IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(IN THE SUB- REGISTRY OF MANYARA)

AT BABATI

CRIMINAL APPEAL NO. 113 OF 2023

(Appeal from the conviction and sentence of the District Court of Mbulu in Criminal Case No. 44 of 2020 Hon. V. E. Kapugi-RM dated 29th December 2020)

RUBEN ISAYA AMA.....APPELLANT

VERSUS

REPUBLIC .....RESPONDENT

Date of Last Order: 13/2/2024

Date of Judgment: 23/2/2024

JUDGEMENT

MAGOIGA, J.

Before Mbulu district court (the trial court) **Ruben Isaya Ama** (hereinafter referred as the 'appellant') was arraigned for impregnating a school girl contrary to section 60 A (3) of the Education Act [CAP 353 R.E. 2002] as amended by section 22 of the Written Laws (Miscellaneous Amendment) Act No. 2 of 2016.

According to the charge sheet, it was alleged that on diver dates between December 2019 and January 2020 at Hasama Area within Mbulu District in

Manyara region, the appellant did impregnate a secondary school girl at Bargish secondary school.

The appellant pleaded not guilty, hence, full trial ensued. In an attempt to prove the case against the appellant, the prosecution called a total of six witnesses and tendered two exhibits namely: the School Attendance Register as well as the PF3 as exhibits P1 and P2 respectively. The appellant fended himself as the sole witness for the defence.

Briefly the case for prosecution was that in the year 2019, PW2 was a form two student at Bargish secondary school. On 12/12/2019 in the night while she was enjoying her slumber, she heard knock on the door for the room she was sleeping. She opened the door and she was able to see the appellant. The appellant wanted PW2 to leave with him.

The record reveals further that amid the conversation between PW2 and the appellant, PW1 (PW2's father) suddenly emerged. The appellant run but he returned after a short while and took PW2 to Tsawa village where the duo lived up to 31/12/2019 when PW1 accompanied with militiamen invaded the appellant's home. Prosecution case was further that the appellant was able to escape and PW2 was taken back home but in the same night she taken

again by the appellant where they stayed again until 8/5/2020 when duo was arrested again and taken to Mbulu police station.

At the police station, PW2 was issued with PF3 and went for medical test where she was attended by PW7 and the former was found to be 13 weeks pregnant. PW2 mentioned the appellant to be responsible for her pregnancy.

In his very brief defence, the appellant claimed that on the material date he had travelled. He denied to know the victim. He claimed that PW2's father had dispute with him and his family.

After hearing both sides, the trial court was convinced that the case against the appellant was proved to the standard required in criminal cases, hence, it convicted him and sentenced him to 30 years imprisonment.

Being aggrieved with the conviction and sentence meted out against him, the appellant has preferred the instant appeal with seven grounds of appeal as follows;

1. *That, the trial court grossly erred in law and fact in not finding that the age of the victim was not proved.*

2. *That, the trial court erred in law and facts in finding that there was variance on the date alleged to be committed the offence on the charge sheet and prosecution evidence.*
3. *That, the trial court erred in law and facts in not finding that there was contradiction between PW2 (victim) and PW5 (Doctor).*
4. *That the trial court erred in law and fact in not finding that exhibit PE I and PEII were not read.*
5. *That the trial court grossly erred in law and facts in not finding that, there was delay to report the incident which was not explained.*
6. *That, the trial court erred in law and in facts in not finding that, the sentence imposed to the appellant was never state the term to serve in prison.*
7. *That the case against the appellant was never proved as required by law section 3(2) of the Evidence Act.*

The appeal was disposed by way of written submissions. The appellant appeared in person while the respondent was represented by Ms. Rhoida Kisinga, learned State Attorney.

In his submission in support of the first ground of appeal, the appellant argued that PW2 seemed to be 20 years but neither her nor any other witness appeared to establish that she was 20 years. To buttress his argument the appellant referred the case of **Andrea Francis v Republic** Criminal Appeal No. 173 of 2014 (unreported).

In reply, the respondent argued that at page 11 of the typed proceedings PW2's age was indicated. The learned Attorney argued that, the appellant was charged and convicted for the offence of impregnating a school girl. She argued that in order to establish such offence, two elements must be proved. The first element is that the girl was a school girl either primary or secondary school and that the girl was impregnated by the accused.

She submitted that there was no need of proving age of the victim. to buttress her argument, the learned State Attorney referred this court to the case of **Salum Nicholaus Mnyumali v Republic** Criminal Appeal No. 327 of 2020 Court of Appeal of Tanzania at Moshi (unreported).

The appellant did not file rejoinder.

The appellant's complaint on the first ground is that, there was no proof to establish that PW2 was 20 years old. It is in on record that before PW2 had

testified she stated that she was 20 years old. Indeed, no proof was tendered by PW2 to establish that she was of that age. But the record is clear that the appellant did not cross examine PW2 on this aspect. Hence his failure to cross examine PW2 regarding her age implied that he was conceding to the fact that PW2 was 20 years old. Rightly as argued by the learned State Attorney in view of the authority referred in the case of **Salum Nicholaus Mnyumali v Republic** (supra) in order to establish the offence of impregnating a school girl, two elements must be established, that the girl impregnated was attending either primary or secondary school and the school girl was impregnated by the accused person. Therefore, it is my considered opinion that impregnating a school girl, age is immaterial. However, proof of age is mandatory in offences of rape that fall under sections 130 (1) (2) (e) and 131 (1) of the Penal Code [Cap16 R.E.2022]. See the decisions in the cases of **George Claud Kasanda v DPP**, Criminal Appeal No. 376 Of 2017 and **Victory S/O Mgenzi@Mlowe v Republic** Criminal Appeal No 354 of 2019 Court of Appeal of Tanzania at Iringa (both unreported) all underscore the point.

Hence the first ground of appeal lacks merits and it is hereby dismissed.

Submitting on the second ground of appeal, the appellant argued that there was variation on the dates on which the offence is alleged to have been committed and the evidence adduced such that, it was alleged on 8/5/2020 the appellant was found with PW2. The appellant argued that on the other hand it was alleged that the offence was committed on 12/12/2019. He argued further that PW4 alleged that the offence was committed in the house of Isaya Ama on 31/12/2019. The appellant was of view that there was variance on the dates on which the offence was committed.

He submitted that where there is variance of evidence, the prosecution is required to amend the charge in terms of section 234(1) of the Criminal Procedure Act [CAP 20 RE 2022], (the CPA). He submitted that in the instant matter there was no such amendment to the charge in respect of the dates on which the offence was committed.

In reply Ms. Kisinga contended that there was no any variation as alleged. The learned Attorney argued that the charge shows the offence was committed on diver dates of December 2019 and January 2020 and that the appellant was moving from one place to another as testified by PW1, PW2, PW3 and PW4. According to the learned Attorney, best evidence in this matter came from PW2 and has not been contradicted anyhow.

Indeed, going by the charge laid against the appellant, it shows that the offence was committed on diver dates between December 2019 and January 2020. I have revisited the pieces of testimony alleged by the appellant which show variations of dates on which the offence was committed. Starting with 12/12/2019 as referred by PW1, on this date PW1 got information that the appellant was seen entering PW2's room while the on 31/12/2019 was date on which PW1 approached PW4 to enquire about her daughter (PW2). There is nowhere it is stated those dates referred by the appellant are the exact dates on which the offence was committed.

In the instant matter taking into account the nature of the offence, it is difficult to come out with specific date on which the impregnation was done rather the dates on which the appellant was seen with PW2 are taken into account. That is why the charge was framed to show the offence might have been committed on diver dates of December 2019 and January 2020. Arithmetically taking into account on 11/5/2020 when PW7 conducted medical test, revealed that PW2 was 13 weeks pregnant, this presupposes that the conception happened on January 2020.

It is for that reason I find the second ground of appeal lacking in merits and the same is dismissed.

Coming to the third ground, the appellant argued that there was variation of evidence between PW2 and PW5. He argued that PW2 stated that she was form II student, while PW5 (the teacher) indicated that PW2 was form IV student. He argued that because of that contradiction, it cannot be said that PW2 was student at the time the offence was committed. He argued that such contradiction went into the root of the matter and there was no proof that PW2 was student at Bargish secondary school.

In reply to the third ground of appeal, Ms. Kisinga argued that it is true that there was contradiction in which class PW2 was. However, the learned Attorney argued that truly PW2 stated that she was in form two when she was impregnated but PW5 testified that PW2 was form IV student. She argued that, that may be due to typing error. She submitted further that even if there was such contradiction, it does not go to the root of the matter and the appellant was not prejudiced.

I must point out that, the contradiction referred to by the appellant was due to typing error. The original record reveals that PW5 told the trial court that PW2 was a form two student. Hence there was no contradiction. The appellant argued that there was no proof that PW2 was a student at Bargish secondary. There is ample evidence to establish the same, starting with the

evidence of PW2, and PW5 the teacher who tendered attendance register. The appellant did not cross examine PW5 on that aspect. This ground too has to fail and is dismissed as I hereby do.

Coming to the fourth ground of appeal, the appellant argued that exhibits PEI and PEII were not read after being tendered. He argued that non-compliance with such requirement is fatal and the documents tendered should be expunged from the record. To buttress his argument, the appellant referred the case of **Robinson Mwanjis v Republic** [2003] TLR 18 and **Lack Kilingani v Republic** Criminal Appeal No. 402 of 2015 (unreported).

In reply the learned state attorney readily conceded that failure to read documentary evidence after being admitted is fatal and same has to be expunged from the record. To this, the learned Attorney referred this court to the decision in the case of **Mwinyi Jamal Kitalamba @ Igonza & 4 others v Republic** Criminal Appeal No. 348 of 2018 (unreported).

She argued that, in the instant matter exhibit PII (the PF3 was not read in court but PE1 were read in court. She maintained that since exhibit PEI was not read, such omission is fatal and therefore such exhibit has to be expunged from the record. She quick to maintained that even if PF3 is

expunged from the record but still the oral account of PW7 still stands and it corroborated the evidence of PW2.

Indeed, exhibit PE1 the School Attendance Register and TSM9 were read out by PW5 after being admitted as evidenced at page 17 of the typed proceedings. But the PF3 which was tendered as exhibit PEII was not read after being admitted. Such omission is fatal.

It is settled principle that, whenever it is intended to introduce any document in evidence, it should first be cleared for admission, and be actually admitted in evidence, before it can be read out in court. See the cases of **Robinson Mwanjisi Vs. Republic,** [2003] TLR 2018, **Walii Abdallah Kibuta and Two Others v. The Republic**, Criminal Appeal No. 181 of 2006, **Kurubone Bagirigwa and Three Others v. The Republic,** Criminal Appeal No. 132 of 2015, **Lack s/o Kilingani v. The Republic**, Criminal Appeal No. 405 of 2015 **Issa Hassan Uki v. The Republic**, Criminal Appeal No. 129 of 2017 and **Kassim Salum v. The Republic**, Criminal Appeal No. 186 of 2018 (All unreported)).

For instance, in **Lack s/o Kilingani** (supra) the Court of Appeal elucidated the three stages which a trial court has to observe before a document is

admitted in evidence; first, it should be cleared for admission; second, it should be admitted in evidence; and third, it should be read out in court. The Court of Appeal observed: -

> ***"Even after their admission, the contents of cautioned statement and the PF3 were not read out to the appellant as the established practice of the Court demands. Reading out would have gone a long way, to fully appraise the appellant of facts he was being called upon to accept as true or reject as untruthful The Court in Robinson Mwanjisi and Three Others v. The Republic [2003] T.L.R. 218, at page 226 alluded to the three stages of clearing, admitting and reading out; which evidence contained in documents invariably pass through, before their exhibition as evidence"***

In the case of **John Mghandi @ Ndovo v. The Republic**, Criminal Appeal No. 352 of 2018 (unreported) the Court of Appeal stated the reason behind the requirement to read over the admitted documentary exhibits to the accused person. In particular the Court stated as follows: -

"We think we should use this opportunity to reiterate that whenever a documentary exhibit is introduced and admitted into evidence, it is imperative upon a presiding officer to read and explain its contents so that the accused is kept posted on its details to enable him/her give a focused defence. That was not done in the matter at hand and we agree with Mr; Mbogoro that, on account of the omission, we are left with no other option than to expunge the document from the record of the evidence."

Back in the instant matter, since exhibit PEII was not read the same is expunged. However, rightly as argued by the learned State Attorney, even if the said exhibit is expunged from the record, it does not affect the oral account of PW7. Hence, without much ado the fourth ground of appeal is partly allowed to the extent of expungement of exhibit PEII and partly disallowed on exhibit PEI.

As to the fifth ground of appeal, the appellant argued that there was delay in reporting the matter and such delay was unexplained. Therefore, the

argued that the offence was reported to the chairman for the first time on 31/12/2019 while the incident was alleged to have been committed on 12/12/2019 hence there was delay of about 18 days.

According to the appellant, the lapse of time between the alleged offence was committed and the time when PW2 mentioned the appellant to be person responsible for her pregnancy not explained for at all.

In reply, the learned State Attorney contended that the appellant and PW2 had sexual affairs. According to the learned Attorney, the fact that the appellant and PW2 were found together on 8/5/2020 where were both arrested and taken to the police station and PW2 was issued with PF3 and on 11/5/2020 when PW2 tested positive for pregnancy, the issue of delay in reporting the matter do not arise at all.

Going by the evidence on record, PW1 got information on 12/12/2019 that the appellant was seen entering PW2's room but the appellant escaped. Again on 31/12/2019 PW1 received information that the appellant was seen in another village but on going to the place where he was seen but again escaped until when he was arrested together with PW2 on 8/5/2020 and taken to the police station.

It is on record that on 8/5/2020 PW2 was issued a PF3 and taken to the hospital where she was discovered to be pregnant. Hence there was no delay in reporting the incidence because as stated by PW1, the appellant run away and was later arrested together with PW2. The record shows that the matter had already been reported to the local government leaders and on the date the appellant was arrested was taken to the police station and later on arraigned before the trial court.

It is for the above reasons; I find the fifth ground of appeal lacks merits and it is dismissed.

Submitting on the sixth ground of appeal the appellant faults the trial court for not explaining the nature of the sentence imposed against him. Hence, he was prejudiced regarding his right to know the punishment imposed against him.

In reply, the learned State Attorney argued that, on page 28 of the proceedings indicates that the appellant was sentenced to 30 years in prison and the right of appeal was fully explained. According to the record, the appellant knew the punishment imposed on him and there was no way the

prison officer would have admitted the appellant if there was no commitment warrant from the trial court.

Going by the record, it is indicated as rightly argued by the learned Attorney and rightly so in my opinion, the appellant was sentenced to 30 years imprisonment. Not only that but also in his memorandum of appeal, the appellant shows clearly that he was sentenced to 30 years imprisonment, therefore, it is without doubt that the appellant is aware of the nature of the sentence imposed against him.

That said and done fifth ground of appeal lacks merits and is dismissed.

As to the last ground of appeal, the appellant claimed that the case against him was not proved beyond reasonable doubt that it was the appellant who impregnated PW2. The appellant argued that there was no DNA test to establish it was the appellant who impregnated PW2.

In reply the learned State Attorney argued that DNA is not mandatory requirement in proving criminal offence. To buttress her argument, she referred the case of **Salum Nicholaus Mnyumali v Republic** (supra). According to the learned Attorney, in order to establish the offence of impregnating a school girl, two elements expounded while arguing the first

ground of appeal should be established. She went on arguing that the two elements in this case were proved beyond reasonable doubt.

The seventh ground of appeal calls upon this court sitting on the first appeal to re-evaluate the evidence on record. The appellant's conviction hinged on the evidence by PW2 as well as that of PW1. It is on record that PW2 testified that she had sexual affair with the appellant and she had never had sexual affair with another person except the appellant.

This piece of evidence was not challenged on cross examination. Besides, the evidence on record reveals that the appellant was arrested with PW2 after having escaped with her twice to different place. Hence in the circumstance there is no reason to fault the evidence of PW2. Therefore, DNA test was not necessary in the matter hand and much as it was not requested for and denied, I find this point raised out as an afterthought on his part.

I, therefore, find the seventh ground of appeal lacking in merits and it is dismissed. In final analysis I find the whole appeal lacking in merits and the same is dismissed in its entirety. However, the appeal did not end here.

Notwithstanding the above findings, I noted some serious legal morass in the sentence passed against the appellant and as such invited the learned State Attorney Ms. Rhoida Kisinga before delivering my judgement to address me on the legality of the sentence in terms of the section 170(1) and (2) of the Criminal Procedure Act, [Cap 20 R.E.2022] on the number of years imposed against the appellant by Resident Magistrate.

Ms. Kisinga learned Attorney guided by the provisions of section 170(1) and (2) of the CPA readily conceded that the trial Magistrate was with the rank below Senior Resident Magistrate as such could not impose a thirty years imprisonment without confirmation by the High Court. The learned Attorney, therefore, invited this court guided by section 43(1) of the MCA to intervene and pass proper sentence in the circumstances, in case, this appeal fails.

The appellant had nothing to add on this legal issue.

Indeed, as rightly noted and so rightly conceded by the learned State Attorney, the trial Magistrate who sentenced the appellant thirty years was below the rank below Senior Resident Magistrate as such under section 170(1) and (2) of the Criminal Procedure Act, [Cap 20 R.E.2022] could not pass a sentence above 5 years without same being confirmed by the High

Court. This was not done and I remind all learned Resident Magistrate who have a rank below Senior Resident Magistrate in passing sentences to have regards to the dictate of the provisions of section 170(1) and (2) of the CPA.

Not only that but have noted as well that the sentence imposed against the appellant is on the high side. Much as the learned State Attorney when invited to addressed this court on this point conceded that the appellant being first offender was to be given a more lenient punishment and much as the trial learned Magistrate did not consider the mitigating factors, I hereby invoke my revision powers under section 43 (1) of the Magistrates' Courts Act, [Cap 11 R.E.2022] set aside the sentence of thirty year and substitute the same with sentence of five years. Having regards that the appellant has been in prison since his arraignment and the mitigating factors by the appellant, I think 5 years imprisonment will do justice to this appeal running from the date of arraignment because the appellant has been in prison since his arrest. Further I order that, the remaining period of 1 year and 1 the appellant is conditionally discharged with a rider not to commit any criminal offence for that period and if he does to be brought in this court for confirmation of the custodial sentence.

That said and done, the appellant is to be released from prison forthwith subject to condition set above unless held for another lawful cause.

It is so ordered.

Dated at Babati this 23rd day of February, 2024.

S. M. MAGOIGA

JUDGE

23/2/2024