IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

IN THE SUB - REGISTRY OF MWANZA

AT MWANZA

CRIMINAL APPEAL NO.54 OF 2022

(Originating from Criminal Case No.113 of 2021 at Sengerema District Court)

OMARY S/O EMMANUEL.....APPELLANT

Versus

THE REPUBLIC.....RESPONDENT

JUDGMENT

Nov. 7th and 17th, 2022

Morris, J

Omary Emmanuel, the appellant above, was convicted of both rape and impregnating a school-going girl. The contravened laws were sections 130(1)(2)(e) and 131(1) of the ***Penal Code***, Cap.16 R.E.2019; and 60 A (3) of the ***Education Act***, Cap 353 R.E.2002. The trial was before the Sengerema District Court. Subsequent to conviction , he was sentenced to a consecutive 30-year term in jail for each count. Aggrieved by the conviction and sentence, he has appealed to this court.

From the trial court's further record, the appellant had sexual intercourse with a victim-girl aged 16 years around August 2021. Subsequently, he eloped with her to a nearby village. The girl was later examined and found pregnant. On arrest and during interrogation by the

police, the appellant confessed per exhibit P3 admissibility of which was not objected by him.

This appeal is based on ten grounds. Six grounds were through a petition of appeal filed on June 20th, 2022 and the remaining four were added on the day of hearing, with the Court's leave. In a paraphrased format, the grounds of appeal are that: evidence of PW2 and PW3 regarding pregnancy did not tally; in absence of DNA test results, the prosecution did not conclusively prove his being responsible for alleged pregnancy; the confession statement was wrongly procured and admitted; the court convicted him basing on fabricated testimonies of PW1 and PW3; and exhibit P4 was wrongly tendered by PW5 who was not its custodian.

Further, the grounds present that there was no proof of penetration and evidence of local government leader to prove alleged concubinage; affidavit of victim's mother, caution statement, students register, attendance register and PF3 were not read loudly before the court for him to know the contents; attendance register and PF3 were wrongly admitted because they were not listed during PH and no notice of additional documents was filed; evidence of PW5 was wrongly admitted as he was not listed amongst witnesses; and the age of the victim and allegations that she was schooling were not sufficiently proved.

The appellant appeared in person without a legal representation while Mr. George Ngemela, learned State Attorney, represented the respondent. I should remark, from the outset, that the appellant obviously had no much to submit rather he requested the Court to give favourable justice to him in the circumstances. To this end, he submitted that the Court should read grounds 1, 3, 4, 5 and 6 as presented and decide the appeal accordingly. That is, he could not explain them further.

In this connection, I find it pertinent to summarize the gist of the grounds for which the appellant was unable to submit. Vide the first ground, as formulated; the Appellant challenges the victim's mother (PW3) who testified that her daughter was discovered as being pregnant on August 15th, 2021 just five (5) days after the alleged sexual intercourse between the victim and the Appellant. To him this is not possible in science (according to the ground, such "evidence does not corroborate with scientific evidence"). For the 3rd ground, the Appellant presents that obtaining and admitting the confession statement in court contravened sections 50 and 169 of the ***Criminal Procedure Act***, Cap 20 R.E.2019.

Through the 4th ground, the appellant states that the victim-girl and her mother used the case to execute their hidden agenda of making the appellant pay compensation to PW3.

Further, the appellant's 5th ground is to the effect that PW5 (school teacher) not being a custodian of the school's register (exhibit P4), he had no mandate to tender it. Regarding ground 6, the appellant was direct that penetration was not proved and the prosecution did not summon any person with personal knowledge to prove that the appellant was cohabiting with the victim.

For the 2nd ground, the appellant submitted that prosecution failed to prove that embryo was associated with him. To him *Deoxyribonucleic* acid (DNA) test was not conducted on the embryo or zygote to prove that he was responsible for the pregnancy. Hence, he faulted the trial court to have found him guilty given such omission. In respect of grounds 7 and 8, he argued that not only the tendered exhibits were not listed during PH, but also the contents were not read to him. Grounds 9 and 9, according to the appellant challenge the evidence of PW5 who was not listed as the intended witness during PH. Instead, it should have been the headmaster. This, accordingly, the evidence from the non-intended witness was wrongly applied by the court to arrive at conviction.

The respondent, through Mr. Ngemela, objected the appeal. He submitted that the trial court's decision should not be faulted. Against ground no. 1, he submitted that PW1 was conclusively proved as having been pregnant by the medical expert (PW2) who examined her (page 10

of court's proceedings). He added that PW2 merely sent the victim (PW1) for the checkup. And that there was no need for evidence of PW3 to be corroborated with PW2 because the former is not an expert.

Regarding the 2nd ground, he conceded that there was no DNA test conducted. However, because the victim (PW1) proved that she was having sexual intercourse with the appellant who also cohabited with her. The pregnancy was conclusively proved as being his. He submitted further that DNA test cannot be conducted before a child was born yet. As for the 3rd ground, the learned State Attorney submitted that during the trial the confession statement was tendered and admitted free from objection of the appellant. Also, during cross examination of PW4 the appellant did not address the mode through which the caution statement was taken or obtained (page 21 of the trial court proceedings). He argued that, pursuant to law, when an exhibit is admitted by the court without being objected by the other party, the same cannot be challenged on appeal.

Submitting against the 4th ground, the respondent argued that evidence of PW1 was straight forward as to rape, impregnating and cohabitation. Credibility of the witness was considered by the trial court. It was further submitted that PW3 testified that before the incident, she had warned the appellant regarding his attempts to establish intimate relationship with the victim (PW1) (pages 15,16 ad 17 of the trial court' s

proceedings). In respect of the 5th ground, it was counter-submitted that PW5 was capable of tendering exhibit P4 (attendance register of Nyamahona Secondary School) because he was a teacher at that school and was competent having testified that he was a responsible person who received, registered PW1 as a student at the said school and being custodian of the said exhibit (pages 22 -24 of proceedings).

The Court was referred to the cases of ***Yohana Paul v R*** Criminal Appeal No. 281 of 2012 CAT-DSM (unreported) and ***Hamis Said Adam v R*** in which it was held that a person responsible to tender document has to either be the author; or knowledgeable to document; or custodian. Hence PW5 was competent to tender exhibit P4. Ground 6 was also contested. The respondent submitted that proof of penetration is irrelevant in rape cases; instead, per the law, best and sufficient evidence of rape should come from the victim. To him, PW2 (medical doctor) testified that the victim's (PW1) hymen was missing. Further, by mere PW1 being found/ proved pregnant the prosecution had done enough to prove that there was sexual intercourse between the appellant and PW1(page 8 of trial court's proceedings) is relevant.

The case of ***Selemani Makumba v R*** (2006) TLR 379 was cited to buttress the foregoing legal position. He submitted further that if the appellant wished his uncle or local leader to be summoned, he should

have been summoned/procured them so that allegations that the appellant was cohabiting with PW1 would be disproved. As for the 7th ground, Mr. Ngemela submitted that all documents were read to the accused before the court (pages 11, 21,24). Further, to him ground 8 is not merited because all exhibits were outlined at page 5 of the proceedings.

In respect of proof of age (ground 9) the learned State Attorney submitted that age of victim may be proved by parent, victim, doctor on teacher. Victim's mother (PW3) proved her daughter's age as being below 18 years through the affidavit which was not objected to by the appellant (page 16 of proceedings). The respondent cited ***Wambura Kiginga v R*** Criminal Appeal no, 301 of 2008 (pages 26-29, CAT- unreported); ***Masalu Kayeye v R*** Criminal Appeal No. 120/2017 (unreported); ***Isaya Renatus v R*** Criminal Appeal No. 542/2015 at page 8 (unreported) to authorities to reinforce that the victim's age was competently established and proved per required standards.

Regarding the 10th ground that PW5 was not listed as intended witness during PH, the respondent submitted that, though it was the headmaster who was listed as witness during PH, PW5 who was also a teacher from the same school, the appellant was not prejudiced. The respondent argued further that the appellant was given an opportunity to

cross examine PW5 and test his competency in respect of exhibit P4. Moreover, he the respondent stated that even if this Court was to find that there was injustice caused by procuring a different witness from the one listed during PH, such defect is curable under section 388 of the ***Criminal Procedure Act***, Cap 20 R.E. 2022.

The above account is the summary of the arguments for and against the appeal. The Court is, thus, to determine the merit of the appeal. To do so, in my view, the Court must answer two pertinent questions. One, if the trial court relied on credible evidence to arrive at conviction of the appellant. Two, if the trial was affected by the fatal procedural irregularities. These issues have been formulated because all the ten grounds of appeal revolve around credibility of evidence and procedural compliance. Grounds of appeal which fault the evidence used by the trial court are numbers, 1, 2, 4, 6, and 10. The remaining grounds (3, 5, 7, 8 and 9) relate to the procedure adopted by the trial court to arrive at conviction.

From the outset, however, I wish to remark that though the petition of appeal envisages that the appellant was "aggrieved with both conviction and sentence", none of the grounds addresses the illegality of the sentence. Further, throughout his submissions, the appellant barely argued against the sentence. Though I know I can address the issue of

sentence under sections 366 and 373 of the ***Criminal Procedure Act***, Cap 20 R.E. 2022; this Court will only deal with conviction.

The foregoing exclusion is based on the long-standing principle that courts should be guided by grounds or matters raised by the parties. This Court is guided by holdings in ***Halid Maulid v R***, Court of Appeal (Dodoma) Crim. Appeal No.94/2021; ***Halid Maulid and Farijara Hamisi @ Ntare v R***, Court of Appeal (Dodoma) Crim. Appeal No. 342 of 2020; ***Emmanuel Josephat v R***, Crim. Appeal No. 323 of 2016; ***Galus Kitaya v R***, Crim. Appeal No. 196 of 2015; and ***Hassan Bundala @ Swaga v R***, Crim. Appeal No. 385 of 2015, (all unreported).

Further, as indicated later in this judgement, in the present appeal the objective of revising the sentence (upwards or downwards) is adequately resolved by the Court while determining the legality of the appellant's conviction by the trial court.

I will start with the credibility of evidence. It was argued by the appellant that the evidence of the victim's mother (PW3) and that of the medical expert (PW2) did not corroborate. Through this argument, in my view, the appellant aims at establishing that the prosecution evidence was, in connection, doubtful. He maintains that it scientifically impossible for the pregnancy to be discovered (literally manually) within the first 5 days as testified by the PW3. Though I tend to find value in the appellant's

argument hereof, I will still hold that it would have been sufficiently sound, in this appeal, if there was no subsequent medical examination which proved otherwise. That is, to conclusively determine that a girl is pregnant, some determinate methods of science are necessary. Hence, as argued by the respondent's Counsel, the documentary evidence of the medical doctor being superior to the oral testimony of the victim's mother, the trial Court was justified to conclude that the victim (PW1) was indeed pregnant. The first ground is therefore determined in disfavor of the appellant.

The foregoing proof of pregnancy notwithstanding, there remains glaring question to resolve around the pregnancy in relation to this appeal: to wit, if such pregnancy was adequately proved as having been the appellant's responsibility. This enquiry lands the Court to the second ground of appeal regarding the issue of DNA testing. Parties to this appeal are at a mutual agreement that it was not done. From the outset, I remark that one of the essences of DNA methodology is to establish identity. That is, the link between specimen in dispute and the alleged party or parties in Court. In the broadest terms, it is a forensic-legal approach in which medicine or rather natura l science interacts with the law. Courts, therefore, are not naïve to elementary concepts of molecular biology, genetics, and statistics where need so dictates.

In this regard, to indicate whether or not the appellant was responsible for impregnating PW1; the prosecution needed more proof than mere depending on circumstantial evidence: that is, so long as the appellant had sex with PW1, he must have been responsible for the unborn child. I am actively alive to the evidence that the prosecution used to establish the offence of rape. Too, I know, in Tanzania DNA test is not a statutory requirement to prove the offence of rape [***Robert Andondile Komba v DPP***, Court of Appeal (Mbeya) Crim. Appeal No.465/2017(unreported); and ***Frank Onesmo v R*** High Court Crim. Appeal No.147 2019 (unreported)].

However, I have obvious reservations in this very particular matter. First, not every raped girl or woman ends up being pregnant. Secondly, it was not established by the prosecution that the victim had had no immediate previous or subsequent sexual intercourse with other boy/man. Thirdly, the medical report was tendered revealing, among other aspects, that the victim-PW1 had a perforated hymen. But there was no direct link that it was the appellant who actually took away her virginity. Fourthly, the appellant was prosecuted within the first few months of the alleged pregnancy. That is, the child had not been born yet. So, it would be unsafe to establish a serious offence attracting a stern sentence to the convict on sheer inconclusive proof. Fifthly, the prosecution used exhibit P3

(confession statement) to prove this count. However, reading it, the exhibit is not irrefutable. I undertake to quote the relevant part.

> "..*tarehe 17/09/2021 saa 11:00 hrs nilipigiwa simu na ilikuja namba ngeni niliipokea alikuwa ni AISHA D/O MIKIDADI akaniambia* ***ana mimba*** *na anataka* ***kuja kuishi*** *na mimi Kisisa..'*(bolding for emphasis).

In its literal translation, the quoted excerpt is to the effect that the appellant is reported as having confessed that on September 17th, 2021 at 11.00 hours; the victim-girl called him via unknown phone number informing him that she was pregnant and that she wished to move into and live with him in his home.

Principally, as an example, it is not indicated by the above passage that the accused-now-appellant admitted being responsible for the pregnancy. Further, it is not even in the context of the victim-PW1 that she was escaping to the appellant's home because the latter was responsible for such impregnation. The whole lot remains to be intrinsically speculative. Consequently, the second count was not satisfactorily proved by the prosecution. The second ground is accordingly merited.

The 4th ground relates to the allegation that the evidence by PW1 and PW3; victim and mother respectively, was fabricated to victimize the appellant. However, the appellant was not able to establish the connection between the offense and the compensation. It was not the role of the prosecutor to create doubts on their case. If the appellant wished to so do, he should have laid necessary proof of his defence line. He did not even describe the kind of compensation, how it arose, why it led him to commit the alleged crime or otherwise. This said, the respective ground (4th) fails and it is, thus, dismissed.

Regarding lack of penetration or calling witness to prove the charge, it was alleged by the appellant that the prosecution did not table evidence in court to prove penetration, on the one hand; and did not bother to summon any witness to evidence that the appellant cohabited with PW1, on the other. This Court finds that it is no longer a requirement of law to establish that there was penetration of male organ to the victim private parts for the offence of rape to be proved.

As rightly submitted by the Mr. Ngemela, the trite law now is that the best evidence of rape comes from the victim. Further reference is made to ***Victory Mgenzi @Mlowe v R***, Court of Appeal (Iringa), Crim. Appeal No. 354 of 2019 (unreported); ***Vedastus Emmanuel @Nkwaya***

v R, Court of Appeal (Mwanza) Crim. Appeal No. 519 of 2017 (unreported); and ***Selemani Makumba v R*** [2006] TLR 379.

However, with respect, I do not agree with the respondent's argument that if the appellant wished to disprove that he was not cohabiting with PW1 he was supposed to call his witness to such regard. In criminal jurisprudence, it is the role of the prosecution to prove the guiltiness of the accused and not otherwise. That is, the onus of proving whether or not the crime was committed lies on the prosecution per ***Ronjino Ramadhani @ Ronji & Others v R***, Court of Appeal (Dar Es Salaam), Crim. Appeal No. 75 of 2019 (unreported); ***Hamisi Mbwana Msuya v R***, Crim. Appeal No. 73 of 2016 (unreported); and ***Mohamed Said Matula v R*** [1995] TLR 3.

This conclusion, notwithstanding, in view of the finding of the Court in respect of the second ground of appeal; the need to prove whether or not there was cohabitation between PW1 and the appellant becomes superfluous. That is, one does not need to necessarily cohabit with another for the offence of rape to be committed. Further, cohabitation, in itself cannot prove that one of the cohabitors impregnated the other. That is, in this case, while proving cohabitation would have added probative value to the body of prosecution evidence regarding offence of rape; the same does not conclusively determine the appellant's guiltiness for the

second count (impregnation a school girl). In fine, the 6th ground is not allowed.

The other ground of appeal which relates to the credibility of evidence in ground number 10. The appellant submitted that the prosecution failed to prove age of the victim (PW1) and that she was a school girl. The basis of such argument on the part of the appellant, is that the prosecution and/or the trial court wrongly used the evidence of PW5 and exhibit P4 (School teacher and school register respectively) to prove the offences herein. Apparently, the ground cuts across two broad aspects: procedural irregularity (wrongly receiving such evidence) and credibility the evidence (using a nullity to convict).

Though this ground is determined in details while answering the second issue formulated above, It suffices here for me to hastily remark that the same lacks the requisite merit. The reasons for this finding are threefold: one, the age of the victim was not solely established by PW5 and exhibit P4. Two, 'statutory' rape under sections 130 and 131 of the ***Penal Code***, Cap 16 R.E. 2022 is not necessarily committed to a school-going girl. Three and last, in view of the Court's holding that the offence of impregnation a school girl was not proved to the required standards, the strength of exhibit P4 is watered down. Hence, the 10th ground fails too.

Briefly laid, therefore, the first issue as to **whether or not the trial court relied on credible evidence to arrive at conviction of the appellant** is partly confirmatory: yes, for the first count (rape) but negatively for the second count (impregnation a school girl).

That said and done, I will now go the second issue. That is, **whether or not the trial was affected by the fatal procedural irregularities**. The basic irregularities raised in this appeal are that; the confession statement was wrongly procured and admitted (3rd ground); exhibit P4 being tendered by incompetent witness (5th ground); exhibits not being read over to the accused-appellant (7th ground); admission of evidence which were not listed during PH (8th ground); and using testimony of PW5- a witness who was not listed during PH (9th ground). I will be very brief for each of these alleged irregularities.

I will briefly discuss them. Starting with the allegation of improper procurement and admission of the Confession statement; it is undisputed that during the trial the subject statement was admitted as exhibit without appellant's opposition. Had the appellant done so, the trial court would have conducted a trial within a trial. Through such sub-trial, parties would have produced respective evidence to support and disprove the alleged inappropriateness of the statement. The appellant's failure to do so, he is taken to had ratified that all was well with the statement. To raise it a

point at this stage is a mere afterthought, on his part, but also was the objective of its refusal/challenge cannot be achieved at the appellate level.

For the essence and procedural aspects of the trial within a trial, I make reference to ***Jumanne Ahmad Chivinjal & Another v R***, Court of Appeal (Dar Es Salaam) Crim. Appeal No. 371 of 2019 (unreported); ***Mayamba Mjarifu & Another v R***, Court of Appeal (Mwanza) Crim. Appeal No. 596 of 2017(unreported); ***Ngwala Kija v R***, Crim. Appeal No. 233 of 2015 (unreported); ***Masanja Mazambi v R*** [1991] TLR 200; ***Bakram v R*** [1972] I EA 92; and ***Kinyori Karuditi v Reginam*** (1956) 23 EACA 480.

The appellant also faults the mode through which exhibit P4 was produced in court. To him the exhibit was tendered by an incompetent witness who was not its custodian or author or addressee. Further, the appellant is discontented that PW5 was not registered as a prospective prosecution witness during PH. From the record, the appellant's assertions in this regard are meritorious. The proceedings of the trial court indicate clearly that PW5 laid down the necessary foundations to how he was not only knowledgeable of the exhibit's contents but also the mode under which he was responsible to have access to and custodian of it. Further, it was PW5 who testified as having been responsible to register PW1 in the said school's register (exhibit P4).

In addition, the law does not limit the powers of the subordinate court to summon or preclude the prosecution's right to call a witness who was not named at PH. Reference is made to section 289 of the ***Criminal Procedure Act***, Cap 20 R.E. 2022 and the case of ***Leopard Joseph @Nyanda v R*** Court of Appeal (Dar es Salaam), Crim. Appeal No. 186 of 2017 (unreported); ***Charles Haule v R***, Court of Appeal (Iringa) Crim. Appeal No.250 of 2018 (unreported). In my view, PW5 not being listed during PH but his testimony taken by the trial court is not fatal. The accused was not prejudiced at all. He, too, had an opportunity to cross examine whoever came as prosecution witness. The same position applies to the exhibit not listed during PH as being intended to be tendered at trial per ***Mashaka Juma @ Ntatula v R***, Court of Appeal (Shinyanga), Crim. Appeal No.140 of 2022 (unreported).

However, I am aware of the legal requirement that a witness whose statement was not read over to the accused during committal proceedings are not covered by the above luxury of not limiting witness-calling exercise. Cases of ***Leonard Joseph @Yanda's case*** *(supra)*; ***Mashaka Juma @ Ntatula's case*** *(supra)*; and ***Peter Charles Makupila @Askofu v R***, Court of Appeal (Dar es Salaam), Crim. Appeal No. 21 of 2019 (unreported) are relevant in this connection.

In view of what I have stated above regarding his allegations that exhibits were not read over to him, I swiftly observe that the appellant is not being truthful. The court record is as clear as a cloudless sky that each of the exhibits were read loudly to him before the trial court. He was also accorded an opportunity to cross examine the witnesses who tendered respective exhibits. I wonder what his objective was to claim the total opposite of what transpired during the trial. It is unsafe for him to had even attempted this approach in the first place.

Before dismissing the respective ground of appeal, I seek comfort from ***Kulwa Daje v R***, Court of Appeal (Mbeya) Crim. Appeal No. 345 of 2018 (unreported) where it was insisted that parties should avoid twisting the situation on an anticipation that they can easily deceive judicial minds working on previous records. In the Court's wise words:

> "*So, as we move on to determine this appeal, it behoves us at this point in time, to remind the appellant and any one of his type and inclination that, the pens and papers we use, keep records. Therefore, before any litigant tries to spin lies in a court of law, he better know what is on the court record.*"

In the final conclusion; the appeal partly succeeds, in purview of this Court's finding in respect of ground number two. The rest of the grounds lack merit and they are consequently dismissed. Accordingly, the

trial court's conviction for the second count [impregnating a school girl contrary to section 60 A (3) of the ***Education Act***, Cap. 353 R.E. 2002 (as amended)] is quashed and sentence thereto set aside. However, its findings, conviction and sentence for the offence of rape contrary to sections 130(1)(2)(e) and 131(1) of the ***Penal Code***, Cap. 16 R.E. 2019 is confirmed. Consequently, the appellant will, as I hereby order, serve the mandatory 30 years imprisonment for the proved and confirmed offence as found above.

It is so ordered. The right of appeal is also duly explained.

C.K.K. Morris
Judge
November 17th, 2022

Judgement delivered in the presence of Mr. Omary Emmanuel (the appellant) and Mr. George Ngemela, learned State Attorney for the respondent.

C.K.K. Morris
Judge
November 17th, 2022