IN THE COURT OF APPEAL OF TANZANIA

AT MWANZA

(CORAM: WAMBALI, J. A., MWANDAMBO, J.A. And MAIGE, J.A.)

CRIMINAL APPEAL NO. 552 OF 2019

MAGANIKO PETRO ..... APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

(Appeal from the decision of the High Court of Tanzania at Mwanza)

(Madeha, J.)

Dated the 16th day of October, 2019

in

Criminal Appeal No. 41 of 2019

JUDGMENT OF THE COURT

18th & 29th August, 2023

WAMBALI, J.A.:

The District Court of Chato sitting at Chato convicted the appellant, Maganiko Petro of the offence of impregnating a secondary school girl, henceforth "the victim" or "PW1" contrary to section 60A (3) of the Education Act Cap. 353 (the Education Act). The allegation contained in the particulars of the charge was to the effect that the appellant impregnated the victim aged 17 years on 17th August, 2017 at about night time at Kalebezo Village within Chato District in Geita Region.

The prosecution case was supported by five witnesses and one exhibit. According to the evidence of the victim (PW1), the appellant was her boyfriend with whom they enjoyed sexual affairs for a long time while she was still a student at Nyamirembe Secondary School until she learnt that she was pregnant. When the victim informed the appellant of being pregnant, he decided to relocate her to Katoro Ward where she stayed until she was arrested after the investigation initiated by her father. The victim testified further that she used to go to the appellant's residence where he lived alone in the room and that they usually had sexual intercourse. The victim emphasized that she had no any sexual relationship with any other man apart from the appellant. She thus insisted that the appellant was the one responsible for her pregnancy.

Lupama Kiyunga (PW2), the victim's father, testified that after the victim disappeared from home, he initiated an investigation and as a result, it came to his knowledge that his daughter was abducted by the appellant and sent to Katoro Ward. The victim was arrested at Katoro and sent to the Nyamirembe Police Station. During the interrogation, she mentioned the appellant as the source of her disappearance and the pregnancy.

The victim's pregnancy was later confirmed by the medical examination which was conducted by Editha Jackson (PW4), a Clinical

Officer at Nyamirembe Dispensary who tendered the PF3 at the trial court and it was admitted as exhibit P2.

It is also on record that Robert Mwita Chacha (PW3), a teacher at Nyamirembe Secondary School, tendered the Attendance Register (exhibit P1) that contained the name of the victim as confirmation that she was the student at that school. PW3 also testified that after the arrest of the victim, he was summoned to appear at Nyamirembe Police Station where he identified her as the student at Nyamirembe Secondary School. PW3 testified further that later, he was informed that the victim was pregnant.

A/Insp. William Mbena (PW5), a police officer incharge of Nyamirembe Police Station, testified that the victim's father informed his office that the appellant had sent the victim to Katoro after he impregnated her. Acting on that information, on 20th January, 2018, he went to Kalebezo Village with his colleague, P/C Andrew, with the help of the complainant and arrested the appellant inside his room and sent him to police station. PW5 testified further that in order to ascertain the status of the victim, he summoned PW4 at the police station and he confirmed that the victim was a student at Nyamirembe Secondary School. The victim was therefore issued with a PF3 for medical examination and it was later revealed by PW4 that she was pregnant.

It is noteworthy that after the prosecution closed its case and a ruling on a case to answer was delivered by the trial court, the appellant was addressed of his rights under section 231 of the Criminal Procedure Act, Cap 20. Consequently, the appellant responded by stating that he would make his defence on oath and that he had neither witness to summon nor exhibit to tender during his defence. Surpringly, on the date set for defence, after the appellant was sworn, he simply stated that he prayed for the lenience of the trial court. The trial magistrate then set the date for delivering a judgment. In the end, after evaluating the prosecution evidence on record, he was fully satisfied that the appellant was guilty of the offence charged hence, he convicted and sentenced him to imprisonment for thirty years.

The appellant's first appeal to the High Court was dismissed in its entirety. He thus preferred the present appeal in which the memorandum of appeal contains two grounds which may be paraphrased as follows: **One,** that the High Court wrongly confirmed the trial court's findings and conviction while the prosecution case was not proved beyond reasonable doubt. **Two,** that the sentence of imprisonment imposed by the trial court and upheld by the High Court on appeal is excessive.

The hearing of the appeal proceeded in the presence of the appellant in person and Mr. Castuce Clemence Ndamugoba, learned Senior State Attorney for the respondent Republic.

Submitting in support of the appeal, apart from urging the Court to consider his grounds of appeal, the appellant maintained that he was wrongly convicted because the prosecution case was supported by weak evidence. He explained that the victim's age was not proved and that her proper name was not known. He argued that while the charge sheet indicated the victim's surname as Kiyunga, the evidence of PW3 shows Lupama and the PF3 indicates Kitinga. On the other hand, he submitted that the sentence imposed against him was excessive. He therefore, implored us to allow the appeal and set him at liberty on the argument that he did not commit the offence.

Responding to the first ground of appeal, Mr. Ndamugoba contested the appellant's complaint. He argued that the trial court properly believed the evidence of the victim and other prosecution witnesses. He submitted that the substance of the evidence for the prosecution was that the victim was impregnated and that it was the appellant who was responsible for the pregnancy. He insisted that, according the record of appeal, the appellant did not cross-examine all prosecution witnesses. Besides, he stated, the appellant did not also defend himself when he was called

upon to do so, except praying for the trial court's lenience. In his view, the appellant's failure to cross-examine the witnesses followed by his action of not offering any defence though he was given the opportunity, suggested that he did not dispute the evidence of those witnesses which was consistent with the allegation set out in the charge.

On the other hand, Mr. Ndamugoba argued that, though the PF3 (exhibit P2) is liable to be discounted from being relied in evidence because it was not read over after it was cleared for admission, the evidence of PW4 remains on record. He added that the oral evidence of PW4 confirmed that after the victim was examined, it was revealed that she was in her 20th week of pregnancy. With regard to the issue of the proper name of the victim, Mr. Ndamugoba argued that if the PF3 which shows her surname as Kitinga is discounted, the dispute on the name of the victim cannot be an issue. He submitted that the use of the name Lupama by PW4 during his testimony is justified because PW2, the victim's father, is Lupama Kiyunga. Indeed, he added, the school Attendance Register (exhibit P1) tendered by PW3 indicated that the victim's surname as Kiyunga Lupama.

Submitting with regard to the victim's age, Mr. Ndamugoba stated that both the victim and her father (PW2), testified that she was 17 years of age when the offence was committed and that the said testimonies

were consistent with the particulars in the charge. He stated further that since the PF3 which indicated the age of the victim as 18 years old has to be discounted, the age of the victim which was proved remains 17 years. In the circumstances, the learned Senior State Attorney prayed that the first ground of appeal be dismissed.

We agree with Mr. Ndamugoba that the first appellate court correctly upheld the findings of facts by the trial court which believed the evidence of the prosecution witnesses. According to the record of appeal, the victim gave a detailed account concerning her sexual relationship with the appellant until when she found herself pregnant. It is also on record that when the victim informed the appellant concerning her pregnancy, she was shifted from her home village to Katoro where she stayed until she was arrested and sent to Nyamirembe Police Station where she mentioned the appellant as a culprit.

The victim's evidence on her arrest and that of appellant was supported by the evidence of her father (PW2) and the Police Officer Incharge of Nyamirembe Police Station (PW5). Therefore, as correctly submitted by Mr. Ndamugoba, PW3's evidence supported the victim's evidence that she was a form three student at Nyamirembe Secondary School until she was suspended for being pregnant. Moreover, PW4, the clinical officer, certified that the victim was in her 20th week of pregnancy.

We also agree with Mr. Ndamugoba's submission with regard to the age of victim as it was proved that she was 17 years old. Moreover, as correctly stated by Mr. Ndamugoba, the victim father's name is Lupama Kiyunga and therefore the use of those names was justified. Indeed, upon discounting the PF3, the name Kitinga appearing therein does not arise.

It is noteworthy that the appellant did not cross examine all prosecution witnesses and indeed, he did not offer any defence and instead, he prayed for the leniency of the trial court. Failure to cross examine implied that the appellant agreed to what the victim and other prosecution witnesses testified at the trial. For this stance, see for instance, the decision of the Court in **Nyerere Nyague v. The Republic,** Criminal Appeal No. 67 of 2010 (unreported) among many. It is in this regard that in **Mathayo Mwalimu and Masai Rengwa v. The Republic**, Criminal Appeal No. 147 of 2008 (unreported), the Court stated among others that:

> *"...The purpose of cross examination is essentially to contradict. That is why it is a useful principle of law for a party not to cross-examine a witness if he/she cannot contradict ..."*

In the circumstances, considering the evidence of the prosecution on record amid the failure by the appellant to cross examine witnesses and to offer his defence, the case against him was proved beyond reasonable doubt. The conviction was therefore properly grounded. In the event, we dismiss the first ground of appeal.

Regarding the second ground of appeal on the severity of the sentence, Mr. Ndamugoba readily conceded that it was excessive. He submitted that the sentence of thirty years' imprisonment prescribed under section 60A (3) of the Education Act is the maximum and not the minimum as observed by the trial court and confirmed by the first appellate court. He therefore submitted that the trial court had discretion to impose a reasonable sentence upon considering that the appellant was the first offender and other mitigating factors. To support his submission, he made reference to the decision of the Court in **Shagi Mang'oma v. The Republic**, Criminal Appeal No. 356 of 2020 [2023] TZCA 17396 (12th July 2023, TANZLII) in which reference was made to the case of **Mawazo Kutamika v. The Republic,** Criminal Appeal No. 64 of 2020 [2023] TZCA 67 (24th February 2023, TANZLII). The learned Senior State Attorney added that, as the record indicates without doubt that the appellant was aged 18 years, he had to be sentenced to a term of imprisonment that the trial court in its discretion deemed appropriate. To

this end, he submitted that as the sentence imposed is excessive, the Court should substitute it with a deserving one after considering the circumstances of the case and taking into account that the appellant is a first offender.

For our part, for purpose of clarity, we deem it appropriate to reproduce section 60A (3) of the Education Act which provides that:

> *"Any person who impregnates a primary school or secondary school girl commits an offence and shall, on conviction be liable to imprisonment for a term of thirty years."*

The import of section 60A (3) of the Education Act was dealt with by the Court in **Mawazo Kutamika v. The Republic** (supra), in which its holding in **Sokoine Mtahali @ Chomongwa v. The Republic,** Criminal Appeal No. 459 of 2018 [2022] TZCA 575 (23rd September 2022, TANZLII) was reproduced thus:

> *" 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 a 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."

It is in this regard that in **Shagi Mang'oma v. The Republic** (supra), the Court construed the above reproduced holding and stated that the following emerge:

> *" ...**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 present case, according to the record of appeal, though the trial court seemed to have taken into account the mitigating factors, it felt bound by what it considered as the mandatory maximum penalty of thirty years under section 60A (3) of the Education Act. We thus agree with the submission of the learned Senior State Attorney that the sentence imposed against the appellant is excessive. We are alive to the settled position that the appellate court should rarely interfere with the discretion of the trial court in sentencing. In this regard, in **John Mbua v. The**

Republic, Criminal Appeal No. 257 of 2006 (unreported) the Court stated among others that:

> *"It has been emphasized by this Court in numerous cases that an appellate court should not interfere with the discretion exercised by a trial judge or magistrate as to sentence except in such cases where it appears that in assessing the sentence the judge or magistrate has acted upon some wrong principle, or has imposed a sentence which is either patently inadequate or manifestly excessive."*

For similar stance, the Court in that decision cited its previous decisions in **Bernadeta Paul v. The Republic** [1992] T.L.R. 97, **Rashid S. Kaniki v. The Republic** [1993] T.L.R. 258, **Yohana Balicheko v. The Republic** [1994] T.L.R. 5 and **Mohamed Ratibu alias Said v. The Republic,** Criminal Appeal No. 11 of 2004 (unreported).

In the present case, we are of the view that since the trial court acted under a wrong principle and thus imposed an excessive sentence of imprisonment against the appellant, we thus have to intervene as urged by Mr. Ndamugoba. Consequently, we allow the second ground of appeal.

In the event, considering the circumstances of the case, the appellant's mitigating factors and taking into account that he is a first

offender, we set aside the sentence of thirty (30) years and substitute thereof with a sentence of ten (10) years to be reckoned from the date of conviction.

In the end, except for our decision in the second ground that has led to the substitution of the sentence, the appeal is dismissed.

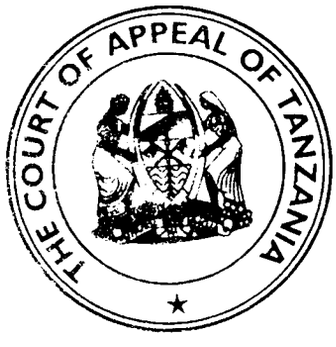
DATED at **MWANZA** this 25th day of August, 2023.

F. L. K. WAMBALI
JUSTICE OF APPEAL

L. J. S. MWANDAMBO
JUSTICE OF APPEAL

I. J. MAIGE
JUSTICE OF APPEAL

The Judgment delivered this 29th day of August, 2023 in the presence of the appellant in person unrepresented and Mr. Castuce C. Ndamugoba, learned Senior State Attorney assisted by Mr. Sileo Mazullah learned State Attorney for the respondent, is hereby certified as a true copy of the original.



A. L. KALEGEYA
DEPUTY REGISTRAR
COURT OF APPEAL