IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(ARUSHA SUB-REGISTRY)
AT ARUSHA

CRIMINAL APPEAL NO. 111 OF 2023
(Originating from the Resident Magistrates' Court of Arusha, Criminal Case No. 185 of 2019)

MOHAMED AYUBU ..... APPELLANT

Versus

THE REPUBLIC ..... RESPONDENT

JUDGMENT

24th July & 25th August 2023

Masara, J

This Appeal arises from the decision of the Resident Magistrates' Court of Arusha (hereinafter "the trial court") dated 08/01/2021. The trial court convicted the Appellant on two counts; namely, Rape, contrary to section 130(1)(2)(e) and 131(1) of the Penal Code, Cap. 16 [R.E 2002] and 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, No. of 2016. He was sentenced to serve a custodial sentence of 30 years imprisonment on both counts, a sentence which was ordered to run concurrently. The Appellant, who persistently claimed innocence, was unhappy with both the conviction and sentence. He has preferred this Appeal on the following grounds:

a) *That, the Honourable trial Magistrate erred both in law and in fact for convicting and sentencing the Appellant basing on a defective charge sheet which was incurably defective;*
b) *That, the Honourable trial Magistrate erred in law and fact for failing to note that there was variance between the evidence adduced and the charge sheet;*
c) *That, the Honourable trial Magistrate erred in law and fact for convicting and sentencing the Appellant basing on evidence which was loaded with contradictions, inconsistencies and discrepancies which tainted the credibility of the prosecution witnesses;*
d) *That, the Honourable trial Magistrate erred in law and fact for failing to draw adverse inference to the prosecution for failure to summon material witnesses (the victim's teacher, WEO to whom the incident was immediately reported);*
e) *That the Honourable trial Magistrate erred in law and fact for failing to consider the Appellant's evidence; and*
f) *That, the case against the Appellant was not proved beyond reasonable doubts.*

At the hearing of the appeal, the Appellant appeared in Court in person, unrepresented, while the Respondent was represented by Mr Filbert Morrison Msuya, learned State Attorney. The appeal was heard through filing of written submissions.

The background facts of the case leading to the Appellant's arraignment and conviction as garnered from the evidence on record are as follows: Flora Jeremiah (PW2), the victim of the crime, was a form one student at

Danyani Secondary School in 2018. On 26/10/2017, she went to visit her mother where she met the Appellant. She entered into sexual relationship with the Appellant, whereas the Appellant promised to marry her, despite warning him that she was still a student. On 06/06/2018, she again went to visit her home; along the way, she met the Appellant who lured her to go to his home. At his home, they had sexual intercourse on that very day. According to the victim, they had sexual intercourse three times. Three months later, she missed her menstrual periods. She notified the Appellant who enticed her to abscond from her home. She ran out of her home towards working as a house maid. The ordeal of working as a house maid was difficulty for her. Like the prodigal son, she decided to go back home after just two weeks of working. She informed her mother, Rebecca Jeremiah, of her pregnancy.

According to Rebecca Jeremiah (PW1), the victim had absconded from her home after being beaten by her brother in relation to the pregnancy. PW1 reported the matter to the Ward Executive officer (WEO), where the Appellant was summoned and admitted to be responsible for the pregnancy. He was then taken to the police station.

On 12/12/2018, PW2 was taken to Mount Meru Hospital where she was attended by one Mbuki Emmanuel Ndalahwa (PW5). After clinical

examination, PW5 discovered that PW2 was seven months pregnant. He filled in the PF3, which was admitted as exhibit P2. PW2 later gave birth to a baby boy and named him Alpha Mohamed. The Appellant's father approached PW2's family promising to take care of PW2 and the new born baby. The Appellant's father gave her TZS 50,000/= three times as part of maintenance and the Appellant used to buy her oranges.

On 08/07/2019, the prosecution asked the trial court to order for a DNA test to be conducted as the victim had already delivered a child. On 04/09/2019, blood samples from Alpha Mohamed, the Appellant and the victim, were taken to the Government Chemist offices in Dar es Salaam. The samples were received by Mohamed Mohamed Saidy (PW4), who conducted laboratory tests. The test revealed that the Appellant is a true biological father of Alpha and the victim was found to be the true biological mother of Alpha Mohamed by 99.99%. The DNA test report was admitted as exhibit P1.

In his affirmed defence, the Appellant accounted that he was summoned in the office of the Village Executive Officer, where he was accused of impregnating a student who was studying at Moshi. He was taken to police station and later he was arraigned in the trial court. He denied to have engaged in sexual affair with the victim. He complained that he did not

get a copy of the DNA report. When cross examined, he stated that according to exhibit P1, he was the father of the baby.

Ramadhan Ahmed @Nameru (DW2) the VEO of Nashomi village accounted that the victim accompanied by PW1 went to his office. They asked DW2 to help them get transfer from Moshi to Nashomi Secondary School. DW2 met the headmaster of Nashomi Secondary School who confirmed the transfer of the victim to his school. He made a follow up and realized that the victim did not go to school, but she was in Iringa where she was working. The victim was later returned home. On inquiry, she said that she did not want to go to school rather she wanted to go to VETA. She was later discovered pregnant.

In the hearing of the appeal, the Appellant maintained his innocence plea. Submitting in support of the first ground of appeal, the Appellant asserted that the evidence adduced by PW2 regarding the date of the incident does not support the charge. While the charge shows that PW2 was raped on diverse dates, in her evidence PW2 stated that she met the Appellant on 26/10/2017. They had sexual intercourse for the first time on 06/06/2018 and three months later she missed her menstrual period. He maintained that the offence was committed on a known date contrary to what the charge suggests. He added that once there is a variance between the

charge sheet and the evidence adduced regarding the date of the crime, the prosecution is duty bound to amend the charge, failure of which renders it defective. Bolstering his stance, he relied on the case of **Abel Masikiti vs Republic, Criminal Appeal No. 24 of 2015** (unreported).

Explaining the 2nd ground of appeal, the Appellant amplified that there was variance between the charge sheet and the evidence adduced in respect of the crime scene. He insinuated that in his defence, the Appellant stated that he lived at Kikatiti. In her evidence, PW2 testified that the duo had sexual intercourse at the Appellant's home, hence the charge sheet ought to have referred to Kikatiti as the crime scene, instead of Kambi ya Mkaa. The variance in respect of the crime scene rendered the charge defective, the Appellant asserted. In support of his argument, he referred the case of **John Julius Martine and Another vs Republic, Criminal Appeal No. 42 of 2020** (unreported).

Submitting in support of the 3rd ground of appeal, the Appellant accounted that PW2 stated that she ran out of her home after being advised by the Appellant to flee while in her evidence PW1 stated that the victim escaped after being beaten by her brother due to the pregnancy. Further, that PW2 informed her mother of her pregnancy after returning home, which implies that at the time she escaped, her mother had no clue of the

pregnancy. He also referred to the evidence of the doctor, PW5 who stated that he examined the victim on 12/12/2018, who had 18 years while the age mentioned in the charge sheet was 16 years. To him these were contradictions that affected the credibility of the Prosecution case. The Appellant also accounted that the victim was discovered seven months' pregnant while PW5 stated that she was raped six months back. According to the Appellant, the age of the pregnancy ought to be six months, contrary to PW5's account. On a further note, it was the Appellant's contention that pregnancy cannot be a proof of rape because it is not always the case that once a person is raped, she conceives. Again, he faulted the evidence of PW1 who named the Appellant as Maulid while his name is Mohamed Ayubu. That apart, PW2 admitted that the Appellant got married recently while at the same time she stated that she had sexual intercourse with him three times in his house, which in his view, could not be possible to a married man.

Another complaint by the Appellant concerning this ground is that after the magistrate who was in conduct of the case (Mwankuga, RM) recused herself from the conduct of the case, the successor magistrate (Mahumbuga, SRM) ought to have recalled the five witnesses who had testified to testify afresh. According to the Appellant, that was prejudicial

to him, insisting that if retrial is ordered, the prosecution will use that opportunity to rectify their evidence. In his view, the prosecution has failed to prove its case beyond reasonable doubts, relying on the case of **Jeremia Shemweta vs Republic [1985] TLR 226**.

Substantiating the 4th ground of appeal, the Appellant accounted that since PW1 testified that the matter was reported to the WEO and the Appellant admitted before the WEO to have impregnated the victim, the said WEO was a key witness. Also, it was crucial for the prosecution to summon a teacher from Danyari Secondary School to prove that the victim was a student at that school. Failure to summon such material witnesses by the prosecution, the Court is entitled to draw an adverse inference against the prosecution. He insisted that failure by the prosecution to call all the material witnesses irrespective of their number, is proof that the case has not been proved to the required standard. To reinforce his argument, he relied on the reported decision of **Aziz Abdallah vs Republic [1991] TLR 71**.

The Appellant's submission as far as the 5th ground is concerned is to the effect that the trial court's judgment said nothing regarding the Appellant's defence. That, the law requires a judgment to take into account the defence evidence. Failure of which constitutes a fatal

irregularity. In this front, he relied on the decision in **Tanzania Breweries Limited vs Anthony Nyingi [2016] LR 99 and Theobald Charles Kessy and Another vs Republic [2000] TLR 186.**

On the 6th ground of appeal, the Appellant averred that the prosecution failed to prove the offence to the required standard on a number of reasons: **First**, credibility of PW2 was shaky because she stated that she missed her menstrual period for three months hence she ought to be found three months pregnant and not seven months as the doctor testified. **Second**, there was no evidence on the chain of custody of the samples alleged to be taken from the Appellant, PW2 and the child. There being no cogent and proper chain of custody of the collected samples, it was dangerous to rely on such evidence since its assurance is unworthy of belief. In support of his account, the Appellant referred to the case of **Illuminatus Mkoka vs Republic [2003] TLR 245**. Similarly, that there was no notice that PW4 would testify, given the fact that he was not listed as one of the prosecution witnesses. He prayed for the appeal to be allowed by quashing the conviction and setting aside the sentence imposed on him.

In rebuttal, the learned State Attorney in opposition to the 1st ground of appeal contended that the charge is not defective because PW2 did not

testify that she had sexual intercourse with Appellant on 06/06/2018 only. That, she stated that they had sexual intercourse three times in the Appellant's residence which implies that they had sexual intercourse more than once and on diverse dates. Further, the Appellant understood the nature and seriousness of the charges against him as he readily gave his defence. According to the learned State Attorney, the Appellant was given opportunity to cross examine the victim on that aspect but he opted not to, implying that he admitted. It was his further account that the Appellant did not show how he was prejudiced, terming this complaint as an afterthought.

Resisting the 2nd ground, Mr Msuya submitted that, in her evidence, PW1 stated clearly that she lived at Kambi ya Mkaa with her children. She also testified to the effect that she knew the Appellant as they lived within the same village, which is none other than Kambi ya Mkaa. Mr Msuya added that when testifying, PW2 stated that she visited her mother in June 2018, when she met the Appellant and they had sexual intercourse at his residence. Moreover, the Appellant mentioned Kikatiti as his place of residence when mentioning his particulars, before even being affirmed. Therefore, such information cannot form part of his evidence. Additionally, it was the learned State Attorney's contention that Kambi ya

Mkaa is just an area within Kikatiti ward, therefore the Appellant's complaint that there was variance between the charge and the evidence regarding the crime scene is misconceived.

In response to the 3rd ground, the learned State Attorney accounted that the Appellant's conviction was marshalled through the credible evidence of PW2 who testified that she had sexual intercourse with the Appellant more than once. She also managed to identify him as her boyfriend. He insisted that the fact that the doctor said that the age of the victim was 18 years, was a mere slip of the pen because PW2 clearly stated that she was 16 years old. It is also recorded on the PF3 that PW2 was 16 years old. He added that the Appellant was given opportunity to challenge the victim's age through cross examination but he did not make use of that opportunity, referring the decision of **Nelson Onyango vs Republic, Criminal Appeal No. 49 of 2017** (unreported). According to Mr Msuya, the offence of rape was proved by PW2, and since it was statutory rape, consent was immaterial.

Mr Msuya conceded that there was violation of section 214(1) of the Criminal Procedure Act, Cap. 20 [R.E 2022] (hereinafter the "CPA") because after taking over from the predecessor magistrate, the successor magistrate did not explain the reasons for taking over. That

notwithstanding, it was the learned State Attorney's contention that the Appellant did not state how the non-compliance was prejudicial to him, reliance being the case of **Bwanga Rajabu vs Republic, Criminal Appeal No. 87 of 2018** (unreported). According to Mr Msuya, the contradictions and inconsistencies pointed out by the Appellant did not go to the root of the matter.

In response to the 4th ground, it was the learned State Attorney's argument that it was the prosecution who had a duty to decide who was material witness to prove their case. Thus, failure to summon the WEO and the victim's teacher, in his view, did not water down the strong prosecution evidence. He relied on the case of **Halfan Ndubashe vs Republic, Criminal Appeal No. 493 of 2017** (unreported), which had similar facts.

Regarding the 5th ground of appeal, Mr Msuya supported the decision of the trial court stating that the trial magistrate considered both the prosecution as well as the defence evidence. That, at the end of the day, she found that defence evidence failed to cast doubts on the prosecution's account. He referred to page 2 of the trial court's judgment. He also pointed out that if this Court finds that the defence evidence was not considered, it can step into the shoes of the trial court and analyse the

defence evidence, coming up with its own findings. He relied on the case of **Athuman Mussa vs Republic, Criminal Appeal No. 4 of 2020** (unreported).

Reacting on the last ground of appeal, Mr Msuya contended that the case was proved to the hilt because the prosecution proved that PW2 was a student aged 16 years old and that she was raped by the Appellant leading to her pregnancy. He referred to the cherished legal principle that true evidence of rape has to come from the victim, relying on the reported case of **Seleman Makumba vs Republic [2006] TLR 379**. He added that the victim identified the Appellant as the person she made love with, despite warning him that she was a student. Her evidence was corroborated by the DNA test (exhibit P1) which showed that the Appellant was the father of the child by 99.9%. He relied on the case of **Juma Idd Yohana vs Republic, Criminal Appeal No. 48 of 2021** (unreported) which underscored that not every discrepancy in the prosecution evidence will cause the prosecution case to flop. Based on the submission, Mr Msuya urged the Court to dismiss the appeal for wanting in merits.

In a brief rejoinder submission, the Appellant wondered how could the victim mention the date of the incident but the same date did not appear

in the charge sheet. That, the victim testified that she started her love affairs with the Appellant on 26/10/2017 but she did not report to any one until 2018 when she was discovered pregnant. The Appellant insisted that there was no any document tendered in court to prove the victim's age because one of the ingredients of statutory rape is proof of the victim's age. He also faulted recusal of Mwankuga, RM from the conduct of the case without assigning any reason, in contravention of section 214(1) of the CPA.

I have given deserving weight to the grounds of appeal and the submissions for and against the Appeal. I have also revisited the trial court records. In determining the Appeal, I will, where necessary, combine some of them depending on their interrelationship.

Beginning with the 1st and 2nd grounds of appeal, it was the Appellant's contention that there was variance between the charge sheet and the evidence adduced regarding both the crime scene and the date of the incident. On his part, Mr Msuya opposed the Appellant's contention stating that there was none. The charge sheet shows that the Appellant and the victim had sexual intercourse on unknown date and month of 2018. In her evidence, the victim stated that the two started their love affairs on 26/10/2017 when she went to visit her mother. She also testified that on

06/06/2018, she again went to visit her home, when she met the Appellant who lured her to pay him a visit at his residence. On that date, they had sexual intercourse. She maintained that they had sexual intercourse three times, thereafter she missed her menstrual period after three months.

Although the proceedings seem to be a bit truncated in the flow of events, from the above set of facts, it is apparent that the sexual intercourse between the Appellant and the victim was not done only once. The sexual relationship persisted for a considerable period of time. The victim mentioned just the first date they had sex; which is on 06/06/2018. According to the evidence by the victim, their love relationship began on 26/10/2017. Owing to the circumstances of this case, it was a bit difficulty for the prosecution to refer to the date of the incident as 06/06/2018 because it was not only done on that day.

Even assuming that this was an error deserving attention of the prosecution, there are a myriad of decisions from the Court of Appeal which have underscored that variance between the charge and evidence on the dates is a curable defect under section 234(3) of the CPA. For example, in **Damian Ruhele vs Republic, Criminal Appeal No. 501 of 2007** (unreported), it was held:

"The complaint in the second ground has merit in the sense that it is true that the charge sheet reflected that the date of incident was 23/4/2002 whereas in the evidence of PW1 it was stated that the incident took place on 23/3/2002. However, as was correctly submitted by Mr. Hilla, this was probably a slip of the pen. At any rate, ***the variance in dates was curable under section 234 (3) of the Act.*** *"*(Emphasis added)

That position was followed in a number of decisions, including **Nkanga Daudi Nkanga vs Republic, Criminal Appeal No. 316 of 2013** (unreported). When confronted with an akin situation on when did the incident occur between 25/7/2009 and 26/7/2009, the Court found that the variance was not a big deal because it was curable under section 234(3) of the CPA. Similarly, in a recent decision of **Said Majaliwa vs Republic, Criminal Appeal No. 2 of 2020** (unreported), relying on the above cited decisions the Court observed:

"Thus, being guided by the cases of ***Selemani Rajabu*** *(supra),* ***Damian Ruhele*** *(supra),* ***Issa Ramadhani*** *(supra) and* ***Nkanga Daudi Mkanga*** *(supra),* ***we think that the variance in dates was curable under section 234 (3) of the CPA*** *and, therefore, the 1st appellate court cannot be faulted in its finding."* (Emphasis added)

In consonance with the above authoritative decisions, I find the complaint by the Appellant regarding variance between the charge and evidence on

the date of the incident, misplaced. The case of **Abel Masikiti** (supra) relied on by the Appellant is distinguishable from the facts of this case in the sense that, in that case, the victim was raped only once but the date was uncertain, while in this case the Appellant and the victim had continuous sexual relationship associated with regular copulation.

With regard to variance between the charge and the evidence in respect of the crime scene, the charge sheet shows that the offence took place at Kambi ya Mkaa area, within Arumeru District. In her evidence, PW1, the victim's mother, testified that she lived at Kambi ya Mkaa with her children. She further testified that she knew the Appellant as he was residing in the same village. On the same token, PW2 testified that she went to visit her mother in 2017, when she met the Appellant. Relying on PW1's evidence, one will conclude that the victim's mother lived at Kambi ya Mkaa. Again, she stated that on 06/06/2018, she went to visit her home when she met the Appellant who lured her and they had sexual intercourse in the Appellant's residence.

From PW2's evidence, it is apparent that the sexual intercourse took place at Kambi ya Mkaa because that is where her mother lived. The mere fact that the Appellant, prior to giving his defence mentioned Kikatiti as the place he resided, does not necessarily waive the fact that the incident

occurred at Kambi ya Mkaa. It may as well be that Kambi ya Mkaa and Kikatiti are synonymous as contended by the learned State Attorney. In sum, the contention by the Appellant that there was variance between the charge and the evidence regarding the crime scene, is not supported by the evidence on record. I do not find merits in the 1st and 2nd grounds of appeal, the same are dismissed.

Turning to the 3rd ground of appeal, it is my view that this ground can be divided into two. Part of it, will be dealt with while deliberating the 6th ground of appeal. That is in respect of whether the evidence of the prosecution was tainted with contradictions and inconsistencies. The rest of the complaints in the 3rd ground are determined hereunder. First, the Appellant complained that the handling of the case from the predecessor magistrate to the successor magistrate was in contravention of section 214(1) of the CPA. For avoidance of doubt, the provision provides:

> *"Where any magistrate, after having heard and recorded the whole or any part of the evidence in any trial or conducted in whole or part any committal proceedings is for any reason unable to complete the trial or the committal proceedings or he is unable to complete the trial or committal proceedings within a reasonable time, another magistrate who has and who exercises jurisdiction may take over and continue the trial or committal proceedings, as the case may be, and the magistrate so taking over may act on the evidence or proceeding recorded by his*

predecessor and may, in the case of a trial and if he considers it necessary, re-summon the witnesses and recommence the trial or the committal proceedings."

According to the record, the case was heard by Mwankuga, RM, who heard it from the beginning until completion of all the prosecution witnesses. On 04/10/2020, when the case was scheduled for hearing, the following transpired:

"04/10/2020
Coram: G. A Mwankuga RM
Prosecution: Naomi Mollel, State Attorney
Accused: Present
B/C Anna
State Attorney: We don't have witness today. We have left (sic) with one witness.
Order: (1) Hearing to proceed on 20/10/2020
(2) ABE

Sgd: G. A, Mwankuga
Resident Magistrate
04/10/2020

Court: I find myself not impartial to proceed with this case ***due to circumstances involving this case****, for the interest of justice, I disqualify from the case. The case file be tabled before RMi/c for her steps.*

Sgd: G. A, Mwankuga
Resident Magistrate
04/10/2020"

From the above quote, it is noted that the magistrate who was in conduct the case recused herself from the conduct of the case due to reasons which she did not disclose. That is abdication of duty by the trial magistrate. One cannot disqualify oneself from the conduct of the case without assigning reasons for so doing or disqualify for trivial reasons. A magistrate or judge, to whom a case has been assigned, has a duty to take that case to its completion unless for genuine reasons he has failed to do so. There is a plethora of decisions of the Court of Appeal to the effect that a magistrate or judge's recusal from the conduct of a case based on trivial reasons is an abdication of duty. For example, in the case of **Omari Said @Mami and Another vs Republic, Criminal Appeal No. 99/1 of 2014** (unreported), it was held *inter alia* that:

> *"The prayer to have the Panel reconstituted did not attract us because we had the view that the reasons advanced by the appellants were trivial. We did not think that reconstituting the Panel on shear apprehension of fear that the appellants would lose the appeal would be in the interest of justice.* ***If anything, recusal on trivial grounds would be tantamount to abdication of our calling****."* (Emphasis added)

As the record has it, on 05/10/2020, the case file was reassigned to M.J. Mahumbuga, RM i/c. However, no reasons were assigned for her taking over. Further, the Appellant was not addressed in terms of section 214(1)

of the CPA. That was in contravention of the law. It cannot be reemphasised enough that a successor magistrate must state reasons for taking up a partly heard case. In **Priscus Kimario vs Republic, Criminal Appeal No. 301 of 2013** (unreported), it was held:

> *"We are of the settled mind that where it is necessary to re-assign a partly heard matter to another magistrate,* ***the reason for the failure of the first magistrate to complete the matter must be recorded****. If that is not done it may lead to chaos in the administration of justice. Anyone, for personal reasons could just pick up any file and deal with it to the detriment of justice. This must not be allowed."* (Emphasis added).

Similarly, in the case of **Kinondoni Municipal Council vs Q Consult Limited, Civil Appeal No. 70 of 2016**, the Court of Appeal held:

> *"Referring to* ***Priscus Kimaro vs The Republic****, Criminal Appeal No. 301 of 2013 and* ***Abdi Masoud @Iboma and Others vs The Republic****, Criminal Appeal No. 116 of 2015 (both unreported), the Court held that* ***in the absence of any reason on the record for the succession by a judicial officer in partly heard case, the succeeding judicial officer lacks jurisdiction to proceed with the trial and consequently all proceedings pertaining to the takeover of the partly heard case become a nullity. Without much ado, we wish to state that we wholly subscribe to that position."*** (Emphasis added)

Taking leaf from the above authorities, I entirely agree with the Appellant that the case was perfunctorily handed by the learned magistrates. There was no reason for recusal of the predecessor magistrate; likewise, there was no reason for taking over by the successor magistrate. That was in contravention of the law. I thus, find merit in this complaint and proceed to upheld it.

The 4th ground will not detain me. I endorse the submission by the learned State Attorney that it is the prosecution who are in a position to decide the material witnesses to be summoned in support of their case. According to section 143 of the Evidence Act, Cap. 6 [R.E 2022], there is no legal requirement for the prosecution to call a specific number of witnesses to prove a particular fact. In the case of **Halifan Ndubashe vs Republic** (supra), it was held that: *"It should also be reminded that what matters is not the number of witnesses but the quality and relevancy of the evidence the witnesses give."*

The Appellant's argument that WEO and a teacher from the victim's school were material witnesses who ought to have been summoned by the prosecution, is without legal basis. If he thought that they were key witnesses, who would give evidence that would exonerate him, he ought

to have called them to testify on his side. I therefore find the 4th ground of appeal lacking in merit. The same is dismissed.

I now turn to consider the 5th, 6th and part of the 3rd grounds of appeal. In the first place, the Appellant complained that the prosecution evidence was tainted with material contradictions and inconsistencies. He stated that PW1 named the person who impregnated the victim as Maulid and not Mohamed (the Appellant herein). However, after revisiting the trial court record, at page 6, it is true that it is written that PW1 named the accused as Maulid. However, upon revisiting the hand written proceedings, PW1 named the Appellant (Mohamed). The record shows PW1 stated: *"... so, she had absconded from home. The victim told me the one who impregnated her is Mohamed."*

What can be discerned from the typed proceedings, appears a typographical error when compared to the handwritten proceedings which are considered to be the original proceedings. Therefore, the complaint arose as a result of the typing error which cannot be attributed to the witness.

Next for consideration is whether the victim was a student as the charge suggests. In the first place, PW1 testified that the victim was a student and on 09/10/2018 she was sent home accompanied by her teacher.

However, there was no evidence by PW1 regarding the school that the victim was studying. In her testimonial account, PW2 testified that she was studying at Danyani Secondary School. On the other hand, the charge sheet shows that the victim was a form one student at Sokoni II Secondary School. There is also evidence by DW2 that the victim's mother approached him to help him get transfer of the victim from Moshi to Nashoni Secondary School. DW2 added that later he realised that the victim was not a student, she was in Iringa working.

From the above set of facts, it is trite to note that there was no evidence to support the prosecution evidence that the victim was a student, an important ingredient in proving the second count. The evidence of PW2 was at variance with the charge sheet regarding the school she studied. Such variance renders the charge unproven, because the contradiction is one going to the root of the matter.

The victim's age is another aspect subject of challenge. PW1 stated that in 2017, the victim was sixteen years old. Similarly, PW2 also testified that she was 16 years old in 2017, the first time she met the Appellant. That evidence disproves the Appellant's contention. His basis is on what is obtained from PW5, the doctor, and lack of written evidence of the age of the victim. It is a principle of law that the evidence of a parent is better

than that of doctor or any other witness when it comes to proof of the child's age. The fact that there was no documentary proof on the victim's age cannot override the truth that her mother (PW1) was in the best position to prove her age. See **Edson Simon Mwombeki vs Republic, Criminal Appeal No. 94 of 2019** (unreported). Thus, I do not agree with the Appellant that the victim's age was vague.

The other aspect relates to the examination conducted to PW2, which according to PW5, it was done on 12/12/2018. The evidence of PW2 is to the effect that she had sexual intercourse with the Appellant for the first time on 06/06/2018. At the time she was examined by PW5, she was found to be seven months pregnant. The difference of a few weeks cannot, in my view be taken to be a serious blow on the evidence. When one counts from 06/06/2018 when the two allegedly had sexual intercourse 12/12/2018 when she was examined, the pregnancy was six months plus. Thus, rounding it to seven months is justified.

The complaint that the Appellant's defence was not considered is also without any doubt, untenable. At page 2 of the typed judgment, as submitted correctly by the learned State Attorney, the defence evidence was found to have failed to cast any doubt in the prosecution's account.

I find and hold the part of the 3rd, the 5th and 6th grounds of appeal devoid are of merits. I proceed to dismiss them.

For the foregoing reasons, the appeal is partly allowed to the extent that the trial court casually dealt with the case. The change from the predecessor magistrate to the successor magistrate was in violation of section 214(1) of the CPA. Consequently, I invoke revisional powers to quash the Appellant's conviction and set aside the sentence imposed on him. I aiso quash and set aside the trial court proceedings from 02/10/2020, when Mwankuga, RM recused herself from the conduct of the case. I remit the file to the trial court for continuation of hearing from the above date before another Magistrate and in compliance with the law. Meanwhile, the Appellant shall remain in custody.

Y.B. Masara

JUDGE

25th August 2023