IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(IN THE DISTRICT REGISTRY OF KIGOMA)

AT KIGOMA

(APPELLATE JURISDICTION)

(DC) CRIMINAL APPEAL NO. 56 OF 2020

(Original Criminal Case No. 224/2020 of the Kasulu District Court, before Hon. C.A. Mushi - SRM)

SIYOMWE S/O JUMA..... APPELLANT

VERSUS

REPUBLIC..... RESPONDENT

J U D G M E N T

23rd Feb. & 8th March, 2021

I.C. MUGETA, J.

Before me is an appeal by the appellant who is incarcerated for thirty years imprison after a conviction of impregnating his fellow student. At the incident time he was aged 20 years and a student at Kabagwe Secondary School, Kasulu District. The impregnated girl was aged 19 years and both were form four students. Due to the nature of the case I shall not disclose either the name of the girl or any witness.

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On discovery of the pregnancy, the girl was expelled from the school and the boy was charged with 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 amendment) (No. 2) Act, 2016. His trial led to conviction and the sentence which he is now serving. Section 60A (3) of the Education Act reads: -

> *'Any person who impregnates a Primary or Secondary School girl commits an offence and shall on conviction be liable to imprisonment for a term of thirty years'.*

It is on the basis of this law the learned Senior Resident Magistrate imposed the thirty years imprisonment to the appellant. Intriguingly, when the baby was born the father was a prisoner and the mother reduced to a single mother without right to education!

The appellant was aggrieved by both the conviction and sentence and he has appealed on the following grounds: -

i. *That, the trial court Magistrate erred in law and fact by convicting the appellant basing on the weak evidence provided by prosecution side which did not prove the case beyond reasonable doubt.*

ii. *That the trial court magistrate erred in law and facts by convicting and sentencing the appellant without any justifiable proof of the ingredients of the offence of impregnate school girl such as DNA test.*

iii. *That, the trial court magistrate erred in law and fact by convicting and sentencing the appellant basing on baseless corroborative evidence adduced by prosecution witness which was totally hearsay evidence.*

iv. *That, the trial court magistrate erred in law and fact in disregarding the appellant defense and failure to consider the principal that the accused cannot be convicted basing on weakness of his/her defense but on strength of the prosecution evidence adduced and proved against the accused.*

v. *That, the guilty of appellant was not proved beyond reasonable doubt as required by the laws.*

On the hearing date the appellant appeared in person unrepresented. Benedict Kivuma, learned State Attorney opposed the appeal. In his submissions on the grounds of appeal, the appellant, being a lay person, said nothing useful. He just lamented that he was not responsible for the pregnancy and that it was not sufficiently proved that at any given time he had had sex with the girl. Finally, he prayed the court to allow the appeal by setting him free so that he can go back to school to accomplish his dreams

as the charge was framed up due to misunderstanding between their families.

As I have said, the learned State Attorney opposed the appeal. He argued, rightly so, that the evidence of the prosecution proved that the girl was pregnant and since the girl pointed to the appellant as the man responsible for it, she ought to be believed. He cited the case of **Seleman Mkumba V. R** [2006] TLR 379 where it was held that in sexual offences the best evidence is that of the victim. I find the thrust of this submission impeccable. I buy it.

It is clear in the trial court's proceedings that when the girl took the witness box and said for certain that the appellant was responsible for the pregnancy the appellant lost the audacity to put any question to her on cross examination. When a witness is not cross examined on a material fact in his evidence, that fact is deemed proved if that witness is found to be credible. Is the evidence of girl on who is responsible for the pregnancy reliable?

I have read the evidence of the girl on who impregnated her, it is my view that she is entitled to belief. Her testimony is direct evidence which is also described as positive evidence. She testified in court that she had had several sexual encounters with the appellant before the pregnancy. This evidence is

uncontroverted. Shaws, Chief Justice, in the case of **Commonwealth V. Webster** [1850] 50 Mass 255 commended such evidence in these terms: -

> *'The advantage of positive evidence is that it is the direct testimony of a witness to the fact to be proved, who, if he speaks the truth, saw it done, and the only question is whether he is entitle to belief. The disadvantage is that the witness may be false and corrupt and that the case may not afford the means of detecting his falsehood'.*

Therefore, since the girl is credible, the principle in Seleman Mkumba's case (supra) applies. The application of the principle of best evidence in sexual offence cases must be preceded with ascertaining that the witness is entitled to belief (credible). Where the witness is found to be false and corrupt and the case offers the means for detection of her falsehood, the principle cannot apply.

The complaint in the fourth ground of appeal that the defence of the appellant was ignored is misconceived. The appellant made a very brief defence which if juxtaposed on the prosecution's evidence does raise any doubt. He simply said: -

'When I was in class the teacher was teaching, I was summoned. I went out up to the office of the teacher who told me I committed the crime of impregnating a student. I refused the allegation. Then he forced me but I continued refusing, he asked me to get out. I was surprised to see the Police Officers coming at school and they brought me here'.

It is my view that this defence is a general denial where the girl had specifically pointed out to the appellant as responsible for the pregnancy. Therefore, the learned trial magistrate was entitled to disregard it and proceed to convict the appellant.

The complaint in the second ground of appeal that DNA test was not conducted to prove his responsibility for the pregnancy cannot salvage the appellant's sinking ship because DNA test result was not the only evidence to prove that fact. I have held that the girl is credible and her evidence ought to be believed. In his rejoinder submissions the appellant argued that the girl named him due to pressure from her parents because of sour blood between the two families. I find this argument to be an afterthought as it is not borne out in evidence. The same applies to the third ground of appeal where the complaint is that evidence of the prosecution is hearsay. The

material evidence on record particularly that of the girl and the doctor is positive evidence. This makes the whole appeal meritless as the prosecution proved the case beyond reasonable doubts unlike the complaint in the first ground of appeal that it was not proved. I find that the conviction was well deserved.

What about the sentence? The learned Senior Resident Magistrate imposed the maximum sentence prescribed by the law. In passing the sentence the learned magistrate had the following to say: -

> *'In consideration of the fact that, accused is first offender, the opined (sic) of the public prosecutor, this court has also considered aggravating circumstances that warrant for serious penalty against the accused person and as there are many cases of students who has been impregnated during the time when the schools were shut down due to Covid – 19 corona pandemic, hence fourth, this court is hereby as per section 60A (3) of the education Act Cap. 353 as amended by section 22 of the Written Laws (Miscellaneous Amendment) (No. 2) Act, 2016 sentence accused to suffer a term of third years imprisonment'.*

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When I posed the issue of legality of the sentence to the learned State Attorney, he submitted that the sentence is excessive because the penalty provision is not framed in the mandatory terms. Therefore, since the appellant is a student and first offender, the learned State Attorney submitted, he deserved a lenient punishment. On his part, the appellant, being lay person, said nothing useful on the legality of the sentence.

With respect, the learned Senior Magistrate went into error in several aspects of application of the law on sentencing. As submitted by the learned State Attorney, the thirty years imprisonment sentence for the offence charged is neither mandatory nor prescribed under the Minimum Sentences Act [Cap. 90 R.E. 2020]. In such circumstances, reasons for imposition of such a long term sentence, being the maximum prescribe by the law, must be given. From the above quotation one of the reasons for the sentence seems to be that the learned magistrate thought the sentence is mandatory as in rape cases. However, the provision of the law appellant was charged with does not impose a mandatory sentence. The phrase "... shall on conviction be sentence to thirty years" makes the sentence neither mandatory nor minimum. In **Tabu Fikwa v. R** [1988] T.L.R 48 it was held:-

'Section 30 of the Moshi (Manufacture and Distillation) Act uses the words "shall be liable on conviction to imprisonment" which when properly construed gives discretion to the court to impose an option of a fine sentence'.

Therefore, when section 60A (3) of the Education Act says the convict "shall on conviction be liable to imprisonment for a term of thirty years" it does not mean the discretion of the court to impose a lesser or alternative sentence has been removed.

The second reason given for imposition of a harsh sentence is the period when the girl was impregnated. In assessing the sentence, the learned Senior Resident Magistrate considered extraneous factors like effects of closing schools following the outbreak of COVID-19 pandemic while there is no evidence on record that the girl was impregnated during that period. Ironically, relevant factors like that the appellant is a student and first offender were given less weight. The importance to exercise great care during sentencing process cannot be overemphasized. In the case of **Peter Mtengo & 4 others v. R** [1994] TLR 112 it was held: -

'The process of sentencing is not a mechanical function but that calling for utmost mental effort to

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ensure that the sentence imposed not only fits the offence but also the offender...'.

In this case the Court of Appeal accepted imposing different sentences to offenders in the same trial considering the wide difference in their age. In the present appeal, I hold, the sentence fitted the offence but not the offender who is a student. In Tabu Fikwa case (supra) it was further held: -

'An offender is a member of society and quite often a product of social and economic conditions. If his interests and those of society conflict the former must be subordinated to the latter. If, however, they can be reconciled the court should embark upon that course'.

This is a typical case were public interest and those of the appellant are in conflict. However, since both the offender and the principal victim are students, I shall endeavor to reconcile the conflicting interests.

I am aware of the importance of protecting girls from pregnancy while still at school. However, a distinction ought to be drawn between pregnancy by a male adult and pregnancy by another student. In the former case, severe punishment is deserved unlike in the latter case. Even then courts must not overreact and overlook the social and economic conditions of the time. As it

was rightly stated in **Republic v. Edward Giriki** [1986] T.L.R 165 the history of sentencing has clearly demonstrated that draconian sentences do not by themselves achieve much. Here is a case where two consenting adult students engaged in unprotected sex which resulted into pregnancy. Their age, their future life and that of the "consequent child" must be well considered during sentencing unless the offence falls under the minimum sentences. Further, it is a settled principle in sentencing that a first offender should, depending on circumstance of each case, not be sentenced to custodial sentence. On part of the appellant this sentence completely shut his door to attend school. It may be argued that his act shut the door for the girl's further study too. However, two wrongs do not make a right.

I am also live to the fact that an appellate should not interfere with the sentence imposed by the trial court except where the sentence is: -

a. *Manifestly excessive, or;*
b. *Based upon a wrong principle or;*
c. *Manifestly inadequate, or;*
d. *Plainly illegal, or;*
e. *The trial Court failed or overlooked a material consideration, and;*
f. *The trial court allowed an irrelevant or extraneous matter to affect the sentencing decision.*

These guiding factors were restated in the case of **Rajabu Dausi v. R**, Criminal Appeal No. 106/2012, Court of Appeal, Mtwara (unreported). In our case the sentence imposed is lawful because it is prescribed by the law and the trial Magistrate is a Senior Resident Magistrate who under section 170 (1) of the Criminal Procedure Act [Cap. 20 R.E. 2019] has powers to pass a sentence of more than five years without seeking confirmation of that sentence from the High Court.

The foregoing notwithstanding, I find that this sentence is manifestly excessive for overlooking material consideration and for extraneous matters affecting the sentencing decision. It is my view that the learned trial magistrate failed to accord due weight on material considerations like the appellant being a student and first offender. In lieu thereof, much weight was given to issues of pregnancy during school activities suspension which are irrelevant consideration for want of evidence.

In the event, I find that there is a good cause to interfere with the sentence imposed by the trial court. The appellant has been in prison since 19/11/2020. Being a secondary school student, I am settled in my mind that he has learned his lesson and considering all the circumstances of this case that is enough punishment already. I, therefore, set aside the 30 years

imprisonment term imposed and substitute thereof with a sentence that would amount to his immediate release from the prison. I so direct and order. Save for the variation of the sentence, the appeal is dismissed for want of merits.

I.C. Mugeta

Judge

8/3/2021

Court: Judgment delivered by Video Conference in the presence of the appellant at Bangwe prison and Benedict Kivuma, State Attorney at open court and I in chambers.

Sgd: I.C. Mugeta

Judge

8/3/2021