IN THE HIGH COURT OF THE UNITED REPUBLC OF TANZANIA

BUKOBA SUB- REGISTRY

AT BUKOBA

CRIMINAL APPEAL CASE NO. 49 OF 2023

THE DIRECTOR OF PUBLIC PROSECUTIONS.....APPELLANT

VERSUS

PETRO SALEY@NANYARO ..... RESPONDENT

JUDGMENT

08/02/2024 & 22/03/2024
E. L. NGIGWANA, J.

After a full trial, the district court of Ngara, at Ngara acquitted the respondent on the two counts he was facing. The first count was rape contrary to section 130 (1) (2) (e) and section 131 (1) of Penal Code, [CAP.16 R. E 2019]. The second count was impregnating a school girl contrary to section 60A (3) of the Education Act, Cap 353 as amended by section 22 of the Written Laws (Miscellaneous Amendments) Act No.2/2016.

The decision of the trial court which resulted into the said acquittal order, did not please the republic and as a result, the Director of Public Prosecutions (DPP) has lodged the petition of appeal to challenge the same in this temple of justice. The petition of appeal presents two points of grievances as follows:

(1) *That, the trial Court grossly erred in law and facts by holding that the prosecution case was not proved beyond reasonable doubt.*

(2) *That, the taking the totality of the evidence on record the trial magistrate erred in law and facts to acquit the respondent herein above.*

The matter proceeded *exparte* after the effort of procuring the respondent to enter appearance in court, by way of substituted summons had become futile. In that regard, this court having satisfied itself that the appellant has dully served the summons by way of publication in terms of section 383 (2) of the Criminal Procedure Act, [Cap 20 R.E 2022] and yet the respondent entered no appearance, it allowed the commencement of the hearing *exparte*. Mr. Haruna Shomari the learned State Attorney represented the appellant and made oral submission.

Submitting on the first ground which faults the trial court to have ruled that the prosecution did not prove the case beyond reasonable doubt, Mr. Haruna Shomari stated that the prosecution case at the trial court was proved beyond reasonable doubt. The learned counsel substantiated that the respondent was charged with two counts namely rape and impregnating a school girl. He further submitted that the girl raped was 16 years old and was a form one student at Mumiterama Secondary School in Ngara District, the incident which took place in March 2022.He

contended that as a result of rape, the victim became pregnant. It was Mr. Haruna's submission that all seven (7) prosecution witnesses featured and the two tendered exhibits to wit, PF3 (exhibit P1) and school attendance register (exhibit P2) at the trial court proved the case beyond reasonable doubt that it was the respondent who raped the victim and impregnated her and not any other person.

Mr. Haruna relied on the stance in the case of **Seleman Makumba vs Republic** [2006] TLR 379 which stated that it is trite that in sexual offences the best evidence comes from the victim. Mr. Haruna further submitted that the evidence of PW1 (Victim) was clear at page 3 to 6 of the trial court proceedings. He added that PW1 testified to be the student of 16 years age and that he knew the respondent by the name of Mr. Nanyaro, a secondary school teacher teaching Biology subject in form II and form III at Mumiterama Secondary School.

He went on that the victim went on explaining that sometimes in March 2022, the respondent called, seduced, and gave her TZS.10,000/= and promised her that even if she becomes pregnant, he will take care of it. That she agreed and both started having sexual relationship. Whereas they started having sexual intercourse for the first time in March 2022 at the respondent's house and went on doing so in April, May and June, 2022. On cross examination PW1 expressed that she felt pain because it

was her first time to have sexual intercourse with a man as she had never had sexual intercourse with any man before she met the respondent. Mr. Haruna further contended that PW5 (a medical doctor) who examined the victim confirmed that the victim was penetrated.

Mr. Haruna strongly disputed what was laid down by the trial court by discussing the issue of consent as one of the elements of statutory rape but the trial court never resolved it. He was heard explaining that in statutory rape, consent is immaterial since the victim was 16 years old.

Cementing on the issue that PW1 was credible, he bolstered his stance with the case of **Goodluck Kyando versus Republic** (2006) TLR 363 that the said witness was credible.

To stress that PW1 was saying nothing but the truth, Mr. Haruna submitted that he named the respondent to various people at the earliest possible time. He added PW1 named the respondent timely to PW2, PW4 and PW5. To back up this legal position, he referred this court to the case of **Marwa Wangiti versus Republic** (2002) TLR, 22 which stated that the ability of naming a suspect at the earliest possible time gives credit to the witness.

The appellant's learned counsel further expressed that even if PW2 and PW4 are brothers of PW1, that does not weaken their evidence. The position which according to Mr. Haruna was stated in **Esio Nyamoelo**

versus Republic Criminal Appeal No.49 of 1995 (Unreported) cited in **Geofrey Mahenge versus Republic**, Criminal Appeal No.248/2011 CAT at Mbeya (Pages.5-7).

The appellant's counsel told this court that in order to prove the offence of statutory rape, the prosecution must prove beyond reasonable doubt the following elements. **One**, the age of the victim. To back up his stance he cited the case of **Issaya Renatus versus the Republic**, Criminal Appeal No.542 of 2015, CAT at Tabora page 8-9 and **Sumitu Abdallah versus the Republic**, Criminal Appeal No.247 of 2021, CAT at Bukoba page 12-13 which both cases held that the age of the victim may be proved by the victim herself, Parents, guardian or relatives.

He explained that, in the case at hand, PW1 herself testified to be 16 years old, also PW5 testified that the victim's brothers told him the victim was 16 years old. The PF3 (exhibit P3) is also to the same effect.PW2 and PW4 said PW1 was 16 years old.

Two, penetration. Mr. Haruna submitted that PW1 testified that she was penetrated by the respondent.PW5, the medical doctor also confirmed that PW1 was penetrated.

As regard to the second count of impregnating a school girl,Mr.Haruna invited this court to read the case of **Salum Nicholaus Mnyumali versus The Republic**, Criminal Appeal No.327 of 2020,CAT at Moshi pg

14-15 where it was held that it is trite law that to prove the offence of impregnating a school girl; the prosecution must **first**, prove that the girl was impregnated while she was either attending a primary school or a secondary school, and **second**, the school girl was impregnated by the accused person.

The appellant counsel contended that in the case at hand, PW1 testified that she was a student.PW2 and PW4, the brothers of PW1 testified that their young sister was a student. He went on that if that was not enough PW7, the Headmistress of the secondary school which the victim was attending testified that PW1 was a student and went to the extent of tendering the attendance register which was admitted as exhibit P2.

As regard to the issue of whether PW1 was pregnant and who was responsible, Mr. Haruna submitted that PW1 was examined at Nyamihaga hospital by the medical doctor (PW5) and PW5 confirmed that PW1 was pregnant and, he (PW5) tendered a PF3 which was admitted as exhibit P1. Mr. Haruna further submitted that the evidence of PW1 from page 4-6 of the typed proceedings is very strong that the respondent is the one who is responsible. The learned counsel insisted that she (the victim) even took PW2 and PW4 to the respondent's house which PW1 and the respondent used to have sexual intercourse.PW1 mentioned the respondent to PW2, PW4 and at the police that is the one responsible.

That according to PW2, the respondent admitted before him to have committed the offence, hence meetings to attempt to settle the matter were held.PW1 also testified that there was such an attempt, the fact which was confirmed by PW3 who is a close friend of the respondent.PW4 and PW6 also testified that there was an attempt to settle the matter amicably.

Faulting the reason that PW1 had many men, meaning had sexual intercourse with different men, relied upon by the trial court to doubt PW1 on who raped her, Mr. Haruna was of the view that, reading the trial court findings, it appears that the trial court appreciated that the respondent had sexual intercourse with the respondent. According to Mr. Haruna, the respondent could not have been exonerated from the offence of rape because according to PW1, (the victim) she had no sexual affairs with any other man except the respondent starting from March, 2022.

Mr. Haruna further submitted that the trial court misdirected itself when it reasoned that in order to prove pregnancy DNA test is necessary. He contended that DNA test report is not a legal requirement in proving the offence of impregnation a school girl. He backed up his stance with the case of **Salum** (Supra) page 15 where the court stated that DNA is vital in linking the accused with sexual offence but it is not a legal requirement.

He appealed to this court to read also the case of **Sumitu Abdalla** (Supra).

It was the appellant's counsel final conviction that the charge was proved beyond reasonable doubts on two counts thus the respondent ought to be convicted.

I wish to register my concern that after a thorough scrutiny of the impugned trial court judgment, I was confronted with the crucial legal issue of whether the said judgment complied with the provisions of section 312(1) of the Criminal Procedure Act [Cap. 20 R.E. 2022] (the CPA) to enable this court to determine the appeal.

In that regard, it was incumbent to me, to re-open the matter and give the appellant/republic who had prosecuted this appeal *ex parte* an opportunity to address me on the said flaw. Ms. Elizabeth Tuwakazi, the state attorney for the appellant submitted that on page 6 of the trial court judgment, it was not made clear by the trial magistrate on all the ingredients she listed were for which offence between the two charged offences namely rape and impregnating a school girl. She went on that each count has different ingredients to prove whereas in statutory rape the ingredients which must be proved are **age, penetration** and **who is responsible** with such rape, and in the offence of impregnating a school girl issues to be resolved are; **one, whether the girl was the primary**

or secondary school student. Two, whether she was impregnated and three, who was a responsible person.

It was MS. Elizabeth's further submission that the trial court raised an issue of lack of consent but she did not at all address on it hence difficult for the appellate court to evaluate on it in the circumstances where the trial court left it unresolved. To bolster her position, she prayed for this court to read the case of **Abubakari I.H Kilongo and Another versus Republic**, Criminal Appeal no. 230 of 2021, CAT at Dar es salaam. She concluded that the judgment did not conform with the provisions of section 312(1) of Criminal Procedure Act, [Cap 20 R.E 2022] and the remedy is to quash the judgment and return the case file to the trial court to recompose another judgment with the order that parties to be notified for the delivery of it.

As a take-off point, I will quote section 312 (1) of the CPA, for easy reference, which provides that:

"Every judgment under the provisions of section 311 shall, except as otherwise expressly provided by this Act, be written by or reduced to writing under the personal direction and superintendence of the presiding judge or magistrate in the language of the court and shall contain ***the point or points for determination****, the decision thereon and the reasons for the decision, and shall be dated and signed by the presiding*

officer as of the date on which it is pronounced in open court." (The bolded phrase is mine)

From the above quoted provisions, it is ostensibly clear that every judgment of the court among other ingredients enumerated under section 312 must contain the points for the determination. The points to be determined by the court are what may be known as issues framed. I am alive that in criminal cases issues need not be framed at the hearing stage as it is in civil cases but the trial court ought to ascertain them as ingredients/elements of the offences in each and every count/offence charged during analysis or evaluation.

The said exercise is mandatory because ingredients stem from legal provision creating the charged offence. Short of that, the trial court cannot be able to reach to a proper evaluation or analysis in relation to parties' evidence.

In the case at hand, as also rightly submitted by Ms. Elizabeth, the accused was charged with two counts namely statutory rape and impregnating a school girl. The said two counts have different ingredients to be proved and different evidence to prove them. It is my considered view that failure by the trial court to concisely and precisely ascertaining the issues on each and every charged count separately, it cannot be said that the trial court has thoroughly evaluated and considered the parties'

evidence tendered in relation to the applicable law, and more so, disclosing the reason for the decision and the conclusion thereon as per section 312(1) of the CPA. (supra).

Emphasizing on the need for the courts to compose a judgment which complies to section 312 of CPA, the Court of Appeal of Tanzania in the case of **Abubakari I.H Kilongo and Another versus Republic**, Criminal Appeal no. 230 of 2021, CAT at Dar es salaam also relied by the appellant's learned counsel, was quoted saying:

"..... the primary purpose of a judgment is to set out qualitatively by reference to the evidence that is accepted or rejected; ***the primary facts which the judge or magistrate finds; to relate those findings to the factual issues in the case****; and to show how any inference has been drawn..." (The bolded is mine)*

It is apposite to demonstrate what was part of the trial court opening paragraph (page 6 of the trial court judgment) in the impugned judgment which the trial court magistrate purportedly to have ascertained the issues and ingredients of the two charged counts collectively. Let the record speak for itself, as quoted hereunder:

"In the case at hand the accused person stand (sic) charged with two counts namely rape and impregnating a school girl. What is to be proved here is (1) penetration(ii) lack of consent(iii) that it was the accused

person who raped the victim (iv) that it was the accused who impregnant (sic)the victim."

What are apparently smelling unpleasant from the above excerpt are; **one**, it is not clear whether all the four issues or ingredients (i)-(iv) enumerated above belongs to which count/offence, is it statutory rape? or impregnating a school girl? **Two**, it is so surprising that the four ingredients were dumped and co-exist in both counts charged separately despite the fact that they are created by different provisions of law and different statutes. **Three,** if the above quotation is what was real in the mind of the trial magistrate, can it be said with certainty that the parties' evidences adduced were properly evaluated and considered in relation to the applicable law? **Four**, there was one of the ingredients raised to wit; lack of consent but the trial court did not talk on it whether it was really one of the ingredients in both offences which it relied to arrive at its conclusion; since it was left unresolved.

Principally, considering the points for determination in form of ingredients of offences raised without specifying which offence/count between the two was referring to, and considering that this appellate court failed to comprehend what was being determined between the two counts charged, and leaving other issues unresolved, it is my respectful view that, this is not a fit case where I should rewrite the judgment of the trial court

by stepping into its shoes to re-evaluate the evidence afresh and finally upheld or dismiss.

Sincerely, the judgment in this case falls short of what a judgment is supposed to contain as provided for by section 312 (1) of the CPA hence fatally defective. It is apparent that the omission to comply the said provisions of law occasioned miscarriage of justice to the parties.

In **Stanslaus Rugaba Kasusura and the Attorney General v. Phares Kabuye** [1982] T.L.R. 338 which was cited in approval of the Court of Appeal in **Abubakari I.H Kilongo and Another versus Republic** (supra), the Court observed that:

"In our view, the judgment is fatally defective; it leaves contested material issues of facts unresolved. It is not really a judgment because it decided nothing, in so far as material facts are concerned. It is not a judgment which can be upheld or upset. It can only be rejected; it is in fact a travesty of a judgment. We find ourselves in a dilemma"

I agree with the appellant's counsel that the judgment which fails to conform with the provision of section 312 of CPA its remedy has been quashing the same. In **Abubakari I.H Kilongo and Another versus Republic** (supra) it was stated:

"It follows that a judgment of the trial court which does not conform to the requirement of the provisions of section 312 (1) of the CPA is not a judgment in law and will often run the risk of being quashed."

Before I pen off, it is of noteworthy to remind the trial magistrates that every provision of the law creating an offence charged in the charge sheet has got its legal ingredients or elements to be proved. Undoubtedly, if they are extracted from each and particular count separately, it becomes easy especially in cases involving more than one counts to test the ingredients from the available evidence in relation to law in the evaluation and analysis stage.

Besides, various case laws from this court and the Court of Appeal of Tanzania have severally spearheaded in explaining the legal ingredients of every offence which need to be proved by the prosecution in each and particular charged offence. Magistrates are reminded to read various decisions from courts of records.

In the final result, I invoke revisionary power of this court under section 366 of Criminal Procedure Act, [Cap 20 R.E 2022] and proceed to quash the judgment and its resultant acquittal order of the respondent arrived thereat.

Ultimately, I order an expeditiously return of the case file to the trial court and direct that the trial magistrate should compose a proper judgment

which reflects what transpired at the trial in accordance with the law. The new judgment should be composed and read expeditiously to parties within 45 days from the date of receipt of the trial court record to avoid future inconveniences. The proceedings of the trial court should remain intact.

Order accordingly.

E. L. NGIGWANA

JUDGE

22/03/2024

Judgment delivered this 22nd day of March, 2024 in the presence of Ms. Elizabeth Twakazi learned State Attorney for the Appellant/Republic, Hon. E. M. Kamaleki, Judge's Law Assistant and Ms. Queen Koba B/C, but in the absence of the respondent.

E. L. NGIGWANA

JUDGE

22/03/2024