IN THE HIGH COURT OF TANZANIA

DODOMA SUB REGISTRY

AT DODOMA

DC CRIMINAL APPEAL NO.51 OF 2023

(Originating from Criminal Case No. 97 of 2022 of Iramba District Court at Kiomboi)

GEORGE FEDRICK @ GEORGE..... APPELLANT

VERSUS

THE REPUBLIC.....RESPONDENT

JUDGMENT

Date of last order: 21/02/2024

Date of Judgment: 06/03/2024

LONGOPA, J.:-

On 21/04/2023, the appellant one **George Fedrick @George** was convicted and sentence by the District Court of Iramba at Kiomboi on two offences: rape contrary to sections 130 (1) (2), (e) and 131 (1) of the Penal Code, Cap. 16 R.E. 2022; and impregnating a school girl contrary to section 60A (1) and (3) of the Education Act Cap. 353 as amended by the Written Laws (Miscellaneous Amendment No.2) Act No. 4 of 2016.

It was alleged that on 20th January 2022 during the daytime at Kinambeu Village within Iramba District in Singida Region, the appellant willfully and unlawfully did have carnal knowledge of one Wanindila d/o George aged 17 years, and a schoolgirl. As a result, of the sexual intercourse between appellant and victim who was a secondary school girl the victim became pregnant.

The appellant denied the charge but upon full trial, he was convicted and sentenced to imprisonment of thirty (30) years each on first and second counts. The terms of imprisonment were ordered to run concurrently. Aggrieved by the trial court's decision, the appellant appealed to this court.

In his petition of appeal, the appellant advanced six grounds of appeal which are:

1. *That, the learned trial court magistrate erred in law and facts by convicting the appellant on the offence of rape in which its essential ingredients were not proved to the standard required in proving criminal cases.*
2. *That, the trial court erred in law in convicting the appellant with the offence of raping a victim of supposedly seventeen years of age, basing on unproved fact that the victim was under eighteen years of age.*
3. *That, it was unsafe for the trial court to convict and sentence the appellant for impregnating a schoolgirl*

contrary to section 60A (1) and (3) of the Education Act Cap.353 in the absence of scientific evidence to show that, the appellant is responsible for the pregnancy of the victim.

4. *That, the learned trial court magistrate erred in law and facts by relying on the evidence of the prosecution witnesses who were neither credible nor reliable.*
5. *That, the learned trial court magistrate erred in law and facts by failing to properly evaluate the evidence tendered by both parties hence miscarriage of justice.*
6. *That, the learned trial court magistrate erred in law and facts by deciding the case in favour of the prosecution basing on the weakness of the defence side, specifically on appellant's ability to defend his case.*

On 22/2/2024 both parties appeared before me for viva voce arguments on the grounds of appeal. The appellant fended for himself, and the respondent was represented by Mr. Francis Mwakifuna, State Attorney. The appellant adopted all his grounds of appeal as setforth in the petition of appeal. Appellant challenged the conviction and sentence because: First, the appellant was not subjected to medical tests to verify that he participated in commission of rape. Second, no DNA test was done to verify that appellant is responsible for pregnancy. Third, all the prosecution witnesses stated to have not witnessed the commission of the offence.

On the other hand, State Attorney for Republic did not support the appeal. He was of the view that this appeal lacks merits. First, the offence of rape was proved by the victim PW 2 which is in line with decision in the case of **Selemani Makumba vs Republic** [2006] TLR 386. He reiterated that pregnancy of the victim is the proof for both offences of rape and impregnating a schoolgirl. Second, age of the victim was established by Exhibit P1 and P2 as well as evidence of PW 2. Third, the law prohibits having sexual intercourse with schoolgirls. Fourth, all six witnesses testified about the occurrence of the two offences. Fifth, the judgment contained analysis of both prosecution and defence. Sixth, the trial court determined the matter on strengths of the prosecution evidence. This was upon affording adequate opportunity to the defence to defend himself.

Having heard both sides, I have dispassionately reviewed the record from the trial court both proceedings and judgment, and grounds of appeal to establish the truthness of the grounds of appeal. The first ground is on the failure to prove all ingredients of offence of rape. The appellant was convicted with an offence of rape. However, he is challenging the same on ground that ingredients were not proved. Appellant argues that ingredients of offence of rape were not proved.

With respect to the first offence that is rape contrary to section 130 (1), (2) (e) and section 131 (1) of the Penal Code [CAP 16 R.E. 2022], the appellant submitted that essential ingredients were not proved to the standard required in proving criminal cases. Under Penal Code rape can be

committed by a male person to a female in one of these ways. One, having sexual intercourse with a woman above the age of eighteen years without her consent. Two, having sexual intercourse with a girl of the age of eighteen years and below with or without her consent (statutory rape). In either case, one essential ingredient of the offence must be proved beyond reasonable doubt. This is the element of penetration i.e. the penetration, even to the slightest degree, of the penis into the vagina as it was stated in the case of **Godi Kasenegala vs Republic** (Criminal Appeal 10 of 2008) [2010] TZCA 5 (2 September 2010).

In the case of **Joshua Mgaya vs Republic** (Criminal Appeal 205 of 2018) [2020] TZCA 231 (13 May 2020), the Court of Appeal reiterated that:

> *It is common ground that NM was a girl of tender age and so, unlike in other cases of rape involving adult women where consent is necessary ingredient, the only ingredient in this case was penetration. This is what is referred to as statutory rape.*

The available testimony on record does not have any proof of penetration except words of mouth of the victim and PF. 3 on the victim being pregnant. There is nothing more as the rest would only be hearsay as the witnesses were told by the victim.

According to the respondent's submission the fact that the victim of the offence was found pregnant and named the appellant as responsible

for pregnancy there is no need to prove penetration like in a common rape case because the fact that the victim was impregnated is enough proof that it was through sexual intercourse that led to the victim's pregnancy.

Similarly, ingredients of the offence of impregnating a school girl is categorically stated in Section 60A (1) and (3) of the Education Act. In the case of **Mawazo Kutamika vs Republic** (Criminal Appeal No. 64 of 2020) [2023] TZCA 67 (24 February 2023, the Court of Appeal instructively stated that:

> *The appellant was charged under section 60A (3) of the Education Act, which provides that: any person who impregnates a primary school or a secondary school girl commits an offence. It is clear that the prosecution in the instant case, was required to prove that PW1 was a secondary school girl at the material time, that she was pregnant, and that she was impregnated by the appellant.*

The proof of the two offences is based on circumstantial evidence especially existence of the pregnancy. It hinges on three main aspects. First, that evidence of PW 1 as the victim of the offences is credible and reliable. Second, existence of two exhibits to establish that victim is a schoolgirl and that she was found pregnant when examined by the medical doctor. Thus, Exhibits P1 and P2 are vital. Three, that it is the appellant who is responsible for pregnancy. I should state at the outset that without proof of these three aspects, commission of both counts would stand

unproved. The reason is simple, proof of offence of rape is solely reliant on proof of pregnancy of school girl being caused by the appellant. There is no any other valid evidence to support that offence apart from existence of pregnancy. In fact, important element of penetration is inferred from existence of pregnancy of the victim.

Credibility of PW 1 who is the victim forms the foundation of this case at hand. It is on record that PW 1 had sexual intercourse with the appellant on 20th January 2022. The appellant and victim had a single encounter without use of condom. As a result, the victim stated to have not seen her periods in February. The victim did not inform anyone about the incident until April 2022.It was until sometimes 20/04/2024 when it was found by school administration and parents that she was pregnant.

The failure of the victim to report and mention the appellant to anyone else raised eyebrows. Is it that appellant is responsible for the pregnancy? If yes, why did the victim fail to name him for about three months from the date of sexual encounter until 20th April 2022 when it was known by the school authorities and parents that she was pregnant. The victim knows better as to what reasons made her keep silent despite assertion that in February 2022 when she knew she was pregnant the appellant denied responsibility.

In the case of **Mpemba Joseph vs Republic** (Criminal Appeal No.420 of 2019) [2023] TZCA 17623 (18 September 2023), at page 9 the Court of Appeal stated that:

> ***It is trite law as stated in the case of Selemani Makumba v. Republic [2006] TLR 384, that in sexual offences, the evidence of a victim alone, if believed, is sufficient to found conviction.*** *In this case, PW1 mentioned the appellant as the person who raped her. She did so after she had become pregnant. While the offence is alleged to have been committed in June, 2017, she mentioned the appellant as the person who is responsible for the pregnancy in September, 2017. The record bears that, PW1 failed to name the appellant at the earliest point and no justifiable reasons were given for the delay. The evidence of PW1 also shows that there was no threat ever made by the appellant to her to justify her action.* ***On that account, it is our strong view that PW1 was not a credible and reliable witness****.*

I fully subscribe to this binding precedent that victim's silence on naming a responsible person for the pregnancy for about three months period is wanting thus makes credibility and reliability of her testimony questionable.

There is another important case law on the credence and reliability of the witness' evidence. In the case of **Ally Ngozi vs Republic** (Criminal Appeal 216 of 2018) [2020] TZCA 1786 (24 September 2020), the Court of Appeal reiterated that:

> *It is trite law that every witness is entitled to credence and must be believed and his testimony accepted unless there are cogent and good reasons for not believing the witness which include the fact that, the witness has given improbable or implausible evidence, or the evidence has been materially contradicted by another witness or witnesses. See –* ***Goodluck Kyando vs Republic*** *[2006] TLR 363 and* ***Mathias Bundala vs Republic****, Criminal Appeal No 62 of 2004 (unreported).*

From available record, there is conspicuous contradictory evidence of the prosecution. Such contradictions centres on timing of the medical examination and age of pregnancy by early May 2022.

In respect of medical examination, PW 3's evidence (p.12 of the proceedings) indicates that on April 2022, they got a PF 3 from police station and went to the hospital for medical examination where the victim was found to be four months pregnant. Evidence of PW 4 (at p. 16 of the proceedings) is to the effect that he examined the victim on 17/05/2022 and results indicated that the victim was pregnant for 19 weeks which is four months and three weeks. Evidence of PW 6 WP 8568 D/C Lukia

reveals that on 03/05/2022 noticed that the victim had not seen her periods since January to March 2022 and that she found the PF 3 in the police file that indicated the victim had pregnancy of five months. Similarly, PW 1 (at page7 of the proceedings) stated to have been taken to Kiomboi district hospital in April 2022.

This evidence of the prosecution contradicts each other. PW 6 who is investigator of the crime found a filled PF. 3 which indicated that victim was five months pregnancy before 03/05/2022. At pages 20 to 21 of the proceedings, PW 6 states that: *"...on 03/05/2022 I was assigned to investigate criminal allegation of rape. The accused was not arrested rather the victim was present I interrogated the victim whom I noticed that the victim had not seen her period since January to March. I found the PF.3 in the file which indicated that she had already taken at Hospital and found to have five months pregnant she named George Fredrick George from Kinambeu village she claimed to met with the accused at Kinambeu while she was still at form III student..."*

This evidence is at variance with the evidence of PW 4 who found the victim to have four months and three weeks' pregnancy on 17/05/2022. This is two weeks later from when PW 6 found in police file that PF.3 revealed five months' pregnancy of the same victim. Also, it contradicts PW 4 to have conducted medical examination of the victim on 17/05/2022. Such contradictions go to the root of the matter. It clear that the victim was pregnant way back before having alleged sexual intercourse with the

appellant on 20/01/2022. It leaves a lot to be desired and whether the appellant is responsible to the pregnancy of the victim.

Furthermore, if the victim had sexual encounter with the appellants on 20/01/2022, by the time PW 4 examined her on 17/05/2022 pregnancy would have not exceeded period of four months by normal count. Four months from the date of alleged sexual intercourse would only be attained on 20/05/2022. The age of the pregnancy therefore was older than the alleged date of sexual encounter between the appellant and victim. The evidence is more likely than not that the appellant is not responsible for that pregnancy.

That being the case, it is plethora of authorities that when there are contradictory of this magnitude then the same must be interpreted in favour of the appellant. In the case of **Lyongo s/o Hamisi @ Gembe vs Republic** (Criminal Appeal 135 of 2017) [2020] TZCA 1911 (17 December 2020), at pp. 11-12 the Court of Appeal observed that:

> *The reason for the discrepancy in evidence between PW2 and PW3 as to the place where PW1 was examined is not known.* ***This discrepancy, in our view, is not minor as it goes to the root of the matter in which in effect vitiated the credibility of PW2's evidence.*** *[See also* ***Dickson Elia Nsamba Shapwata & Another v. Republic,*** *Criminal Appeal No. 92 of 2007 (unreported)].*

Indeed, in the instant case evidence of PW 4 and PW 6 have effect of rendering the whole testimony of PW 1 who is the victim unreliable and without credibility. Similarly, as the evidence of PW 4 and PW 6 is at variance on very crucial aspects of when was the pregnancy test done and filling in of PF. 3, and the period/age of the pregnancy which are the most relied evidence to find the appellant culpable of the offence of impregnating a school girl, I am inclined to certainly find that there is no any remaining cogent evidence to support the conviction.

Having indicated that that evidence of PW 1 is contradicted by evidence of PW 4 and PW 6 on the age of the pregnancy and date of medical examination, the testimony of the victim lacks credence thus cannot be relied upon singularly to find the culpability of appellant for the two counts he stood charged.

The conviction and sentence are marred with other pertinent weaknesses that renders the findings a nullity. The admission of exhibits both copy of admission registration book of Kinambeu Secondary School as Exhibit P1 and PF 3 as Exhibit P 2 was irregular and unprocedurally done. Both exhibits have not adhered to the requirements of admission of exhibits. The extract for admission registration book simply, reveals partly at page 10 that:

> *The registration number and his (sic[her]) both years in school registration/admission book I can recognise*

registration book because the title indicates the school title I pray to tender the same as exhibit.

SGD
MAKWAYA C.C-RM
05/09/2022

***Accused**: No objection*

SGD
MAKWAYA C.C-RM
05/09/2022

***Court**: Copy of admission registration book of Kinambeu Secondary School received and marked as EX-P1.*

SGD
MAKWAYA C.C-RM
05/09/2022

***XXD Accused:** Nil*

Similarly, on page 16 of the proceedings regarding PF 3 it is reflected as follows:

I filled the PF.3 which I can recognise the PF. 3. It has office stamp of the hospital, my name and my signature. It is dated on 17/05/2022. I pray the court to receive PF 3 as exhibit.

SGD
MAKWAYA C.C-RM
24/10/2022

***Accused**: No objection*

SGD

MAKWAYA C.C-RM
24/10/2022

***Court**: PF. 3 received and marked as EX-P2.*

SGD
MAKWAYA C.C-RM
24/10/2022

PW 4 continue to explain the PF. 3

PW4 Continue

Pregnancy is the results of cohabitation between a man and the woman.

SGD
MAKWAYA C.C-RM
24/10/2022

XXD Accused:

We did not know who was responsible for the pregnancy.

These two extracts indicate that contents of exhibits were not read in court. The law is settled that any documentary or exhibits must undergo three processes in tendering them. In the case of **Robinson Mwanjisi and Three Others vs. R.** [2003] T.L.R. 218, at 226, the Court of Appeal stated that:

> *Whenever it is intended to introduce any document in evidence, it should first be cleared for admission, and be actually admitted, **before it can be read out**.*

It has been succinctly argued that reading out the contents of the document so admitted is a necessary and crucial stage of the trial. It

affords the accused with the right to prepare its defence well beforehand. It explains all or some of the ingredients of the offence for which the accused stand charged. In the case of **Erneo Kidilo & Another vs Republic** (Criminal Appeal 206 of 2017) [2019] TZCA 253 (21 August 2019), at pp.11-12, where the Court of Appeal stated that:

> *We do not agree with the learned Senior State Attorney for the respondent for suggesting that the appellants must be taken to have known the facts contained in exhibits P4 (Inventory Form), P5 (Trophy Valuation Certificate), and P6 and P7 (the appellants' confessional statements) which were not read out in court.* ***Contents of these exhibits carry detailed facts which affect ingredients of the counts preferred against these appellants.*** *The case of* ***LACK KILINGANI VS. R. (supra) is relevant to our proposition that where an accused person pleads guilty to an offence, the obligation to read out the facts contained in the tendered exhibits goes a long way to fully appraise the accused concerned all of facts that are locked in the exhibits. This appraisal in light of full knowledge of facts in exhibits will enable the accused person to either accept the facts therein as true, or even reject them and change his plea to NOT GUILTY.***

> ***In other words, an unequivocal plea of guilty cannot be sustained where contents of admitted exhibits were not read out to any person charged with an offence.*** (Emphasis added).

The legal implication of failure to read out the contents of a document that is admitted as exhibits has been demonstrated lucidly in the case of **Geophrey Jonathan @ Kitomari vs Republic** (Criminal Appeal 237 of 2017) [2021] TZCA 17 (16 February 2021), the Court of Appeal emphasized that:

> *It is trite principle that when a document is sought to be introduced in evidence three important functions must be performed by the court, clearing the document for admission, actual admission and finally, to ensure that the same is read out in court.* ***The effect of the omission... is to expunge the documents from the record****. The position is the same where the document is admitted without being cleared for admission as it happened in this case. In the circumstances, we agree with the learned Senior State Attorney that exhibits P1 - P3 which were wrongly admitted in evidence deserve to be expunged from the record and thus we accordingly hereby do so.*

[See also **Frenk Onesmo vs Republic** (Criminal Appeal No. 476 of 2020) [2024] TZCA 41 (14 February 2024)].

Having demonstrated that Exhibit P.1 and Exhibit P. 2 were irregularly admitted, both suffer a legal impediment of being unsafe to rely on them. Thus, this Court is duty bound to expunge them from record and I proceed to expunge them accordingly.

The effect of expunging these two exhibits makes the prosecution evidence too weak and disjointed. First, there is no proof that the victim was a school girl as there is nothing on record to cement the assertions that she was a schoolgirl. Second, there is nothing to establish that the victim was pregnant let alone that it is the appellant who was responsible. Neither a student identity card of the victim nor employment identity card of PW 2 was tendered to substantiate that the victim was a school girl.

Absence of documentary evidence regarding establishing the ingredient of the victim being a school girl is tantamount to failure to prove necessary ingredient of the offence. In the case of **Matibya N g'habi vs Republic** (Criminal Appeal No. 651 of 2021) [2024] TZCA 34 (14 February 2024) [TANZLII], the Court of Appeal reiterated as follows:

> *Worse enough, apart from introducing himself as the school headmaster of Pwaga Secondary school, PW3 did not support his evidence by any documentary evidence like his employment identity card and a student's register book to prove PW1's enrollment and her attendance in that school. It is our considered view that, the said register could have assisted the trial court to ascertain the*

allegation that PW1 was a student in that school and, when she was impregnated, she was still a student.

It is our further view that, since there was no any explanation as to why the said documents were not tendered in evidence, the trial court is entitled to draw an adverse inference against the prosecution which would have been resolved in the favour of the appellant.

This is what the appellant raised in his grounds to be random hand-picking of the prosecution witnesses. PW 2 was required to provide all details which would have identified her properly apart from mere word of mouth as her evidence intended to prove one of the important elements of the offence.

Another anomaly is on failure by the trial Court to inform the appellant on the right to defend himself. My perusal of trial court proceedings reveals that the appellant was not fully informed of his rights upon finding of the case to answer. The Court ought to have sufficiently inform the appellant.

The Criminal Procedure Act, Cap 20 R.E. 2022 provides for the requirements on occasion where a case to answer is stated by trial court. It provides that:

231.*-(1) At the close of the evidence in support of the charge, if it appears to the court that a case is made*

against the accused person sufficiently to require him to make a defence either in relation to the offence with which he is charged or in relation to any other offence of which, under the provisions of sections 300 to 309 of this Act, he is liable to be convicted, ***the court shall again explain the substance of the charge to the accused person and inform him of his right-***

(a) ***to give evidence whether or not on oath or affirmation, on his own behalf; and***

(b) to call witness in his defence*, and shall then ask the accused person or his advocate if it is intended to exercise any of the above rights and shall record the answer; and the court shall then call on the accused person to enter on his defence save where the accused person does not wish to exercise any of those rights.*

The proceedings partly reveal that:

DATE: 02/12/2022

CORAM: MAKWAYA C.C-SRM

PROSECUTOR: INSP SALUM

ACC: PRESENT

C/CLERK: HAMIS

PP

Case for hearing I pray for to end the case against the accused person.

Court:

The prima facie (sic) against the accused is established. The accused person has a case to answer. Defence case on 06/12/2022

SGD
MAKWAYA C.C-SRM
02/12/2022

DATE: 06/12/2022

CORAM: MAKWAYA C.C-SRM

PROSECUTOR: A/INSP OMARI

ACC: PRESENT

C/CLERK: HAMIS

PP *Absent with no information.*

Court: Defence case on 12/12/2022

SGD
MAKWAYA C.C-SRM
06/12/2022

From the extract, provision of section 231 of the Criminal Procedure Act, Cap 20 R.E. 2022 was not complied with. Failure by the trial court to afford the appellant to be fully versed with his rights related to his defence. As such, the defence was deprived his right to prepare formidable defence against the prosecution case.

In the case of **Nestory Simchimba vs Republic** (Criminal Appeal 454 of 2017) [2020] TZCA 155 (1 April 2020), the Court of Appeal noted that:

> *The right of an accused person to defend himself before his rights are determined is taken or an adverse action is taken by a court of law is a constitutional right as enshrined under Article 13(6)(a) of the Constitution of the United Republic of Tanzania, 1977. To uphold that right in the conduct of criminal trials, section 231(1)(a)(b) of the CPA was enacted. No one else can wish away that right except the appellant himself by expressly opting out not to render his defence. We, consequently, have no doubts in our minds that failure to affirm the two witnesses rendered the trial defective.*

This failure to accord the appellant full opportunity regarding next stage of the proceedings that was so essential to raise doubts on the prosecution case impaired significantly ability of the appellant to prepare defence of his case.

In the circumstances, I am inclined to find that conviction and sentence of the appellant was a based on a nullity as the trial was not fair to the appellant. The appellant was deprived an opportunity to understand the magnitude of the charges he was facing and the need to prepare a defence that would raise reasonable doubts on the prosecution's case.

On the strengths of these reasons, it is my finding that the trial court erred to find that the appellant guilty of the offence of rape and that of impregnating the schoolgirl. I am satisfied that all grounds of appeal save for age of the victim have merits and I shall uphold them accordingly.

In the case of **Ahmed Said vs Republic** (Criminal Appeal 291 of 2015) [2016] TZCA 192 (7 November 2016, at page 15 the Court of Appeal stated that:

> *It is, so to speak, elementary and a settled principle that, on any criminal trial, the prosecution is required to prove its case beyond reasonable doubt and that it cannot be said to have discharged its burden unless the evidence given by or on behalf of the accused is put into the balance and weighed against that adduced by the prosecution. We have already expressed the extent to which the learned convicting magistrate in this case did not, as she should have done, take into consideration the defence put up by the appellant and his witnesses. Upon numerous authorities, it has been held that it is so important that the trial court should keep the defence testimony continuously in mind in its verdict.*

The analysis of the grounds of appeal in the light of deficiencies of the prosecution case, it is certain that the case against the appellant was not proved beyond reasonable doubts. There are numerous legal

impediments that go to the root of the whole trial. The legal impediments make the totality of evidence too weak to support conviction and sentence of the appellant for the two offences.

That said, this appeal has merits for both conviction and sentence was based on some illegalities which caused miscarriage of justice. The appellant has provided formidable grounds of appeal to warrant this Court to uphold the appeal before it.

I am certain that this appeal is meritorious, thus I shall proceed to uphold it. The conviction on both offences against the appellant was marred with illegalities that caused miscarriage of justice. The conviction is therefore hereby quashed, and the sentence thereof is set aside for both offences. I order that the appellant be set at liberty immediately unless he is held otherwise for any other lawful cause.

It is so ordered.

DATED at **DODOMA** this 6th day of March 2024

THE HIGH COURT TANZANIA

E.E. LONGOPA
JUDGE
06/03/2024.