IN THE COURT OF APPEAL OF TANZANIA

AT ARUSHA

(CORAM: NDIKA, J.A., LEVIRA, J.A., And MAKUNGU, J.A.)

CRIMINAL APPEAL NO. 64 OF 2020

MAWAZO KUTAMIKA ..... APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

(Appeal from Judgment of the Resident Magistrate's Court of Arusha at Arusha)

(Temu, SRM – EXT. JRS.)

Dated the 9th day of October, 2019

in

Criminal Appeal No. 102 of 2019

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JUDGMENT OF THE COURT

13th & 24th February, 2023

MAKUNGU, J.A.:

This appeal challenges the decision dated 9th October, 2019 of the Court of Resident Magistrates of Arusha at Arusha exercising extended jurisdiction which partly dismissed the appellant's appeal in Criminal Appeal No. 102 of 2019.

Initially, the appellant was tried before the District Court of Kiteto with two counts, namely; rape contrary to sections 130 (1) (2) (e) and 131 (1) of the Penal Code [Cap. 16 R.E. 2002; now R.E. 2019]; and

impregnating a school girl contrary to section 60A (3) of the Education Act [CAP. 353 R.E. 2002] as amended by the Written Laws (Miscellaneous Amendments) Act No. 4 of 2016.

The prosecution alleged that on unknown day of September, 2017 at Dongo Village within Kiteto District in Manyara Region, the appellant had carnal knowledge of a secondary school girl who testified as PW1 and impregnated her. We shall maintain reference to her as PW1 or the victim.

The appellant denied the charge but at the end of the trial, he was convicted and sentenced to imprisonment of thirty years on each count. The terms of imprisonment were ordered to run concurrently.

Aggrieved by the trial court's decision, the appellant appealed to the High Court of Tanzania at Arusha District Registry. However, according to the record, that court transferred the appeal to the court of Resident Magistrate of Arusha to be heard and determined by Hon. Temu, Senior Resident Magistrate with Extended Jurisdiction. The first appellate court allowed the appeal on the first count of rape but dismissed it on the second count of impregnating a school girl. That

decision did not make the appellant lose interest in his pursuit of justice as subsequently, he lodged the instant appeal.

The facts in respect of the case can be briefly stated as follows: The victim of the offence (PW1) was at the material time of the offence a student of Dongo Secondary School. Sometime in September, 2017 it was discovered that she was pregnant.

When asked, PW1 admitted that she was indeed pregnant and that it was the appellant who was responsible for the pregnancy. Upon that information, PW3 decided to report the matter and took her to Police where she was given a Police Form No. 3 (PF3) so that PW1 could be taken to hospital for medical examination. The medical examination confirmed that she was pregnant.

It was PW1's evidence at the trial that one day she was approached by the appellant but she refused. Later on, she informed her grandmother about the appellant and later that information reached to her grandfather's attention who advised her to accept the appellant's offer. From there PW1 had the relationship with the appellant. According to PW1, the appellant used to have sexual intercourse with her on several occasions until she got pregnant.

In his defence, the appellant denied the offence blaming PW1's mother for framing him up because of a land dispute which existed between them, but as alluded to earlier on, upon the conclusion of trial he was convicted and sentenced accordingly. The first appellate court confirmed both conviction and sentence.

In his memorandum of appeal, the appellant advanced six grounds of appeal which were followed by another set of seven supplementary grounds making a total of thirteen grounds. From the substantive memorandum of appeal, the substance of his complaints are:

1. *That the predecessor Magistrate recorded the evidence of PW1 to PW4 in point form instead of a narration form as required under section 210 (1) (b) of the CPA.*
2. *That the medical doctor's evidence fell short of proof, as it did not describe the period of the alleged victim's pregnancy.*
3. *That the PF3 (exhibit P1) was wrongly admitted in evidence and the contents were not read out after admission as exhibit.*
4. *That the contents of the Attendance Register (exhibit P2) were not read out after admission as exhibit.*
5. *That the delay of PW1 to disclose the information of the alleged sexual ordeal was not explained.*

6. *That the charge on that particular count was not proved to the required standard of law.*

The seven grounds of appeal advanced in the supplementary memorandum of appeal are that, **one;** that the charge sheet in respect of the second count is fatally defective, **two;** that there was an uncertainty of the date between the charge and the evidence making the charge incurably defective, **three;** that, the evidence on record was tainted with contradictions and inconsistencies, **four;** that there was unexplained delay in reporting and naming the appellant by PW1, **five;** that the appellant's defence was not considered, **six;** that the charge was not proved beyond reasonable doubt and **seven;** that exhibit P3 was read out before it was admitted.

Before us, the appellant appeared in person, unrepresented whereas Mr. Felix Kwetukia, learned Senior State Attorney assisted by Ms. Grace Michael Madikenya, learned State Attorney represented the respondent Republic.

When he was called upon to argue his appeal, the appellant adopted the grounds of appeal and briefly elaborated them. He started with the seven grounds of appeal in the supplementary memorandum of

appeal. However, he did not touch the six grounds in the substantive memorandum of appeal.

In his oral submission, the appellant submitted that the charge sheet was defective for failure to mention the date of the commission of the offence (1st and 2nd grounds in the supplementary memorandum). In the 3rd ground, he complained that there were contradictory statements in the evidence of PW1, PW2 and PW3 regarding the age of the alleged pregnancy. Another complaint raised in ground four was improper admission of exhibits P1 and P2 as evidence.

In the fifth ground, the appellant's claim was that the matter was not immediately reported to Police. He questioned the credibility of PW1's evidence as regards the date in which she became pregnant contending that it could not be in September, 2017 as alleged by her.

The appellant also argued in ground six that the lower courts erred in failing to consider his defence. Finally, he argued that the offence on the second count was not proved beyond reasonable doubt and therefore the appeal should be allowed.

Mr. Kwetukia did not support the appeal. He submitted in response that the case against the appellant was proved beyond

reasonable doubt. On the 1st and 2nd grounds, as presented by the appellant, he argued that the charge sheet was very clear and therefore it was not defective as claimed by the appellant.

The learned Senior State Attorney similarly urged us to dismiss the appellant's complaint in the 3rd ground contending that there were no contradictions in the evidence of PW1, PW2 and PW3. He submitted that PW1 and PW3 proved that PW1 was a school girl and PW1, PW2 and PW3 proved that PW1 was pregnant. He urged us to find that the victim's evidence (PW1) established the offence and we should accord her evidence the weight it deserves.

Mr. Kwetukia urged us to dismiss the 4th ground of appeal, which was the complaint over the delay in reporting and naming him done by PW1. The learned Senior State Attorney denied the alleged delay and submitted that the matter was reported immediately after PW1 was discovered pregnant.

On the fifth ground that the appellant's defence was not accorded weight, the learned Senior State Attorney submitted that the contention is devoid of merit because the first appellate court considered it and

found that the trial Magistrate considered the defence evidence and rejected it. He referred us to page 48 of the record of appeal.

With regard to the sixth and seventh grounds, that the prosecution did not prove its case beyond reasonable doubt, Mr. Kwetukia submitted that the prosecution proved that PW1 was a school girl that she was pregnant and that it was the appellant who impregnated her.

Before the learned State Attorney sat down, we pressed him to submit on six grounds of appeal in the substantive memorandum of appeal. He drew our attention that some grounds of appeal have already been addressed because they appeared in both memoranda and that only the 1st and 4th grounds were yet to be addressed.

On the 1st ground of appeal, he admitted that section 210 (1) (b) of the Criminal Procedure Act [Cap. 20 R.E. 2019] (CPA) was not complied with. However, he argued that it did not prejudice the appellant and that error was curable under section 388 of the CPA.

On the 4th ground regarding exhibit P2 which was not read after its admission, he submitted that it was not properly received as evidence and should be expunged. However, he maintained that the oral evidence of PW2 covered the contents of the expunged exhibit. He

referred us to the case of **Kadili Ally v. The Republic**, Criminal Appeal No. 99 of 2020 (unreported) to reinforce his submissions.

Eventually, Mr. Kwetukia submitted that on the strength of the prosecution evidence on record, the first appellate court correctly confirmed the trial court's finding that the appellant was guilty of the offence of impregnating a school girl and therefore the conviction is proper. To this end, he implored us to find that this appeal is devoid of merit and dismiss it.

When his turn came to respond to the learned State Attorney's submissions, the appellant had nothing to say and left the matter to Court to decide. He prayed that on the basis of the grounds of appeal, his appeal be allowed and that he be restored to liberty.

We have considered this appeal and submissions on the grounds of appeal. In terms of section 6 (7) (a) of the Appellate Jurisdiction Act, Cap. 141 (the AJA) our mandate when hearing a second appeal is mainly concerned with issues of law, not matters of fact.

It is trite law that this being a second appeal the Court can interfere on concurrent findings of fact by the two courts below only where there is a sufficient reason to do so. In the case of **Salum**

Mhando v. Republic, [1993] T.L.R. 170 the principle was stated as follows: -

> *"Where there are mis-directions and non-directions on the evidence a court of second appeal is entitled to look at the relevant evidence and make its own finding of fact."*

There is not much to go by however, we will place little significance on few of the complaints so that we deal with a more deserving complaints on the evidence of PW1, the alleged victim of the offence. In short, we find no merit in the complaint that the charge is defective, because after taking a good look at that charge sheet, it is not. We similarly find no merit in arguing that the victim's pregnancy period was not proved, because the opposite is, actually the case. As correctly submitted by the learned State Attorney what was required of the prosecution in proving the offence against the appellant is PW1's pregnancy which was proved by PW1 herself and the medical report (exhibit P.1) of PW2. It was also proved that PW1 was a school girl by PW1 herself and PW3.

We are mindful of the argument of the appellant that the evidence of PW2 who examined the victim and filed a report in the PF3 showing

that she was pregnant did not indicate the age of that pregnancy. This, in his view, that the pregnancy was not proved is baseless because what was required to be proved, as clearly put by PW2 in his evidence, is pregnancy, which was proved in the PF3.

We have also considered the complaint that exhibits P2 and P3 were received and admitted as evidence contrary to the law. We need not mince words; the complaint has merit. The said exhibits should be expunged. However, all these are not determinant of the matter, in our view. Based on the above discussions, we find the above grounds without merit and we dismiss them.

After dismissing the above grounds of appeal, the main issue which calls for our determination is whether the evidence on record supports the concurrent findings of facts that the appellant committed the offence for which the two courts below convicted him.

After re-evaluation of evidence of the victim (PW1), that of PW2 the medical officer and PW3, the first appellate court (Temu, SRM) was not in any doubt in the second count that it was the appellant who impregnated her.

In the present appeal, we agree with the learned State Attorney that the charge was proved beyond reasonable doubt that the victim was a school girl when she and the appellant had sexual intercourse. Again, the result of the appellant's act, the victim was tested pregnant.

The appellant was charged under section 60A (3) of the Education Act, which provides that: any person who impregnates a primary school or a secondary school girl commits an offence. It is clear that the prosecution in the instant case, was required to prove that PW1 was a secondary school girl at the material time, that she was pregnant, and that she was impregnated by the appellant.

It is clear that the appellant's complaint that the prosecution case was not proved to the required standard, it has no merit. To ascertain this complaint we scanned the entire record of appeal and we agree with the learned Senior State Attorney that the first appellate court properly re-evaluated the evidence and was satisfied with the finding of the trial court.

We have also revisited the testimonies of PW1 and there is no doubt that she clearly explained the incident. PW1 in particular at pages 4 and 5 of the record of appeal testified on how the appellant

impregnated her while she was a secondary school girl of Dongo Secondary School. Likewise, PW3 at pages 11 and 12 of the same record, testified that PW1 was her student of Form II of that school and how they found that PW1 was pregnant. There is no doubt that PW2's evidence corroborated the evidence of PW1 that she was pregnant.

It is therefore, our settled view that there is no fault in the factual findings of the two courts below on this ground for this Court to interfere. In the circumstances, we find no merit in the appeal against the appellant's conviction, which we hereby dismiss it in its entirety.

Finally, we deal with the propriety of the sentence of thirty years' imprisonment imposed on the appellant, an issue that we raised *suo motu* on the hearing of the appeal.

Addressing us on that issue Mr. Kwetukia submitted that it was an obvious error for the trial magistrate to impose a maximum term of thirty years stipulated by section 60A (3) of the Education Act. He admitted that the punishment of thirty years imposed on the appellant was manifestly excessive. Accordingly, he moves us to interfere and revise the sentence in terms of section 4 (2) of the Appellate Jurisdiction Act, Cap. 141 R.E. 2022.

We are in full agreement with the learned Senior State Attorney that the sentence imposed on the appellant was excessive. For ease of reference section 60A (3) of the Education Act, under which the offence at hand was laid provides as follows:

> *"60A (3) 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.****"*
>
> *[Emphasis added]*

The above section has been interpreted by the Court in the case of **Sokoine Mtahali @ Chomongwa v. The Republic**, Criminal Appeal No. 459 of 2018, where the Court had this:

> *"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 of 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."*

See also **Dauson Athanaz v. Republic**, Criminal Appeal No. 285 of 2015 and **Abdi Masoud @ Iboma v. Republic**, Criminal Appeal No. 116 of 2015 (both unreported).

In terms of section 170 (1) and (2) of the CPA, the trial Magistrate, being a Resident Magistrate of the rank below Senior Resident Magistrate, could not pass a sentence of imprisonment for a term exceeding five years except where the law imposes a minimum imprisonment exceeding five years. It seems in sentencing the appellant, the learned trial Magistrate mistook the prescribed penalty as the mandatory punishment. In the premises, we uphold Mr. Kwetukia's submission that the said imposed sentence was manifestly excessive.

Since this aspect escaped the attention of the first appellate court, it is now our solemn duty to intervene pursuant to section 4 (2) of the AJA as we did in analogous circumstances in **Faruku Mushenga v. Republic**, Criminal Appeal No. 356 of 2014 (unreported).

Accordingly, we set aside the sentence of thirty years' imprisonment imposed on the appellant. Taking into account the appellant's mitigating factors and the trial Magistrate could not sentence above 5 years imprisonment and that he has been in prison for more

than 5 years a period that could have amounted to a maximum sentence the trial Magistrate could have imposed on him, we order the immediate release of the appellant, unless he is held for other lawful cause.

Order accordingly.

DATED at **ARUSHA** this 24th day of February, 2023.

G. A. M. NDIKA
JUSTICE OF APPEAL

M. C. LEVIRA
JUSTICE OF APPEAL

O. O. MAKUNGU
JUSTICE OF APPEAL

The Judgment delivered this 24th day of February, 2023 in the presence of the appellant in person and Mr. Felix Kwetukia, learned Senior State Attorney for the Respondent/Republic, is hereby certified as a true copy of the original.

E. G. MRANGU
SENIOR DEPUTY REGISTRAR
COURT OF APPEAL