IN THE COURT OF APPEAL OF TANZANIA
AT MOSHI

(CORAM: SEHEL, J.A., KEREFU, J.A. And MLACHA, J.A.)

CRIMINAL APPEAL NO. 327 OF 2020

SALUM NICHOLAUS MNYUMALI..... APPELLANT

VERSUS

THE REPUBLIC.....RESPONDENT

(Appeal from the Judgment and Decree of the High Court of Tanzania at Moshi)

(Mkapa, J.)

dated the 6th day of July, 2020
in
DC. Criminal Appeal No. 52 of 2019

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JUDGMENT OF THE COURT

6th & 14th December, 2023

SEHEL, J.A.:

The appellant, Salum Nicholaus Mnyumali, was charged before the District Court of Moshi at Moshi (the trial court) with two counts. The first count concerned the offence of impregnating a secondary school girl contrary to section 60 A of the Education Act as amended by section 22 of the Written Laws (Miscellaneous Amendment) Act, No. 2 of 2016. It was particularized that, between January and June, 2018, at Msaranga area within the District of Moshi in Kilimanjaro Region, the appellant

impregnated a school girl aged 16 years of J.K. Nyerere Secondary School.

The second count was on the offence of rape contrary to section 130 (1) (2) (e) and 131 of the Penal Code. It was alleged that in the same months and year, the appellant had carnal knowledge of a girl aged 16 years. For the purpose of this judgment, we shall refer to her as "the victim" or "PW2" in order to disguise her identity.

The appellant denied the charge. Thus, a full trial ensued whereby the prosecution called a total of six witnesses, while, the appellant fended for himself; he did not call any witness. The prosecution case was also built upon three exhibits, namely; the PF3 of the victim (exhibit P1), a seizure certificate (exhibit P2) and a black school bag (exhibit P3).

The first prosecution witness was the father of the victim (PW1). His evidence was to the effect that his daughter (PW2), sixteen years old girl, was a Form II student at J.K Nyerere Secondary School. That, in June, 2018, his wife informed him that PW2 had signs of pregnancy. They tried to interrogate her but she ran away from home. It happened that, on 30th June, 2018, PW1 was informed by his neighbour, that she

saw PW2 in Njoro area. He decided to make a follow up and managed to find the victim. She was put under arrest after being alleged to have stolen money from one of their neighbours. Upon interrogation, PW2 told his father that she gave the money to the appellant, his lover whom she had been sleeping with. The father reported the matter to Majengo Police Station where he was issued with a PF3. He took the victim to Mawenzi hospital for medical check-up.

At the hospital, they were attended by Dr. Victor Gerenia Adolf, (PW4) who examined the victim by ultra sound and found that she was three months' pregnant. PW4 filled the PF3 which was tendered and admitted in evidence as exhibit P1.

The evidence of the victim was that she met the appellant in January, 2018 and started having love affair with him until when she was found by his father. That, whenever she was visiting the appellant, he used to give her money.

The investigative officer, F. 4369 Sergent Layasa (PW5) said that on 1st July, 2018, he was assigned a rape case for investigation. He visited the appellant's house and conducted search where he managed

to retrieve a black bag belonging to the victim. The seizure certificate and the black school bag were tendered and admitted in evidence as exhibits P2 and P3 respectively. Perhaps, we should point out here that although, at page 25 of the record of appeal, the trial court indicated it admitted search warrant but the document admitted was seizure certificate which appears at page 35 of the record of appeal.

According to Elihaika Nelson (PW3) who was the neighbour of the appellant testified that the victim used to visit the appellant's home. He tried to warn the appellant not to invite and have love affairs with a student but the appellant did not heed to his warning instead he told him that the girl was his wife and prisons are meant for people like him.

A teacher from J.K. Nyerere Primary School, Floride Alexander Ngowi (PW6), said that she knew the victim as a Form II student and in 2018 they found out that PW2 was pregnant. The Board meeting was convened, discussed her issue and decided to expel her from school which they did.

In his defence, the appellant denied committing the offence although he acknowledged that he knew PW2 as he used to see her in

the neighbourhood, and that, the victim was his customer at his photo studio.

At the end of the trial, the appellant was found guilty as charged. He was convicted and sentenced to one year imprisonment for the first count and thirty years imprisonment for the second count. The sentences were to run concurrently. Aggrieved by both the convictions and sentences, he unsuccessfully appealed to the High Court of Tanzania at Moshi (the first appellate court). Still dissatisfied, the appellant has come to this Court on appeal.

On 30th September, 2020, the appellant filed a memorandum of appeal comprising of six grounds. On 8th February, 2023, he filed a supplementary memorandum of appeal raising three grounds, and again, on 6th December, 2023, he filed a second supplementary memorandum of appeal comprising of three grounds. The learned Principal State Attorney conveniently condensed the appellant's grounds of appeal into the following complaints: **One,** the trial of the appellant was conducted contrary to section 186 (3) of the Criminal Procedure Act (the CPA). **Two,** the appellant who is physically incapacitated was not informed of his right to have legal aid services in terms of section 310 of the CPA.

Three, the charge was defective. **Four,** the seizure of the black school bag was made in contravention with section 38 (1) (2) and (3) of the CPA. And **five**, the case against the appellant was not proved to the required standard.

At the hearing of the appeal, the appellant appeared in person, unrepresented whereas Ms. Dorothy Massawe, learned Principal State Attorney assisted by Jaqueline Werema, learned State Attorney, appeared for the respondent Republic.

Before dealing with the appeal, we wish to preface this judgment with the settled principle governing the second stage appeal. The Court rarely interferes with concurrent findings of facts by the courts below. We can only interfere where there are mis-directions or non-directions on the evidence, or where there was a miscarriage of justice or a violation of some principle of law or practice – see: **The Director of Public Prosecutions v. Jaffari Mfaume Kawawa** [1981] T.L.R. 149 and **Musa Mwaikunda v. The Republic** [2006] T.L.R. 387.

Now back to the appeal, when the appellant was invited to argue his appeal, he opted to adopt the grounds of appeal contained in the

three sets of the memoranda of appeal, and thereafter, urged the Court to let him free from the prison custody basing on the grounds of appeal he raised.

The learned Principal State Attorney begun to respond to the appeal by submitting on the complaint that the trial was not conducted in camera. She outrightly conceded that, it is true; the trial of the appellant was not conducted in camera as required by section 186 (3) of the CPA. Nevertheless, she argued that the appellant was not prejudiced because he did not protest at the conduct of his trial. Similarly, she argued, the appellant did not raise this complaint in the first appellate court.

Section 186 (3) of the CPA which the appellant is complaining that it was not complied with by the trial court provides:

> *"Notwithstanding the provisions of any other law, the evidence of all persons in all trials involving sexual offences shall be received by the court in camera, and the evidence and witnesses involved in these proceedings shall not be published by or in any newspaper or other media, but this subsection shall not prohibit the printing or*

publishing of any such matter in a bona fide series of law reports or in a newspaper or periodical of a technical character bona fide intended for circulation among members of the legal or medical professions."

The above provision of the law is clear that all trials involving sexual offences "*shall be conducted in camera*". Further, it makes it unlawful for any person to "*print*" or "*publish*" the evidence and witnesses involved in the proceedings involving sexual offences save and except the printing or publishing is intended for circulation among members of the legal or medical practitioners including *bonafide* publication in law reports. This provision has its origin in the Sexual Offences Special Provisions Act, 1998 which was enacted in order, among others, to safeguard the personal integrity, dignity, liberty and security of women and children – see: **Goodluck Kyando v. The Republic** [2006] T.L.R. 363. We are alive that sexual violence concerns both genders but, generally, women and children are more likely to be victims and in most cases the perpetrators are male and known by the victim. In that respect, the enactment of section 186 (3) of the CPA was

meant to safeguard women and children who are particularly vulnerable to sexual abuse.

In the present appeal, it is on record that the victim is a girl aged sixteen years. Therefore, her trial was supposed to be conducted in camera as required by the provision of section 186 (3) of the CPA. Nonetheless, the record of appeal shows that all evidence was received in open court. Neither the victim nor the appellant raised a concern on the manner the trial was conducted. Equally, in the first appellate court, the appellant did not raise this complaint. He brought it in the second stage of appeal. We asked ourselves if the appellant was ever prejudiced. In the case of **Mashaka Marwa v. The Republic** (supra) the Court was faced with a similar complaint and said:

> *"...considering that the appellant did not make any protest at the trial or complain in the first appellate court, he cannot now complain that he was prejudiced by the said omission. The record if completely silent if the appellant raised the issue during the trial..."*

In the same vein, we find that the appellant was not prejudiced. This ground of appeal is therefore without merit and we dismiss it.

This takes us to the second ground that the appellant who is physically incapacitated was not informed of his right to have legal aid services in terms of section 310 of the CPA. The learned Principal State Attorney referred us to the provision of section 310 of the CPA, and contended that it was the responsibility of the appellant to request for legal aid. To cement her submission, she referred us to the case of **Ernest Jackson @ Mwandikaupesi & Another v. The Republic,** Criminal Application No. 46/01 of 2021 [2023] TZCA 17472 (7 August, 2023; TANZLII) where the Court held that enjoyment of legal aid services is neither automatic nor as of a right as it is subject to a party in a case to apply for it in terms of section 33 (1) of the Legal Aid Act.

In this appeal, the appellant was facing two criminal charges, one being statutory rape which attracts a sentence of not less thirty years imprisonment. We gathered from the record of appeal that, throughout his trial before the District Court and in his appeal, at the first appellate court and before us, the appellant appeared in person. He had no legal representation. Undeniably, the right to legal representation is a human

right issue but, as rightly submitted by the learned Principal State Attorney, that right is not automatic. We, like the first appellate court, find that the appellant was required to apply for the legal aid services since section 22 of the Legal Aid Act permits 'indigent person' who intends to receive legal aid to approach any legal aid provider and apply for the legal aid services. For the case of a person in custody to apply for the same from the officer in charge of the police station or prison – see: Regulation 22 of the Legal Aid Regulations, 2018, the Government Notice No. 6 of 2018. Given that the appellant did not apply for the legal aid services, we find that his complaint is baseless. We accordingly proceed to dismiss it.

We now move to the complaint that the charge was defective. Responding to this complaint, the learned Principal State Attorney referred us at page 1 of the record of appeal where there is a charge and readily admitted that, in the second count, that is a count for rape, sub-section (1) of section 131 of the Penal Code was not cited. Nevertheless, she contended that the omission did not prejudice the appellant because, she said, the particulars of the offence fully informed the appellant that he was charged with an offence of raping a child of

sixteen years and that the evidence led during trial also informed him so, such that, he was able to mount his defence.

Having revisited the record of appeal, we discerned therefrom that the charge laid against the appellant at the trial court cited sections 130 (1) (2) (e) and 131 of the Penal Code and it did not cite subsection 1 of section 131 of the Penal Code. Section 131 (1) prescribes a sentence of not less than thirty years imprisonment to a person convicted of a charge of raping a child below eighteen years. Obviously, that omission rendered the charge sheet to be defective. Nonetheless, we are in full agreement with Ms. Massawe that the defect did not prejudice the appellant because the particulars of offence gave sufficient information to the appellant that he was alleged to have committed the offence of rape to a girl of sixteen years. Further, through the evidence of PW1 and exhibit P1, the appellant grasped that the victim was a child whose age was below eighteen years. It is also on record that the appellant was present in court when the witnesses gave their evidence. Therefore, the appellant had an opportunity to hear the evidence of PW1 and PW4 who tendered exhibit P1. Besides, the appellant mounted his defence with the understanding that he was alleged to have raped a child of sixteen

years. Accordingly, we hold that the irregularity did not occasion a failure of justice and it is curable under section 388 of the CPA -see: **Jamali Ally @ Salum v. The Republic**, Criminal Appeal No. 52 of 2017 [2019] TZCA 32 (28 February 2019; TANZLII).

Next, the appellant complained on non-compliance to section 38 (1) of the CPA on search and seizure of a black school bag, exhibit P3, the learned Principal State Attorney rightly submitted that the law was not complied with as there was no search warrant to evidence that, indeed, a search was conducted at the house of the appellant where the alleged black school bag, exhibit P3 was retrieved as contained in the seizure certificate, exhibit P2. Though, at page 34 of the record of appeal, there is a seizure certificate signed by an independent witness, one Nelson Adiel Mero, the appellant, the victim and PW5, there is no search warrant. We therefore find merit on this ground of appeal. Accordingly, we proceed to expunged exhibits P2 and P3 from the record of appeal.

The learned Principal State Attorney addressed us on the remaining grounds of appeal into one issue, that is, whether the charges

of impregnating a school girl and rape were proved beyond reasonable doubt.

At the outset, Ms. Massawe intimated to the Court that the respondent supports the appeal in respect of the first count of impregnating a school girl as it was not proven beyond reasonable doubt. She further conceded to the complaint regarding failure to conduct DNA test which the appellant asked for an order of DNA but no order was issued. She argued that such omission should be resolved in favour of the appellant. To cement her argument, she referred us to the case of **Peter Bugumba @ Cherehani v. The Republic**, Criminal Appeal No. 251 of 2019 [2023] TZCA 221 (4 May 2023; TANZLII). With the above submission, the learned Principal State Attorney urged the Court to dismiss the appeal for want of merit.

It is trite law that, for the prosecution to establish the offence of impregnating a school girl, 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.

In this appeal, there is no such proof. The prosecution did not bring any witness from J.K. Nyerere Secondary School where the victim was alleged to be studying at. Neither was there any documentary evidence like log book or student's register book to show that the victim was attending the said school. Instead, the prosecution brought PW6 who was a primary school teacher at J.K. Nyerere primary school. This witness was called without cause because she did not add any value to the prosecution case.

Further, it is true that, at page 18 of the record of appeal, when the appellant was cross examining PW3, requested for an order for DNA test but no order was issued by the trial court. Admittedly, DNA is vital scientific evidence in solving crimes as it links the accused person with the crime committed - see: **Christopher Kandidius @ Albino v. The Republic**, Criminal Appeal No. 394 of 2015 [2016] TZCA 196 (13 December, 2016; TANZLII). However, it is not a mandatory legal requirement for proving any criminal offence. Accordingly, we agree with the submission of Ms. Massawe that the first count was not proven.

For the second count, the learned Principal State Attorney submitted that the offence of rape was proved beyond reasonable doubt.

Relying on the principle stated in the case of **Selemani Makumba v. The Republic** [2006] T.L.R. 379, she contended that, in rape offences, the best evidence comes from the victim. She submitted that PW2 was categorical in her evidence that she visited the appellant more than once and, in every visit, she was having sexual intercourse with the appellant. She further submitted that the evidence of PW2 is corroborated by the evidence of PW3 who used to see her visiting the appellant.

On the complaint that the evidence of PW4 contradicts with the exhibit P1, the learned Principal State Attorney conceded to the contradiction that, at page 19 of the record of appeal, PW4 said he examined "*Debora Fredy*" while exhibit P1 found at pages 32 and 33 of the same record shows that the person who was examined was "*Debora d/o Frate*". She contended that such a contradiction was minor as it did not go to the root of the prosecution case which had been proven by the victim, herself.

On our part, we have closely re-evaluated the evidence on record and find that the prosecution proved the offence of rape to the required standard; that is, beyond reasonable doubt. As alluded earlier, the appellant was charged with an offence of rape contrary to sections 130

(1) (2) (e) and 131 (1) of the Penal Code. The first appellate court correctly applied its mind that, for this kind of rape which falls under section 130 (1) (2) (e) of the Penal Code, there must be proof of penetration, and that, consent of the victim is not required to be proved. In order to appreciate the findings of the first appellate court, we find it prudent to reproduce the extract of the judgment that:

> *"It is plain clear that the...testimony [of PW2] has established penetration whereby PW2 had described how the appellant had inserted his penis into her vagina and that fact she had sex with him many times. It is noteworthy to point out that the victim, sixteen (16) years (by then) testified to have sex with the appellant willingly. However, according to section 130 (2) (e) of the Penal Code a person is guilty of rape if he carnally known a girl "with or without her consent when she is under eighteen years of age".*

Therefore, as soundly held by the first appellate court, regardless of the willingness of the victim, the offence was sufficiently established and proven by the victim herself (PW2) whose evidence is the best in sexual offences – see the case of **Selemani Makumba** (supra).

Moreover, her evidence was corroborated by the evidence of PW3 who testified that he used to see the victim visiting the appellant, and that, he tried to warn the appellant but he did not heed to his warning. As far as the complaint of contradiction is concerned, we agree with the submission of Ms. Massawe that the discrepancy on the name of the person examined by PW4 with the one appearing in exhibit P1 is minor. It does not go to the root of the prosecution's case that PW2 was raped by the appellant. Besides, the evidence of PW1, PW2, PW3, PW4 and PW5 and exhibit P1 were found credible and reliable by the trial court which was in a better position to assess their credibility than this Court. We note that the finding of the trial court was upheld by the first appellate court. We are therefore satisfied that the appellant was rightly convicted of the offence of rape by the trial court which was justifiably upheld by the first appellate court. We find nothing to disturb the concurrent findings of the two lower courts. Accordingly, this ground of appeal is partly upheld.

In the end, we find the appeal on conviction of the offence of impregnating a school girl has merit but the appeal on the offence of rape is without merit. We therefore set aside the conviction of the

offence of impregnating a school girl and the sentence of one year imprisonment. However, we uphold the conviction of the offence of rape and sustained the correct sentence of thirty years imprisonment imposed on the appellant.

DATED at **MOSHI** this 14th day of December, 2023.

B. M. A. SEHEL
JUSTICE OF APPEAL

R. J. KEREFU
JUSTICE OF APPEAL

L. M. MLACHA
JUSTICE OF APPEAL

The judgment delivered this 14th day of December, 2023 in the presence of the appellant in person and Mr. Ramadhani Kajembe, learned State Attorney for the respondent/Republic, is hereby certified as a true copy of the original.

G. H. HERBERT
DEPUTY REGISTRAR
COURT OF APPEAL