

TANZANIA / JUDGMENT

CRIMINAL APPEAL NO

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TANZLIIDECIDED
1 January 2021

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IN THE COURT OF APPEAL OF TANZANIA AT MWANZA (CORAM: MKUYE. 3.A.. KITUSI. 3.A..
And ISSA. J.A.^ CRIMINAL APPEAL NO. 275 OF 2021 MATHIAS

JOSEPH..... APPELLANT VERSUS

REPUBLIC..... RESPONDENT (Appeal from the decision of
the High Court of Tanzania at Mwanza) (Mashauri, J.1 dated the 18th day of February 2021 in
Criminal Appeal No. 147 of 2020 JUD GM EN T OF THE COURT l 5ih & 21st August, 2024 KITUSI.
J.A.! The appellant was tried before Chato District Court for two related offences. The first was
rape contrary to section 130 (1) (2) (e) and 131

- (1) of the Penal Code. The second was impregnating a Primary School Girl contrary to section 60A (3) of the Education Act Cap 353, as amended by section 22 of the Written Laws Miscellaneous (Amendments) Act No. 2 of 2016. It was alleged in relation to the first count that on 18th April, 2019 at Mtundu village in Chato District, the appellant had carnal knowledge of i a girl who was aged 14 years, an offence under the cited provisions of the Penal Code. In relation to the second count, it was alleged that on the same date and at the same place and time, the appellant impregnated the alleged victim of the first count who was a scholar at Mtundu Primary School. The District Court convicted the appellant with both counts and imposed custodial sentence of 30 years for each, to run concurrently. The appellant unsuccessfully appealed to the High Court, it taking the view that the true evidence of rape comes from the victim and that: "it is a cardinal principle o flaw that a man who had sexual relation with a woman and whom she names is responsible for her pregnancy even If the woman had more than one lover [See *Didas Paulo v. Christina Leiya* (1968) HCD 488]". It dismissed the appeal. This is a second appeal. It raises 10 grounds in the substantive memorandum of appeal and 6 grounds in the supplementary memorandum. However, we took special interest in ground 2 of the substantive memorandum of appeal, which raises the following complaint: "2. That the 1st appellate court's judgment does not meet the mandatory statutory requirement enlisted under section 312 (1) o f the Criminal Procedure Act Cap. 20 (R.E. 2019) as it omits to analyse and determine each ground o f appeal presented to it by the appellant." We invited Mr. Castuce Ciemence Ndamugoba, learned Principal State Attorney representing the respondent/ Republic to address us on this point first. We did so, painfully aware that if this ground carries the day, it may render the other grounds of appeal premature. Incidentally, the appellant had earlier presented all

grounds of appeal for our consideration, praying for an order allowing the appeal and setting him free. Mr. Ndamugoba briefly submitted that it is true that the High Court's pronouncement generalized the appeal leaving out two grounds undetermined. One ground was in relation to the absence of evidence of DNA and the other was on the credibility of PW3, the alleged victim of the offence. Conceding, Mr. Ndamugoba submitted that the irregularity amounted to denying the appellant the right to be heard. He cautioned against this Court stepping into the shoes of the High Court, in that by doing so, it shall have exceeded its mandate and that the appellant will be denied his right of a second appeal should he feel aggrieved. 3 As a way forward, Mr. Ndamugoba prayed that we should invoke our revisional powers under section 4(2) of the Appellate Jurisdiction Act (AJA), nullify the proceedings before the High Court and order a rehearing of the appeal. We agree with the learned Principal State Attorney but we shall briefly skip determination of this point to later. At the moment, in keeping with our duty to ensure proper and correct application of laws, we have to iron out a small wrinkle. We have done so previously such as in *Evarist Arobogast v. Republic*, Criminal Appeal No. 60 of 2021,

[2024] TZCA 348 (10 May 2024). It is in relation to the learned judge's reference to the case *Didas Paulo* (supra) and the principle that whoever is named by a woman as being responsible for her pregnancy, must be the father of the child even if the woman was seeing other men. When we drew Mr. Ndamugoba's attention to this statement he submitted that it is incorrect and irrelevant to the case at hand because it applies to issues of fatherhood. We agree that the case cited by the learned judge and its principle is, with respect, not relevant to the facts of this criminal case. The issue before the court in this case was the alleged criminality of impregnating a girl who happens to be a school girl thereby causing her not to attend school. It was no an issue of paternity as in *Didas Paulo* (supra), which would be under a totally different regime of law. Back to Mr. Ndamugoba's submissions with which we earlier said we agree. The petition of appeal at pages 28 - 29 of the record raises at least two key issues which were not determined by the High Court. Since the learned judge's determination of the charge of rape was based on the principle that true evidence of rape comes from the victim, it was incumbent upon the High Court to make a finding on the 6th ground of the petition which we reproduce as it is, as follows: "6. That, the only afterthought and utterances of PW3 can hardly be relied on since the Court admits to have convinced PW3 to testify against the appellant and nowhere said to have tested the credibility of the victim (PW3)" In our view, credibility of the victim was of the essence in this case, in line with section 127 (6) of the Evidence Act otherwise there would be no basis for the court stating that true evidence of rape comes from the victim. Thus, we agree with the submissions and prayer made by Mr. Ndamugoba that the proceedings before the High Court be nullified and we order so under section 4 (2) of AJA because the appellant was denied a fair and adequate hearing. As this ground is sufficient to dispose of the appeal, we shall not address the rest of the grounds of appeal. Consequently, we quash the judgment of the High Court and order a fresh hearing of the first appeal according to law. Meanwhile the appellant to remain in custody to wait for the re-hearing of the first

appeal, which should be as soon as possible. DATED at MWANZA this 20th day of August, 2024. R. K. MKUYE JUSTICE OF APPEAL The Judgment delivered this 21st day of August, 2024 in the presence of Appellant in person and Mr. Deogratius R. Rumanyika, learned State Attorney for the Respondent/Republic, is hereby certified as a true copy of the original. 'Mm- :hw A. S. CHWGULU DEPUTY REC REGISTRAR COURT OF APPEAL 6

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