

**IN THE HIGH COURT OF TANZANIA
(MTWARA DISTRICT REGISTRY)**

AT MTWARA

CRIMINAL APPEAL NO. 107 OF 2020

(Originating District Court of Kilwa at Masoko Criminal Case
No. 107 of 2019)

MOHAMEDI ABDALLAH NDUNGWI.....APPELLANT

VERSUS

THE REPUBLIC.....RESPONDENT

JUDGMENT

2 June & 14 July, 2021

DYANSOBERA, J.:

The appellant Mohamed Abdallah Ndungwi was charged before the District Court with rape c/ss 130 (1), (2), (e) and 131 (1) of the Penal Code [Cap.16 R.E.2002]. It was alleged by the prosecution that on 17th day of September, 2019 at about 0900 hrs at Kibata village within Kilwa District in Lindi Region, the appellant did have carnal knowledge of Halima d/o Salehe Mweyo, a girl of 17 years, a student of form two at Kibata Secondary School.

The trial court found that the ingredients of the offence charged were not established. It, however, found that the appellant had solicited the

victim so that they can get married while the latter was still pursuing secondary education. The appellant was thus, convicted under section 60A (4) of the Education Act [Cap.353 as amended by the Written Laws (Misc. Amendments (No.2) Act No.4 of 2019)] and sentenced to pay a fine of Tshs. 5, 000,000/= or in default, to imprisonment of five years term.

The appellant was aggrieved and, armed with six main grounds of appeal coupled with three additional grounds of appeal, has appealed to this court.

Briefly, the facts leading to the appellant's conviction are these. The victim (PW 1) is the daughter of Swalehe Ally Mweyo (PW 2) and Huruma Mohamed. The victim was a Form II student at Kibata Secondary School. In July, 2019, PW 2 was informed by his wife, Huruma Mohamed that PW 1 was not attending the school. PW 2 made a follow up by taking PW 1 to the Headmaster where she was schooling. PW 1, upon interrogation, stated that she did not want to continue with the school any more. She reduced that commitment in writing and signed it. The Headmaster suspended her from school for unspecified period. In August, 2019, PW 2 took PW 1 to the village executive officer where she was interrogated. PW 1 stated that she had been advised by the appellant not to attend school. PW 2 suspected illicit intimacy between the appellant and PW 1.

In his defence, the appellant denied to have made any sexual advances to PW 1 and denied to have done anything with her.

At the hearing of this appeal, the appellant appeared in person while the respondent was represented by Mr. Paul Kimweri, learned Senior State Attorney.

When invited to argue his appeal, the appellant said that he had filed a total of nine grounds of appeal and opted the learned Senior State Attorney to respond and then he would rejoin if need arose.

In responding to the appeal, learned Senior State Attorney declined to support the conviction and sentence. He submitted that the offence of soliciting a secondary school girl to marry while pursuing her secondary education was not cognate to the offence of rape and, therefore, it was wrong on part of the trial court to convict the appellant of the offence under section 60A (4) of the Education Act.

With due respect to both learned Senior State Attorney and the appellant, I agree.

It is true that when a person is charged with an offence and the facts are proved which reduce it to a minor offence, he may be convicted of the minor offence, although he was not charged with it. However, an accused person, in order to be convicted of a lesser or minor offence, the offence

should be on the face of it minor and cognate in character to the greater offence to which the accused person was initially charged with and the test would be, I think, whether the minor offence is accommodated in or cognate to the major offence before a conviction can be entered for such minor offence. Here two considerations are apt: one, whether the circumstances embodied in the major charge necessarily and according to the definition of the offence imputed by that charge constitute the minor offence also, and two, whether the charged major offence gives the accused notice of all circumstances going to constitute the minor offence intended to be substituted

In the case under consideration, it was not established that the circumstances embodied in the rape charge necessarily and according to the definition of the offence imputed by that charge constituted the minor offence under section 60A (4) of the Education Act [Cap. 353 R.E.2019]. Besides, it was not established that the charged major offence gives the appellant notice of all circumstances going to constitute the minor offence intended to be substituted, that is soliciting a secondary school girl to marry while pursuing secondary education.

For those reasons, I align myself with Mr. Paul Kimweri that the learned Resident Magistrate erred in law and fact to convict the appellant

of the offence of soliciting a secondary school girl to marry while pursuing secondary education contrary to section 60A (4) of the Education Act [Cap. 353 R.E.2019].

The appeal succeeds and is allowed. The conviction is quashed and sentence set aside. The appellant is ordered to be released from custody unless his liberty is being assailed for other lawful causes.



A handwritten signature in blue ink, appearing to read 'W.P. Dyansobera'.

W.P. Dyansobera

Judge

14.7.2021

This judgment is delivered under my hand and the seal of this Court on this 14th day of July, 2021 in the presence of Mr. Gideon Magesa, learned State Attorney for the respondent and in the presence of the appellant.



A handwritten signature in blue ink, appearing to read 'W.P. Dyansobera'.

W.P. Dyansobera

Judge