

IN THE HIGH COURT OF TANZANIA

DODOMA SUB-REGISTRY

AT DODOMA

CRIMINAL APPEAL NO. 05 OF 2023

(Originating from District Court of Dodoma in Criminal Case No. 02 of 2022)

LAMECK ELIA NZWIYAAPPELLANT

VERSUS

THE REPUBLICRESPONDENT

JUDGMENT

16th November, 2023

HASSAN, J.:

The appellant Lameck s/o Elia Nzwiya was arraigned in the District Court of Dodoma for two counts namely; rape contrary to section 130 (1) (2) (e) and section 131 (1) of the Penal Code, [Cap. 16 R. E 2019]; and impregnating school girl contrary to section 60A (3) of the Education Act, Cap. 353 R.E 2002 as amended by the Written Laws (Misc. Amendment) Act, No. 2 of 2016.

For the offence of rape, the particulars of the offence obtained in the charge sheet depicted that, Lameck Elia Nzwiya, on 16th day of January, 2021 there at Nkhome area within Dodoma District, in Dodoma



Region did have sexual intercourse with one Agape d/o Yared, a girl of 16 years old.

Whereas, for the offence of impregnating a school girl, the particulars of the offence portray that, Lameck Elia Nzwiya, on 16th day of January, 2021 at Nkhome area within Dodoma District in Dodoma Region, did impregnate one Agape d/o Yared a form IV student at Mnadani Secondary School.

Upon hearing the evidence from both sides, the trial court believed that prosecution had made their case against the accused person by proving the same to the hilt. Accordingly, the accused was sentenced to serve 30 years jail terms for each count, the sentences were settled to run concurrently.

Aggrieved, the appellant paraded ten (10) grounds of appeal to be determined by the court. At this juncture, as it will be apparent here under, I will reserve them all.

In brief note, facts leading to the charge are that, the victim (PW1) was a form IV student at Mnadani Secondary School. She was 16 years old as she was born on 3rd December, 2004. On the material day, that is the 16th day of January, 2021 there at Nkhome village during evening hours, the victim (PW1) and her sister (Pw2) went to attend their sister's

wedding ceremony. While they were at the wedding at around 18:00 hours, the victim father (Pw3) informed them that he had somewhere else to go, thus he left, leaving them at the wedding ceremony.

Later on, after they have had dinner, PW1 went outside the house with her young sister (Pw2) where they met with their brother in-law, the accused person. With his gentle hospitality, he offered them a soft drink thus, in his company they went to the shop to buy the drinks but the shop were all closed. Seeing that, the accused person took them to his home and as they were familiar with him, it was easy for them to accept.

At accused's home, they greeted the accused's grandmother and they spent a night there in the accused's room since it was night time already. Initially, both Pw1 and Pw2 had asked the accused person to send them back to the ceremony but he refused, saying that it was already night and thus, they should spend a night there. The victim and her young sister took a mat and slept while the accused decided to go out and slept with his friend elsewhere.

Later at night, the accused person went back where Pw1 and Pw2 slept, he knocked the door, and asked the victim to open. She obeyed the order, and the accused queried if her young sister has already dozed. As the answer was yes, the accused then turned the victim on another side



of the house, unfolded her Khanga and had carnal knowledge of her. Pw1 did not resist since the accused shoved her mouth with his hands. The accused person begged the victim not to tell anybody otherwise he would do her a bad thing. After a while, Pw1 called her sister and seeing that Pw2 was coming out, then the accused person ran away. Pw2 was curious to what happened to her sister but the victim concealed to tell anybody.

The turpitude took until June, 2021 where the victim was called by her school head master for suspicion, and thus, she revealed that she was pregnant. The head master informed the victim's father who then pegged her to hospital where after examination, she was discovered to be five (5) months pregnant.

On the day this appeal was called on for hearing, the appellant appeared in court under legal representation of Mr. Kenneth Nchimbi, learned advocate. Whereas, the respondent Republic was represented by learned State Attorney Ms. Prisca Kipagile.

During hearing, Mr. Nchimbi had this to say, thus, he started to submit on the 5th ground of appeal that is, the trial court has grossly erred in law and in facts to convict and sentence the appellant based on procedural irregularities. He went on submitting that, for instance, exhibit P1 (DNA report) which was tendered by Pw4 and admitted in evidence

was not read loudly to the appellant before the court as at page 10 of the proceedings. He further submitted that reference can be made in the case of **Robinson Mwanjisi & others v. R (2003) TLR. 218**, which provide that:

"Failure to read out document or exhibit after admission in the court is fatal and it vitiates fair hearing."

See also **Jaffari Juma v. R, Criminal Appeal No. 252 of 2019** CAT (unreported) where at page 12 it was held that:

"We wish to remark in passing the exhibit P2 was further faulted by the learned State Attorney, and rightly so in our mind that, it was improperly admitted and wrongly relied upon by the trial court to ground conviction of the appellant because it was not read out after being admitted in evidence."

Thus, from the omission above, Mr. Nchimbi cemented that, the exhibit P1 should be expunged from the record.

Moving ahead, advocate Nchimbi submitted further for the 7th ground of appeal that, the trial court erred in law and in facts by failure



to observe the requirement of section 235 (1) and 312 (2) of the Criminal Procedure Code, Cap. 20 R.E 2019. On that he submitted that the trial district court had sentenced the appellant to serve imprisonment for 30 years for each offence together with 12 strokes without first being convicted. He stressed that, this is contrary to the directions of the law. In conclusion, he prayed the decision of the trial district court to be quashed and the sentence be set aside. That said, he dropped the remaining grounds of appeal since those two are sufficient to dispose the appeal.

On another side, the learned State Attorney readily conceded to the faults as pointed out by the appellant's advocate. Thus, in furtherance she submitted that the trial court have not convicted the appellant as per the law. Also, the court has failed to specify under which provision of law the appellant was sentenced as at page 15 and 16 of the judgment. She cemented that the omission is contrary to section 312 (2) of CPA.

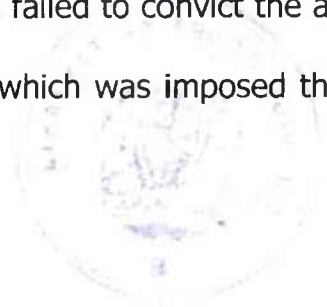
Going forward, she also admitted that the trial court has not read out or caused to be read out the exhibit P1 which was admitted by the court as at page 10 of the proceedings. Again, with that omission, it is obvious that the appellant was not afforded an opportunity to understand the nature of the exhibit. And, since this exhibit form base of prosecution

case, she argued, if expunged, then prosecution case will remain without having strong evidence.

Therefore, based on the irregularities, she supported the appeal thus, appeal be allowed, the decision meted out in the trial court be quashed and sentence be set aside. Consequently, the appellant be set free.

From the foregoing submissions by the learned counsels, without repeating the same, I have been left with no option except to join-hand with what they have observed. Passing on the records, it is crystal clear that looking at page 10 of the proceedings, exhibit P1 (DNA report) was not read out loudly to the court after being admitted in evidence. Similarly, I am also in agreement with Ms. Kipagile's submission that, owing to the nature of this charge, by expunging exhibit P1, prosecution case will endure with empty shell. Thus, it suffices to say that, there will be no evidence to prove the charge against the appellant.

On the other context, it has been submitted by the counsels that, the appellant was sentenced without being convicted first. In my deliberation to the records, it is ostensibly clear that, at page 14, 15 and 16 of the proceedings, the trial court have failed to convict the appellant at all. Worth enough, even the sentence which was imposed thereof, it



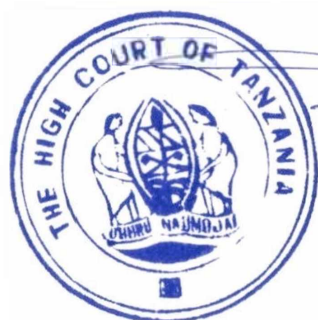
was derived from an unknown law. In fact, the record is silent as to which law it was cited from.

Thus, based on the above deliberation in totality, I think it will be pretentiously academic at this stage to make further painstaking inquiry into this matter. What said by the counsels speaks volume, that the omission was fatal. Hence, its obvious that failure to read out exhibit P1 loudly after being admitted in evidence had prejudiced the appellant's right to understand its nature and contents before he had offered his defence to the accusation. In the similar vein, to impose punishment to the appellant without first being convicted, is another meaning of worsening smooth manifestation of our criminal justice.

At the end, I allow the appeal, quash conviction and set aside the sentence arrived by the trial court. Furthermore, I order immediate release of the appellant from incarceration.

It is ordered.

DATED at **DODOMA** this 16th day of November, 2023.




S. H. HASSAN

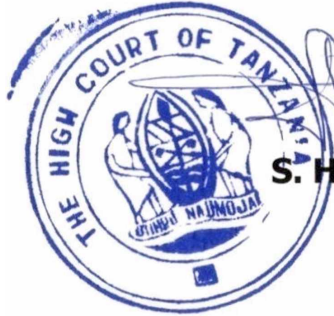
JUDGE

COURT:

Judgment read over in the presence of the parties through video conferencing facilities linking them from IJC- Dodoma to Kondo District Court.



S. H. HASSAN
JUDGE

The seal of the High Court of Tanzania is circular. It features a central emblem with a scale of justice and a book. The text "THE HIGH COURT OF TANZANIA" is written around the top inner edge, and "KOTIMBO NA JUDUJAJI" is written around the bottom inner edge.