

TANZANIA / JUDGMENT

MASANJA JUDGMENT

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IN THE HIGH COURT OF TANZANIA GEITA SUB-REGISTRY AT GEITA CRIMINAL APPEAL NO.
18647 OF 2024 (Original Criminal Case No. 74 of 2023 of Mbogwe District Court at Mbogwe before
A. Fungo SRM) MASANJA s/o ELIAS@MPINI-----APPELLANT
VERSUS THE REPUBLIC -----RESPONDENT

JUDGMENT

Date of last Order: 05/08/2024 Date of Judgment: 24/09/2024 K. D. MHINA, J. In the District Court of Mbogwe, the appellant, Masanja s/o Elias Mpini, was arraigned for three counts of abduction of a school girl contrary to section 134 of the Penal Code, Cap 16 [R: E 2022], rape contrary to section 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 of the Education Act, Cap 353, as amended by section 22 of the Miscellaneous Amendment No. 2 of 2016, respectively. 1 The appellant did unequivocally deny the charges against him at the commencement of his trial. At the trial, the prosecution had five witnesses and four exhibits to prove the charge against the accused, and the accused, who appeared unrepresented, entered his defence in person on oath. Briefly, the prosecution case, as found credible by the trial court, was that PW1, a girl aged sixteen (16) years, who, for purposes of concealing her identity, will be referred to, in this judgment, as the victim, was a form one (I) student at Lulembela Secondary School. According to her evidence, the appellant was her husband, whom they started dating in June 2023. One day the appellant inserted his penis into her vagina and promised to marry her. Then, the appellant took her to his mother at Masumbwe area and started living together as a wife and husband. They lived together for two months, and she got pregnant. The appellant's mother took her to the hospital. However, after a while, she was arrested and taken back to her parents. She said she was impregnated by the appellant, and at the time, she testified she was five (5) months pregnant. 2 According to PW3 (the medical practitioner), on 31 August 2023, while at Lulembela Dispensary, she received the victim, who was accompanied by her mother, and they had a PF3 (Exhibit P1). He medically examined the victim and found that she was three months pregnant. Further, he saw bruises indicating that she was carnally known. The evidence of the victim's mother (PW2) was to the effect that the victim was a form one (I) student at Lulembela secondary school and was born in May 2005. On the evening of 24 June 2023, she sent the victim to buy home supplies, but she did not return. After two days, she reported the incident to the ten-cell leader, who issued her a letter to search for her daughter. They searched for her at Ushirombo area, and fortunately, after two months, they

found her at Masumbwe area. At Lulembela Police Station, they were issued by the PF3, and the victim was taken to Lulembela Health Centre. They left the appellant at the police station. Upon clinical examination, the victim was found to be pregnant by two weeks. 3 The teacher at Lulembela Secondary School (PW5) testified that the victim was a form one student who joined the school in January 2023. She was registered with No. 5014 and PREM No. 20161885706 (Exhibits P3 and P4, respectively). She attended school up to June 2023. In July 2023, she attended for only two days, and later, they were notified that the victim was pregnant. PW4 was the police officer who recorded the appellant's cautioned statement (Exhibit P2). In his evidence, when he was cross-examined, he stated that the appellant confessed to committing the offence. In his defence, the appellant denied committing the offence. His defence was as follows; "I was arrested by Mgambo on 30/08/2025 at Nyambogo Gold Mine. I have been working at that mine. It was a civil case Enos owes me Tsh 300,000/- I was taken to Lulembela police post and they changed the case. I was not aware about that case of abduction of the school girl I denied the case they started to beat me I decided to accept the case. Even my relatives do not know my whereabouts". 4 In the end, the trial court found that the prosecution sufficiently proved the third count of impregnating a school girl contrary to section 60A of the Education Act, Cap 353, as amended by section 22 of the Miscellaneous Amendment No. 2 of 2016 against the appellant. Thus, he was found guilty, convicted, and, accordingly, sentenced to a term of thirty

(30) years imprisonment. However, the trial court absolved the appellant of responsibility regarding the first and second counts and consequently acquitted him. Dissatisfied, the accused preferred this appeal grounded on three complaints in faulting the trial court's decision as follows: -

- i. That the trial Magistrate Court erred in law and facts to convict the Appellant with an excessive sentence of 30 years imprisonment for the offence of Impregnating A school Girl C/ S 60A of the Education Act Cap 353 as amended by section 22 of the miscellaneous Act No.2/2016.
- ii. That the Trial Magistrate Court erred in law and facts to convict the Appellant without proving by DNA that the Appellant was the one who impregnated the school girl.
- iii. That no Witness brought by the Prosecution side in the Trial Court to prove that the Appellant (MASANJA S/O ELIAS ©MPINI) was the one who impregnated a Victim. The reason used by the Trial Magistrate Court was 5 that two Parties had to live as a wife and husband. In prosecuting the appeal, the accused person appeared in person unrepresented while the prosecution had the services of Ms. Verena Mathias, learned state attorney. At the appellant's request, Ms. Mathias was the first to submit. In her submission, she resisted the appeal and supported both the conviction and sentence imposed by the trial court. When submitting, Ms. Mathias argued both grounds together as she said they were closely intertwined. She argued that it is common ground that sexual intercourses are usually done in private; therefore, apart from PW1, the prosecution couldn't parade another witness who witnessed the victim when raped and impregnated. Further, the victim testified that she lived with the appellant as husband and wife for two months, therefore as per sections 127 (6) and

- (7) of the Tanzania Evidence Act and the of *Seleman Makumba vs. Republic*, [2006] T.L.R. 379 at page 8, the law provides that the best evidence is the evidence of the victim of sexual offences. 6 The evidence at the trial was that the victim and the appellant lived as a husband and wife for two months, and the appellant justified that act by also involving his mother. His mother was the one who took the victim to the hospital, where she was found to be pregnant. Therefore, the evidence of PW1 (the victim) was truthful based on the chain of action between the appellant and the victim. She amplified that, first, the victim and the appellant started a sexual relationship; second, they lived together for two months; and third, the appellant introduced the victim to his mother. Also, the appellant's mother was the one who sent the victim to the hospital. Ms. Mathias further submitted that the evidence of PW3 (the medical practitioner) proved that the victim was pregnant, and an act of the victim to agree to be sent to the hospital by the appellant's mother proved that the pregnancy was caused by the appellant. Therefore, there was ample evidence that the one who impregnated PW1 was the appellant. Regarding the DNA test, Ms Mathias stated that it was not the only proof to prove that a person impregnated the schoolgirl because, as per the case *Shagi Mang'oma vs. Republic*, Criminal Appeal No 356 of 2020 7 (Tanzlii) at page 14, even the victim's evidence can prove the offence as happened at the trial. On the sentence of thirty (30) years imposed by the trial court, Ms. Mathias submitted that according to section 60A of the Education Act as amended by section 22 of the Misc. Amendment No. 2 of 2016, the maximum penalty for the offence is 30 years. Therefore, the sentence given to the appellant was lawful. When the appellant was given the floor to support his appeal, he stated that he married the victim and took her to his home. Later, they sent the information to the victim's parents. He explained that he married the victim based on Sukuma traditions. After informing the victim's parents, they followed up on the dowry, but unfortunately, he failed to pay. After that failure, he was arrested and taken to court. He concluded that the marriage was agreed upon by the victim whom they met in the "streets". He did not know if the victim was a victim, and the victim did not tell him if she was a student. 8 Having objectively gone through the grounds of appeal, the submissions by both parties and the entire records of appeal, I will start with the second ground, then the third ground and finalise with the first ground of appeal. In the second ground, the complaint was the trial court erred in convicting the appellant without proof by DNA that the appellant was the one who impregnated a schoolgirl. Unfortunately, in his submission, the appellant did not explain or substantiate the ground. On the other hand, Ms. Mathias for the Republic argued that DNA is not the only proof to prove that a person impregnated the schoolgirl. She cited *Shagi Mang'oma* (Supra) to fortify that position. On this, there is a surfeit of court decision by the Court of Appeal on the subject. In the cited case *Shagi Mang'oma* (Supra), it was held that; "Secondly, 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, but there 9 is more to support that fact as we are going to demonstrate below". [Emphasis provided] Further, in *Salum Nicholas Mnyumali vs. The Republic*, Criminal Appeal No. 327 of 2020 (Tanzlii), it was held that; "Admittedly, DNA is vital scientific evidence

in solving crimes as it links the accused person with the crime committed - see Christopher Karrdidius @ Albino v. The Republic, Criminal Appeal No. 394 of 2015 [2016] TZCA 196 (13 December 2016; TANZLII). However, it is not a mandatory legal requirement for proving any criminal offence". From above, it is clear that the law does not provide that DNA evidence be mandatory in proving the offence of impregnating a schoolgirl. Such an offence can be proved without DNA by other relevant evidence. Therefore, without much ado, the ground as it stands lacks merits, and I dismiss it. Now I turn to the third ground, and the complaint was the prosecution failed to bring witnesses to prove that the appellant was the one who impregnated the victim. 10 On this, the entry point is the decision of the Court of Appeal in Salum Nicholas Mnyumali (Supra), where the Court of Appeal held that; "It is trite law that, for the prosecution to establish the offence of impregnating a school girl, it has to prove beyond reasonable doubt 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". In the instant appeal, the evidence in relation to whether the victim was impregnated when she was attending secondary school was given by the victim herself, her mother (PW2) and the school teacher (PW5), who also tendered the victim's registration number. In her evidence, the victim testified that in 2023, she was a form one student at Lulembela Secondary School. Her evidence was corroborated by the evidence of her mother, PW2. Further, PW5, the teacher at Lulembela Secondary School, confirmed that the victim was a form one (I) student at their school who joined in January 2023. She was registered with No. 5014 and PREM No. 20161885706 (Exhibits P3 and P4, respectively). 11 According to PW3, the medical practitioner, when he clinically examined the victim on 31 August 2023, the victim was three months pregnant. Therefore, the victim was impregnated, and she was a secondary school student. On whether the accused person was the one who impregnated the victim is a matter of evidence and law. According to the victim's evidence, the appellant was her husband, whom they started dating in June 2023. They lived together at the appellant's mother's premises at Masumbwe area for two months, and she got pregnant. This is what the appellant complained in the third ground of appeal, that the prosecution failed to parade any witness who testified he was the one who impregnated the victim apart from the evidence that they lived together for two months as husband and wife. On this, in law, the offence of which the appellant was convicted, the best evidence comes from the victim. In the cited case of Seleman Makumba (Supra) and Nimo Samu vs. Republic, Criminal Appeal No. 12 31 of 2019 (Tanzlii), the Court of Appeal held that the best evidence of sexual offences comes from the victim. However, before relying on the evidence of the victim to enter conviction, courts must scrutinise that evidence and satisfy itself that the evidence is truthful, coherent and reliable. This was insisted by the Court of Appeal in Mohamed Said vs. Republic, Criminal Appeal No. 145 of 2017 (Tanzlii), where it was held that; "We think that it was never intended that the word of the victim of sexual offence should be taken as gospel truth but that her or his testimony should pass the test of truthfulness. We have no doubt that justice in cases of sexual offences requires strict compliance with rules of evidence in general, and S. 127 (7) of Cap. 6 in particular, and that such compliance will lead to punishing the offenders only in deserving cases". In

scrutinizing and assessing the testimony, there are ways in which the credibility of a witness can be assessed. The Court of Appeal in the cited case of Nimo Samu (Supra), while citing its earlier decision of Shabani Daudi vs. Republic, Criminal Appeal No. 28 of 2001(unreported), held that; “The credibility of a witness can also be determined in other two ways, that is one, by assessing the coherence of the testimony 13 of the witness, and two, when the testimony of the witness is considered in relation to the evidence of other witnesses”. From the above discussion, having scrutinised the victim's evidence, I find it to be true, coherent and reliable. She testified that while she was a student, she lived with the appellant as husband and wife for about two months, though they started a sexual relationship earlier than that. As a result of that union, they conceived a pregnancy; thus, it was the appellant who impregnated her. When considering that evidence in relation to the evidence of other witnesses, I find it to be coherent. Other witnesses testified that she was a student, and when examined, she was found to be pregnant. Further, PW2 testified that her daughter (the victim) disappeared from home, and they searched for her for about two months until they found her at Masumbwe area. Therefore, the evidence of the victim is credible that he was the appellant who impregnated her. Nothing indicated that she was not telling the truth. Consequently, since the victim's evidence was the best evidence, the 14 complaint in the third ground of appeal does not have merits. Therefore, the ground is dismissed. On this ground, I wish to add one issue regarding what was submitted by the appellant when supporting his appeal. He submitted that he married the victim under the Sukuma traditions. Briefly, I have two observations; One, the appellant submitted what was not canvassed in the grounds of appeal. That means the appellant introduced a new issue during the

submissions.

The Court of Appeal in Yusuf Khamis Hamza vs. Juma Ali Abdallah, Civil Appeal No. 25 of 2020 (Tanzlii), held that; “In this case, the issue of time bar was not raised by the parties in their pleadings. In this sense it was quite in order and absolutely perfect for the court below not deal with matters which was not canvassed in pleadings”. Further, in Rosemary Stella Chambe Jairo vs. David Kitundu Jairo, Civil Reference No. 6 of 2018 (Tanzlii), the Court of Appeal branded that practice as abhorred and discouraged by the Court. 15 Therefore, that is why I did not consider those submissions when determining this ground of appeal. Two, even if I consider the reason in the submission to be rightly raised, it was still of no help to the appellant. There is no such defence for the person who impregnated a schoolgirl. The defence of contracting a Sukuma customary Marriage while the victim was still a student was a mistaken belief and an unlawful act. The victim, as a schoolgirl, was protected by sections 60A (3) and (4) of the Education Act. Under Section 60A (3), any person who impregnates a schoolgirl commits an offence, while under Section 60A(4), any person who aids, abets and solicits a schoolgirl or schoolboy to marry while pursuing primary or secondary school education commits an offence. Therefore, the submissions are not only improperly raised but also lack merits. The last ground in the determination is the first ground regarding the sentence of thirty years for the offence of

impregnating a schoolgirl. The sentence for the offence of impregnating a schoolgirl is provided under the Education Act, Cap 353, as amended by section 22 of the 16 Written Laws (Miscellaneous Amendment Act) No. 2 of 2016. The relevant section is 60A (3) of that Act. The section provides that; “Any person who impregnates a primary school or a secondary school girl commits an offence and shall, on conviction, be liable to imprisonment for the term of thirty years”. [Emphasis provided] From above, it is quite clear that the courts have the discretionary powers to sentence for the offence of impregnating a schoolgirl up to the maximum sentence of thirty years. This is because in sentencing an offender, if the law reads: “shall be liable to”, then this sets out a discretionary sentence up to a maximum amount. Therefore, section 60A (3) of the Education Act is not couched in mandatory terms; thus, the words in the provision of law are not imperative and obligatory to impose a maximum sentence of thirty years. The Court of Appeal in *Jafari Juma vs. Republic*, Criminal Appeal No. 252 of 2019 (Tanzlii), had an opportunity to discuss the remedy of the phrase shall be liable. It held that; 17 Time and again, we have emphasized that the phrase "shall be liable to imprisonment for a term of thirty years which we have emboldened above, does not impose the custodial term of thirty years as the mandatory penalty. It gives discretion to the trial court, subject to its sentencing jurisdiction, to sentence the offender up to the maximum of thirty years imprisonment depending upon the circumstances of the case after considering all mitigating factors. Therefore, contrary to what Ms. Mathias, State Attorney had submitted, it is not mandatory for the courts to sentence the offenders of impregnating schoolgirls to the maximum sentence of thirty years. In this appeal, the trial Court sentenced the appellant to the maximum sentence of 30 years for the convicted offence. On reading the trial court’s judgment, this is what happened when it sentenced the appellant to thirty (30) years in prison, I quote; “PREVIOUS CONVICTION: No records. I pray for sentence according to law. MITIGATION: I pray for lenient sentence I have 3 children whom they depend on me. 18 SENTENCE: The accused to serve 30 years imprisonment as provided for under section 22 of the Miscellaneous Amendment Act No. 2 of 2016”. The question is whether the trial court was justifiable in imposing the maximum sentence on the appellant. This is because it is a settled law that sentences approach the maximum should only imposed when the offence comes close to the worst of its type. See *David Gamata and another vs. Republic*, Criminal Appeal No. 216 of 2014 (unreported), where the Court of Appeal held that; “We are aware of the legendary principle of law to the effect that a maximum punishment should be reserved for the worst offence of the class of which the punishment is provided”. On close scrutiny of the above, it is clear that the trial court did not give the reasons why it imposed the maximum sentence of thirty years to enable this court to scrutinize why the trial court imposed the maximum sentence to the appellant. In his paper titled “Sentencing by Courts in Tanzania”, presented during the Induction Training of the newly appointed on 4 March 2019 at 19 the Institute of Judicial Administration-Lushoto, the Retired Justice of Appeal, Edward Rutakangwa, pointed out that; “Sentencing is a judicial function, so it is important that its exercise be backed by reasons to account for the sentence one proposes to impose. It is common knowledge that appellate courts have been loath to interfere with sentences where reasons have been given by the sentencing court to justify the imposition of a particular sentence though it appears to be outside of the normal range”. The reasons are, I quote;

- i. Natural justice: A convicted person is entitled to know the reasons why a particular sentence has been imposed on him. ii. Rationalization of sentences: The choice of a sentence, in many cases, involves careful consideration of different and, at times, conflicting factors. iii. Consistency in sentencing policy: It is an elementary principle of justice that, like cases, be treated alike. Giving reasons would have an added advantage of avoiding the semblance or appearance of arbitrary departures from settled practice in those cases where it is found necessary to depart from the 20 general pattern. A sentence grounded on sound reasons will also provide guidance in other cases. iv. Providing a sound basis for appeal: The giving of reasons, therefore, may be decisive when one is contemplating to appeal the sentence and may work as a catalyst for reducing the number of appeals against sentences. Furthermore, it will be beneficial to the appellate court. If reasons are given, the possibility of a sentence based on incorrect principles or misapprehensions escaping corrections would be greatly reduced". For fairness, proper sentencing and avoiding unfair consideration of sentences and prejudice, I subscribe to the position cited in the paper above. Further, the Court of Appeal in *Misango Shantiel vs. The Republic*, Criminal Appeal No. 250 of 2007 (Tanzlii) held that; "...we have already said that it cannot; there is nothing on record to justify the imposition of the maximum penalty for the offence of armed robbery which the learned judge imposed". 21 On that failure, the Court of Appeal in the case above cited its earlier decision of *Yohana Balicheko vs. R* [1994] T.L.R. 5, where it held that failure is an error in principle. Flowing from above, it is quite clear that the trial court erred in sentencing the appellant by failing to give reasons for the sentence, non- failure to consider the mitigation advanced by the appellant that he was a caregiver to his three children, he had no criminal record as he was a first offender and other relevant factors such as he already spent time in prison and that he was twenty-five years old thus still productive in the society. Therefore, in principle, the trial court erred in sentencing the appellant to a maximum sentence of thirty years. On the way forward, as the general rule, this court will normally not interfere with a sentence imposed by the trial Court unless satisfied that the sentence was manifestly excessive, that the sentencing court failed to consider a material circumstance, or that it erred in principle. See *Misango Shantiel* (Supra). 22 Further, in the Court of Appeal in *Mashinika Mashaka Mswanzali@Shine vs. The Republic*, Criminal Appeal No. 416 of 2017 (Tanzlii) held that; "Although it is settled law that sentencing is the domain of the trial court, the appellate Court can alter or interfere with the sentence imposed by the trial court, where there are good grounds". The Court illustrated those good grounds to be
1. Where the sentence is manifestly excessive or is so excessive as to shock.
 2. Where the sentence is manifestly inadequate,
 3. Where the sentence is based upon a wrong principle of sentencing,
 4. Where the trial court overlooked a material factor, and

5. Where the trial court ignored the period, the appellant had been in custody pending trial”. However, since I have already held that the trial court erred in sentencing the appellant, this Court is entitled to interfere with the sentence imposed by the trial Court. 23 On the error occasioned by the trial court, as a reminder to the Magistrates, I wish to cite the decision of the Court of Appeal in Nemes Myombe Ntalanda vs. The Republic, Criminal Appeal No. 1 of 2019 (Tanzlii) where the Court of Appeal held that; “All Judicial Officers and practitioners be acquainted with the Tanzania Sentencing Manual for Judicial Officers in order to ensure that sentences imposed on the offenders are consistent, proportionate, fair, just and proper”. Having discussed above, the trial court's misapprehension of the law and procedure relating to the sentencing of offenders and, as a result, it affected the discretion to impose the maximum sentence. Therefore, in considering the trial court's error of not giving reason (s) for the sentence, which is not mandatory and taking into consideration that the appellant was a first offender as he had no criminal record, he was a caregiver to his three children, he already spent one year in prison, and that he was twenty-five years old thus still productive in the society. In the circumstances, I quash and set aside the sentence of thirty (30) years imposed by the trial court. The appellant deserved a lenient sentence rather than a maximum sentence. 24 Therefore, I substitute the sentence of thirty (30) with a sentence of seven (7) years from the date he was sentenced by the trial court. In the final analysis, the appeal is dismissed save for altering the sentence from thirty (30) years to seven (7) years. It is so ordered. K. D. MHINA JUDGE 24/09/2024 Court The right to appeal explained to the parties. K. D. MHINA JUDGE 24/09/2024 25 26

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