IN THE HIGH COURT OF THE UNITED OF REPUBLIC OF TANZANIA

IN THE DISTRICT REGISTRY OF ARUSHA

AT ARUSHA

CRIMINAL APPEAL No. 36 OF 2022

(Arising from Criminal Case No. 60 of 2021 of Babati District Court)

WILLIAM @WILSON JOSEPH..... APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

Date: 23/9/2022 & 28/9/2022

BARTHY, J.

The appellant William @Wilson Joseph was arraigned before trial court for two counts of rape contrary to sections 130(1), (2)(e) and 131(1) of the Penal Code [Cap 16 R.E. 2019] and second count being impregnating a school girl contrary to section 60A (3) of Education Act [Cap. 353 R.E. 2002] as amended by section 22 of the Written Laws (Miscellaneous Amendments) Act No. 2 of 2016.

The particulars of the offences were such that, on 14th day of March 2021 at Seloto village of Babati district within Manyara region, the appellant had the carnal knowledge of the girl of 17 years and impregnated her as a school girl at Patrick Winter Primary School. The appellant denied the allegation.

To appreciate the circumstances led to the appellant's arraignment and conviction, brief factual background of the case albeit is important; on 14/3/2021 at 15:00 hours when she was returning home from school she met with the appellant. He induced her to have sexual intercourse with him which she agreed to. She was led to the nearby farm where she was undressed her clothes and the appellant undressed his trousers. The appellant put his manhood in her womanhood and after the incident she was given with the appellant Tsh. 2,000/- so that she should not tell anyone.

Thereafter, the victim did not see her usual period and on April she started to feel bad, her mother (PW3) learned she was pregnant and informed the victim's father (PW1). The victim named the appellant to be the only man she had carnal knowledge with her. The report was made to the police station and the victim was sent to the hospital for test and the PF3 (Exh. PE) was prepared.

On 3/6/2021 PW2 was sent back home from school with her head teacher and matron because she was pregnant. PW2 added that she was born on 10/8/2004.

It was further stated during prosecution hearing that PW1 stated that the victim was born on 10/8/2004 and his daughter the victim was expelled from school due to pregnancy as the class seven student. The appellant was named to be responsible with pregnancy. The report was taken to the police and the victim was sent to the hospital for test. The evidence of PW3 the mother of the victim was same as that of PW1. However, the testimony of PW2 and PW3 was heard under section 226 of the Criminal Procedure Act [Cap 20 R.E. 2019] in the absence of the appellant.

The hearing of the prosecution side continued in the presence of the appellant with PW4, the police detective who recorded the caution statement of the appellant faced with the allegation of sexual offence and impregnating the victim. PW4 stated that the appellant was informed all his rights and he made his statement (Exh. PE1) which was admitted without objection.

The testimony of PW5 the clinical officer was on medical examination done to the victim (PW2) on 18/5/2021. The test revealed the victim was two months pregnant. PW5 filled the PF3 (Exh. PE2) which was admitted without objection.

The last prosecution witness PW6 was the Head Teacher of Patrick Winters primary school. He stated that the victim was their student with registration number 1320 and up to 3/6/2021 she was the class seven student, until he was informed by the police that she was pregnant. Then the school convened a meeting and expelled her from school. Attendance register of the school was admitted as Exh. PE3 without any objection.

The appellant who testified under oath as DW1 he stated he was 21years old and he denied the allegation of raping and impregnating the school girl.

Upon the conclusion of the trial, the trial court convicted the appellant on both counts and he was sentenced to serve thirty years imprisonment on each count and the sentence was to run concurrently. Aggrieved with the decision of the trial court the appellant appealed to this court.

In the petition of appeal, the appellant advanced six grounds of appeal;

1. That, the trial court erred in law and fact to try the appellant who was a minor without legal representation in the court other than juvenile court.
2. That, the trial court erred in fact and law for proceeding with the trial in the absence of the appellant (accused person) who was sick and admitted in hospital.
3. That, the trial court erred in law and fact for failure consider the requirement of the law to prosecute the appellant who was minor without consideration of social welfare officer which affect the composition and jurisdiction of the trial court.
4. That, the trial court erred in law and fact to convict the appellant while the offence charged were not proved to the required standard threshold of beyond all reasonable doubt.
5. That, the trial court erred in law and fact to hold that the victim was student in the absence of the substantive evidence to that effect.
6. That, trial court erred in law and fact to failure to evaluate and analyse the evidence on records thereby convict the appellant with the prosecution evidence which was not establishing the offence charged beyond all reasonable doubts.

During the hearing of this appeal, the appellant appeared unrepresented, while the respondent Republic was represented by Messrs Alice Mtenga, learned State Attorney.

The appellant adopted his grounds of appeal and opted to hear from the respondent first, and thereafter would make a rejoinder, should the need arise.

Messrs Alice Mtenga, the learned state attorney started with her submission and contested the appeal. In her submission she addressed the first and third grounds which were related. She argued that, the appellant had claimed that he was the minor at the time of the trial and therefore the presence of the social welfare officer was required.

She went further to argue that these grounds lack basis as the appellant during preliminary hearing he admitted his personal particulars including his age to be 21 years as seen on page 9 of the proceedings. Also, when making his defence the appellant said he was 21 years old as seen on page 21 of the proceedings. Whereas section 4 of the Law of the Child Act defines the child to be the one below eighteen years old.

She contended that, the appellant did not raise the issue of age during the trial, therefore it was said to be an afterthought. She therefore prayed the court to dismiss those grounds of appeal.

Submitting on the second ground of appeal, she argued that the appellant is faulting the trial court to hear the case in his absence as he was sick and admitted at the hospital. She went further to argue that, there was no proof that the appellant was sick. She prayed this ground to be dismissed as well.

The learned state attorney went on to submit on the fifth ground where the appellant faulted the findings of the trial court that, the victim was said to be the student without any clear evidence. She argued that there was plenty evidence from PW6 the Head Teacher who also tendered the attendance register (Exh PE3) as seen in pages 30 to 32 of the proceedings.

She added that, even the evidence of PW3 was never contested by appellant through cross examination. She referred to the case of **Nyerere Nyagwe v. Republic,** Criminal Appeal No. 67 of 2010 where at page 5 it was held that, fact not cross examined are considered to have been admitted. She firmly contended that the victim was the school girl.

Finally addressing the fourth and sixth grounds of appeal were it was claimed that the trial court erred to consider the evidence tendered did prove the offences facing the appellant to have been proved beyond reasonable doubt.

The learned state attorney on these grounds he submitted that there was strong evidence from PW2 who mentioned the appellant at early possible time to be responsible with her pregnancy. The evidence which was corroborated with PW1. As decided in the case of **Joachim Mayani v. Republic,** Criminal Appeal No. 558 of 2026 where it was held that the victim mentioning the accused at early time give assurance of her testimony.

She went on to argue that, even the caution statement of the appellant himself which was tendered and admitted as Exh. PE1 was not objected by him. There was also the evidence of PW5 the clinical officer who attended the victim and found her pregnant as supported with Exh. PE2 (PF3). She thus stated that there was sufficient evidence to warrant conviction of the appellant and therefore the appeal should be dismissed with costs.

The appellant re-joined briefly stating that, the trial court relied on the statement that was wrongly obtained as it was recorded after the lapse of the required time as seen on page 24 of the proceedings. He cited the

case of **Anold Loishie v. Republic**, Criminal Appeal No. 249 of 2017 where the court held that, should there be any doubt I left vy prosecution, thent must benefit the accused person. He also referred this court to the case of **Dotto Nalakubanija v. Republic** [2016] TLR 388 and rested his argument.

In addressing those grounds of appeal, the court finds that they can be consolidated to the following issues;

1. Whether the appellant was afforded the fair hearing during the trial.
2. Whether the appellant was the minor during the trial.
3. Whether the offences facing the appellant were proved beyond reasonable doubt.

In addressing the first issue as to whether the appellant was afforded fair hearing during the trial. On the second ground of appeal the appellant faulted the trial court to have proceeded with the hearing in his absence as he was sick and admitted at the hospital.

Submitting on that ground, the learned state attorney, Messrs Alice Mtenga argued that there was no proof that the appellant was sick. Also, when he appeared before the court after he absconded the trial, he informed the court that there is no need to recall the witnesses who testified in his absence.

The records of the trial court clearly show that, on the date fixed for hearing of the case the accused (appellant) appeared in all court proceedings save for the sessions dated 24/11/2021, 25/11/2021 where the prosecution side prayed for the case to proceed in the absence of the accused under section 226 of the Criminal Procedure Act [Cap 20 R.E. 2019]. The prayer was granted by the court. Again on 29/11/2021 and it

went ahead to hear the testimony of PW2 and PW3 in the absence of the appellant.

Despite the fact that the surety of the appellant who was summoned to appear before the court had informed the court that, the appellant was sick and admitted at the hospital. On 7/12/2021 when the case was scheduled to proceed, the appellant appeared but the trial magistrate was absent. Until on 8/12/2021 then the appellant informed the trial court that his absence was caused by the reason of his sickness and he was admitted at the hospital.

It clear that, the accused person absented from the trial for only three dates, which were in total of 6 days apart: That is from 24/11 to 29/11/2021. On the following date the appellant appeared in person without being arrested, despite the arrest order of the trial court.

The surety of the appellant had prior informed the court that the appellant was sick and admitted at the hospital. The same was corroborated with the statement of the appellant himself before the trial court. However, the trial court dismissed the fact given that the appellant was sick because it was not supported by evidence. The appellant was a lay person, but the surety Joseph Tluway had already informed the court that the appellant was sick.

The provision of section 226 of the Criminal Procedure Act [Cap 20 R.E. 2019] provides;

> *226. Non-appearance of parties after adjournment*
>
> *(1) Where at the time or place to which the hearing or further hearing is adjourned, the accused person does not appear before*

the court in which the order of adjournment was made, it shall be lawful for the court to proceed with the hearing or further hearing as if the accused were present; and if the complainant does not appear, the court may dismiss the charge and discharge the accused with or without costs as the court thinks fit.

(2) ...

(3) ...

(4) The court, in its discretion, may refrain from convicting the accused in his absence, and in every such case the court shall issue a warrant for the apprehension of the accused person and cause him to be brought before the court.

(5) ...

(6) ...

The procedural laws are aimed at facilitating smooth trial and serve justice to both parties. It is the cardinal principle that both parties should be present and fully heard during the trial without any unreasonable delay. As correctly stated in the case of **Olonyo Lemuna & Lekitoni Lemuna vs Republic** [1994] TLR 54;

In our understanding, various provisions of the Criminal Procedure Act 1985 ..., were among other reasons aimed at speeding up trials. For instance, the non-appearance of the accused persons on the dates fixed for the hearing of the case due to reasons which could otherwise be avoided accounts for further delays in the disposal of cases. In order to minimize delays of this kind, sections 226 and 227 of the Criminal Procedure Act 1985 were enacted. However, in doing

so, the cardinal principle of affording opportunity to the parties to be heard is not to be overlooked.

The right to fair trial is the cardinal principle in the dispensation of justice. Should there be an intention delay of the court, then it is in the discretion of the court to proceed with the hearing of the case in the absence of the accused person. However, this discretion must be exercised judiciously.

In various decisions, the court has observed that, the absence of the party is the serious omission that amounted to breach of the principle of natural justice. The consequences of which are to make the proceedings null and void, the same was decided in the case of **Rukwa Auto Parts and Transport Ltd v. Jestina George Mwakyoma** [2003] TLR 251 and **Hamisi Rajabu Dibagula v. Republic** [2004] TLR 181.

The learned state attorney had argued that, when the appellant had appeared in court after the court had proceeded to hear two witnesses in his absence, the accused was asked if he was willing for those witnesses to be re-called, but he refuted.

Considering there was a good reason already offered by the appellant, explained by his surety and himself that his absence was caused by his sickness. Also, the fact that the accused was able to appear in court afterwards without being arrested, it is clear that he had no intention to abscond the trial.

The court therefore had the duty to consider that the three dates of the case making total of six days absence would have not delayed the hearing of the case. The appellant to consent to the procedure that will derogate the right to fair hearing should not have gotten the blessing of the trial court. It was important for the court in those circumstances to adjourn

the case after he was informed the accused was sick, but it is clear that the trial magistrate had already formed his mind to proceed with the hearing in *absentia.*

This issue was well discussed in the case of **Fweda Mwanajoma and John Daniel v. Republic**, Criminal Appeal No. 174 of 2008, Court of Appeal of Tanzania at Dodoma (unreported) where it made a wider interpretation on the application of sections 226 and 227 of the Criminal Procedure Act [Cap 20 R.E. 2002] which are the same as in R.E. 2019 and warned the powers in these provisions to be used judiciously.

The court upon perusal of the court records has observed that, the absence of the accused persons on three dates were coupled with reasons. Guided by the law and case authorities cited above, I find that the appellant was not afforded fair trial which makes this appeal have a merit.

For those reason I quash all the proceedings, judgment and convictions and set aside the sentences imposed by the trial court. Considering the serious nature of the offence with which the appellants is charged, in the interests of justice I order the appellants be retried *de-novo* before another magistrate of competent jurisdiction.

I order accordingly.

Dated at **Arusha** this 28th day of September, 2022

HIGH COURT OF TANZANIA

G.N. BARTHY

JUDGE

28/9/2022