IN THE HIGH COURT OF TANZANIA

(MWANZA DISTRICT REGISTRY)

AT MWANZA

CRIMINAL APPEAL NO. 174 OF 2019

(Appeal from the Judgement of the District Court of Bukombe at Ushirombo (Moshi, RM) Dated 30th of September, 2019 in Criminal Case No. 60 of 2019

EMMANUEL JUMA ..... APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

Date of the order: 30.03.2020
Date of Judgment: 01.04.2020

JUDGMENT

M.K. ISMAIL, J

The appellant was arraigned in court two counts. In the first count, the appellant was charged with the offence of rape contrary to **sections 130 (1) (2) (e)** and **131 (1)** of the Penal Code, Cap. 16 R.E. 2002. The second counts involves impregnating a 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 Amendments) Act No. 2 of 2016. It was alleged that

on 1st day of October, 2018, at about 16:00 at Kapela village in Bukombe District, within Geita region, the appellant did unlawfully have carnal knowledge of ABC (in pseudonym), a girl of 14 years of age. It was further alleged that on the same date and time, at Kapela village in Bukombe District, within Geita region, the appellant impregnated ABC, a form one student at Ushirombo Secondary school.

At the conclusion of the trial, the District Court of Bukombe at Ushirombo, before which the appellant was arraigned, found the appellant guilty and convicted him of both counts. He was consequently sentenced to imprisonment for thirty (30) years in each of the counts. The sentences were ordered to run concurrently. The conviction and sentence did not go well with the appellant. He preferred this appeal and raised 7 grounds of appeal. For reasons that will be apparent shortly, I will not reproduce the appellant's grounds of appeal.

Brief facts of this case are to the effect that the appellant and the victim live in the same village, and they have known each

other for a long time. On 28th September, 2018, the victim was on the way to the market when she mete the appellant who seduced her. Flattered by the appellant's advances, the victim gave in and met him on 1st October, 2018, at the appellant's home. They had their first encounter of a sexual intercourse. They met again on 28th December, 2018, when the victim was going to her friend. The appellant took the victim to his home and had a carnal knowledge of her. Months later, around February, 2019, the victim's mother suspected that the victim was carrying some pregnancy. This prompted her to inform the school which decided to suspend her. She was then taken to a health centre in Ushirombo where tests confirmed that she had a four-month pregnancy. Following this revelation, the appellant was arrested and conveyed to the police for investigation that led to his eventual prosecution, conviction and sentence to a prison term.

At the hearing before me, the appellant prosecuted the appeal on his own, whereas Ms. Gisela Alex, learned State Attorney, represented the respondent. Aware that he was a lay person who did not have a legal representation, the appellant acceded to the

Court's proposal that the counsel for the respondent should have the first opportunity to submit on the grounds of appeal before he makes his submission.

Ms. Alex began by supporting the conviction and sentence passed against the appellant by the trial court. However, before she went ahead with her submission, the Court interjected and required her to address me on the legality of the sentence imposed on the appellant, taking into consideration the appellant's age which was stated in the particulars of the accused person, attached to the charge sheet. It was stated that, at the time of his arraignment in court, the appellant was 18 years of age.

Submitting on that point, the learned counsel for the respondent confirmed that, looking at the proceedings, it is discernible that the appellant was 18 years of age when he was tried, meaning that the custodial sentence passed by the trial court was imposed on an 18-year old accused person, contrary to the requirements of ***section 131 (1) (2) (a)*** of the Penal Code which is to the effect that, where the accused is aged 18 years or less and he is

a first offender, he should then be subjected to corporal punishment only. In view of what is gathered in the proceedings, Ms. Alex was of the view that the trial magistrate misdirected herself when she imposed a custodial sentence. Ms. Alex prayed that this Court, under ***section 388*** of the CPA, be pleased to substitute the sentence by imposing a fitting sentence in terms of ***section 131 (2) (a)*** of the Penal Code.

Ms. Alex noted, as well, that though the defence testimony, was mentioned in passing in the judgment, the same was not considered in the analysis and composition of the judgment. She contended that this was an anomaly. She made reference to the case of ***Jonas Bulai v. Republic***, CAT-Criminal Appeal No. 49 of 2006 and ***James Bulow & Others v. Republic*** [1981] TLR 283 (both unreported) in both of which it was held that failure to consider the defence was fatal. She, consequently, prayed that a retrial be ordered to cure the anomaly.

The appellant had nothing useful to submit other than praying that he be set free and join his family.

Having heard the respondent's submission my attention is tuned to assessing the propriety or otherwise of the sentence imposed on the appellant.

It is quite clear that, upon conviction, the appellant was sentenced to a 30-year custodial sentence in respect of each of the counts. The custodial sentence assumed that the appellant was an offender of the age of above eighteen years. This was done by the trial court without making reference to the charge sheet, admitted in the court on 13th March, 2019. Page 2 of the charge sheet contains particulars of the accused person which clearly indicate that, at the time of commission of the offence and arraignment in court, the appellant was 18 years old. These facts ought to have transferred the trial court's attention to ***section 131 (2) (a)*** of the Penal Code and pass a fitting sentence that takes cognizance of the appellant's age. This she did not do.

It has been emphasized in countless times, that imposition of sentences has to conform to the tenets of the law that creates the offence charged, and that the discretion of trial courts will only be

interfered where the appellate court is of the view that principles of sentencing have not been complied with . Thus, in ***Masanja Charles v. Republic***, CAT-Criminal Appeal No. 219 of 2011 (unreported), the Court of Appeal guided that an appellate court would interfere with the trial court's sentencing powers in the following circumstances:

- *Where the sentence is manifestly excessive or is so excessive as to shock,*
- *Where the sentence is manifestly inadequate,*
- *Where the sentence is based upon a wrong principle of sentencing,*
- *Where the trial court overlooked a material factor,*
- *The period the appellant had been in custody pending trial.*

The superior Court categorically went further and held:

> *"we have cautioned ourselves and be mindful of the well settled principle that we should not interfere with the discretion exercised by a trial court while imposing a sentence except where it is apparent that the circumstances show that the trial court acted upon a wrong principle or erred both in law and factual analysis leading to the imposition of a manifestly excessive sentence."*

While I am yet to make sense of what may have befallen the trial magistrate as to indulge in this horrendous immoderateness, I get the feeling that may be, the trial court had doubts about the

appellant's age. If my guess has any semblance of truth, then the appropriate recourse would be to call for evidence which would establish the appellant's age. This would settle any doubts that would linger in her mind regarding age of the appellant and sentence that fits the bill. This trite position has been stated in a multitude of court decisions. In ***Emmanuel Kibona & Others v. Republic*** [1995] TLR 241 (CAT), it was held that:

> *"Evidence of a parent is better than that of medical doctor as regards that parent's child's age. Where age can't be assessed accurately the benefit of doubt must be given to the accused."*

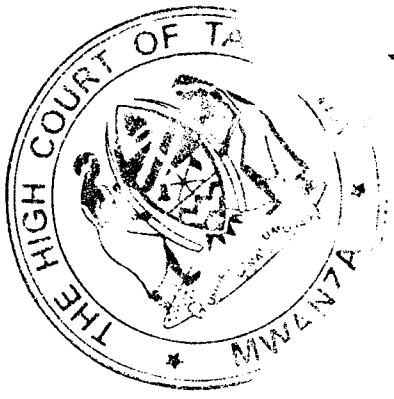
If the trial magistrate was still in doubt with respect to the appellant's age, the benefit of that doubt ought to have been accorded to the appellant. Fortunately, in this case, the appellant's age was stated by the prosecution and there was no qualms about that. This means, therefore, that the appellant fell in the age bracket spelt out in ***section 131 (2) (a)*** of the Penal Code. True as well, as recorded by the trial magistrate herself, is the fact that the appellant was a first offender.

Since the trial magistrate's sentence defied the principles, choosing instead to walk the route of excessiveness, this Court is perfectly justified to interfere with her discretion and correct the immoderateness that arose therefrom. I choose to **set aside the sentence imposed by the trial court**. Ordinarily, setting aside the sentence would require me to substitute it with an appropriate sentence which, in terms of ***section 131 (2) (a)*** of the Penal Code, is imposition of a corporal punishment. I am mindful, however, of the fact that corporal punishment is a lesser degree punishment compared with six months of custodial service, during which the appellant has suffered far worse that what he would suffer, were he to be subjected to corporal punishment. I am of the considered view, therefore, that the prison term, so far served, adequately covers what I would order in substitution. Having resolved the issue of sentence, I find the submission on failure to consider the defence superfluous. It need not strain our muscles anymore, and I choose to have it consigned in the dustbin of oblivion.

In the upshot, I set aside the sentence and order that the appellant be set free with no other punishment in respect of his conviction, unless he is detained for other lawful reasons.

It is ordered accordingly.

DATED at **MWANZA** this 1st day of April, 2020.



M.K. ISMAIL

JUDGE

Date: 01/04/2020

Coram: Hon. M. K. Ismail, J

Appellant: Present in person

Respondent: Ms. Gisela Alex, State Attorney

B/C: Leonard

Ms. Alex:

The matter is for the judgment. We are ready for it.

Sgd: M. K. Ismail
JUDGE
01.04.2020

Appellant:

I am ready My Lord.

Sgd: M. K. Ismail
JUDGE
01.04.2020

Court:

Judgment delivered in chamber, in the presence of the appellant in person, Ms. Gisela Alex, learned State Attorney for the Respondent, and Mr. Leonard B/C, this 01st day of April, 2020.

M. K. Ismail

JUDGE

At Mwanza

01st April, 2020