IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
MUSOMA DISTRICT REGISTRY
AT MUSOMA
CRIMINAL APPEAL NO. 101 OF 2021
(Arising from the District Court of Serengeti at Mugumu in Criminal Case No. 280 of 2020)

BETWEEN

MACHEGE S/O SAMSON @ NYARWEMBE..... APPELLANT
VERSUS
THE REPUBLIC .....RESPONDENT

JUDGMENT

A. A. MBAGWA, J.:

The appellant Machege Samson Nyarwembe was arraigned in the District Court of Serengeti on indictment of three counts.

In the first count, he was charged with rape contrary to sections 130(1) and (2)(e) and 131 of the Penal Code. It was alleged that between January and July, 2020 at Nyamisingisi village with Serengeti district in Mara region the accused had carnal knowledge with the victim of 16 years who was in standard five at Nyaberekera Primary School.

In the second count, the accused was charged with impregnating a primary school girl contrary to section 60A (1) and (3) of the Education Act [Cap 353

R.E. 2002] as amended by Written Laws (Miscellaneous Amendment) Act No. 2 of 2016. The particulars of offence alleged that Machege Samson Nyarwembe in July, 2020 at Nyamisingisi village within Serengeti district in Mara region impregnated the victim who was 16 years old and a standard five pupil at Nyaberekera Primary School.

In the third count, the accused was charged with preventing a school girl from attending school regularly contrary to Rule 4(2) of GN No. 280/2002 read together with section 35(3) and (4) of the Education Act.

In a bid to prove the accusations, the prosecution paraded four witnesses and produced two documentary exhibits to wit, PF3 (exhibit P1) and a letter from Nyaberekera Primary School confirming that the victim was a standard five pupil.

It was the prosecution evidence, in particular of the victim (PW1) that she had sexual relationship with the appellant as from January, 2020. PW1 testified that they started love relationship with appellant in January, 2020 and had frequent sexual intercourse at the appellant's house as a result she became pregnant. The victim's evidence was supported by her mother (PW2) who told the court that after noticing the victim's pregnancy, the victim attempted to flee but PW2 smelt rat and therefore submitted her to Isenye

Police Post. PW2 narrated that at Isenye Police Post, they were issued with PF3 for medical examination. Thereafter PW2 took the victim along with PF3 to Nyamisingisi Health Centre where the victim was examined and found with four week pregnancy. PW3 Matobela Elias Kazale after examining the victim, filled the PF3 which he tendered in court as exhibit P1. PW4 one WP 7277 D/CPL Anastazia went to Nyaberekera Primary School to investigate on the status of the victim. She confirmed that the victim was a pupil at Nyaberekera Primary School and, at the time she was investigating the case, the victim had stopped attending school due to pregnancy. PW4 tendered a letter (exhibit P2) from Nyaberekera Primary School confirming that the victim was a pupil at that school.

In defence, the appellant denied the allegations. He contended that the case was framed up against him because of the misunderstandings between his (appellant's) mother and the victim's mother (PW3). The appellant, however, did not explain the cause of misunderstandings nor did he call his mother to buttress his version.

In the end, the trial magistrate was satisfied that the charge was proved beyond reasonable doubt. She consequently convicted the appellant of all three counts and sentenced him accordingly. The trial magistrate sentenced

the appellant to serve thirty (30) years in jail in respect of the 1st and 2nd counts respectively and two-year imprisonment for the 3rd count.

The appellant was dissatisfied with both conviction and sentence hence he appealed to the Court. In the petition of appeal, he raised several complaints challenging his conviction on the ground that the prosecution evidence was not sufficient and reliable enough to ground his conviction.

When the matter was called on for hearing before me, the appellant appeared in person from prison via teleconference whereas the respondent/Republic was represented by Nimrod Byamungu, learned State Attorney.

Mr. Byamungu partly resisted the appeal. He was of the firm view that both the first and second counts were proved to the hilt. He said that the age of the victim was sufficiently established by the victim's mother (PW2). Byamungu further submitted that PW3, a clinical officer was competent and had all qualifications to examine the victim on the web of the decision in **Charles Bode vs the Republic**, Criminal Appeal No. 46 of 2016, CAT at Dar es Salaam. Nonetheless, Mr. Byamungu conceded the appeal in respect of 3rd count stating that there was no scintilla of evidence proving that the victim stopped attending school.

I have had an occasion to navigate through the record, grounds of appeal and submissions by the parties. There is uncontroverted evidence from the victim (PW1) that she had sexual intercourse with the appellant on several occasions as from January, 2020. The victim said that they used to have sex at the appellant's home and, as a result, she fell pregnant. PW1 testified that she had never had sex with other man than the appellant. It is a trite law that in sexual offences, the victim's testimony is the best evidence. See **Selemani Makumba v. R,** [2006] TLR 379 and **Ally Ngozi versus the Republic, Criminal** Appeal No. 216 of 2018, CAT at Dar Es Salaam. In addition, her evidence was corroborated by a Clinical Officer one Matobela Elias Kazale who confirmed that the victim was four week pregnant.

Further, it is crystal from the evidence of the victim's mother (PW2) that at the time of commission of an offence, the victim was below eighteen years. PW2 said that the victim was born in 2004 as such, at the material time, she was 16 years old. It is cardinal principle of the law that proof of the victim's age may be given by either the victim, relative, parent, medical practitioner or through a birth certificate, if available. See the case of **Makende Simon versus the Republic**, Criminal Appeal No. 412 of 2017, CAT at Mwanza and **Issaya Renatus v. Republic**, Criminal Appeal No. 542 of 2015.

On the strength of the evidence of PW1, PW2 and PW3, like the trial court, I am of the firm view that the appellant had sexual intercourse with the victim who was aged 16 years and therefore the offence of rape was proved beyond reasonable doubt.

With regard to the second count of impregnating a school girl, in this case the appellant was charged with rape contrary to section 130(1), (2)(e) and 130(1) of the Penal Code [Cap 16 R.E. 2019] and impregnating a school girl contrary to section 60A (1) and (3) of the Education Act Cap. 353 R: E 2002 as amended by section 22(3) of the Written Laws (Miscellaneous Amendment) Act No. 2 of 2016. The two counts, in my considered opinion, are the result of one act but constitutes an offence under two different laws/enactments. This is because both offences are predicated on one key act namely, sexual intercourse. I find that the appellant cannot be punished twice as this would amount to double jeopardy envisaged under section 70 of the Interpretation of Laws Act [Cap. 1 R.E. 2019]. In fact, the second count was supposed to be in alternative to the first count. The law is very clear that in case of double jeopardy, the appellate court should quash conviction in respect of lesser offence. See the case of **Omary Mohamed China & 3 others vs. The Republic**, CA No. 230 of 2004 CAT at Dar es salaam.

In criminal law, the gravity or severity of offence is weighed by looking at the punishment provided by law. Coincidentally, in this instant appeal, both counts/offences of raped and impregnating a primary school girl are punishable by 30 years imprisonment. Consequently, I invoke my revisional powers to quash conviction and set aside the sentence in respect of the second count of impregnating a school girl.

Coming to the 3rd count of preventing a school girl from attending school, there is evidence from PW4, exhibit P2 and PW2 that the victim stopped going to school because of falling pregnant. I therefore find that the offence was sufficiently proved. However, Rule 4(2) of the Primary School (Compulsory Enrolment and Attendance) Rules G.N. No. 280 of 2002 provides a sentence of fine not less than thirty thousand shillings but not exceeding fifty thousand shillings or a term of imprisonment not exceeding six months or to both such fine and imprisonment. It is a trite law that where a provision of law provides for an option of fine, the court should first resort to fine. See **Yeremiah Jonas Tehani vs Republic,** Criminal Appeal No. 100 of 2021, CAT at Dar es Salaam. In this case, the trial court erroneously sentenced the appellant to two-year imprisonment without giving him an option of a fine. In the circumstances, I set aside the sentence of two-year imprisonment and substitute it for a fine of thirty thousand shillings

(30,000/=) and in default imprisonment of six months starting from the date he was convicted.

In view of what has been deliberated above, I quash conviction and set aside sentence in respect of second count. I sustain conviction in the third count but I set aside the sentence of two years and substitute it for a fine of thirty thousand shillings (30,000/=) and in default, imprisonment of six months in respect of the third count. In the similar vein, I uphold conviction of rape and the attending sentence of thirty (30) years meted out by the trial court. Thus, this appeal is dismissed save for conviction and sentence in respect of second count (impregnating a school girl) and amendment of sentence pertaining to the third count as indicated above.

It is so ordered.

The right of appeal is explained.

THE HIGH COURT OF TANZANIA
MUSOMA

A. A. Mbagwa

JUDGE

14/09/2022

Court:

The judgment has been delivered in the presence of the appellant from prison and Nimrod Byamungu, learned State Attorney for the Republic this 14th day of September, 2022.

A.A. Mbagwa

JUDGE

14/09/2022