IN THE COURT OF APPEAL OF TANZANIA

AT SHINYANGA

(CORAM: MWARIJA, J.A., KITUSI, J.A., And MGEYEKWA, J.A.)

CRIMINAL APPEAL NO. 356 OF 2020

SHAGI MANG'OMA ..... APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

(Appeal from judgment of the Resident Magistrate's Court of Shinyanga at Shinyanga)

(Mbuya, PRM. Extended Jur.)

dated the 27th day of July, 2020

in

Criminal Appeal No. 67 of 202020

JUDGMENT OF THE COURT

5th & 12th July, 2023

KITUSI, J.A.:

The appellant was charged with impregnating a school girl, in violation of section 60A (3) of the Education Act [Cap 353 R. E. 2002] as amended by section 22 of the Written Laws (Miscellaneous Amendments) Act No. 2 of 2016. There was no dispute that Neema Charles who testified as PW1 during the trial was a student at Mwantimba Secondary School in Bariadi District where incidentally, the appellant worked as a teacher. The prosecution alleged that between

September and October, 2016 the appellant impregnated that girl student.

The appellant denied the allegations, but the trial District Court of Bariadi accepted the version given by the prosecution witnesses and concluded that the defence case did not raise any reasonable doubt. Consequently, it convicted the appellant and sentenced him to 30 years' imprisonment. The appellant's first appeal was dismissed by Mbuya, PRM., exercising extended jurisdiction. The appellant is relentless and has preferred this appeal which he prosecuted with vigour.

The star story teller for the prosecution is PW1 who stated that she knew the appellant as her teacher at Mwantimba Secondary School since 2013 but it was in 2016 when he made advances towards her and proposed an affair. According to PW1, she eventually yielded to the appellant's proposal, and in September, 2016 the two made love for the first time in PW1's room at Madakani Street. She said that on another occasion, they made love at the appellant's house when his wife was away.

In November, 2016, when PW1 missed her menstruation cycle, she learnt that she was pregnant and she immediately informed her mother about it. In turn her mother informed John Kazi (PW2) who is

PW1's paternal uncle. There was no dispute that PW2 was the elder brother of PW1's father and as the latter was away from Bariadi where his family lived, the said brother was responsible for his family's affairs.

So, after being informed about the pregnancy on 27/1/2017 PW2 lodged a complaint with the Ward Executive Officer (WEO) of Matongo area on 1/2/2017 and on the same day reported to police. On 2/2/2017 medical examination on PW1 confirmed that she was into the fourth month or 16 weeks of the pregnancy. There will later be considerable argument on why there was such lapse of time from November, 2016 when PW1 detected that she was pregnant to 2/2/2017 when the complaint was formally lodged.

One Magebu Buharata (PW3) the Headmaster of Mwantimba Secondary School was summoned to the office of the WEO and was told about the allegation against the appellant. PW3 said that when he put the issue to the appellant the latter denied being the perpetrator, but suspected one of his brothers known as Barnaba Mang'oma who resided in his house. Relevant to the case, is that PW3 sought to prove that PW1 was a Form Four student in 2016 and she sat for her final exam, the result of which came out on 1/2/2017 and she obtained a Division Four.

In defence the appellant said that on 25/1/2017 PW3 and another man visited him at his residence to deliver a message that PW1 was carrying Barnabas Mang'oma's unborn child. This triggered a series of negotiation meetings, and the appellant would have us believe that he was taking part in those meetings not because he was the one who made PW1 pregnant, but that he was the guardian of Barnabas Mang'oma, the villain.

When these negotiations led to no avail, the appellant was summoned to the office of the WEO where the allegations of impregnating PW1 were levelled against him. He denied the allegations but he was nevertheless taken to police and later charged when further attempt at amicable settlement failed.

The appellant called Simon Oneka (DW2) his brother who testified on the negotiations with PW1's parents and that Barnabas Mang'oma was the one who had caused problems. The other witness was John Edward (DW3) a former teacher at Mwantimba Secondary School, who knew Barnabas Mang'oma to be the man who impregnated PW1. We note that during cross – examinations, the appellant stated that he is in touch with Barnabas who is currently in Mwanza, but that he was not going to call him as a witness. Before us when we put to the appellant

the issue of Barnabas Mang'oma's alleged involvement and why he had not called him as a witness he respondent that he bears no duty to prove his innocence.

The appellant raised five substantive grounds of appeal and other five additional grounds, making a total of ten grounds of appeal. However, at the outset, the appellant abandoned the first and fourth grounds in the original memorandum of appeal. Later in the course of arguing the appeal, he also abandoned the fourth additional ground of appeal that alleged that PW2's evidence was nothing but hearsay.

The respondent republic appeared through Mr. Shaban Mwegole, learned Senior State Attorney who supported the conviction.

We shall begin with the fifth ground of appeal in the additional memorandum of appeal which alleges:

> *5. THAT, both the charge substitution and the Preliminary Hearing were done in violation of sections 192 (1) (2) and (3) and 234 (1) (3) both of the CPA [Cap 20 R.E. 2019] for lack of Court order.*

The appellant submitted on this ground by referring us to section 234 (1) of the Criminal Procedure Act (CPA) which requires a trial magistrate to make an order of amendment or substitution of charge if,

during the trial, he gets satisfied that there is such a need. He also argued that since the record does not show that the trial court informed him about the purpose of conducting a Preliminary Hearing, then section 192 of the CPA was no complied with.

Mr. Mwegole submitted that the appellant's complaints in the ground of appeal under discussion are baseless. He pointed out that substitution of the charge was done when trial had not commenced therefore section 234 (1) of the CPA is inapplicable. As for the alleged violation of section 192 of the CPA, the learned Senior State Attorney submitted that the appellant expressed his preparedness to proceed, therefore he was not prejudiced.

There is an obvious misconception by the appellant, in our settled view. Presentation of formal charge is governed by section 135 of the CPA and substitution of a charge at any time before commencement of trial is governed by the same provision. Section 135 of the CPA has a clear bar against any objection. It provides:-

> *"The following provisions of this section shall apply to all charges and informations and, notwithstanding any rule of law or practice, a charge or an information shall, subject to the provisions of this Act, not be open to objection in*

respect of its form or contents if it is framed in accordance with the provisions of this section."

The above provision does not raise a requirement for any formal court order allowing substitution of a formal charge. But we understand that the appellant has wrongly called section 234 (1) of the CPA to his aid. That provision, as its marginal note indicates, empowers the court to order substitution of the charge when there is variance between the charge and evidence. This presupposes that trial has commenced, unlike in the instant case, as rightly submitted by Mr. Mwegole.

Similarly, the complaint alleging violation of section 192 (1) and (3) of the CPA is borne out of a misconception because the appellant did not admit any incriminating facts as to negatively affect the conclusion of the case. We need to reiterate that the purpose of preliminary hearing is to expedite trial by identifying matters that are not in dispute. See, **Samson Marco & Another v. Republic,** Criminal Appeal No. 446 of 2016 (unreported).

On the basis of what we have discussed above there is no trace of merit in the fifth additional ground of appeal. We dismiss it.

The grounds of appeal in the original memorandum of appeal are: **One,** there is no expert evidence to prove the person responsible for

PW1's pregnancy. **Two,** the offence was not proved beyond reasonable doubt. **Three,** it was wrong for the two courts below to proceed without evidence of DNA test. **Five,** the two courts below erred in not resolving contradictions in his favour. We have deliberately skipped ground four because it makes no sense to us and the appellant did not address it. The fourth ground of appeal alleges that advocacy rights were denied during the trial. Assuming that the complaint alleges denial of legal representation, the record showing that Chiku Chande and Veronica Tesha, learned advocates represented the appellant, contradicts the complaint. This ground stands dismissed.

We shall consider the above four grounds along with two grounds in the additional grounds namely; ground two that the defence case was not considered and ground three that there was misapprehension of the substance, nature and quality of the evidence for the prosecution, misdirection and non-direction leading to gross miscarriage of justice. All these six grounds may be dealt with by addressing three issues, in our considered view, that is; whether PW1 was pregnant, and if yes, whether she was a school girl at the time of impregnation and lastly whether it is the appellant who impregnated her.

We shall also consider the issue of sentence, which has been raised as the first additional ground of appeal. It is good to note upfront, that Mr. Mwegole conceded that the learned trial Senior Resident Magistrate did not exercise her discretion properly in sentencing the appellant to 30 years in jail. We shall resolve this aspect, after determining the above three issues.

So, we begin with the first issue; was PW1 pregnant or not? The appellant attacked the concurrent findings that PW1 was pregnant for having been reached without there being proof by medical evidence such as PF3, clinical card and ultra sound results. He also relied on alleged contradictions between PW1, PW2 and PW4 on the issue.

Mr. Mwegole, referred us to the case of **Goodluck Kyando v. Republic** [2006] TLR 363 to argue that PW1 is entitled to credence. He submitted that according to PW1, she was pregnant, and that was sufficient to prove the fact. He prayed for the appellant's arguments to be dismissed.

With respect, we have found it difficult to take the appellant seriously on this. Not only is he throwing dices, but he seems to be unaware that fanciful possibilities have no place in dispensation of criminal justice [See the case of **Joshua Mgaya v. Republic** Criminal

Appeal No. 205 of 2018 (unreported]. In addition, we are entitled to take into account an accused's story that advances the prosecution case. In **Mohamed Haruna @ Mtupeni and Another v. Republic,** Criminal Appeal No. 259 of 2007 (unreported) the Court stated the following on that principle:-

> *"Of course, in cases of this nature the burden of proof is always on the prosecution. The standard has always been proof beyond reasonable doubt. It is trite law that an accused person can only be convicted on the strength of the prosecution case and not on the basis of the weakness of his defence. But as the learned first appellate judge rightly observed in his judgment, "if the accused person in the course of his defence gives evidence which carries the prosecution case further, the court will be entitled to take into account such evidence of the accused in deciding on the question of his guilt"...".*

See also **Ally Haji v. Republic,** Criminal Appeal No. 45 of 2011 (unreported) citing **Mohamed Haruna @ Mtupeni** (supra.). In this case, the appellant cannot be heard saying that the pregnancy was caused by Barnabas Mang'oma, then say, within the same breath, that PW1 was not pregnant. We take his assertion that Barnabas Mang'oma

was responsible for the pregnancy as advancing the prosecution case that PW1 was indeed pregnant. We are resolved that PW1 was pregnant and we dismiss the appellant's arguments as fanciful.

The second issue is whether at the time of the conception, PW1 was a scholar. According to the charge sheet, the act that caused PW1's pregnancy took place between September and October. The appellant's main attack on this particular allegation was that PW1, PW2 and PW4 gave contradictory facts as to the dates. Further that there was an unexplained delay in taking steps. He even took issue with whether the alleged first sexual intercourse took place at a rented house or "rested" house, as per the court record.

Mr. Mwegole responded by pointing out that the contradictions pointed out by the appellant are minor. As for PW2, he submitted, he basically testified on the steps he took upon being notified that PW1 was pregnant, therefore he could not contradict her on the alleged sexual intercourse that caused the pregnancy, because the details of such facts were known only to PW1.

We agree with the appellant that there were some contradictions in the evidence of key witnesses particularly on dates, but we are alive to the principle that not all contradictions or inconsistencies would affect

the merit of the case except those which go to the root. See **Dickson Elia Nsamba Shapwata v. Republic,** Criminal Appeal No. 92 of 2007 (unreported).

In relation to this issue, the two courts below believed PW1. We have reflected on the appellant's contention that the findings of those courts were affected by misapprehension, misdirection and non-direction, but he has not demonstrated to us how. We also cannot figure out what the appellant had in mind in alleging the said misapprehension, misdirection and non-direction. We cannot, therefore, interfere with the finding as regards PW1's reliability. We believe, as the two courts below did, that PW1's first sexual encounter was in her rented room. The appellant's attempted distinction between a rented and "rested" house is an unnecessary nibbling which we do not accept. The delay in taking steps could be explained by the negotiations, which the appellant himself alluded to. It is our finding that the first sexual intercourse was in September, 2016, followed by others between that month and October.

There is no dispute according to PW3 who was the headmaster of the school, that in September 2016, PW1 was still a student at Mwantimba Secondary School. Therefore, in September and October

when she had sex, she was a school girl and one of these sexual intercourses, in our conclusion, resulted in PW1's pregnancy, consistent with the 16 weeks of the pregnancy testified to by PW1, PW2 and PW4.

Considering the totality of the above, the two courts below were justified in concluding that PW1 was impregnated when she was still a school girl.

The last issue to consider is whether there is evidence that the appellant is the one who impregnated PW1. The two courts below were satisfied that the appellant was the one responsible for the pregnancy. However, the appellant is challenging that finding arguing that it was wrongly arrived at without there being proof by a DNA test result nor a clinical card naming him as the father. He further argued that the real culprit was Barnabas Mang'oma so he criticized the two courts below for shifting the burden of proof on to him.

On the other hand, Mr. Mwegole submitted that DNA test was not requested by the appellant and in any event, it could not have been performed before the child being born. He maintained that there was sufficient evidence from PW1 to prove that the appellant was the culprit arguing that in sexual offences, the victim offers the best evidence. He

referred us to the case of **Selemani Makumba v. Republic** [2006] TLR 379.

In addressing these competing arguments, we begin by reaffirming our position that the concurrent finding of the two courts below on PW1's reliability was well considered and we have no reason to disturb it. Secondly, we do not agree with the appellant that scientific evidence though very appropriate, was the only means in this case to prove that the unborn child in PW1's womb was his. There is the evidence of PW1 which suffices to conclude that the appellant was the father, but there is more to support that fact as we are going to demonstrate below.

To add to PW1's testimony, there is the fact that in the course of cross-examining PW1, the name and involvement of Barnabas Mang'oma was never brought up. Since PW1 is the only one who would have responded to the appellant's suggestion that Barnabas Mang'oma was the real culprit or not, his belated mention of him when PW1 was not there to respond, was clearly an afterthought. We therefore dismiss the appellant's contention for being an afterthought.

Again, there is the appellant's participation in negotiating a settlement or dowry demanded by PW1's parents. The argument that he

was negotiating on behalf of Barnabas Mang'oma is defeated by the fact that he did not raise that name to PW1 as shown above. We find the appellant's behavior curious and not consistent with innocence. We wish to note that the appellant's defence was considered but dismissed because he had not indicated earlier that the theme of his defence would point a finger at Barnabas Mang'oma. Such was the position in **Hatibu Gandhi v. Republic** [1996] TLR 12, **Mohamed Katindi v. Republic** [1986] TLR 134 and **John Madata v. Republic**, Criminal Appeal No. 453 of 2017 (unreported). Although as argued by the appellant, he had no duty to prove his innocence, that does not mean that he could say anything in defence even if it does not appeal to reason and common sense. With respect, the appellant's defence belatedly bringing Barnabas Mang'oma into the picture, did not appeal to reason and common sense and his conduct towards PW1's parents was not consistent with his innocence.

It is therefore our conclusion that the appellant is the one who impregnated PW1 at the time when she was a school girl. We are satisfied that the case against him was proved beyond all reasonable doubts and he was properly convicted.

We now consider the sentence which, as we have shown earlier, pauses little difficulty because the respondent Republic concedes that the trial court ought to have exercised its discretion in favour of a more lenient sentence. This complaint was raised as the first additional ground of appeal which states:-

> 1. *THAT, both the learned trial Magistrate and the 1st Appellate court misdirected themselves in upholding an excessive sentence of 30 years imprisonment meted upon the appellant without complying mutatis mutandis with Rules 5 of the Education (Imposition of Penalties to Persons who Marry or impregnate a School Girl) Rule GN No. 265 of 2003: made under section 35 (3) of the Education Act [Cap 353 R.E. 2002] and that of Section 60A (6) of the Education Act [Cap 353 R.E. 2002] as amended by section 22 of the Written Laws, Miscellaneous Amendments Act No. 2 of 2016. See in the case of OSWALD CHARLES VS REPUBLIC CRIMINAL APPEAL NO. 223 OF 2017 C.A.T SITTING AT Shinyanga (Unreported).*

The appellant submitted that had the trial court considered Rule 5 of the Education (Imposition of Penalties to Persons who Marry or Impregnate a School Girl) Rules, GN No. 265 of 2003 (GN No. 265 of

2003) in determining the appropriate sentence, it would have imposed on him a lenient sentence instead of the maximum 30 years which it imposed. He cited to us our unreported decision in **Oswald Charles v. Republic**, Criminal Appeal No. 223 of 2017. Responding to that argument, Mr. Mwegole submitted that this case is distinguishable from the case of **Oswald Charles** (supra) because in the latter case the accused had been charged under Rule 5 of GN No. 265 of 2003 while the present appellant was charged under section 60A of the Education Act, Cap 363 as amended (the Act). The learned Senior State Attorney further submitted that under section 60A (3) of the Act, a person found guilty and convicted for impregnating a school girl is liable to imprisonment for 30 years. He conceded that the court had discretion to impose a lesser sentence considering that the appellant was a first offender and had raised mitigating factors.

We have had an opportunity to deal with this issue in two other previous matters. We agree with Mr. Mwegole that Rule 5 of GN No. 265 of 2003 was inapplicable after the amendment to section 60 of the Act vide The Written Laws (Miscellaneous Amendments (No. 2) Act 2016 which introduced section 60A. Sub section (3) of section 60A provides:-

Any person who impregnates a primary school
or a secondary school girl commits an offence

and shall, on conviction, be liable to imprisonment for a term of thirty years.

In **Mawazo Kutamika v. Republic**, Criminal Appeal No. 64 of 2020 (unreported) we dealt with the import of section 60A (3) of the Act, citing our earlier decision in **Sokoine Mtahali @ Chomongwa v. Republic**, Criminal Appeal No. 459 of 2018 (unreported). In the former case we reproduced the following paragraph from the latter:-

"The above phrase "shall, on conviction, be liable to imprisonment for a term of thirty years" to which we have supplied emphasis, does not impose the custodial term of thirty years as the mandatory penalty. It gives discretion to the trial court, subject to its sentencing jurisdiction, to sentence the offender up to the maximum of thirty years' imprisonment depending upon the circumstances of the case after considering all mitigating and aggravating factors"

A number of principles emerge from the above paragraph, and it is clear to us that they were not addressed. One, the sentence of 30 years for the offence under section 60A of the Act is the maximum, but not mandatory. Two, that the court has discretion to impose a lesser sentence. Three, in determining the appropriate sentence, the court will

take into account its sentencing powers, circumstances of the case, mitigating as well as aggravating factors.

In the case at hand, the appellant had prayed for leniency because he had small children and an elderly mother to provide for, apart from the fact that he was not enjoying good health himself. In sentencing the appellant, the court stated that it was taking into account his mitigation and the fact that he was a first offender. We ask, if the court imposed the maximum term of imprisonment for a first offender after considering his mitigation, what sentence would it have imposed if it had not taken those factors into account? In **Tofiki Juma v. Republic**, Criminal Appeal No. 418 of 2013 (unreported), citing **Nyanzala Madaha v. Republic**, Criminal Appeal No. 135 of 2005 and **Mathias Masaka v. Republic**, Criminal Appeal No. 274 of 2000 (both unreported), we restated grounds that may lead an appeal court to interfere with sentence. These are: -

(i) Where the sentence is manifestly excessive or it is so excessive as to shock.

(ii) Where the sentence is manifestly inadequate.

(iii) Where the sentence is based upon a wrong principle of sentencing.

(iv) Where a trial court overlooked a material factor.

(v) Where the sentence has been based on irrelevant consideration such as race or religion of the offender.

(vi) Where the sentence is plainly illegal, as for example corporal punishment being imposed for the offence of receiving stolen property.

(vii) Where the trial court did not consider the time spent in remand by the accused person.

This case suffers from two of the errors mentioned above, which justifies our interference with the sentence. The first is that the sentence is manifestly excessive and secondly the court acted on a wrong principle of sentencing by imposing the maximum term of imprisonment to a first offender. We wish to reiterate that courts should not pay lip service to mitigations as it was stated in **Willy Walasha v. Republic**, Criminal Appeal No. 7 of 2002 cited in **Manoni Masele v. Republic,** Criminal Appeal No. 344 of 2016 (both unreported), that:-

> *"It appears to us that, with respect, although ostensibly a judge may say that he has taken into consideration mitigating circumstances in assessing sentence, it is not always apparent that he has, in fact, done so".*

That is what happened in this case. For the reasons demonstrated, we allow the first additional ground of appeal. We quash and set aside the sentence of 30 years and substitute it with the sentence of six (6) years to reckon from the date he started serving the previous sentence.

For the avoidance of doubt, except for the variation in the sentence, the entire appeal is dismissed.

DATED at **SHINYANGA** this 12th day of July, 2023.

A. G. MWARIJA
JUSTICE OF APPEAL

I. P. KITUSI
JUSTICE OF APPEAL

A. Z. MGEYEKWA
JUSTICE OF APPEAL

The Judgment delivered this 12th day of July, 2023 in the presence of the Appellant in person and Mr. Louis Boniface, learned State Attorneys for the Respondent/Republic is hereby certified as a true copy of the original.

R. W. CHAUNGU
DEPUTY REGISTRAR
COURT OF APPEAL