

TANZANIA / JUDGMENT

DC

COURT
TANZLIIDECIDED
1 January 2024

Source: media.tanzlii.org · Research copy typeset by Esheria. Not court-issued or certified.

© THE JUDICIARY OF TANZANIA IN THE HIGH COURT OF UNITED REPUBLIC OF TANZANIA AT KIGOMA (CORAM: HON. AUGUSTINE RWIZILE) DC. CRIMINAL APPEAL NO. 000003271 OF 2024
OBADIA S/O ELIAKIM COMPLAINANT / APPELLANT I APPLICANT / PLAINTIFF VERSUS
REPUBLIC RESPONDENT/ DEFENDANT

JUDGMENT

Fly Notes

Facts

Ratio Decidendi 30th of July 2024 Hon. RWIZILE.: The appellant, Obadia Eliakim was charged before the district court of Kasulu at Kasulu on two counts. The first count is rape contrary to section 130 (1) (2) (e) and 131 of the Penal Code. It was alleged by the prosecution side that on unknown date in September 2022 at Nyumbigwa Village within Kasulu District, the appellant had carnal knowledge of a girl of 17 years. Second count, is impregnating a secondary school girl contrary to section 60A (3) of the Education Act, [Cap 353 R.E. 2002] as amended by section 22 of the Written Laws [Miscellaneous amendment No. 2] Act of 2016. It was alleged by the prosecution that on unknown date in September 2022 at Nyumbigwa Village within Kasulu District, the appellant, unlawfully, did impregnate a girl of 17 years, a form II student at Nyumbigwa Secondary school. In the end, he was tried, found guilty as charged, convicted and sentenced to 30 years imprisonment on the 1st count, and 3 years imprisonment on the 2nd count. Sentences, it was ordered, to run concurrently. The appellant however, was not satisfied, this is the reason for this appeal. The following are the grounds of appeal: -

1. That, the learned trial magistrate erred in both law and fact in convicting the appellant with the offence of rape while, the same was not proved beyond reasonable doubt. Page. I Hon. AUGUSTINE RWIZILE
2. That, the learned trial magistrate erred in both law and fact in convicting the appellant on the offence of impregnating a school girl while the prosecution failed to prove the offence beyond reasonable doubt.

3. That, the learned trial magistrate erred in both law and facts by holding that failure by the victim to name the appellant earlier did not cast doubt on the prosecution side.
4. That, the learned trial magistrate erred in both law and facts in convicting the appellant on both counts of rape and impregnating a school girl without meting the sentence.
5. That, the trial court erred in both law and fact in not according weight the appellant's evidence of alibi.
6. That the trial court erred in both law and fact in recording the evidences of the appellant and his witnesses without informing them of their rights that they are entitled to have their evidences read over to them. At the hearing, the appellant was unrepresented while the Republic was under the service of Ms Edna Makala learned state attorney. The appellant, not being represented, had no legal argument to advance in respect of his grounds of appeal. On the first ground, his submission was that the offence was not proved beyond reasonable doubt. On the second ground as well, that there is no evidence to prove the appellant impregnating the victim. On the third ground, it was his submission that failure, by Pw1 to name the appellant at the earliest time, cast doubt in her evidence, the same doubt ought to be resolved in the favour of the appellant, a thing which the trial court did not do. Dealing with the fourth ground, the submission was on the defence of alibi by the appellant, that it was given less weight. The last ground was that the appellant was not affording the right to hear the evidence of witnesses after they gave evidence, in accordance with the law. He said, the evidence was not read to the witnesses in compliance to the law. In contesting the appeal, the learned state attorney argued the 1st, 2nd and 3rd grounds together. She was of the opinion that under section 130(1) of the Penal Code, in proving rape, the court considers the elements of the offence which are penetration without consent, or as in this case with proof of age of the victim of the offence, that she was under 18 years. She argued, penetration was proved by the victim. Likewise, on the age of the victim, it was proved by Pw3, her mother, that the victim was below 18 years. She added, the appellant was identified by the victim as she met him on the way and went home together where she was raped. She said, the offence was proved by the best evidence of the victim as in the case of *Seleman Makumba vs The Republic*, [2006] TLR 384. On the second count, she argued that in terms of section 60A of the Education Act, the victim was a school girl of Nyumbigwa secondary school as testified by her teacher Pw2. She said, the evidence of rape was proved by the victim and Pw5. She said, Pw5 proved that the victim was seven months pregnant. It was the victim, according to the learned attorney who mentioned the appellant as responsible for that pregnancy. The case of *Aman Ally Joka vs The Republic*, Criminal Appeal No.353 of 2019 to support the submission was cited. On the fourth ground, it was submitted that the court sentenced the appellant to serve 30 years imprisonment, on the 1st count and three years for the 2nd count without convicting him. The learned attorney held the view that Page.2 Hon. AUGUSTINE RWIZILE despite failure to convict which is an irregularity, but it is curable as held in the case of *Aman Ally Joka v R*, Criminal Appeal No. 353 of 2019. On the fifth ground, MS Edna Makala was of the view that, the appellant's defence of alibi, did not comply with

section 194(6) of Criminal Procedure Act, since the notice was not given before the prosecution case was closed. She therefore submitted; it was proper for the trial court to disregard his defence. It was submitted on the sixth ground that in terms of the record of appeal, the trial court complied with section 210(3) of the Criminal Procedure Act. She prayed; the appeal be dismissed. Having gone through the submissions advanced by both parties. I will start with the 1st and 2nd grounds which will be dealt with jointly. As shown before the appellant was charged on two counts of statutory rape and impregnating a schoolgirl. Proving statutory rape goes with proving penetration and that the victim was underage of 18 years. In the case of John Mgema @ Sabago v. Republic, criminal appeal No. 601 of 2017 (CAT) on page 9, it was held, the evidence of the victim is regarded to be the best evidence. There is evidence that the appellant raped the victim at night hours. This brings in the crucial issue of identification. In identification at night, issues to be considered were restated in the case of Robert Faida @ Samora vs The Republic, (Cat), Criminal Appeal No. 276 of 2016 on pages 12-13; How long did the witness have the accused under his/her observation, the kind of light and its intensity, if the witness knew the accused before the incident and for how long. From the record, the incident occurred at her homestead. There is evidence that there was solar light, bright enough to enable proper identification of the appellant. The appellant was familiar to the victim. She knows the appellant well, as he used to seduce her. It was her evidence that, they previously met at the market, and on the fateful day, when the appellant stopped her and asked for a date as she was coming home from a friend in uniforms. After changing her clothes, she came out of the house, and it is where she met the appellant who then raped her. Identification of the appellant is of paramount importance. See the case of Raymond Francis vs. Republic, [1994] TLR I 00 at 103, it was stated: - " .. It is elementary that in a criminal case where determination depends essentially on identification, evidence on conditions favouring identification is of the utmost importance." Based on the attending circumstances, I have no doubt, the appellant knew the victim and had previously advanced a move to have a love affair. It is crystal clear that the appellant was identified by the victim as the assailant who raped her. On the second count of impregnating a school girl. It was made clear by the court of appeal in the case of Salum Nicholas Mnyumali vs The Republic, (CAT), Criminal Appeal No. 327 of 2020 on page 15: - "It is trite law that, for the prosecution to establish the offence of impregnating a schoolgirl, it has to prove beyond reasonable doubts two things. One, the girl was impregnated when she was attending either primary or secondary school; and two, the schoolgirl was impregnated by the accused person. " Page. 3 Hon. AUGUSTINE RWIZILE On the first element, it was not disputed that the victim was a form II student at Nyumbigwa secondary school. It was testified to that effect by her headmaster, Pw2. He tendered exhibit P1, an attendance register to prove that the victim was indeed a schoolgirl. After all there is no dispute that the victim was not a schoolgirl. The second thing, to prove is that the victim was impregnated by the appellant. The prosecution simply tendered evidence proving that the victim was a schoolgirl. It did not show if indeed it is the appellant who impregnated her. It should be noted that rape may result to impregnating a woman. But it is not in all incidences that whenever a woman knows a man, pregnancy must occur. If that was the case, I think the

world could be falling short of space. In my view Proof of sexual intercourse alone may not necessarily prove that it led to a pregnancy. By parity of reasoning, if in affiliation cases corroboration is required to prove paternity, there is, even more need for corroboration in a criminal case such as the present one, to prove that a man has impregnated a girl, before he can be convicted for the offence. See the Court of Appeal in *Haji Ally Nkane vs R*, Criminal Appeal No.21 of 2007 (unreported) on page 7. It means therefrom, the prosecution has to prove, pregnancy was caused by the appellant. That was not done. I have no doubt, there was no evidence proving the second element of the offence. I agree with the appellant that the offence of impregnating a school girl was not proved. On the third ground, indeed, the appellant was not named as early as possible. It is true, however, not all the delays favour the appellant. At the end, each case must be decided on its own facts. This was the position in the case of *Republic vs. Mohamed Bin Alhui*, (1942) 9 EACA 72) "The ability of a witness to name a suspect at the earliest opportunity is an all-important assurance of his credibility in the same way as an unexplained delay or complete failure to do so should put a prudent court to inquiry ... " The record shows that the appellant was named by the victim after seven months. The reason put forward was that, the victim was afraid of her parents. I find no reason to doubt this version of evidence. This is common in traditional societies. If having a boyfriend/or a girl friend is something unspeakable in certain families, imagine how in such families, one discloses rape that was done without notice of parents or relatives. Girls resort to let it go, provided they were not seen, because consequences that follow are severe. This ground has no merit as well. The fourth ground is about the sentence, that it was not met in both counts against the appellant. This was misconceived. The record shows, the appellant was found guilty and convicted on both counts. On 7th December 2023, he was sentenced upon mitigation for 30 years imprisonment in the first count of statutory rape, and 3 years on the second count. I do not find merit in this ground of appeal as well. Going by the fifth ground, the defence of alibi, it is shown, it was considered by the trial court. In considering it, the trial court was of the opinion that the offence was committed on unknown date in September 2022. The defence of alibi put forward by the appellant was that, he left the village on 17th, October 2022 and returned on 17th February 2023. His evidence, I have to add, was supported by two witnesses. It means, it is what it was made. The trial court was of the opinion that the same was not merited as it is the period out of the time, the offence was alleged committed. I think, despite the fact that, the appellant did not plead his alibi early as section 194(4) of the Criminal Procedure Act wants it, still the trial court considered and found it unmerited in terms of section 194(6) of Page.4 Hon. AUGUSTINE RWIZILE the CPA. I find not merit in this ground as well. Lastly, the appellant complained on the terms of section 210(3) of the CPA. Perusing the record, it is shown that after recording the evidence of each witness, section 210(3) of the Act was complied. This means, the appellant was given the options the law puts available. The court proceedings, it has been held, times without number, that they are a serious document that cannot be lightly impeached. The appellant had to procure strong evidence or allegations to support this point. Therefore, the ground lacks merit. From the foregoing, I hold the first count of rape was proved. The second count was not and therefore, the sentence imposed is quashed,

the appellant is acquitted on the second count of impregnating a schoolgirl. The appeal therefore is partly allowed to the extent shown. Dated at KIGOMA ZONE this 30th of July 2024. AUGUSTINE RWIZILE JUDGE OF THE HIGH COURT Page. 5 Hon. AUGUSTINE RWIZILE

Source & reproduction note

Judgment wording, source notices and original paragraph numbers are retained. Esheria supplies the layout and this PDF's page numbers; these are not the source pagination. This is a research copy, not an official or certified court document. Check quotations, citations and publication restrictions against the original source before relying on it.

ORIGINAL SOURCE	https://media.tanzlii.org/media/judgment/314442/source_file/030408c028e12c83/DC.CRIMINAL_APPEAL_NO._3271_OF_2024_OBADIA_ELIAKIM.pdf
CASE PAGE	https://chat.esheria.ai/case-law/tanzania/obadia-so-eliakim-v-republic-rape-tanzlii-2024--6a3ea52d3b1caa9129826933

Prepared on 14 October 2026 · Esheria