IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

IN THE DISTRICT REGISTRY OF MOROGORO

AT MOROGORO

CRIMINAL APPEAL No 000005616 OF 2024

(Appeal from the Judgment and Sentence of the District Court of Kilombero at Ifakara in Criminal Case No 4 of 2023 Hon. Futakamba, Esquire Senior Resident Magistrate)

BETWEEN

LACKSON SICHONE.....APPELLANT

VERSUS

THE REPUBLIC.....RESPONDENT

JUDGMENT

MRUMA, J.

The Appellant Lackson Sichone was charged with two counts of sexual assaults. In the first count the Appellant was charged with and convicted of the offence of rape contrary to section 130 (1) (2) (e) and 131 (1) of the Penal Code [Cap 16 R.E. 2019].

In the second count the Appellant was charged with but was acquitted on the count of impregnating a school girl contrary to section 60 A (1) and (3) of the Education Act [Cap 353 R.E. 2019] as amended by the Written Laws (Written amendment) Act No 4 of 2016.

Dissatisfied with the conviction and sentence passed, the Appellant has appealed to this court on seven grounds of appeal alleging that the prosecution did not prove its case beyond reasonable doubt and the conviction was based on uncorroborated evidence and further that the trial erred in law in failing to have directed a DNA test to be conducted. The Appellant's grounds are coached in the following styles;

1. That the learned trial magistrate erred in law and in fact by contravening the provision of section 210 (3) of the Criminal Procedure Act by not reading over the appellant's evidence to him during his defence;
2. That the trial magistrate erred in law and in fact in convicting the Appellant based on the evidence of the victim which was to the effect that she identified the Appellant as the only person who had affairs with her which evidence was not corroborated;
3. That the learned trial magistrate erred in law in convicting the Appellant relying on the testimony of an expert witness (PW4) which is not a conclusive proof;
4. That the learned trial magistrate erred in law and in fact in denying the Appellant to have a DNA test to be conducted in order to

establish paternity of the child despite the fact that PW1 delivered before the completion of the trial;

5. That the learned trial magistrate erred in law and in fact in that the victim PW1 gave contradictory evidence and failed to tender evidence any letter written by the Appellant despite the fact that she told the court that the Appellant used to write letters to her;
6. That the trial magistrate erred in law and in fact in convicting the Appellant based on hearsay evidence of PW2 and PW3;
7. That the trial magistrate erred in law and in fact in relying on the decision of the Court of Appeal in the Case of Selemani Makumba V. R which was not applicable in this case as the testimony of PW1 was not consistent which creates a doubt that she was coached as a result she failed to show the room where the offence of rape was committed.

At the hearing of this appeal the Appellant appeared in person and was not represented, while the Respondent/Republic was represented by Mr Simon Mpina learned State Attorney. The appeal was argued viva voce.

The appellant being a layman had nothing much in arguing his appeal. He simply requested the court to look into his grounds of appeal and allow it because he didn't commit the alleged offence.

On his part, Mr Simon Mpina opposed the appeal. Submitting against the first ground of the appeal the learned State Attorney State Attorney conceded that in terms of **section 210 (3) of the Criminal Procedure Act [Cap 20 R.E. 2019]**, the trial magistrate is obliged to inform each witness that he is entitled to have his evidence read over to him but he quickly added that, failure to do so is an irregularity which is not fatal to the case because it does not occasion any injustice to the accused. He said that the complained irregularity is curable under Section 388 (1) of the Criminal Procedure Act. He said that although the records of the trial court are silent on whether the trial magistrate informed witnesses of their rights to have their evidence read over to them as required by Section 210 (3) of the Criminal Procedure Act or not, there was no prejudice on the part of the Appellant because under that law it were only witnesses who had that right to have their evidence read to them and not the Appellant.

Submitting with respect to the second ground the learned State Attorney submitted that there was no contradiction on the testimony of PW1 as alleged. He said that in her evidence PW1 was able to explain clearly how she was engaged in love affairs with the Appellant irs since when she was at standard V in 2020 up to 2022 when she went for a pre-form one class

at Queens Girls Secondary School in October 2022 where she was tested and found to be pregnant.

On the third ground of appeal the learned State Attorney contended that the trial magistrate did not rely on the evidence of the medical expert to convict the Appellant as alleged by the Appellant. He said that contrary to those allegations the evidence of the expert (PW4) was simply used to corroborate that of the victim.

On the fourth ground, it was the learned State Attorney's contention that the Appellant was convicted of the offence of rape and was acquitted on the charge of impregnating a school girl because there was no evidence to support the charge on the second count. He said that the trial court was not to direct the conduct of DNA because it is not the requirement of the law to have a DNA test before an offender could be convicted of the offence he is charged with. The learned State Attorney stressed that proof of rape does not require DNA test and particularly so when it is a statutory rape.

Submitting against the fifth ground, the learned State Attorney submitted that non-production of letters allegedly written by the Appellant to the victim (PW1) didn't affect the prosecution's case because in view of the decision of the Court of Appeal in **Makumbas case** (supra) best evidence

of rape comes from the victim and since there is evidence from the victim that she had an affair with the Appellant their written communications were immaterial.

On the hearsay evidence, the learned State Attorney stated that there is nothing on the record which suggests that the Appellant was convicted basing solely on the testimonies of PW2 and PW3 which is hearsay according to the Appellant.

On the seventh ground, the learned State Attorney contended that the fact that the Appellant's clothes were not found in the room searched did not affect the prosecution's case because it is a minor discrepancy which does not affect the kernel of the prosecution's evidence.

Based on his submissions the learned State Attorney requested this court to dismiss the Appellant's appeal in its entirety for lack of merits.

This is a first appeal. In the first appeal the appellate court is required to evaluate the evidence adduced at the trial and come to its own conclusions taking into consideration that it did not hear the witnesses and see their demeanour (See **Pandya Versus R [1957]** EA 336, **R Versus Okelo [1972]** EA 32 and **Kaimu Said Versus R Criminal Appeal No 391 of 2019 CAT**)

As stated at the outset of this judgment the Appellant was facing two counts of sexual offences. In the first count the Appellant was facing the charge of Rape Contrary to Section 130 (1) (2) (e) and 131 (2) of the Penal Code. It was alleged that on unknown dates between 1st January 2022 and 30th October 2022 at Kwa Shungu area Ifakara Township in Kilombero District in Morogoro Region he had carnal knowledge of one **LDL** (true name withheld) a school girl of 14 years old age.

In the second count the Appellant was charged with the offence of impregnating a school contrary to section 60A (1) and (3) of the Education Act it being alleged that on unknown date between 1st January 2022 and 30th October 2022 he impregnated a school girl one **LDL** who was aged 14 years old.

Looking at the way the charge sheet was framed one gets an impression that the two offences were charged in the same charge sheet because according to the evidence gathered, they were committed in the course of the same transaction and that is why each offence formed a separate count contained in one charge sheet which is the requirement of the law under **section 133 (1) of the Criminal Procedure Act** which provides that:

"Any offences may be charged together in the same charge or information if the offences charged are founded on the same facts or if they form or are part of a series of offences of the same or similar character"

Thus, it follows that by charging the Appellant with the offence of rape and that of impregnating a school girl in the same charge sheet the prosecution had intended to show that the two offences were committed in the course of the same transaction, that is to say sexual intercourse and impregnating a school girl were committed in one act. The relationship of the two charged offences is important in proving the case against the accused because impregnating a school girl under the age of 18 is a resultant or consequential offence of statutory rape.

Now in the case at hand the prosecution led evidence through four witnesses. The first witness was the victim PW1 **(LDL)** who testified in her testimony that she had sexual intercourse with the Appellant from 2020 when she was a standard five pupil to October 2022 when she was a pre- form one student at Queens Secondary school where she was noticed to be pregnant. She told the court that the Appellant was responsible for her pregnancy. According to PW1, during their

relationship the Appellant used to write letters to her and used they used to meet for sexual duels at the Appellant's rented room. In that context PW1 told the trial court that she knew some items which were inside the Appellant's room including clothes e.t.c, but when the Appellant's room was searched those clothes' which she had mentioned to the police were not recovered. It is the Appellant's complaint that failure to produce the said letters and failure to show those clothes' means that they were not there and the prosecution did not prove its case against him.

On how the Appellant was arrested after the incident it was PW1's evidence in cross-examination that the Appellant was arrested by her father one Deogratias Luvumbi (PW2). This evidence contradicted the testimony of her father PW2 who told the court that the Appellant was arrested by the police while at police station.

On when PW1 went for pregnant test, PW1 told the court that between 30th October 2022 to 10th December 2022 she was attending pre-form one lessons at Queens Boarding school. He returned home on 10th December 2022. On her part Lilian Luvumbi (PW3), the victim's grandmother testified that when the victim came back from school she suspected her to be pregnant and she took her to a nearby

pharmacy for test on 10th December 2022 where she tested positive to pregnancy. She reported the incident to the police and took the complainant to the hospital for another test. **Neema Trogemsy Bashota** (PW4), a clinical officer who tested the victim testified that the victim was taken to Kibaoni hospital by her father. She attended her on 17th December 2022 and she was tested two weeks' pregnancy. This is another contradiction complained of by the Appellant. While PW1 (the victim) testified that she used to meet the Appellant at his rented room and that between 30th October to 10th December 2022 she was at Queens Boarding school, and that she went back home on 10th December 2022, PW4 testified that when she tested her on 17th December 2022 the victim was two weeks pregnant. As stated by PW2, PW1 was first tested at a nearby pharmacy on 10th December 2022 but the result was not made available to the court. If we go by the victim's testimony that she used to meet the Appellant at his rented room and that between 30th October 2022 and 10th October 2022 she was at Queens Boarding School, then it follows that the two weeks' pregnancy diagnosed on 17th December 2022 was conceived while at school. There is no other evidence showing that she met the Appellant during that period. This casts doubt on the prosecution's case, a doubt which had to be

resolved in appellant's favour. In his fourth ground the Appellant is complaining that the prosecution didn't prove its case beyond reasonable doubt. The requirement that a criminal case must be proved beyond reasonable doubt is provided under the provisions of Section 2 (3) of the Evidence Act which provides that:

"A fact is said to be proved when-

(a) In criminal matters, except where any statute or other law provides otherwise, the court is satisfied by the prosecution beyond reasonable doubt that the fact exists"

The question here is what were the facts in issue in this case and whether they were proved beyond reasonable doubt as required by law. The term facts in issue is defined under **section 3 (1) (d) of the Evidence Act (Cap 6 R.E. 2019)** as:

"..Any fact from which by itself or in connection with other facts, the existence, non-existence nature or extent of any right, liability or disability, asserted or denied in any suit or proceedings necessarily follows".

In the case at hand the asserted facts are found in the particulars of the offence which states that "*on unknown date between 1st January*

*2022 and 30th October 2022 at Kwa Shungu area Ifakara Township within Kilombero Distirct in Morogoro Region had carnal knowledge of one **LDL** a school girl of 14 years age".*

The facts in issue are that:

i. The Appellant had **carnal knowledge** of the victim **who was 14 years** old as a result of which **he impregnated** her and hence the second count of impregnating a school girl.

As stated above, to prove these facts the victim (PW1) testified that she had sexual intercourse with the Appellant between 2020 when she was at standard V and December 2022, she told the court that their main venue was at her home and also at the Appellant's rented room. She said that between 30th October and 10th December 2022, she was at Queens Boarding school for pre-form one studies. She told the court that on 17th December 2022 when she was tested by **Dr Neema Trogemsy Bashato** (PW4), she was found to be two weeks pregnant. Thus, from this evidence it can safely be concluded that she conceived either on or before 3rd of December 2022. Thus in absence of the evidence that she had chance or opportunity of meeting the Appellant between 30th October 2022 when she joined Queens Boarding school and 10th December 2022, when she left

boarding and went back home then the allegation that the Appellant was responsible for her pregnancy was far- fetched. Now the question is whether in view of the foregoing reviewed evidence the facts in issue that the Appellant had **carnal knowledge** of the victim and **impregnated** her were proved beyond reasonable doubt.

In its judgment the trial court found that on the evidence of the victim, the allegations that the Appellant had sexual intercourse with the victim was proved. The trial court based its finding on the fact that the Appellant was mentioned by the victim in the earliest opportunity possible and that her evidence was corroborated by the evidence of Dr **Neema Trogemsy Bashota (PW4)**, which was to the effect that she conducted a pregnancy test against the victim and found her to be two weeks pregnant. The trial court went on to hold that the offence of Impregnating a school girl was not proved because there was no scientific proof that it was the Appellant who impregnated the victim.

I have carefully gone through the records of the trial, the grounds of the appeal and the submissions of the parties and I find this conclusion of the trial court to be a bit confusing. Starting with the trial court's findings that in order to prove pregnancy there must be

scientific proof that the pregnancy or unborn child belongs to the accused person, while I agree with the trial court's view on how to prove pregnancy, but I think in the circumstances of this case such finding ought to have been extended to cover the allegation of rape too. In other words in my view where the allegation of rape resulted into pregnancy of the victim, conviction could be justly and safely grounded on the forensic science evidence and particularly Deoxyribonucleic Acid (DNA) test. The DNA test is a genetic testing which is used to identify changes in DNA sequences of chromosomes structure. DNA test can be used to identify paternity by taking a cheek swab to determine a child's biological father. In a situation where the evidence is one against one, that is to say the victim is the only eye witness of the incident and the accused denies to have committed the offence there must be some explanation on why the court decided to believe the victim who claimed to have been raped and not the accused who denied to have raped her. In such a situation despite the fact strictly speaking DNA test may not be a mandatory requirement of the law but justice would require it and more so because **Section 3 (2) (a) of the Evidence Act** [Cap 6 R.E. 2019] puts the standard of proof required in criminal cases at beyond reasonable doubt ceiling. Forensic Science must be a critical element

of our criminal justice systems. It may be used to analyse evidence from the crime scenes and elsewhere to develop objective findings that can assist in the investigation and prosecution of perpetrators of crime or absolve an innocent person from suspicion.

Secondly, by charging the Appellant with two counts in the same charge it means that the two offences were committed in course of the same transaction. The prosecution was of the view that the two offences were committed in the course of the same transaction and that is why each distinct offence formed a separate count in the same charge in order to avoid duplicity. Given the nature of the offences it goes without saying that rape resulted into pregnancy of the victim therefore in such circumstances it was improper to separate pregnancy from rape. The key ingredients of the offence of statutory rape which have to be proved includes age of the victim, penetration and that the Appellant was the perpetrator of the offence. In the case at hand age and penetration were not seriously contested. What was contended is who was the perpetrator of the offence and as I have just stated the evidence on this issue was **one against one**, that is to say the victim was saying to the Appellant "you raped me" while the Appellant was saying to the victim "I didn't rape you". In such

circumstances court ought to have explained why it chose to believe the victim and not the suspect.

Back to the first ground of the appeal in which the Appellant is complaining that the trial court erred in law and in fact for failure to inform witnesses that they are entitled to have their evidence read over to them. The learned State Attorney conceded that it was an error for the trial omission to inform witnesses of their right to have their evidence to read over to them but he quickly added that the omission is not fatal because in the first place it is only the witnesses who were denied that right and not the Appellant and secondly that no prejudice was occasioned by the omission. I do not agree. The impugned provision of the law imposes a duty to the trial magistrate to inform each witness of his right under the law. Such duty must be performed and any omission amounts to denial of right and denial of right is fatal to the denied. **Section 210 (3) of the Criminal Procedure Act (Cap 20 R.E. 2019)** provides that:-

"The magistrate shall inform each witness that he is entitled to have his evidence be read over to him....."

As quoted above the word used by sub-section (3), of Section 210 of the Criminal Procedure Act, is "shall" which is interpreted under the

Interpretation of Laws Act as connoting mandatory requirement that directly and clearly impose a duty on the subject of the sentence. Section 53 (2) of the Interpretation of Laws Act (Cap 1 R.E. 2019) provides that:-

> *"Where in a written law the word "shall" is used in conferring a power, such word shall be interpreted to mean the function so conferred must be performed"*

Thus, a trial magistrate is obliged to inform each witness of his/her right to have his/her evidence read over to him/her. The learned State Attorney has submitted that because the Appellant was an accused person and not a witness he is not covered by section 210 (3) of the Criminal Procedure Act. I think the learned State Attorney did misconceive the word witness. The term witness is not defined under the Evidence Act, however, **Blacks' Law Dictionary Bryan A. Garner 10th Edition** at page 1838 defines the term witness to mean:-

> *" one who gives evidence in a cause before a court and in its strict sense includes all persons from whose lips testimony is extracted to be used in any judicial proceeding and so includes deponents*

and affiants as well as persons delivering oral testimony before a court or jury"

From the above definition of the term witness, it follows therefore that because the Appellant testified in these proceedings as Defence witness No 1, he was a witness and was entitled to be informed of his right to have his evidence read over to him. Because the word used in the law is "shall" the omission to inform him of his right was fatal.

Grounds two up to seven can be fused into one ground of complaint and that is to say, the prosecution did not prove its case to the tilt because the evidence adduced was contradictory and insufficient.

In law an accused person is innocent until proven guilty by the evidence adduced. The standard that must be met by the prosecution is proof beyond reasonable doubt. If there is a reasonable doubt, the accused must be found not guilty. I have re-evaluated the evidence adduced during the trial. Generally the evidence by the victim (PW1), the victim's father (PW2) and the victim's grand ma (PW3), was to the effect that between 10th October and 10th December 2022, the victim was at a boarding school. On the other hand the evidence of the Medical Doctor (PW4) is to the effect that when she tested the victim on 17th December, 2022 she was two weeks pregnant. This

implies that the allegation that she was impregnated by the Appellant may not be true because based on that evidence the victim must have conceived while at school and since she told the court that she used to meet the Appellant at her grandmother's house and sometimes at the Appellant's rented room, the chance of the Appellant impregnating her at school is not there. In my view the least that was required was that the trial court ought to have taken into account all the evidence in its entirety before getting into a conclusion. I think it didn't do so.

It has been submitted that in view of the principle laid down in the case of **Selemani Makumba Versus Republic [2006] TLR 379,** there was evidence from the victim which proved that the Appellant committed the offence charged. In that case the Court of Appeal held that the evidence of rape has to come from the victim, if an adult that there was penetration and no consent and in case of any other woman where the consent is irrelevant that there was penetration. While I fully subscribe myself to the binding decision of the Court of Appeal in that case which was decided in 1999c, but I am of the view that each case has to be decided on its own peculiarity. First with the current development of forensic sciences and its application in the

quest for justice for all, I think evidence from the victim and particularly so where the victim is a child below eighteen (18) years of age who can easily be coached and where the case involves pregnancy, such evidence must be supplemented by forensic evidence and particularly the DNA test. The necessity for corroboration or supporting of the evidence of a child by DNA test comes from the following facts:

1. That the victim was the only eye witness to the commission of the charged offence which the accused denied
2. That child witnesses are prone to coaching
3. That since there was expectation that in nine months period a child would be born, for the interest of justice trial could be delayed to await for DNA test to be conducted.

In the circumstances of this case, evidence of the victim was not in my view, *a carte blanche* for the trial court to ignore some other crucial facts of the case that would assist the court to do real justice to the parties. The principle laid down in Makumbas' case (supra) was not meant to enable a sloppy approach to investigations or to lower the standard of proof. The standard remains proof beyond reasonable doubt. Here there was an allegation of impregnating the victim, which

could be correctly established by DNA test. DNA test in this case would tie up the accused/Appellant to the pregnancy and therefore to the charged offence of rape. The charges which the Appellant was facing very serious in nature. They attracted a sentence of thirty years imprisonment and if the victim is below the age of ten years' the prescribed sentence is life imprisonment. In such circumstances, courts of justice should not be in hurry to determine cases which may result in curtailing one's Constitutional Basic Rights as provided for under Part III of the Constitution of the United Republic and particularly freedom of movement embodied under Article 17 thereof for the rest of his life. Justice hurried in a circumstance like this may result into a justice being buried which may affect even the unborn child as it may not be sure who is his/her biological father.

I note that the trial magistrate stated in his judgment that experience shows that; *"there should be scientific proof that the child belongs to the accused and not any other person"*. I fully agree with him on this observation, however as I have just stated hereinabove scientific proof was also essential in proving the offence of rape which is more serious offence than impregnation of the victim. I do not think that the evidence on record was sufficient to enable the trial court to come

to the conclusion that the Appellant raped the victim. As stated above having observed that there was no scientific proof that the Appellant impregnated the victim, the trial court ought to have taken into account that finding in determining whether the offence of rape had been proved or not. In absence of connection between the offence of rape and that of impregnating a school girl which according to the charge were committed in the course of the same transaction or in one single act (i.e. of having carnal knowledge of the victim) it was improper for the court to find the Appellant guilty of the offence of rape and not guilty of the offence of impregnating a school girl. DNA evidence would have played an important role in a case like this to establish a link between the offence and the perpetrators. DNA evidence may be crucial to protect victim's right and solve grave crimes such as statutory rape. Further DNA test can also exonerate suspects who may be wrongly implicated in the commission of offences which they did not commit. Courts of law should consider themselves not only as courts of law and apply the law mechanically or spontaneity, but they should also consider themselves as courts of justice and apply justice where there is lacuna in our laws. They must appreciate and push for the use of forensic science and particularly DNA evidence in ensuring that justice is done. It is unfortunately that

in the present case just like in many other cases of sexual harassments perpetrators are normally not medically examined and or tested to establish their involvement in the commission of the offences they are charged with even where they are caught within the scene of crime or what is sometimes called red handed. This is a lapse on the part of investigations. For instance in the case at hand the police did not bother to take the Appellant for medical examination. Despite the fact that pregnancy was a fact in issue, the police did never thought of conducting DNA test.

To say the least both the investigations and the prosecutions seem to have in mind the view that they have obligations to secure conviction instead of justice. That is wrong. Article 107 A (1) of the Constitution of the United Republic of Tanzania, does not say that the judiciary is the only authority to dispense justice in the country, but it simply gives it a mandate to be the final authority in dispensing justice. This means that all organs and authorities of the state are obliged to dispense justice but where there are dispute amongst themselves then court's decision is final.

Finally let me say something about Exhibit PI a PF3 which was tendered in evidence. PF3 is a Police Standard Form (No 3) provided

for under Police General Orders commonly known as PGO. It is issued to an injured person to refer him for medical attention in a recognized hospital or medical facility. PF3 has to be filled by a qualified and registered medical practitioner after examining the victim. The contents of the PF3 is an extract of medical report from patient's file kept at the hospital. In the present case Exhibit P1 (PF3) report was geared towards establishing that the victim was pregnant only. The police requested the medical practitioner to diagnose if the victim was pregnant. That was done and according to the report ***"Amepimwa na kukutwa ni Mjamzito"***. The report does not show how old was the pregnancy. There is a space in the PF3 for the Medical Practitioner to his/her registration number. The space is empty which means that PW4 didn't fill her registration number. Section 15 of the **Medical Practitioner and Dentist Act [Cap 152 R.E. 2019],** requires every Medical Practitioner to be registered by the Registrar of Medical Practitioners and Dentist appointed under Section 8 of the Act. Under sub-section (5) of Section 15 of the Act any certificate or other document required to be signed by a legally or duly qualified medical practitioner is valid if it is signed by a person who is registered as such. Exhibit PI does not show the registration number of the person who filled and signed it therefore casts doubt on the qualification of

PW4. Furthermore, Exhibit P1 doesn't show the Personal Patient File Number which is a requirement in the PF3. The Personal Patient File is a document from which the report in the PF3 (i.e. Exhibit P1) purports to have been extracted. Thus, failure to provide such information and the registration number of the Medical Practitioner who attended the victim as required creates doubts on the genuineness and/or legitimacy of the report itself.

From the foregoing analysis of the evidence on record, it is clear that the prosecution evidence did not set out a clear case of proof beyond reasonable doubt. For those reasons the appeal succeeds, the conviction is quashed and the sentence is set aside. The Appellant shall be set at liberty unless otherwise lawfully held.

Order accordingly,

THE HIGH COURT OF TANZANIA

A. R. MRUMA

JUDGE,

3rd June 2024.