IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(IRINGA SUB REGISTRY)

AT IRINGA

CRIMINAL APPEAL NO. 80 OF 2022

(Original Criminal Case No. 97/2021 of the District Court of Iringa before Hon. S.A Mkasiwa, PRM.)

BATISTA NGWALE ..... **APPELLANT**

VERSUS

REPUBLIC ..... **RESPONDENT**

JUDGMENT

22nd May & 2nd August, 2023

I.C MUGETA, J:

The appellant was convicted of the offence of 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) (No. 2) Act, 2016. The prosecution alleged that, in the month of June 2021 at Rutitiri area within Iringa region, the appellant impregnated the victim, a form four student at Kibena Secondary School.

The evidence of the prosecution is that the victim (PW3) had a sexual relationship with the appellant from May 2021. In June 2021 during midterm holiday, the victim missed her menstrual period. She decided to have the urine pregnancy test. The result showed that she was pregnant.

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She informed the appellant who advised her to have an abortion. The victim refused. When school resumed, the victim could not go to school as she was sick. The news of her pregnancy reached her school. She was then medically tested by Dr. Basil Mponzi (PW4) and the results showed that she was 4 weeks pregnant. The matter was reported to the police station and the victim named the appellant as the one responsible for the pregnancy. The appellant was then arrested.

In his defence, the appellant denied the allegations leveled against him.

The trial court was convinced that the prosecution proved its case beyond reasonable doubt. The appellant was, thus, convicted and sentenced to 30 years imprisonment. His appeal was based on three grounds, however, when the parties appeared in court, the appellant added one ground making a total of four grounds namely:

1. *Trial magistrate erred in law and fact for relying on weak evidence to convict the accused person.*

2. *That the trial magistrate erred in law for convicting the appellant while the prosecution failed to prove the case beyond reasonable doubt.*
3. *That the trial magistrate erred in law and fact taking into account that DNA test was not conducted as to prove the allegations.*
4. *That the trial court erred to impose the maximum sentence to the appellant in disregard of his mitigating factors.*

The appeal was argued by way of filing written submissions. Neema Chacha, learned advocate represented the appellant whereas Sauli Makori, learned State Attorney, appeared for the Republic.

In supporting the appeal, the appellant's advocate argued the 1st, 2nd and 3rd grounds jointly. She submitted that the trial magistrate failed to analyze properly the prosecution evidence. In her view, the victim's evidence is the only evidence on record incriminating the appellant, but her evidence lacked corroboration. She contended that the appellant admitted having sex with the victim in his statement but used a condom which

bursted, he had not ejaculated. Therefore, she concluded, the charge was not proved to the hilt.

On the 4th ground, the appellant's counsel submitted that the trial magistrate imposed the maximum punishment without considering appellant's mitigating factors. In her view, section 60A (3) of the Education Act as amended by section 22 of the Written Laws (Miscellaneous Amendments) (No. 2) Act, Act No. 4 of 2019 gives the court discretion to impose a sentence depending on the circumstances of the case. The 30 years imprisonment is the maximum she submitted further that sentencing the appellant 30 years imprisonment deprives the unborn child of his father's care. She cited the case of **Sokoine Mtahali @ Chimongwa v. Republic**, Criminal Appeal No. 459/2018, Court of Appeal – Moshi (unreported) to support her argument that the magistrate ought to have considered the appellant's mitigation and impose a lesser punishment.

The learned State Attorney opposed the appeal in the order of submissions made by the counsel for the appellant. On the 1st, 2nd and 3rd grounds, the learned State Attorney submitted that the charge against the appellant was proved beyond reasonable doubt as required by section 110

(2) of the Evidence Act [Cap. 6 R.E 2022] and the holding in **Justine Hamis Juma Chamashine v. Republic**, Criminal Appeal No. 669 of 2021, Court of Appeal – Morogoro (unreported). He submitted that the appellant had confessed in his cautioned statement to have committed the charged offence only that he did not know that the victim was a student. He submitted further that in sexual offences the best evidence is that of the victim as it was held in **Selemani Makumba v. Republic** [2006] TLR 379. Thus, in his view, the victim was the best witness as she proved that the appellant had sexual intercourse with her on 6/06/2021, a fact which was not disputed by the appellant. Moreover, the victim's evidence was corroborated by PW1, who proved that the victim was a student and PW4 the medical doctor who proved that the victim was pregnant.

Regarding the 4th ground, the learned State Attorney submitted that the offence section provides a mandatory sentence of 30 years. Thus, the magistrate was correct in sentencing the appellant.

The complaint in the 1st, 2nd and 3rd grounds is that the charge against the appellant was not proved beyond reasonable doubts for want of corroboration of the evidence of the victim. According to the victim, she

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started a love affair with the appellant on 28th May, 2021 and had sex with him on 6th June, 2021 without using a condom. In the same month she noticed that she was pregnant as she missed her menstruation. On informing the appellant, he told her to undergo an abortion. The victim refused. This evidence is supported by the medical doctor who examined the victim on 10th July, 2021 and opined that she was 4 weeks pregnant.

As correctly submitted by the learned State Attorney, the victim is the best witness in sexual offences provided that he/she is credible. I am inclined to hold that the victim was credible in her evidence as she gave a detailed account of her love affair with the appellant, thus, her evidence was enough to prove the offence. Moreover, the appellant in his defence did not raise any doubts in the prosecution case. He just made a general denial despite the damning evidence from the victim about their sexual affairs. It is trite law that every witness is entitled to credence unless there are good reasons for not doing so. (See **Goodluck Kyando v. Republic** [2006] TLR 363). In the present case, I have not seen any good reason not to trust the victim. I disregard the evidence of the appellant for being a general denial.

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Further, I agree with the appellant's counsel that no DNA test was performed to test the paternity of the child. However, it should be noted that DNA test is not a legal requirement as expert opinion evidence cannot override oral evidence of the victim where the appellant did not raise meaningful defence. In **Edward Nzabuga v. Republic**, Criminal Appeal No. 136/2008, Court of Appeal (unreported) the Court held:

> *"An expert opinion is admissible to furnish the court with scientific information which is likely to be outside the experience and knowledge of a judge or jury. If on the proven facts a judge or jury can form their conclusions without help, then the opinion of an expert is unnecessary"*

It is my view that the medical evidence proved that the victim was pregnant and according to the victim, the appellant was the one responsible for her pregnancy. Her testimony to that effect ought to be believed.

Next for consideration is the complaint on the sentence imposed on the appellant. Section 60A (1) of the Education Act was amended by section 22 of the Written Laws (Miscellaneous Amendment) (No. 2) Act. According to this section, punishment for a person who impregnates a

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secondary school girl is a jail term of thirty years. However, this sentence is not mandatory as argued by the learned State Attorney. In **Sokoine Mtahali @ Chimungwa v. Republic**, Criminal Appeal No. 459/2018, Court of Appeal – Moshi (unreported) it was held that the offence of impregnating a school girl is not punishable by a mandatory sentence of 30 years imprisonment which is the maximum punishment prescribed by the law. The court has a discretion to impose a lesser punishment depending on the circumstances of each case (page 12 – 13). The learned trial magistrate noted, rightly, that the prescribed punishment is not mandatory. However, he was of the view that the aggravating factors which includes that the victim lost her hymen after encountering the appellant in a sexual act outweigh the mitigation factors like that the appellant is a first offender.

It is settled principle that first offenders ought to be spared with prison sentence. I find the sentence imposed on the appellant highly excessive. He has been in prison since 3/8/2023 which is about a year now. In **Sokoine Mtahali** (supra) the appellant who had served 5 years in prison was released as the time he had served in prison was considered a sufficient punishment. In this case considering the mitigation, among other

factors that the appellant has dependants and aggravating factor on prevalence of schools impregnation offences, I reduce the sentence imposed to three years imprisonment. The time he has spent in prison has, in my view, in my view has taught him a lesson so the remaining time shall be served on community service upon assessing his suitability by a social inquiry report. I order the community service officer to file his report with the trial court within 14 days from the date of his order. I direct the trial court to deal with the processes for admitting the appellant on community service upon receipt of the social inquiry report. Should the social inquiry report show that the appellant is unsuitable for the programme, he shall serve the full sentence I have imposed in prison.

The appeal against conviction is dismissed while the appeal against sentence is allowed to the stated extent.

I.C. MUGETA

JUDGE

2/8/2023

Court: Judgment delivered in the presence of the appellant who is represented by Neema Chacha, learned advocate and Rehema Ndege, learned State Attorney for the respondent.

Sgd. I.C. MUGETA

JUDGE

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