IN THE HIGH COURT OF TANZANIA
(MOROGORO SUB-REGISTRY)
AT IJC MOROGORO

CRIMINAL APPEAL NO. 9801 OF 2024
(Originating from Criminal Case No 21 of 2021 at the District Court of Morogoro)

DANIEL LEONARD SANGA@ MSAUZI.....APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

JUDGEMENT

12th of June,2024.
L. MANSOOR, J.

The appellant herein was arraigned before the District Court of Morogoro where he was charged with two counts. The first count was Incest by Male contrary to section 158(1)(a) of the Penal Code, [Cap. 16., R.E 2019] and the second was impregnating a school girl contrary to section 60A of the Education Act [Cap 353 R.E, 2002] as amended by Written Laws (Written Amendments) Act No. 4 of 2016 read together with Regulation 5 of the Education Act (Imposition of Penalty to persons who marry or impregnate School Girls) Rule, 2003 GN 265 of 2003.

Before the trial court, the prosecution alleged that, on the 16th day of January 2021 at Majengo Mapya, Lukobe Area within Morogoro District in

Morogoro Region, the accused had a prohibited sexual intercourse with one, Maria Daniel Kibua, his biological daughter and as a result he impregnated her. After hearing both sides, the trial court was convinced that the prosecution evidence was cogent and genuine. It therefore found the appellant guilty and imposed on him a sentence of 30 years' imprisonment for both counts. The sentences were set to run concurrently.

Unhappy with the decision of the trial court, the appellant preferred the present appeal which has been predicated on the following grounds;

1. *That, the Hon. Trial magistrate erred in law and fact to convict and sentence the appellant based on wrong provisions of the law for the first count as the victim was of the age of eighteen years the proper section was supposed to be section 158(1)(b) of the penal code (cap 16 RE :2019) and not section 158(1l(a) of the penal code hence the charge is defective;*

2. *That the trial court judgement lacked analysis on the point for determination and also incomplete consideration of the*

defence case contrary to section 312 (1) of the CPA (cap. 20 RE 2022);

3. *That, without prejudice to the above ground of appeal there was no, any conviction in the trial court's judgement contrary to section 312(2) of the criminal procedure Act cap 2.0 RE 2022(the CPA);*

4. *That, the learned trial magistrate erred in law and upon fact to convict and sentence the appellant without observing that there were inconsistencies of the prosecution witness PW1, PW2 and PW4 on the age of the victim;*

5. *That, the learned trial magistrate erred in law and fact to convict and sentence the appellant without consideration that there was contradiction of the prosecution witness PW1, PW2 and PW4, (Doctor) on the date when PF3 was filled as PW1 (mother of the victim) and PW2 (victim) testified that the victim was examined on 16/01/2023 while the Doctor (PW4) testified that He examined the Victim and filled PF3 on 16/03/2023;*

6. *That, there was variance between charge and evidence of prosecution side particularly on the date when the victim was alleged impregnated as;*

   i. *Charge indicated that the victim was impregnated on 16/01/2021 while PW2 [victim testified that she was raped on 09/01/2021 and on 13/1/2/2021(please See page 15 of the proceeding];*

   ii. *PF.3 of the victim indicated that the pregnancy had seven weeks but as per second count in the charge it was supposed to have eight weeks and five days from alleged date (16/01/2021).*

7. *That the learned trial magistrate erred in law and fact to convict and sentence the appellant on the second count without any proof of the victim was ex-secondary school girl as there was no any document tendered any evidence to satisfy the court that she was terminated from school due to pregnancy as alleged by prosecution;*

8. *That the learned trial magistrate misdirected himself In evaluating the evidence by failing to draw adverse inference against the prosecution for failure to can as witness D/SGT CLEMENCE (investigator of the case) who was summoned and warned but never returned;*

9. *That, the learned trial magistrate failed to realize that the PF3 was alleged issued to PW2 escorted by PW1 is not the one which was tendered in court by PW4(Doctor);*

10. *That the learned trial magistrate erred in law and in fact to convict and sentence the appellant on the case that was not proved to the required standard.*

At the hearing of the appeal, the appellant appeared in person, unrepresented. Upon given the floor to present his arguments in support of his appeal, the appellant being a lay person was brief and straightforward. He told the court that the District Court did not do justice to him, and that he has preferred the present appeal praying for justice.

On the part of the respondent Republic, it was Mr. Shaban Kabelwa the Learned State Attorney, who entered appearance. Unhesitant, the

Learned State Attorney conceded to the 1st, 2nd and 3rd grounds but resisted the rest of the remaining grounds.

On the 1st, 2nd and 3rd grounds he admitted that the appellant was charged under the wrong provisions of the law but according to him the defect is curable under section 388 of the Criminal Procedure Act. He therefore prayed that the Magistrate be directed to re-write the judgement, as it was decided by the Court of Appeal in the case **of Kenedy Mahuive @ Majaliwa vs Republic, Criminal Appeal No 540/590 of 2020**.

As for the 3rd ground, Mr. Kabelwa cited the case of **John Naoryo and another vs Republic, Criminal Appeal No. 308/2021**, in which at page 11, the Court of Appeal held that if the accused is not convicted, the error is curable. Considering the established fact that the Trial Magistrate did not enter the conviction, and that there were no reasons given in the judgements for finding the appellant guilty, the Learned State Attorney opined that the file be returned to the Trial Magistrate or Judge to enter the conviction.

Arguing against the 4th ground of appeal, the Attorney submitted that the age of the victim was established by her father, the appellant herein. He

added that the mother of the victim also proved the age when she told the court that the victim was 18 years old at the time of the incident. He referred the court to the case **of Ado Alon @ Mziku vs R, Criminal Appeal No 449/2021, at page 11**, to fortify his contention that the victim mother's testimony is enough to prove the age of the victim.

Submitting against the 5th ground of appeal revolving around the complaint that there were contradictions as on the date the PF3 was filled by the Doctor, the Learned State Attorney averred that there is no dispute that on 16th January 2021, and on 17th January, 2021 the victim was taken for medical examination but the medical report was not tendered in court. Relying on the case of **Justas Evarist vs R, Criminal Appeal No 242 of 2021**, the Attorney pressed that the victim's testimony need not be corroborated by medical evidence. He said, on 16th March 2021, the victim was expelled from school as she was found pregnant. He admitted that there was no DNA conducted to find out as to who impregnated the victim, however, according to him, since PW2, the victim was a reliable witness, her evidence was credible and watertight.

Regarding the 6th ground of appeal that there were contradictions between the evidence given, and the charge sheet as to the date the appellant had sexual intercourse with the victim, the Learned State

Attorney attacked the ground for being baseless. He said, PW1 and PW2's evidences were corroborated by PW3 who is Jonas Daniel, the son of the appellant, as they all testified that the appellant raped the victim on 16th January 2021. He added that, the doctor also testified that the victim conceived sometimes in January 2023, and that during the hearing of the case, the victim had already delivered a child.

In relation to the 7th ground of appeal that there was no documentary evidence that the victim was expelled from school after she was found pregnant, Mr Kabelwa referred this court to page 11 and 13 of the typed trial courts proceedings and averred that in those pages it is clearly seen that PW1 and PW2 explained how the victim was expelled from school.

As regards to the 8th ground of appeal, the Attorney reminded the court that the Republic is not bound by any law to bring a certain number of witnesses in proving the charge. He cited the case of **Justine Hamisi Juma Chamashine v R CA No 669 of 2021, CA, at page 24, the CA** to cement his assertion that it is not the number of witnesses that is required to prove the case, and that DNA is not mandatory in proving all criminal cases.

In relation to the 9th ground, the Learned State Attorney elaborated that the PF3 tendered by PW4, the Medical Doctor as evidence was for proving pregnancy and not rape.

Submitting against the 10th and the last ground, the Attorney contended that the case against the appellant was proved beyond reasonable doubt since all the ingredients of the offences he stood charged with were proved by the four prosecution witnesses, in particular, PW1, the victim's mother who explained clearly on how her daughter was raped by her own father at page 13 and 14 of the trial court proceedings.

As for the second offence, the Learned State Attorney told the court that the victim, PW2, testified that her father raped her and she conceived after she was raped, and that PW4 confirmed that the victim conceived during the month of January 2023. He prayed for the dismissal of the appeal and urged the Court to invoke Section 369 of CPA to direct the lower court to take the additional evidence if it sees the need to conduct DNA.

In his brief rejoinder, the appellant narrated the existing conflicts between him and his wife (PW1) and told the court that she was the one who

framed the cases just to punish him. He further told the court that the victim is not mentally fit.

Having carefully scanned through the records of the trial court, the appellant's grounds of appeal and submissions of both parties, I am inclined to determine whether the present appeal is meritorious.

Following the State Attorney's conceding to the 1st, 2nd and 3rd grounds of Appeal, I shall to first determine the third ground boiling on the complaint that there was no any conviction in the trial court's judgment contrary to section 312(2) of the Criminal Procedure Act, Cap 20, R.E 2022) as in my fortified view the same is capable of disposing the appeal if answered in affirmative.

I have made a thoroughly perusal of the trial court proceedings in consideration of the third ground of appeal. As well conceded by the Learned State Attorney, it is an uncontroverted fact that the trial RM's Court did not convict the appellant after finding him guilty on both counts hence infracting the provision of section 235 (1) of the CPA which states that: -

> *"The court, having heard both the complainant and the accused person and their witnesses and the evidence, shall convict the*

accused and pass sentence upon or make an order against him according to law or shall acquit him or shall dismiss the charge under section 38 of the Penal Code"

It is also important to note that, in terms of section 312(2) of the Criminal Procedure Act, the conviction part is one of the ingredients of a proper and valid judgment in the eyes of the law. Section 312(2) provides;

"In the case of conviction, the judgment shall specify the offence of which, and the section of the Penal Code or other law under which, the accused person is convicted and the punishment to which he is sentenced"

In the present appeal, it is evident as reflected on the last page of the trial court's judgment that, after evaluating the evidence before it, the trial court went ahead and proceeded as follows;

"all be said, I found accused guilty of the offences of; INCENT BY MALE; Contrary to section 158(1)(a) of the Penal Code [Cap 16 R.E 2019], IMPREGNANTING a school girl contrary to section 60A of the Education Act [Cap 353 R.E, 2002] as amended by Written Laws

(Written Amendments) Act No. 4 of 2016 read together with Regulation 5 of the Education (Imposition of Penalty to persons who marry or impregnate School Girls) Rule, 2003 GN 265 OF 2003. Section 235 of the Criminal Procedure Act. [Cap 20 R.E 2019]

PREVIOUS RECORDS

SA: I have no bad records against the accused, I pray for a sentence

MITIGATION

Accused: Absent

SENTENCE

For the first count the accused will serve thirty years' imprisonment. For the second count accused will serve thirty (30) years imprisonment. A sentence to run concurrently

It is so ordered!

R.R KASELE-PRM

29/03/2023"

Reading the above extract of the trial court's judgment in line with sections 235(1) and 312(2) of the CPA, I am of a firm position that the trial magistrate contravened the foregoing provisions of the law as after finding the appellant guilty of the offences he stood charged with, the honourable trial Magistrate was supposed to proceed with convicting the

appellant in accordance with the provision of the law under which the offence has been established.

Insisting in the compliance of section 235(1), the court of Appeal observed as follows in the case of **Juma Sackson Shida vs Republic (Criminal Appeal 254 of 2011) 2013 TZCA 205 (12 June 2013);**

> *"The above cited section is couched in mandatory terms; therefore, the sentencing process must be preceded by a conviction. Failure to enter a conviction is a fatal irregularity. Therefore, there is no valid judgment upon which the High Court could uphold or dismiss an appeal."*

Equally in the Case of **Aman Fungabikasi vs Republic (Criminal Appeal 270 of 2008) [2012] TZCA 2 (29 October 2012)**, the Court of Appeal deliberated that;

> *"With respect, we agree with Ms. Pendo Makondo. It was imperative upon the trial District Court to comply with the provisions of Section 235(1) of the Act by convicting the appellant after the magistrate was satisfied that the evidence on record established the*

prosecution case against him beyond reasonable doubt. In the absence of a conviction, it follows that one of the prerequisites of a true judgment in terms of Section 312(2) of the Act was missing"

As a way forward, the court went ahead and stated;

"It is true, as contended by Ms. Pendo Makondo that in the light of the above shortcoming we could make an order for a retrial. But it is also true that we could have easily set aside the decision of the High Court and consequently direct that the record be remitted to the District Court so that it enters a conviction. However, after giving the matter a very careful thought and consideration we are not inclined to make any of the above orders. We go along with Ms. Pendo Makondo that sending the matter back to the District Court will not serve the best interests of justice. It is true that the evidence on record did not justify the "guilty verdict". Therefore remitting the record to the District Court will not serve any useful purpose. Sending the record back to the District Court will only be a waste of time and thereby subjecting the appellant to unnecessary jeopardy".

Reverting to the matter under consideration in light of the above leaf of wisdom from the holding of the Apex court, I am not at one with Mr Kabelwa that the case file be remitted to the trial court for the same to enter conviction. I also find an order for retrial inappropriate. I say so because having scrutinized the evidence relied upon by the trial court in reaching its final verdict, I have found the same to be marred some deficiencies that rises doubt as to the guiltiness of the appellant.

In their attempt to convince the trial court as to the appellant's involvement in the commission of the alleged offences, the prosecution side sought support from the testimonies of four witnesses, PW1, PW2, PW3 and PW4. However, my critical review of the testimonies in respect of the proof as to the appellant's commission of the first offence has revealed that the same were solely hearsay with exception of the evidence of PW2, the victim. All the same, PW2's evidence was self-contradictory as to the exact date in which the appellant herein had sexual intercourse with her. While the victim told the court in her testimony in chief that the appellant had sex with her on 16/1/2021, during cross examination by the appellant at page 15 of the typed trial court proceedings PW2 changed the story and told the court that the appellant had sex with her on 9/1/2021. With this kind of discrepancy which in my view has corroded

the credibility of PW2, I don't find that it was safe for the trial court to conclude that there was indeed sexual intercourse between the appellant and the victim as alleged by the prosecution without firstly addressing and resolving the contradiction. **[See the case of Toyidoto S/O Kosima Vs The Republic, Criminal Appeal No 525 of 2021, CAT at Kigoma].**

Again, the evidence of PW4 and PF3 that he tendered before the court did not at any rate connect the appellant to the commission of the offence in the first count as the same didn't establish that on the alleged material date, the victim's private parts were penetrated by the appellant's male organ. A closer look at the said PF3, the same has only established that the victim was pregnant with no proof as to who impregnated her.

Undoubtedly, nothing in the entire prosecution's evidence has established that the appellant was responsible for the pregnancy.

In my view, under the circumstances a cogent proof that the appellant not only had sexual intercourse but also impregnated the victim could have come from the DNA test results. As such, I don't understand why the prosecution opted not to use the DNA to establish the paternity of the victim's child who according to the evidence on record was already born

the time the victim was fronting her evidence at the trial court. Having so observed, I find the allegations that the appellant impregnated the victim baseless in absence of such a reliable scientific proof.

In view of the above shortcomings, it is my firm conclusion that the Prosecution failed to prove the offences against the appellant beyond reasonable doubt. That said, I am not convinced that it is not in the best interests of justice to order a retrial in the circumstances of the case at hand. Instead, it is my profound view that ordering retrial will serve nothing other than affording the Prosecution an opportunity to fill gaps in its weak evidence **[See the case of Fatehali Manji v. Republic [1966] E.A.343].**

In the final result, the 3rd ground of appeal is allowed. Since the determination of the said ground suffices to dispose the entire appeal, I find no need to test the merit or otherwise of the remaining grounds of appeal.

In the circumstances, I quash and set aside the sentence of the trial court which was not preceded by a conviction. Having found out that the Prosecution failed to prove the offences against the appellant beyond

reasonable doubt, I order the immediate release of the appellant DANIEL LEORNARD SANGA @ MSAUZ from prison unless lawfully held for any other lawful cause.

It is so ordered.

DATED AND DELIVERED AT MOROGORO THIS 12th DAY OF JUNE, 2024

LATIFA MANSOOR
JUDGE
12.06.2024