsible for the victim's pregnancy.

The trial court relied on the evidence of PW1 to convict the appellant with the offence charged because it was believed to be true. The trial magistrate referred to the case of ***Mohamed Msoma vs. Republic [1989] TLR 228*** where it was held that: -

> *"In law the evidence of one witness if believed is sufficient to found conviction".*

However, the appellant has challenged the credibility of PW1 by asserting that her failure to name the suspect at the earliest possible opportunity should have not attracted confidence on her testimony before the trial court. At this juncture I do agree with the appellant based on the circumstances of the present case. It is a known principle of law that failure to name the suspect at the earliest possible opportunity dents a witness's credibility especially where the identification of the suspect is in issue as it was held in the case of **Jaribu Abdallah Vs the Republic, Criminal Appeal No. 220 of 1994.** Further to that, the ability of a witness to mention or name a suspect at the earliest opportunity possible is an all-important assurance of his reliability, in the same way unexplained delay or complete failure to do so should put a prudent court to inquiry. This was also held in the case of **Marwa wangiti Mwita & Another Vs the Republic [2002] TLR 39.** In the present case that fact that the victim (PW1) withheld the information about her pregnancy and who was responsible for a long time made me

question her honesty, it is possible she was not sure of who was responsible due to her character. If it was possible for her to have sex in her parent's house suggests that she was not a person of good behaviour. All in all, what could clear this doubt in prosecution's evidence was proof of who was responsible for the pregnancy.

In order to prove whether the appellant was the one responsible for the pregnancy DNA test was necessary. In absence of DNA evidence, it leaves a doubt as to whether the appellant was the one responsible for the pregnancy considering that the appellant has denied the charges. With this doubt since there is no other evidence that links the appellant to the charged offences, it cannot be said that the prosecution proved the charge beyond reasonable doubt.

The appellant is also accused of Impregnation of a secondary school girl contrary to section 60A (3) of the Education Act, Cap. 353 R.E. 2002 as amended by Act No. 2 of 2016. Principally, the offence must be proved along side the sexual intercourse which in this case the allegations are that the accused/appellant raped the victim. I have just held that it is doubtful that it is really the responsibility of the appellant. Despite the fact that there was proof that the girl was registered at Chanjagaa Secondary School, with admission No. 1315, still the onus to prove the offence of rape and incidental acts of removal of the child from lawful custody were taken lightly by the prosecution in disregard to the strict burden to prove with the highest standard, beyond reasonable doubt, of the offences charged.

For this reason, I find that the trial court misdirected itself by convicting the appellant for offences with the offences charged. It is obvious, the prosecution did not prove all the counts beyond reasonable doubt and that occasioned failure of justice on the part of the appellant. It is trite law that in criminal cases the burden of proof lies with the prosecution and whenever there is a doubt however small benefits the accused as it was held in the case of ***Jonas Nkize v R*** **[1992] T.L.R 213**

In view of the foregoing, I allow the appeal. I quash the appellant's conviction and set aside the sentence meted out against him. I further order that the appellant be released from prison forthwith, unless he is held on some other lawful cause.

DATED and DELIVERED at Moshi this 10th day of June, 2021

T. MWENEMPAZI

JUDGE