IN THE COURT OF APPEAL OF TANZANIA

AT DAR ES SALAAM

(CORAM: MUGASHA, J. A., SEHEL, J.A And RUMANYIKA, J.A.)

CRIMINAL APPEAL NO. 35 OF 2021

MANENO s/o MATIBWA FRANCIS @ BABIO .....APPELLANT

VERSUS

THE REPUBLIC.....RESPONDENT

(Appeal from the decision of the Court of Resident Magistrate at Kisutu at Dar es Salaam)

(Hamza, PRM-Ext. Jur.)

Dated the 8th day of December, 2020

in

Extended Jurisdiction Criminal Appeal No. 52 of 2020

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JUDGMENT OF THE COURT

17th February & 1st March, 2023

SEHEL, J.A.:

The appellant, Maneno s/o Matibwa Francis @ Babio was charged before the District Court of Kinondoni at Kinondoni (the trial court) with the offence of impregnating a school girl contrary to section 35 of the Education Act, Cap. 353 R.E. 2002 (the Education Act) read together with Rule 5 of the Education (Imposition of Penalties to Person who Marry or Impregnate a School Girl) Rules, 2003 published in the Government Notice number 265 of 2003 (G.N. No. 265 of 2003). He was found guilty as charged, convicted and

sentenced to 30 years' imprisonment. In terms of section 45 (2) of the Magistrates' Courts Act, Cap. 11 R.E 2019, his appeal to the High Court, which was later on, transferred to the Court of the Resident Magistrate at Kisutu at Dar es Salaam to be heard and determined by W. Hamza, Principal Resident Magistrate with extended jurisdiction (the first appellate court), was dismissed for want of merit. Hence, this second appeal.

The facts leading to his conviction and sentence as can be gleaned from the record of appeal are as follows: the prosecution alleged that on diverse dates in March, 2015 at Tegeta area within Kinondoni District in Dar es Salaam region, the appellant did impregnate a school girl aged 15 years old. For the purposes of hiding the identity of the victim, we shall refer her as the 'victim' or PW7. The appellant denied the charge. Thus, a full trial ensued.

The prosecution called a total of seven witnesses while the appellant absconded trial hence he lost his chance to give his defence. The prosecution case was also built upon two exhibits, namely; the Deoxyribonucleic Acid (DNA) report (exhibit P1) and the PF3 (exhibit P2).

The first prosecution witness was Fadhili Antony Meela (PW1), the father of the victim. His evidence was to the effect that his daughter (PW7) disappeared and he didn't know her whereabouts. However, in 2015, he was informed by his niece, one Jane that PW7 was pregnant. In that year, his

daughter was a Form III student schooling at Makongo Secondary School. He reported the matter to Kawe Police Station where a PF3 was issued. Thereafter, PW1 together with the aunty of the victim, Emma Meela, the second prosecution witness (PW2), took the victim to Sinza Palestina hospital for medical check-up. At the hospital, they were attended by Stanley Maganga, (PW6) who examined the victim by ultra sound and found that she was six months' pregnant. PW6 tendered the PF3 and admitted in evidence as exhibit P2. The evidence of the victim, PW7 was that she met the appellant when she was in Form II. In 2015, when she was in Form III, the appellant impregnated her.

The investigative officer, WP 3246 Corporal Joyce was paraded as the fifth prosecution witness (PW5). It was her evidence that on 20th November, 2015 she received a complaint from PW1 regarding a student being impregnated. She opened a police case file and started investigation by visiting Makongo Secondary School and interviewed some teachers there. According to PW5, the teachers informed her that the victim was expelled from school due to pregnancy. When she interviewed the victim, PW7 mentioned to her the appellant as the father of the child but during his interrogation, the appellant denied the allegation. Hence, she decided to conduct the Deoxyribonucleic Acid (DNA) test.

The Government Chemist Officer, Mohamed Said was paraded as the fourth prosecution witness (PW4). It was his evidence that on 20th June, 2017, he received a sealed sample from Forensic Bureau Dar es Salaam containing buccal swabs of three people for DNA testing. He examined the samples and found that the profiles had high probability of parentage between the appellant and the baby, that it was 99.99%. The results also established that PW7 was the mother of the baby. PW4 recorded and transmitted his findings in the DNA Report which he tendered and admitted in evidence as exhibit P1.

The arresting militiaman, one MG. 4871 Destory Mpeka (PW3) told the trial court that he arrested the appellant on 16th April, 2017 at Wazo area.

Having received the prosecution evidence, the trial court made a finding that the appellant had a case to answer. However, on the date when the appellant was required to mount his defence, he absconded. In that regard, the trial court proceeded to compose a judgment and delivered it in his absence. Later, the appellant was re-arrested and brought before the trial court. In terms of sections 226 (1) and 227 of the Criminal Procedure Act, Cap. 20 R.E. 2022, the trial court gave the chance to the appellant to explain the reasons for jumping bail. After hearing him, the trial court decided not to give chance to the appellant to mount his defence. As stated earlier, the

appellant was found guilty as charged, convicted and sentenced to serve prison term of 30 years.

Aggrieved, the appellant lodged his appeal to the first appellate court but it was dismissed for want of merit. Still aggrieved, the appellant has filed the present appeal. On 25th February, 2021, he filed a memorandum of appeal comprising of nine grounds and on 29th April,2021 he filed a supplementary memorandum of appeal raising four grounds. We shall deal with the grounds of appeal as submitted by the learned State Attorney.

At the hearing of the appeal, the appellant appeared in person, unrepresented whereas Ms. Janeth Magoho, learned State Attorney appeared for the respondent/ Republic.

When given a chance to amplify his grounds of appeal, the appellant adopted his grounds of appeal and written statement of arguments filed on 15th June, 2021. He had nothing more to add.

Ms. Magoho began her reply submission by supporting the appeal. She first submitted on the fifth ground of the memorandum of appeal whereby the appellant complained that, the prosecution documentary exhibits P1 and P2 were not properly admitted in evidence. Ms. Magoho conceded that, exhibits P1 and P2 were improperly admitted into evidence because they were not

read out in court after being cleared for admission. She argued that such an omission was fatal as it denied the appellant the right to understand the contents of such exhibits. She therefore urged the Court to expunge the exhibits from the record.

On our part, having duly considered the submission of the learned State Attorney and reviewed the record of appeal, we entirely agree that the documentary exhibits were not read over to the appellant after they were cleared and admitted in evidence. It is a settled position of the law that before a document is admitted in evidence it should be read over to the accused person-see: **Walii Abdallah Kibuta & 2 Others v. The Republic**, Criminal Appeal No. 181 of 2006, **Kurubone Bagirigwa & 3 Others v. The Republic**, Criminal Appeal No. 132 of 2015, **Issa Hassan Uki v. The Republic**, Criminal Appeal No. 129 of 2017 and **Kassim Salum v. The Republic**, Criminal Appeal No. 186 of 2018 (all unreported).

We deduced from the record of appeal that after the DNA Report (exhibit P1) and the PF3 (exhibit P2) were cleared for admission and admitted in evidence, their contents were not read over to the appellant. Obviously, such a failure occasioned a miscarriage of justice to the appellant as he failed to understand the contents of the exhibits tendered. We therefore proceed to expunge exhibits P1 and P2 from the record. That apart, we remained with

the oral account of the witnesses who tendered the exhibits, that is, PW5 and PW6 whose evidence will be dealt later on.

We now turn to the grounds raising evidential issues. This being a second appeal to this Court we shall be mindful of the settled principle of law that, the Court rarely interferes with concurrent findings of fact by the courts below. We can only interfere where there are mis-directions or non-directions on the evidence, a miscarriage of justice or a violation of some principle of law or practice – see: **The Director of Public Prosecutions v. Jaffari Mfaume Kawawa** [1981] T.L.R. 149 and **Musa Mwaikunda v. The Republic** [2006] T.L.R. 387.

The learned State Attorney addressed us on the remaining grounds of appeal into one issue, that is, whether the charge of impregnating a school girl was proved beyond reasonable doubt. She submitted that though PW1, PW3, PW5 and PW7 told the trial court that the victim was a Form III student at Makongo Secondary School evidence is wanting. She elaborated that the evidence of PW5 that she visited Makongo Secondary School where she was told that the victim was expelled because of pregnancy was purely hearsay. She argued that for PW5's evidence to be credible, she ought to have at least tendered a school register or call one of the teachers as a witness, failure of

which cast doubt on the evidence of PW1, PW3 and PW7 that at the time the victim was impregnated she was still a student.

Ms. Magoho further questioned the evidence of PW4 concerning the DNA test she conducted. It was her submission that the chain of custody of buccal swabs was not established as there was no oral account or paper trail to show how the samples were taken from the appellant and sent to PW4 for testing. She also commented on the sentence imposed upon the appellant that it was illegal. She argued that, before the amendment of the Education Act in 2016, the sentence was imprisonment for a term of three years but not exceeding six years. With that submission, the learned State Attorney urged the Court to allow the appeal.

In re-joinder, the appellant welcomed the positive submission of the learned State Attorney and urged the Court to allow his appeal and set him free.

Having heard the submission of the learned State Attorney and carefully appraised the evidence on record of appeal, we entirely agree that the prosecution failed to prove their case against the appellant on the charged offence. The appellant was charged with the offence of impregnating a school girl under section 35 of the Education Act read together with Rule 5 of G.N. No. 265 of 2003. For that offence to be established, the prosecution has to

prove beyond reasonable doubts two things. One; the girl was impregnated when she was attending either primary or secondary school; and two, the schoolgirl was impregnated by the accused person.

The evidence showing that the victim was a student came from PW1, PW2, PW5 and PW7. Our close scrutiny of record of appeal revealed that PW1 said that her daughter was a Form III student at Makongo Secondary School but he was not aware of her whereabouts. It was in 2015 when he was informed by PW2 about PW7 being pregnant. In contrast, PW2 said that PW7 was a student but was expelled from school due to pregnancy and that it was in 2015 when PW1 who told her that PW7 was sick. They therefore took PW7 to Sinza Palestina hospital and upon examination, she was found pregnant. We find this contradiction critical because it is not clear as to whether in 2015 when the victim was found pregnant was still a student or not. Besides, we gather from the account of PW7 that at the time she was testifying she had already given birth to a baby girl. Further, we wonder why the school register was not brought before the trial court. The learned State Attorney had amply submitted that the said register could have assisted the trial court to ascertain the allegation that the victim was a student at the time she was impregnated and that she was expelled due that reason of pregnancy. Connected to that is

the failure to call a material witness, that is, the teacher of Makongo Secondary School.

We are alive that the prosecution does not have any obligation to produce certain number of witnesses and it enjoys a full discretion in deciding which witness to call. However, at times, a court may be invited to draw an adverse inference against the prosecution case where a crucial or material witness who is within reach and who could have testified against a critical or decisive aspect of its case is withheld without sufficient reason. This was stated in the case of **Azizi Abdallah v. The Republic** [1991] T.L.R. 71 that:

> *"...the general and well-known rule is that the prosecutor is under a prima facie duty to call those witnesses who from their connection with the transaction in question, are able to testify on material facts. If such witnesses are within reach but are not called without sufficient reason being shown, the court may draw an inference adverse to the prosecution..."*

In the present appeal, we find that evidence of the teacher or school register was relevant in establishing that PW7 a student at the time she was impregnated. Since there is no any other explanation why the register book was not tendered in evidence and failure to parade as witness a teacher from

Makongo Secondary School who was within reach entitles us to draw an adverse inference and should be in the benefit of the appellant.

We further agree with the learned State Attorney that there is no connection from the time the buccal swab was collected from the appellant to the time it was delivered to PW4. Our appraisal of the evidence on the record reveals that there is lacking an oral account or paper trail on the chronological event showing the collection of buccal swabs, custody, control and onward transmission to the testing officer, PW4. At page 27 of the record of appeal, PW2 claimed that she decided to conduct DNA test from the appellant, the victim and the baby but it is not clear whether it was PW2 who took the specimen swabs from these three people. We are aware that DNA is vital scientific evidence in solving crimes as it links the accused person with the crime committed - see: **Christopher Kandidius @ Albino v. The Republic**, Criminal Appeal No. 394 of 2015 (unreported). However, in the present appeal, we are not told as to who collected the buccal swab from the appellant for him to be connected with the pregnancy of the victim. Thus, the chain of custody was broken in relation to the collection and preservation of the specimen.

Flowing from the above, we find that both lower courts misapprehended the evidence as there is no cogent proof to establish that the victim was a

student at the time she was impregnated and that the appellant impregnated the victim.

At the end, we find that the appeal has merit. Accordingly, we allow the appeal, quash the conviction, set aside the sentence and order for the immediate release of **Maneno s/o Matibwa Francis @ Babio,** the appellant from prison custody unless he is lawfully held for other reasons.

DATED at **DAR ES SALAAM** this 24th day of February, 2023.

S. E. A. MUGASHA
JUSTICE OF APPEAL

B. M. A. SEHEL
JUSTICE OF APPEAL

S. M. RUMANYIKA
JUSTICE OF APPEAL

The Judgment delivered this 1st day of March, 2023 in the presence of the Appellant in person and Mr. Nassoro Katuga, learned Senior State Attorney for the Respondent, is hereby certified as a true copy of the original.

THE COURT OF APPEAL OF TANZANIA

F. A. MTARANIA
DEPUTY REGISTRAR
COURT OF APPEAL