IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

MOSHI DISTRICT REGISTRY

AT MOSHI

CRIMINAL APPEAL NO. 38 OF 2021

(Originating from Criminal Case No. 49 of 2019, in the District Court of Mwanga at Mwanga)

NURDIN JAMES @ KABOGO ---------- APPELLANT

VERSUS

THE REPUBLIC ----------RESPONDENT

JUDGMENT

MUTUNGI .J.

The appellant, Nurdin James @ Kabogo was arraigned before the District Court of Mwanga at Mwanga (the trial court) and convicted of two offences, one being Rape c/s **130 (1) (2) (e) and 131 of the Penal Code, Cap. 16 R.E. 2019** and Impregnating a School Girl **c/s 60A (3) of the Education Act Cap. 353 R.E. 2002, (Miscellaneous Amendment No. 2/2016).**

It was alleged on diverse dates of September, 2018, at Mangara village within Mwanga District in Kilimanjaro Region, the appellant herein did rape one **SOA** (name

withheld) a girl of 16 years (PW2) and impregnated her while a student at Kisangara Secondary School.

The history behind the case is such that, in September, 2018 while the victim was at her grandmother's house where she had gone for a visit, the appellant approached her and with sweet words, told her "he loved her". Incidentally the two were already in love. He wooed her and took her in one of the rooms and had sex with her. They thereafter spent the whole night together.

Meanwhile the victim's mother (PW2) had noticed her daughter had not returned home the previous day. She sent out her brothers to look for her. To their surprise they found the victim with the appellant. He quickly apologized for sleeping with her and not letting her attend classes considering she was still schooling (in secondary school). It was not until March 2019 when the victim was discovered to be pregnant. The appellant was directly connected to the pregnancy hence was arrested and charged as reflected in the charge sheet.

The matter went on full trial which involved four prosecution witnesses and one defence witness. In the end the trial court found the appellant guilty of the two offences and

convicted him and was to serve thirty years imprisonment for each count which sentences were to run concurrently.

Aggrieved by the Judgment and sentence of the trial Court, he has appealed to this court praying the judgment and sentence be quashed and set aside by raising a total of seven grounds as hereunder: -

1. That, the trial magistrate grossly erred in law and fact in convicting the appellant while the charge sheet and the evidence on record are at variance hence incurably defective.
2. That, the trial magistrate erred in law and fact in failing to note that the act of PW1 and PW2 remaining silent without disclosing the rape incident does not attract the confidence on their evidence.
3. That, the trial magistrate erred in law and fact in failing to note that this case had been fabricated against the appellant.
4. That, the trial magistrate erred in law and fact in shifting the burden of proof to the appellant by stating in her judgment that he was supposed to prove that he was not responsible for PW1's pregnancy.
5. That, the trial magistrate misdirected herself and consequently erred in law and fact in failing to note

that no DNA was conducted to ascertain the father of the victim's child.

6. That, the trial magistrate erred in law and fact in relying on PW3, the medical doctor's evidence while the same was confusing and contrary to legal procedure of receiving evidence in Court.
7. That, the trial magistrate erred in law and fact in holding that the charge against the appellant was proved beyond reasonable doubt.

The court ordered the hearing be done by way of written submissions, whereas the appellant appeared in person and unrepresented and the respondent was represented by Ms. Grace Kabu, learned state attorney.

In support of the appeal, the appellant submitted, the trial court's decision did not ascertain the victim's age. He argued, the trial magistrate was convinced the victim was 16 years old hence consent was immaterial while the prosecution failed to prove the age of the said victim.

The appellant further submitted, he was convicted on the 2nd count of impregnating a school girl, while the prosecution did not prove for a fact that the victim was really a school girl when the incident occurred. He argued that apart from PW1, (victim's mother) stating that her

daughter was a student at Kisaranga Secondary School, neither the school authority nor any other proof was presented at the trial court to prove the same.

Regarding the 3rd ground contesting the case is a result of a fabricated story, the appellant contended, both PW1 and PW2 alleged the rape ordeal happened in September/October, 2018 but it was not until March, 2019 that PW1 was discovered to be pregnant. He argued, it is inconceivable for a mother knowing her daughter had been raped but still remains silent and takes no action at all. In due thereof her testimony and that of the victim are not credible. To cement his argument, the appellant cited the case of **Ahmed Said Vs Republic, Criminal Appeal No. 291 of 2015 CAT at Arusha (unreported)** which underscored the importance of naming the suspect at the earliest opportunity failure of which will put a prudent court into inquiry.

On the 4th and 5th grounds, the appellant challenged the respondent's failure to conduct a DNA test to prove that, the infant born as a result of rape was indeed his and nobody else's.

As to the 6th ground, it was the appellant's further submission that, (PW3), the Medical Doctor who examined

the victim had prepared a report to that effect. However, there were two PF3s tendered as Exhibit P1 and PE1, while the former was not read out aloud after admission the latter was read aloud. In that regard, the appellant's attention was not drawn to the contents of the said exhibits since they were not cleared for admission before being read out aloud. He finally prayed this court resolves the procedural shortfalls in his favour, consequently the appeal be allowed, the conviction set aside, the sentence nullified and in the end set him free.

In reply, Ms. Kabu learned State Attorney submitted on the 1st 2nd and 3rd grounds of appeal that, there was no variance between the charge sheet and the evidence adduced in court. The evidence is clear the incident took place in September, 2018 and the witnesses testified the same. She added, if at all there was any variation the same can be cured by invoking **section 388 of the Criminal Procedure Act, Cap 388, R.E. 2019**. Further there was no delay in reporting the matter, once the victim was discovered pregnant, her mother quickly notified her father who immediately made the necessary follow up leading to the appellant's arrest.

Regarding the 4th and the 5th grounds, Ms. Kabu contended, the burden of proof never shifted to the appellant. The appellant clearly never denied to be the father of the victim's child. Even though, **Section 60A (3) of the Education Act Cap 303 R.E. 2019** does not provide for the mandatory DNA testing to prove the offence of Impregnating a school girl.

On the 6th ground, the respondent conceded to the fact that according to the record, PW3's (the Doctor) testimony was confusing and contradictory. The PF3 was tendered and read out before admission and during cross examination. Considering the anomaly she prayed this court orders a retrial under **section 388 of the CPA Cap 20 R.E. 2019.**

In his brief rejoinder, the appellant maintained the charge against him was never proved at the required standard in criminal jurisprudence. Further the irregularities identified by the respondent should be resolved in his favour.

I have given due consideration to the submission made by both parties and the trial court's record, I now proceed to determine the grounds of appeal as they appear, the same can be summarized one fold, whether the offences

against the appellant were proved at the required standard in criminal justice law.

Starting with the 1st ground regarding the age of the victim. The charge sheet shows that the victim was a secondary school student at Kisangara Secondary School aged 16 years. This fact was never an issue at the trial court, PW2's mother who is also a cook at the said school clearly stated the victim was sixteen years when the unfortunate ordeal happened to her. More so, PW2 herself before testifying stated that she was sixteen years old. The appellant neither cross examined the victim nor her mother on this fact. PW4's testimony, (a police officer) who investigated the case had gone to Kisangara Secondary School to confirm whether PW2 was schooling and after confirmation is when he prepared the charges against the appellant.

In the case of **Nyerere Nyague Vs The Republic, Criminal Appeal No. 67 of 2010 CAT (unreported)**, Court of Appeal held *inter alia* that: -

> *"a party who fails to cross examine the witness on a certain matter is deemed to have accepted that matter and will be stopped from asking the court to disbelieve what the witness has said"*

Since the age of the victim was not questioned from the very beginning, I do not think more proof was needed as the above evidence sufficed.

I will analyse the 2nd, 3rd and 5th grounds jointly these challenge the victim's delay in naming the appellant at the earliest possible opportunity and DNA testing. The law is clear and the Court of Appeal decisions are at one that, the main ingredient of rape is "penetration". This position is fortified in a number of case including that of **Ally Mkombozi Vs Republic, Criminal Appeal No. 227 of 2007, CAT (unreported)**, whereby the Court of Appeal had this to say: -

> *"The essence of rape is penetration, however light is sufficient to constitute sexual intercourse necessary to the offence"*

The Court of Appeal has also emphasized in a number of its decisions that rape is normally conducted in secrecy so the best evidence in rape cases comes from the victims themselves. In the present appeal, the victim was 16 when she claimed voluntarily had sex with the appellant as her lover, thus this was statutory rape. There is no better proof of the sexual act committed than the end result which is pregnancy and later a baby.

Now the pertinent question is whether the appellant was the one responsible for the said act. According to the victim and her mother when the incident occurred in September/October, 2018, they decided to keep matters under the carpet until March 2019, when PW2 realized she was pregnant. It was until then that, the appellant was arrested. There is no evidence portraying what happened in-between as no action of whatever kind was taken against the appellant. In **Marwa Wangiti Mwita and Another V. The Republic, Criminal Appeal No. 6 of 1995 (unreported)** it was stated that: -

> *"The ability of a witness to name a suspect's name at the earliest opportunity is an all important assurance of his reliability".*

In the circumstances, although the victim named the appellant as her lover, there is no other evidence that it was only the appellant and nobody else that had a relationship with her leading to the pregnancy. That apart the appellant challenges the prosecution evidence for not conducting a DNA test on the born infant to prove paternity. Discussing the issue relating to DNA test in rape cases, the Court of Appeal in the case of **Rasul Hemed vs**

Republic, Criminal Appeal No. 202 of 2012 (unreported)

held: -

> *"We wish to also point out here that we do not agree with Miss Hyera that there was required to be DNA evidence in the circumstances of this case to establish whether it was the appellant who raped PW1. The reason is clear that such evidence would be irrelevant here because the issue before the court was rape. In our view, DNA evidence would be relevant where the concern of the court was to determine paternity rather than rape. In the circumstances."*

In view of the above holding, a DNA test is not a necessary ingredient in establishing rape offences as the key ingredient is penetration as earlier noted. The issue should be apart from the absence of the DNA test, was there other credible and reliable evidence to prove the offence of rape against the appellant beyond reasonable doubt. In light of the evidence adduced this was missing.

I agree with the appellant that, although the DNA evidence is not necessary to prove a charge of rape but in a situation such as in the present, where there was a miserable delay in reporting the matter and there was a

baby allegedly a product of the said rape, I think the DNA evidence would have helped to clear the missing link. The DNA evidence would have assisted the prosecution case in order to eliminate the dangers of mistaken convictions on the offence of impregnating the victim, and its absence leaves the case significantly disconnected and doubtful. These grounds have merit and are hereby allowed.

Trickling down to the 4th ground, it is true that the trial magistrate made the following observation at page 5 of her judgment: -

> *"However, the said **PW2** (victim) testified to give birth on 29th May, 2019 and the accused person did not deny to be the legal father of the child or deny paternity, as it was stated in the case of **HENOCK S/O MTOI V. FRIDA D/O YAFETI (HCD) 1968 NO. 214, it was held that, if the man wants to deny paternity, it is up to him to prove his claim.** The accused in his defence, he never deny paternity against the child."*

This being a criminal case unlike the case cited by the trial magistrate, it is a cardinal principle of criminal law that the duty of proving the charge against an accused person always lies on the prosecution. That burden cannot be

shifted. In the case of **Galus Kitaya Vs The Republic, Criminal Appeal No. 196 of 2015 CAT at Mbeya,** Court of Appeal quoted the case of **John Makolebela Kulwa Makolobela and Eric Juma alias Tanganyika [2002] T.L.R. 296** where it was held that: -

> *"A person is not guilty of a criminal offence because his defence is not believed; rather, a person is found guilty and convicted of a criminal offence because of the strength of the prosecution evidence against him which establishes his guilt beyond reasonable doubt."*

In the circumstances the trial magistrate erred in shifting the burden of proof to the appellant. This ground has merit and is allowed.

Regarding the 6th ground, it is clear from the outset that PW3's testimony in the trial court's typed proceedings is contradictory and does not make sense. I thus resorted to the handwritten proceedings, and what I discovered was that, whoever typed the proceedings erroneously skipped a page and returned to it later thus making the whole of PW3's testimony confusing. For avoidance of more doubts, PW3's testimony in the handwritten proceedings reads;

> *PROSECUTION CASE CONTINUES.*

PW3. Mashika R. Nazi, doctor, 54, Christian, sworn and states:

I reside at Kisangara. I am a Doctor at Kisangara health center since 2002. On 26/03/2019 I was at work around 14:00hrs. They come Omaya Ally & his daughter Sabrina Omaya Ally. They said that the girl is pregnant I should examine her to know if she is pregnant. I did UPT test and the result were positive. We had to examine her in order to know the state of pregnancy. We come into knowledge that she was 7 month pregnant. PF3 was given to me. I did fill it in upon my finding. Yes if I will see the PF3 I will know it. It has my name, address of the healthy center & my signature. I have the said PF3 of Sabrina Omaya Ally. I pray to read it over.

** PF3 content read out a loud by PW3.*

PW3 I pray to tender it as an exhibit

Accused:- I have no objection

Court:- PF3 of Sabrina d/o Omary Ally is admitted as exhibit PE1

Sgd: A. S. Hayata - RM

03/10/2019

That's all

<u>XD by accused:-</u>

I am a medical doctor. But I don't know you. Medically we cannot know who did impregnate her. Obviously she is pregnant it means she was raped. She was 7 month pregnant at that time.

That's all

Sgd: A. S. Hayata RM
03/10/2019

RXD – NIL.
That's all
R.O.CC
S.210 (3) CPA of CAP 20 R.E 2002 C/W
Sgd: A. S. Hayata RM
03/10/2019

From the above quoted testimony, there was only one tendered exhibit and not two as alleged by the appellant. The exhibit tendered was a PF3 and the same was admitted as Exhibit PE1, however, the same was read aloud before cleared for admission. In the case of **Robinson Mwanjisi and Three others Vs Republic, [2003] T.L.R. 218** the court held that: -

> *"Documentary evidence whenever it is intended to be introduced in evidence it must be initially cleared for admission and then actually admitted before it can be read out".*

In the circumstance the PF3 tendered as exhibit after it was read aloud is an irregularity and consequently the same is expunged from the record. Remaining with the PW3's oral evidence alone, the same proves that the victim was pregnant. This fact is uncontroverted and the outcome is known. Considering the fact that during trial

the appellant was availed with the right to cross examine PW3, claiming now that the proceedings were irregular based on the computer generated proceedings is a mere afterthought. This ground crumbles.

On the last ground as to whether the case against the appellant was proved at the required standard, the answer is an outright no. The victim alleged the appellant was her lover, and she was 16 years old. Further on the material day she spent the whole night with the appellant, this in itself portrays a picture of her behavior. Even so the incident was never reported. As already observed, the missing time in reporting the incident leaves a lot to be desired. Insisting on testing the truthfulness of rape victims, in the case of **Mohamed Said Vs. The Republic, Criminal Appeal No. 145 of 2017 CAT at Iringa (unreported)** the Apex Court held: -

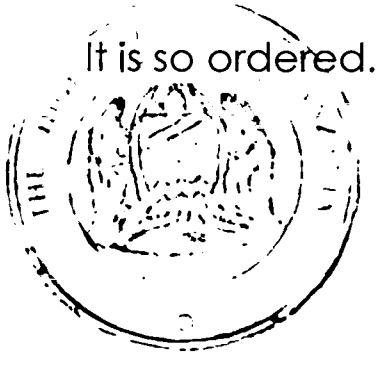
> *"We think that it was never intended that the word of the victim of sexual offence should be taken as gospel truth but that her or his testimony should pass the test of truthfulness. We have no doubt that justice in cases of sexual offences requires strict compliance with rules of evidence in general, and S.127 (7) of Cap. 6 in particular,*

and that such compliance will lead to punishing the offenders only in deserving cases."

In the circumstances, it is my respectful view that, in this appeal, the chain of events was broken significantly in linking the appellant to the offence as the only suspect without the possibility of any other person having committed the offence. In a criminal trial, it is unsafe to convict an accused person where there is such possibility. Based on the above analysis and reasoning, I find the case against the appellant was not proved at the required standard to warrant his conviction.

Consequently, I hereby allow the appeal, conviction entered against the appellant is quashed and sentences set aside. The appellant is to be released from custody forthwith unless therein held for a lawful cause.

It is so ordered.



B. R. MUTUNGI
JUDGE
23/09/2021

Judgment read this day of 23/9/2021 in presence of the Appellant and Miss Grace Kabu (S.A) for the Respondent.

B. R. MUTUNGI
JUDGE
23/09/2021

RIGHT OF APPEAL EXPLAINED.

B. R. MUTUNGI
JUDGE
23/9/2021