

TANZANIA / JUDGMENT

Gwatu Final Judgment

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1|Page IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA GEITA SUB REGISTRY
AT GEITA CRIMINAL APPEAL NO. 8643 OF 2024 (From Criminal Case No.39 of 2023 of the District
Court of Bukombe) GWATU CHARLES APPELLANT VERSUS THE
REPUBLIC..... RESPONDENT

JUDGMENT

Date of last order: 22/04/2024 Date of Judgment 03/05/2024 MWAKAPEJE, J.: The Appellant herein was charged and convicted for the offence of rape and impregnating a schoolgirl contrary to sections 130(1) and (2)(e) of the Penal Code, Cap. 16 R.E. 2022 and section 60A(3) of the Education Act, Cap 353, respectively, as the first accused person in the District Court of Bukombe in Criminal case No. 39 of 2023. The second accused, Janeth Petro, not in this appeal, was charged and convicted of abduction contrary to section 133 of the Penal Code, Cap. 16 R.E. 2022. 2|Page Briefly, it is stated that from 2020 to 2023, the Appellant engaged in a romantic relationship with JJ (PW1- identity withheld), a pupil at Uyovu Primary School. In proving the case against the Appellant, the prosecution presented testimony from five witnesses. The PW1 (the victim) stated to have been in the said relationship with the Appellant since she was in standard five in 2020, culminating in January 2023, when she moved in with him. PW2, the victim's mother, discovered the relationship in late December 2022 and reported it to PW 3, the victim's teacher, who advised that the matter should be reported to the police. PW 3 further testified that PW1 was a pupil at Uyovu Primary School, where the former taught. She further identified Janeth Petro as frequently retrieving her from school. A search led to the discovery of PW1 with the Appellant in January 2023, resulting in their apprehension. The said Janeth Petro confessed to procuring PW1 for the Appellant and relocating her from her parental residence to marry him. A medical practitioner, PW 5, conducted an assessment on PW1 and confirmed her pregnancy of sixteen weeks through an ultrasound 3|Page examination. It was from this evidence that the accused person was convicted and sentenced accordingly. Aggrieved by both conviction and sentence, the Appellant lodged his appeal in this Court with the following grounds of appeal:

1. That the prosecution side did not prove the ingredients of the offence of rape and impregnating a school girl to the standard required by law.

2. That the prosecution side never proved the offence of Abduction for the Magistrate to warrant a conviction on the Appellant.
3. That the offences stated to convict the Appellant in the copy of the judgement, i.e. (Impregnating a school girl) were not the same as found in the warrant of commitment on the sentence of imprisonment. Hence, a cooked case.
4. That the trial court magistrate convicted the Appellant without considering that no evidence supported the commission of two counts by the Appellant; simply what happened was to test PW1's urine and discover the pregnancy, to test the age of the pregnancy, perforated hymen, moreover no evidence proved that DW1 is the one who raped and impregnated PW1.
5. That, in the prosecution evidence, there is no specification of time or date for the commission of the offences of rape and impregnating a schoolgirl; instead, they generalised the date as something bad in the eyes of the Law.
6. That the Appellant was arrested without an independent witness to the incident and later to testify before the court of law? 4|Page
7. That the testimony of PW1 as the only witness cannot be proof of the commission of the offence of rape since it was not corroborated.
8. That the contents of the PF3 and the school attendance register were not made known to the Appellant before tendering them as exhibits as required by the law of evidence. Hence, they are to be expunged.
9. That it is the duty of the prosecution side to prove beyond reasonable doubt the issue of percentage through DNA test as per section 23 of the Human DNA Regulation Act No.9/2009.
10. THAT the trial magistrate erred in law and fact when he failed to consider the defence case.
11. THAT the trial Court Magistrate erred in law and fact as he did not comply with section 312(2) of the Criminal Procedure Act Cap 20 (R.E.2022). When this appeal came up for the hearing, the Appellant appeared pro se, without legal representation. On the other hand, Meers Kabula Benjamin and Verena Mathias, both learned State Attorneys, represented the Respondent Republic; when called to address the court, the Appellant had nothing to say apart from what he submitted in his grounds of appeal, giving the Respondent the right to react to the said grounds of appeal. At the onset, the Respondent opposed the appeal and supported the conviction for rape, but they contended that the Appellant was wrongly convicted for impregnating a schoolgirl. 5|Page Addressing the second ground of appeal, which was that the charge of abduction against the Appellant was not established, Ms Kabula stated that the argument is baseless since the same never involved the Appellant. Citing criminal case No. 39 of 2023 in the District Court, she affirmed that the case was between the Republic and Gwatu Charles and Janeth Petro as 1st and 2nd accused persons, respectively. She stated that in that particular case, the Appellant faced charges on two counts, one about rape and the other about impregnating a schoolgirl. While on the other hand, the 2nd

accused person was charged with abduction. Regarding the fifth ground of appeal, that the charge lacked the date of the commission of the offence, Ms Kabula argued that PW1 testified to the chronology of events, including the duration, i.e. from 2019 to 2023, of the sexual relationship between the Appellant and the victim, which resulted into the pregnancy of the latter. She concluded that this was why the same does not specifically indicate when the sexual relationship between the Appellant and the victim started. On the sixth ground of appeal, the Appellant contends irregularities in his arrest since there were no independent witnesses. Ms Kabula vehemently stated that the Appellant claims a lack of merits of 6|Page independent witnesses during the arrest. However, the Appellant's confession and corroborating testimonies by the prosecution witnesses validated the arrest procedure. She further stated that additional witnesses were unnecessary and bolstered her arguments with the case of Kennedy Owino Onyachi & Others vs Republic (Criminal Appeal 48 of 2006) [2009] TZCA 48 (22 December 2009). Regarding the seventh ground of appeal, where the Appellant challenges the corroboration of rape allegations, Ms Kabula, however, stated briefly that PW1's testimony, supported by PW2 and PW5, sufficiently corroborated the offence, as per section 127(6) of the Evidence Act. She also bolstered her argument with the case of Selemani Makumba vs the Republic, 2006 TLR 379 on page 384, that the evidence by the victim proved the offence of rape. She opined that this ground lacked merit and that it should be dismissed. About the eighth ground, where the Appellant contests the admission of the PF3, Ms Kabula refuted the fact and stated that the Appellant did not object to the admission of the same. She insisted that the PF3 was tendered and read to the accused person, and the trial court 7|Page afforded the Appellant ample opportunity for cross-examination. She, therefore, prayed for this ground to be dismissed. On the tenth ground that the trial court did not consider the evidence, Ms Kabula took the opposite view. She stated that the trial court meticulously evaluated both defence and prosecution evidence, resulting in a fair and just conviction. To cement her point, she referred to the case of John s/o Makolobela Kulwa Kakolobeia & Eric Juma alias Tanganyika vs Republic (2002) TLR 296. She further stated that the ground holds no merit. Regarding the eleventh ground of appeal, which concerns non-compliance with section 312(2) of the Criminal Procedure Act (CPA) in the judgment, Ms Kabula stated that the judgment complied with the requirements of that section of the CPA. She prayed for the dismissal of the ground of appeal as it lacked merits. Ms Verena Mathias, on the other hand, argued the third, fourth and ninth grounds of appeal collectively, as they revolve around the lack of DNA evidence to prove impregnation. Accordingly, she acknowledged that impregnation cannot always be immediately established unless a baby is born and DNA taken. She was of the opinion that the Republic ought to 8|Page have waited for a child to be born to determine the person who impregnated the victim. She concluded, therefore, that the conviction and sentence on the charge of impregnating a schoolgirl should be set aside as the charge was not proved. However, on the first ground of appeal, Ms Verena contented that a charge of rape was proved beyond a reasonable doubt against the Appellant, as all essential elements were substantiated. She, therefore, prayed for the conviction and sentence of a charge of rape to be sustained. In his rejoinder, the Appellant offered no further arguments beyond the grounds of appeal. After

carefully considering the Appellant's grounds of appeal and the Respondent's arguments, I asked myself whether the case against the Appellant was proved to the required standards in criminal law, i.e. beyond reasonable doubt. In answering this question, I will address the grounds of appeal coherently, starting with the second. This ground of appeal need not detain this court because it speaks for itself. Unlike what Ms Kabula Benjamin stated, the Appellant was indeed charged with the offence of abduction together with one Janeth 9|Page Petro, as the third count. The first and second counts were for the Appellant alone. However, the offence was not proved against him; it was against Janeth Petro. The learned trial magistrate, in pronouncing a sentence, stated that: "..... I hereby sentence the first accused person to thirty-year imprisonment for the first count, and three years imprisonment term, for the second count. The second accused is hereby sentenced to one year imprisonment term for the third count. Prison sentence shall run concurrently with respect to the first accused." Therefore, the Appellant can not, at this stage, raise a ground of appeal to challenge the offence he was not convicted of. Hence, this ground of appeal lacks merits. Concerning the fifth ground of appeal, the cry of the Appellant is with regard to the fact that the charge did not specify a day when rape was committed. It is indicated in the evidence on record that the said sexual relations between the Appellant and PW1 started in 2020. The same went on until PW1 moved in with the Appellant as a wife in January 2023 when he was arrested, and the said act went on being done. The fact that the Appellant had sexual relations with the victim from 2020 to 10 | P a g e January 2023 was not disputed, which implies, as stated by PW1, that the said sexual activities were countless. According to the evidence on record, though no exact date of rape is indicated in the charge sheet, the unknown date of January 2023 in the charge sheet as a period of rape is implied within the period the duos had their sexual relations. This position was well articulated in the case of Paschal Aplonal vs Republic (Criminal Appeal 403 of 2016) [2019] TZCA 356 (28 October 2019). In the said case, it was stated that: "The month of June 2013, as recounted by the victim, squarely falls between June and October 2013, being the period during which the Appellant raped the victim, as stated in the charge sheet. In this regard, since the prosecution paraded supportive evidence to that effect, the absence of a specific date as to the occurrence of the rape did not materially impeach the strong victim's account as to when she was raped by the Appellant. Also, as rightly found by the first appellate court, in the event the Appellant did not cross-examine the crucial prosecution witnesses whose account incriminated him on the charged offence, that was tantamount to acceptance of the evidence as accurate". [Emphasis supplied] Looking at the evidence on record, including the credible evidence of PW1 that the Appellant was the only lover she had for all the indicated period to January 2023, the Appellant's contention at this juncture is an 11 | P a g e afterthought. From this, I consider the charge correctly conscripted, and I proceed to dismiss the fifth ground of appeal. With regard to the third ground of appeal, the Appellant contends that the offence of impregnating a school girl, of which he was convicted, was not found in the warrant of commitment. Indeed, as stated by the Appellant, his warrant of commitment did not stipulate the offence of impregnating a schoolgirl as a second count; instead, it indicated the offence of abduction, which in the actual sense referred to the

second accused person. Now, I asked myself whether the warrant of commitment is part of the proceedings. To me, it is not. The same can not be said to have occasion and injustices to the Appellant. Moreover, appeals lie on the decision rendered, not on the document, which is not part of the judgment. The remedy in circumstances like this is to amend the same to correspond with the decision of the court. Therefore, this ground lacks merits and is hereby dismissed. Regarding the sixth ground of appeal, the Appellant questioned why the house owner and a ten-cell leader were not called to testify. The Appellant should, firstly, know that the prosecution of a criminal case is entirely within the mandate of the prosecution. It is the prosecution's duty 12 | P a g e to bring in court the witness they consider material to prove their case and not otherwise. Secondly, what matters to prove a case is the quality of evidence and not the number of witnesses; see section 143 of the Evidence Act. Further, in the case of *Kennedy Owino Onyachi & Others vs Republic (Supra)*, it was stated that: “.....there is no particular number of witnesses required to prove any fact in issue. This means that the court may convict an accused person on the version of a single witness if it believed him that what he had said is nothing than the truth.” Thirdly, in the present case, as correctly stated by Ms Kabula, the police went to arrest the Appellant and he was accordingly arrested at his residence. There was no search conducted in his house for it to require the presence of an independent witness. There is plenty of evidence from PW1 and PW2 indicating that PW1 was found at the said premises where the Appellant was arrested. This ground also fails. The eighth ground of appeal pertains to the fact that the contents of the school attendance Register and the PF3 were not made known to the Appellant. The law requires that the contents of the exhibits tendered and admitted be read to the accused person; see the case of *Robinson 13 | P a g e Mwanjisi and Others v. Republic [2003] T.L.R 218*, where it was 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; otherwise, it is difficult for the court to be seen not to have been influenced by the same” In the present case the procedure of tendering, admitting and reading over was adhered to by the trial magistrate. Looking on page 20 of the trial court’s proceedings, it shows that PW3 when testifying, prayed to tender the School Attendance Register. The Appellant never objected to its being admitted. The same was read over in court in the presence of the Appellant. Also, on page 31 of the trial court’s proceedings, when PW5 testified, he tendered the PF3, which was admitted as PE3, which was also not objected to, by the accused person and was read over. The Appellant was given ample opportunity and did not utilise it. He can, therefore, not at this moment claim that he was not. This is the position in the case of *Nyerere Nyague v Republic, Criminal Appeal No. 67 of 2010*, where it was stated that: “a party who fails to cross-examine a witness on a certain matter is deemed to have accepted the matter and will be 14 | P a g e estopped from asking the trial court to disbelief that what the witness said”. Therefore, the contention of the Appellant at this juncture is baseless and hence dismissed. I now turn to the first, fourth, and seventh grounds of appeal. It is a long-standing and established principle in sexual offences that the best evidence comes from the victim. See the case of *Selemani Makumba v Republic (supra)*. The Appellant in the present case contends that a charge of rape was not proved beyond

reasonable doubt. It is evidenced that PW1 stated to have started sexual relations with the Appellant when she was in standard five in 2020. PW1 stated to engage in sexual activities with the Appellant for a reasonable period of time and on countless numbers. The Appellant did not dispute this fact. On cross-examination, PW1 was firm, and her testimony was not shaken; hence believed and relied upon by the trial court. In the circumstances where the evidence of PW1 is reliable, her testimony does not require corroboration from other witnesses, as was stated in the case of *Majaliwa Ihemo vs Republic* (Criminal Appeal 197 of 2020) [2021] TZCA 304 (15 July 2021), that: 15 | P a g e “The best evidence in sexual-related trials to be that of the victim; however, it has to be credible enough to justify conviction”. [Emphasis supplied] In the present case, PW1 was a credible and trustworthy witness who not only engaged in sexual practices with the Appellant but was also lured to become a wife. See also the cases of *Emmanuel Sang’uda @ Sulukuka and Another v. Republic*, Criminal Appeal No. 422 B of 2013 (unreported); *Goodluck Kyando v. Republic* [2006] TLR 363 and *Mathias Bundala v. Republic*, Criminal Appeal No. 62 of 2004 (unreported). Due to that, the conviction would still have been justifiable even in the absence of other evidence corroborating her testimony. This is now the legal position as far as section 127(6) of the Evidence is concerned and as was stated in the case of *Haji Ally Nkane v R*, Criminal Appeal No. 21 of 2007, Court of Appeal of Tanzania at Mtwara (2010) (unreported) that: “The law now is that once the trial court believes the victim of rape (if an adult woman) or a child, it can convict even without corroboration provided that the witness has told the truth [Emphasis supplied] That notwithstanding, in this case, not only did PW1 testify that there were sexual relations between herself and the Appellant, but also 16 | P a g e the evidence of PW2 and DW2 proved the existence of the said sexual relations between the duos. PW5 also testified that the medical examination indicated that PW1 was experienced in sexual practices. Therefore there was plenty of evidence pointing fingers at the Appellant that it was he who raped PW1, a 17 years old girl. This, thus, responds to the first, fourth and seventh grounds of appeal on proof of rape, which I proceed to dismiss for lack of merits. Now, I turn to the fact of whether the offence of impregnating a schoolgirl was proven as far as the first and ninth grounds of appeal are concerned. The Republic supported this ground of appeal in that the Appellant was wrongly convicted because a DNA test to prove the fatherhood of the child was not done. I am afraid I have to disagree with the contention that proof of this particular offence solely requires a DNA test. First, it should be noted that the DNA test, though crucial, is not the only means to prove the offence of impregnation and paternity of the unborn child. This can be proved by the victim if her testimony is found trustworthy by the court. In the case of *Shagi Mang’oma vs Republic* 17 | P a g e (Criminal Appeal No.356 of 2020) [2023] TZCA 17396 (12 July 2023), it was stated that: “..we do not agree with the Appellant that scientific evidence, though very appropriate, was the only means in this case to prove that the unborn child in PW1's womb was his. There is the evidence of PW1 which suffices to conclude that the Appellant was the father.....,” In this case, PW1 stated that it was the Appellant who impregnated her since she had no other lover apart from him, and she was staying together with him as a wife. PW2 and DW2 supported this fact. During cross-examination, the Appellant never disputed the fact, and the Appellant

did not dispute it. To me, according to this piece of evidence, there is no doubt that it was the Appellant who impregnated the victim while knowing that she was a pupil at Uyovu Primary School, as far as the testimony of PW3, the teacher, is concerned. However, the Exhibit tender by PW3, i.e. PE 3 - the purported attendance register, is expunged for want of its authenticity. Ultimately, therefore, the grounds lack merit and are hereby dismissed. The Appellant also, in the tenth ground of appeal, contends that his defence was not considered in the judgment. It is trite law that the courts 18 | P a g e should consider the defence evidence in the analysis of a case and accord due weight. Failure to do that is fatal and, therefore, vitiates the conviction and sentence posed to the accused person. In the case of Director of Public Prosecutions vs Josephat Joseph Mushi & Another (Criminal Appeal No.471 of 2019) [2023] TZCA 17536 (24 August 2023), it was stated that: “.....failure to consider defence evidence of an accused person, on the authorities cited and many others, is a fatal irregularity and, often, vitiates the ultimate conviction and sentence.” In the case at hand, on page 2 of the judgment, the trial magistrate summarises the defence evidence and, on page 3, analyses it to find out that the same was untrustworthy. In that, the learned trial magistrate stated that: “The defence case rested on premises that the accused person as Dw.1 was just picked from his peaceful home and taken to police where he was just beaten into signing some documents and then immediately arraigned before the court, but has nothing to do with the whole thing. The position which I found untruthful owing to the accused demeanor and explanations which appear suspect because after all, prosecution did not tender any of his statement to suggest that he admitted the offence, while at the police, I think he mistook the whole thing.” 19 | P a g e From the foregoing, it is crystal clear that the defence testimony was accorded due weight when it was being evaluated. However, it was ultimately found unreliable to shake the prosecution case. Therefore, this ground of appeal lacks merit and is dismissed forthwith. As for the eleventh ground of appeal, the Appellant contends that the learned trial magistrate failed to adhere to the requirements of section 312(2) of the Criminal Procedure Act (CPA). Section 312(2) of the CPA outlines the necessary components of a judgment. In the case of Shabani Iddi Jololo and 3 Others Vs Republic, Criminal Appeal No.200 of 2006 referred by the Court of Appeal in Emmanuel Kabelele Vs Republic, Criminal Appeal No.419 of 2015 CAT at Tabora (Unreported) on page 5, it was stated that: “Conviction is one of the pre-requisites of a judgment in terms of section 312(2) of the Criminal Procedure Act, which states: “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 which he is sentenced” It is clear that the provision is mandatory and has to be complied with. Failure to comply is fatal and renders a judgment a nullity where no 20 | P a g e appeal can stem from; see the cases of Jonathan Mluguani vs Republic, Criminal Appeal No. 15 of 2011, Ruzibukya Tibabyekoma vs Republic, Criminal Appeal No. 218 of 2011 and Juma Jackson @ Shida vs. Republic, Criminal Appeal No. 254 of 2011 (All Unreported), to name but a few. Therefore, a lawful judgment has to contain a conviction and sentence as far as section 312(2). Looking at the trial court’s conviction, the learned trial magistrate convicted the Appellant without stating the section of the Penal Code and the Education Act. He stated as follows: “ For I hereby convict the first

accused of first and second counts, he stands charged with, and proceed as well, to convict the second accused of one count as charged.” The question is whether the omission vitiated the conviction. In response to the question posed, I assert the negative. The counts suggest that the offence for which the Appellant was convicted aligns with the charge brought against him. The first count outlines the offence of rape, as per sections 130(1) and (2)(e) of the Penal Code, Cap. 16, while the subsequent count pertains to impregnating a schoolgirl, as per section 60A(3) of the Education Act, Cap 353. In the case of *Abubakari Msafiri vs Republic* (Criminal Appeal 378 of 2017) [2021] TZCA 611 (28 October

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