IN THE HIGH COURT OF TANZANIA

(MTWARA DISTRICT REGISTRY)

AT MTWARA

CRIMINAL APPEAL NO. 28 OF 2021

(Originating from the District Court of Lindi at Lindi in Criminal Case No. 58 of 2020)

MAULID SALUMU.....APPELLANT

VERSUS

THE REPUBLIC.....RESPONDENT

JUDGMENT

3rd Nov. & 15th Dec., 2021

DYANSOBERA, J.:

In the District Court of Lindi at Lindi, the appellant faced a charge of two counts. In the first count, he was charged with rape contrary to Sections 130 (1), (2) (e) and 131 (1) of the Penal Code [Cap. R.E. 2002 now the R.E. 2019] as the first count. As to the second count, the appellant was charged with the offence of Impregnating a Primary School Girl contrary to section 60A (3) of the Education Act [Cap. 353 R.E. 2002] as amended by The Written Laws (Miscellaneous Amendment) (No.2) Act, 2016.The particulars of the first count alleged that on unknown date of March, 2020 at Mahiwa Village within the District and Lindi Region the appellant had carnal knowledge of one "NS" or the victim, a girl of 13 years old whereby it was alleged that on unknown date of March,2020 at Mahiwa Village within the District and

Lindi Region, the appellant did impregnate one "NS" or the victim, a primary school girl of Mahiwa Primary School. The appellant was found guilty, convicted and sentenced to thirty (30) years imprisonment term in the first count of rape and thirty (30) years imprisonment term and twelve strokes of cane in the second count. The sentences were ordered to run concurrently. The appellant was further ordered to pay the victim a compensation of Tshs. 2,000,000/=.

The facts of the case which led to the arraignment and subsequent incarceration of the appellant can be summarized as follows. The appellant is the husband of Fatuma Halid (PW 5). PW 5 is a biological mother of the victim though she has also other children but with separate fathers. The victim's father resides in Dar es Salaam. Her last child was sired by the appellant. Before the incident which culminated into this case PW 5 used to live with the appellant together with the victim at Mahiwa Village. The victim was born on 5th day of January, 2004 and is a pupil at Mahiwa Primary School and at the time of incident she was in STD VI as evidenced by the letter PW3 (Henry Matiku Matwa), a Mahiwa Primary School wrote to Nyangao Police (i.e. Exh. P2) that the victim was a standard six pupil at Mahiwa Primary School with the Registration No. ADM No.5092 and Prem. No.20151145944. On 22nd day of June, 2020, Yusuph Ahmad Mchehe (PW 4), a Village Executive Officer at Mahiwa received information the victim's grandmother by the name of Binti Mbwago that the PW1 was pregnant. Seeing that, PW4 took steps and called the victim's mother whose answer seemed to be unaware on the presence of the pregnancy in the victim. He further traced the victim's biological father who reported in his office on 22/06/2020 while accompanied by the victim and PW5. PW4 notified the

victim's father that the victim is pregnant thus they brough the matter to the attention of the police at Nyangao Police Station where they were given a PF3 for medical examination.

On the part of the victim, she testified that she lives at Mahiwa with PW5 and the appellant as her responsible/step father. She further testified that on January ,2020 the appellant used to go at her bedroom during the night hours and told her that he wanted to have sex with her. PW1 testified that she refused the offer of the appellant thus the appellant threatened her. Following those circumstances, the victim had no option rather than accepting what the appellant demanded from her. In the other words the appellant accomplished his evil desire to the victim. Thereafter the appellant went to sleep.

More so, the victim told the trial court that on March,2020 at night the appellant had sexual intercourse with the victim at her bedroom. As usual before sex had endured on that material date the appellant went to PW1's bedroom and told the victim that he wanted to have sex with her but the victim refused.

According to PW1, the victim in this case, the appellant used to go to her bed in the room, making threats, carnally knowing the victim. She explained that the appellant was undressing her and himself, inserting his penis into her vagina and doing sexual intercourse without using any contraceptive that is a condom. She then ceased to see her periods and she did not tell anyone. As the days went on, the victim started experiencing headache and general body disorder.

Gervas Issa (PW 2), a clinical officer at Nyangao Hospital did, on 22nd June, 2020, receive the victim who was accompanied by her

relatives. PW 2 ordered the victim to undergo urine pregnancy testing (UPT). The result was pos

She decided to inform her mother on the sickness. PW5 informed the victim's father who, in June, 2020 and made follow ups. It was revealed that the victim was pregnant. She told them that the person responsible for the pregnancy was the appellant.

There was further testimony of PW2 (Gervas Issa) a clinical officer of Nyangao Hospital who on 22/06/2020 conducted two tests on the victim as part of his medical examination when was brought by her relatives. The first test was Urinary Tests (UPT) which was conducted at the laboratory which resulted to a positive result that the victim was pregnant. The second test made by PW2 was Ultra Sound examination which was done so that the age of the pregnancy could be realised. Upon conducting Ultra Sound examination PW2 found that the victim had a pregnancy of twelve (12) weeks. As a matter of practice PW2 informed the relatives about his findings and filled in exhibit P1.

In his defence, the appellant distanced himself from raping and impregnating the victim who is a Primary School girl. As part of his defence, he conceded with the facts of living with the victim as the first born of his wife, one PW5. The appellant also admitted to the facts of the victim being sick and, in his defence, he showed how he participated to provide the victim with medication by giving PW5 Tshs.10,000/=. Furthermore, the appellant testified that when his wife and victim came back from the pharmacy, PW5 informed him that she tested the victim for pregnancy and found her pregnant. As per the appellant, PW5 informed him that the victim mentioned Selemani to responsible for the

pregnancy. Thereafter, PW5 gave him Tshs. 10,000/= and when he inquired was told that it was the money Selemani gave the victim for procuring abortion. Thus, the money the appellant received from his wife was used to buy the medicine she was directed such as quinine and kichocho medicine which he bought and brought them at his home. Thereafter, the appellant left to Nangumbu area however, on 22/06/2021 PW5 called the appellant vide his phone and was told to go back home. The appellant responded positively though on the way to his home and near Nyangao Police Station he was arrested for the charge of rape and impregnating a school girl.

After a full trial, the trial court found that the prosecution case was proved beyond reasonable doubt. Thus, the appellant was convicted and sentenced as intimated earlier. Aggrieved, the appellant has filed his petition of appeal which is comprised of twelve grounds are as follows: -

1. That the trial Magistrate erred in law and fact when convicted the appellant without knowing that the evidence of PW1 was not credible evidence (sic) to rely up on the conviction of the appellant.
2. That the trial court erred in law and fact in convicting the appellant when failed to solve the issue of this offence that PW1 was not informed any one including her mother according to this allegation from January up to March until when she was examined and found with pregnancy.
3. That the trial court erred in law and in fact by convicting and sentencing the appellant when she failed to consider that PW1 failed to raise an alarm to her mother who slept at another room in order the appellant to be arrested in the area of crime.

4. That the trial court erred in law and fact in convicting and sentencing the appellant when she failed to solve the issue of visual identification since PW1 was confessed before the trial court that she can't identify the voice of the appellant without seeing him. This means that the said room which PW1 was sleeping was not any light which would enable her to identify the rapist (please look at page 10 of the DC typed proceedings).
5. That the trial court erred in law and fact to convict and sentence the appellant when failed to analyse well the evidence of PW2 that in his evidence nowhere he testified to observe the penetration in the vagina of PW1 which was among of the ingredients of rape.
6. That the trial court erred in law and fact to convict and sentence the appellant while in fact the said PF3 (exhibit P1) was not issued by the police officer of Nyangao Police Station since none of them was called to testify as witness in order to corroborate the said document.
7. That the trial court erred in law and fact in convicting and sentencing the appellant because failed to call a police who issued PF3 and the police who made investigation of this case makes this charge to be false hood and fabricated case against the appellant and the said PF3 was planted exhibit prepared out of the police station against the law.
8. That the trial court erred in law and fact in convicting and sentencing the appellant because if this case was investigated by the police the issue of DNA test of the pregnancy of PW1 would

be done through the appellants sample of blood to proof the owner of the claimed pregnant.

9. That the trial court erred in law and fact in convicting and sentencing the appellant while PW4 told the trial court that they took the letter to Nyangao police station but in his testimony nowhere he testified the police to return this document (exhibit PE2) to him. This means the said letter was remained at police station in how he tendered the letter which was taken to police in the fateful day whenever himself was not a police? Hon. Judge was true this document was planted one against the appellant.
10. That the appellant was convicted on a single witness PW1 only without any corroboration facts against the law.
11. That the evidence of PW3, PW4 and PW5 their evidence was the hearsay evidence which was failed to link the appellant with the crime.
12. That the trial magistrate was disregarded the defence of the appellant while the prosecution side failed to prove the case against the appellant without any doubts.

During the hearing of this appeal the appellant appeared in person and unrepresented. Whereas the respondent Republic enjoyed the services of Mr. Wilbroad Ndunguru, the learned Senior State Attorney. On the part of the appellant submitted that he filed twelve grounds of appeal and had nothing to add.

In response Mr. Ndunguru resisted the appeal by the appellant and instead supported the conviction though he argued that some modification needs to be made. Besides, he further submitted that there is the main ground of appeal carrying other grounds that

there was no sufficient evidence to prove the offence of rape and unnatural carnal knowledge. He went on and argued that the victim was 13 years old and the evidence implicated the appellant. The learned Senior State Attorney argued that PW1 and the appellant are related as the appellant is the step father of PW1 and were living in the same roof for two years.

As to the evidence of penetration Mr. Ndunguru submitted that the evidence comes from PW1 and PW2 however PW2 proved that penetration was on both the vagina and anus and was made twice on January and March. Apart from that, the learned Senior State Attorney submitted on the identification whereby he was of the view that the appellant was clearly identified by PW1 by voice since the offence was committed during the night and there was darkness. To fortify his argument, he referred this court to page 10 of the typed proceedings of the trial court and was of the view that the trial court was clear that there was recognition by voice. Furthermore, Mr. Ndunguru argued that the appellant was forcing the victim to have carnal knowledge with her since there was ample time on the encounter. Besides, he argued that the trial court saw and heard the victim testifying and believed her testimony and enjoined this court to the case of **Selemani Makumba v. R** [2006] TLR 379.

The learned Senior State Attorney submitted on the complaint that that the victim did not mention the appellant at the earliest opportunity but he stressed that PW1 was threatened and the appellant as step father was taking care the victim. As to the sixth and seventh ground Mr. Ndunguru submitted that the complaints are baseless since PW1 and PW2 adduced cogent evidence on it.

Meanwhile, the learned Senior State Attorney argued that the time of filling of PF3 and tendering it was affected by the circumstances of this case since near relative had to intervene. Also, PW1 was not sure if at all she had pregnant. Therefore Mr. Ndunguru was of the view that the delay was sufficiently explained away and there was sufficient cause for the delay. He finally submitted that the evidence of the victim was credible and was believed, thus the sentences were proper. He also called this court to dismiss this appeal on its entirety.

In his rejoinder submission the appellant stressed that the case was not proved beyond reasonable doubt.

Having stated the material background facts to the arraignment of the appellant, the grounds of appeal and summarized the submissions of both parties to this appeal, I should now be in a position to confront the grounds of appeal. From the very beginning I should regret say that the learned Senior State Attorney misdirected himself when he was submitting before this court on the offence of unnatural offence which the appellant was not charged with.

Apart from that, I will start dealing with the six, seven and nine grounds of appeal of the appellant. From the very outset these three grounds are baseless due to the following reasons. One, exhibit "P1" is self-explanatory that was issued at Nyangao Police Station on 22.06.2020 by WP 6649 Flora and it has official stamp of Nyangao Police Station. Besides, I expected the appellant could have submitted by mentioning the place where exhibit "P1" came

from. The prosecution was entitled to choose which witness was material in their case but it is not necessary that all witness who were involved in the case by one way or another must come to court and adduce their evidence. Therefore, the complaint that the prosecution failed to call the police officers who issued the PF3 and who conducted the investigation of his case are immaterial since it was at the option of the prosecution. As to how exhibit "P2" came into possession of PW3 and was tendered by him during trial. This is a common procedure since PW3 is the maker of exhibit "P2" hence the law allows him to tender it in court. Despite the fact that it was written to the Nyangao Police Station. Thus, the prosecution was not obliged to call the OCS of Nyangao Police Station so as to tender it but it had an option. In the light of that observation, I am of the settled view that these three complaints have failed hence dismissed.

As to the eleven ground of appeal I decline to the contention that the evidence of PW3, PW4 and PW5 was hearsay. For example, the evidence of PW3 was significant since it proved several things. First the victim was his pupil who was in standard six at Mahiwa Primary School where PW3 is a teacher. Another significance of the evidence of PW3 is that he proved that PW1 was born on 5/1/2007 and also wrote exhibit "P2" to Nyangao Police Station informing them about the status of PW1.Besides, the evidence of PW4 was important since it shows how he participated in communicating with PW5 and PW1's biological father and also how he interrogated the victim about the person concerned with her pregnancy. Coming to the evidence of PW5 was very crucial as it proved the age of the

victim and heard from the mouth of the victim when she mentioned the person who was concerned with her pregnancy. With these few remarks I am satisfied that the evidence of PW3, PW4 and PW5 was not hearsay as claimed by the appellant. Hence this ground also fails hence dismissed.

Coming to the tenth ground the appellant complained that he was convicted on the evidence of single witness (PW1) only without corroborating with the facts against the law. From the very outset this ground does not hold water since the learned trial Magistrate convicted the appellant not on the evidence of the single witness (i.e., PW1) but she convicted him on the evidence of PW1 as corroborated with the evidence of PW2, PW3, PW4, PW5, exhibit P1 and exhibit P2. The conviction of the appellant was in relation between the facts and the law. For instance, at page 26 of the typed judgment of the trial court the learned trial Magistrate held: -

> "The above evidence was relevant to establish that the prosecution witnesses PW1, PW2, PW3, PW4 and PW5 their testimony worthy to be believed by this court as per section 112 of the Evidence Act, [Cap 6 R.E. 2019].
>
> Under the above analysis of the evidence of the prosecution and defence on record it is evidenced that the prosecution f=directly linked the accused person with the commission of the charged offences."

In view of the above extract from the typed judgment of the trial court it apparent clear that the trial court considered the evidence of all prosecution witnesses and exhibits in convicting him and not

basing on the evidence of the single witness as asserted by the appellant. Therefore, I find this ground is devoid of merit hence is dismissed.

Also, on the same line I should pay a look at the twelfth ground where the appellant complained that his defence evidence was not considered while the prosecution failed to prove its case beyond reasonable doubt. Having read the judgment of the trial court, I have no hesitation at all that the appellant's defence was objectively considered. The objective consideration of the evidence of the appellant is reflected from page 21 to 26 of the typed judgment. What the learned trial Magistrate did, she summarized the evidence of the defence and thereafter put it under objective evaluation vis a viz the prosecution evidence. I am aware that failure to consider the appellant's evidence would occasion miscarriage of justice, and certainly would prejudice him. It is unlike the present case where the learned trial Magistrate considered the appellant's evidence at the highest degree of consideration though after she put it to proper scrutiny, she was satisfied that it could not water down the prosecution evidence. See, **Leornard Mwanshoka v. Republic,** Criminal Appeal No.226 of 2014.Thus, I find this ground is unmeritorious hence dismissed.

Regarding the eighth ground I am of the settled view that the law in our jurisdiction does not require proving rape and impregnating a school girl by DNA. The only requirement to prove rape is through penetration of the penis into the vagina even where the penetration is slight. Therefore, the issue of DNA was not important since the present case featured the offence of rape. See

Charles Yona v. The Republic, Criminal Appeal No.79 of 2019 CAT at Dar es Salaam-unreported. Thus, I find this ground lacks merits hence dismissed.

As to the first, second, third, fourth and fifth grounds are tackled by framing an issue whether the prosecution proved its case against the appellant beyond reasonable doubt. In order to answer this issue, I will start with the issue of penetration. The offence the appellant was charged falls under statutory rape where consent is immaterial but what is of paramount important is penetration of the penis into the vagina. The evidence of PW1 was straight forward that sometimes on January and March 2020 during the night appellant encroached her into her bedroom and told her that he wanted to make sex with her. As per the evidence of PW1 it shows that she refused to do sexual intercourse with the appellant however, the appellant reacted by threatening the victim. For better understanding I will reproduce what the victim testified in the trial court as follows:

"I remember in January 2020 the accused person used to come in my bedroom at night and tell me he want to sex with me. I told the accused person I don't want. Then accused person started to threaten me by saying "kama hutaki kufanya mapenzi na mimi nitakufanya kitu chochote ninacho kitaka mimi. Ndipo baba akafanya mapenzi na mimi. When my father finished sexing with me he left going to sleep.

Again, in March,2020 my guardian father has sex with me. My

guardian father had sex with me at night in my bedroom. When my father came in my room at night he told me "Nataka kufanya mapenzi na wewe. Mimi nilikataa. Baba alinitishia tena kwamba atanifanya kitu chochote anachotaka na ataondoka" Ndipo nilipofanya mapenzi na mimi na alipomaliza akaondoka Baba alikuwa akija kulala na mimi ananivua nguo yangu ya ndani na yeye anavua nguo zake. Alafu anachukua uume wake anaingiza kwenye sehemu zangu za siri ambazo ni uke wangu. Alikuwa hatumii condom.

After that I stopped getting my periods and I did not tell anyone. Then I started getting sick of headache and my body in general."

The above extract depicts how the victim was penetrated by the appellant. Through that piece of evidence there is no doubt that penetration was proved by the victim. And in the given circumstances the second count is the result of the first count therefore according to nature impregnating a girl/woman is done by a male organ by penetrating into the female organ and therefore, the sperms produced by male organ fertilises the ovary which eventually creates the foetus. Basing on this argument I incline with Mr. Ndunguru that the most important thing in rape cases was to prove penetration which PW1 proved it before the trial court.

Apart from the above extract, the victim when was cross examined by the appellant and asked questions for clarification by the court and here I will be interested with the untyped proceedings of the trial court whereby the victim testified as follows:

" XXD BY ACCUSED

-I cannot identify your voice when you speak anywhere without seeing you.

-When you came in my room I saw you forcing me to have sex with you.

-You did not come in my room armed with any instrument.

-It is true you came in my room at night in January and March,2020 and forced me to sex with you.

- I know that my mother was given money Tshs. 10,000/= by Sele and she gave you that money to go to buy medicine for me.

- I don't know relationship my mother has with Sele.
- I don't have any relationship with Sele.
- My eyes can see in the dark.

RXD BY COURT

- I have lived with my guardian father in the same house for 3 years.
- The house we were living with my guardian father has 2 rooms.
- All those 2 times which accused raped me at night my mother is sleeping in her room."

It is settled law that the trial court has exclusive monopoly in observation and assessment of the demeanour of a witness. In

resolving as to whether the witness is trustworthy and tells the truth, the trial Magistrate is enjoined to correlate the demeanour of the witness, and the statements he/she makes during his/her testimony in court. If they are not consistent, then the credibility of the witness, becomes questionable. The monopoly of the trial court in assessing the credibility of a witness, is limited to the extent of the demeanour only. But there are other ways in which the credibility of the witness can also be assessed. See **Shabani Daud v. Republic**, Criminal Appeal No.28 of 2001 where the Court observed as follows: -

> "The credibility of a witness can also be determined in other two ways that is, one, by assessing the coherence of the testimony of the witness, and two, when the testimony of the witness is considered in relation to the evidence of other witnesses..."

Therefore, in view of the above hold of the Court, the evidence of PW1 when was crossed examined and asked by the court contradicted with PW5 who refused to have given the appellant Tshs.10,000/= so as to buy the medicine for aborting the pregnancy the victim had. On part of the victim, she admitted the appellant was given Tshs. 10,000/= which her mother got from Sele for buying the medicine of PW1. Even when PW5 was cross examined by the appellant about the money he received from her, PW5 testified that she did not remember that on 18/06/2020 she gave the appellant Tshs. 10,000/= to buy the medicine for aborting the pregnancy of her daughter (See page 20 of the typed proceedings of the trial court). Indeed, even the appellant in his defence testified

on this fact though the trial court on its objective evaluation rejected it on the ground that the appellant did not cross examine PW5.To me these created doubts as to why Sele gave PW5 money to buy medicine that is quinine and Kichocho for aborting the victim's pregnancy.

Coming to the issue of identification, the evidence of PW1 is very clear that on January and March,2020 the appellant went to her bedroom in the night to make sex with her by threatening her. When the victim was cross examined by the appellant, she contradicted herself when testified that she cannot identify appellant's voice when he spoke anywhere without seeing him. Also, she told the trial court that her eyes can see in the dark. Then the question which comes is how the victim saw the appellant in the darkness. This piece of evidence is wanting since it needed to go beyond than that by provide extra explanation how she managed to identify the appellant in the darkness, what were the clothes worn by the appellant when he encroached her in her room, what was intensity of the voice of the appellant when he told her that he needed sex and while threatening her when she rejected. The same applies to her voice of refusal from the appellant's demand to the extent that her mother (PW5) could not hear them while she sleeping on the same house but different room. The evidence of the victim does not provide for the state of their dwelling house in terms of the size, the type of the house and roof, if the house was branded, whether they did sex on the bed or by lying down. As far as these circumstances are concerned it is very clear that the identification either by visual or voice was featured with

unfavourable conditions and thus, it created the doubts on the prosecution case. See **Waziri Amani v. Republic** [1980] TLR 250 stressed that no court should act on evidence of visual identification unless all possibilities of mistaken identity are eliminated and the court is satisfied that the evidence is absolute watertight. In the present case the trial court did not warn itself when it believed on the evidence of PW1 which was corroborated with the evidence of other prosecution witnesses.

Apart from that it is clear from the record of the trial court that the victim did not tell any person concerning the behaviour of making sexual intercourse with the appellant since January to June,2020 when she was discovered to be pregnant. It is true that the law is settled that naming the suspect at the earliest opportunity is an important assurance of the reliability and credibility of the witness. See **Marwa Wangiti Mwita & Another v. Republic** [2002] TLR 39. In view of the above observation, the trial court had an obligation to ask itself as why the victim did not mention the appellant to her mother and other relatives. I am also aware that the learned trial Magistrate was convinced by the mere words of the victim that when the appellant wanted to sex her used threatening words. But PW1 did not tell the trial court the reason as to why she did not report or mention the appellant to any person or authority if real the appellant sexed her. In view of these arguments, I find that failure by the victim to report or mention the appellant to her mother or any relative makes her uncredible and her evidence unreliable. Thus, her evidence leaves doubts as to the prosecution case against the appellant.

I am increasingly of the view that, those doubts should be resolved in favour of the appellant, as I hereby do. For that reason, I find that prosecution failed to prove their case beyond reasonable doubt. In the event I allow the appeal, quash the conviction and set aside the sentence. The appellant should be released from prison forthwith unless he is lawfully held therein.

It is so ordered.

W.P. Dyansobera

Judge

15.12.2021

This judgment is delivered at Mtwara under my hand and the seal of this Court on this 15th day of December, 2021 in the presence of the appellant who has appeared in person and unrepresented and Mr. Lugano Mwasubila, the learned State Attorney for the respondent.

W.P. Dyansobera

Judge