

TANZANIA / JUDGMENT

Pashal J

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IN THE HIGH COURT OF UNITED REPUBLIC OF TANZANIA TABORA SUB REGISTRY AT TABORA
CRIMINAL APPEAL NO. 72 OF 2021 (From the decision of the District Court of Urambo in
Criminal Case No. 13 of 2021) PASCHAL S/O JUMA APPELLANT VERSUS
REPUBLIC..... RESPONDENT

JUDGMENT

Date of Last Order: 16/01/2025 Date of Delivery: 14/02/2025 MANGO, J. The Appellant herein Paschal s/o Juma stood charged before the District Court of Urambo for two offences to wit; Rape contrary to sections 130(1), (2)(e) and 131(1) of the Penal Code [Cap 16 R.E 2019] and impregnating a school girl contrary to section 60A (3) of the Education Act Cap 353 R.E 2002 as amended by the Written Laws (Miscellaneous Amendment) Act No. 2 of 2016. It was alleged that on diverse dates between June 2020 and December 2020 at Ukwanga village within Urambo District in Tabora Region, the Appellant did have carnal knowledge and impregnated a 16-year-old girl who in this judgement will be referred as HF to protect her dignity. The charge indicates that HF a standard seven pupil was studying at Ushirika primary 1 school After a full trial, the Appellant was found guilty of the two counts. He was convicted and sentenced to thirty years imprisonment for each count, the sentences which were to run concurrently. Dissatisfied with the findings of the trial court, the Appellant unsuccessfully appealed to this Court before a Resident Magistrate with extended jurisdiction. Still aggrieved by the said conviction and sentence, the Appellant appealed to the Court of Appeal and upon consideration of the legal issues raised by the Appellant, the Court went on to nullify the proceedings, quash the judgement and set aside resultant orders made by a Resident Magistrate with extended jurisdiction against the Appellant for want of jurisdiction, as the assignment order was made under a wrong provision. The Court of Appeal also ordered remittance of the case file to this Court for the appeal to be dealt with expeditiously, according to law. The appeal before this Court is based on the following grounds:

1. That the case for prosecution was not proved beyond reasonable doubt as required by law
2. That the age of the victim of the offence was not cogently established since no birth certificate or clinic card was tendered in court to support the same

3. That the age of the pregnancy was not established in order to ascertain whether the age of the pregnancy is at per with the alleged date of rape in the earliest opportunity
4. That the learned trial magistrate erred in law and fact to find and hold that the Appellant was responsible with the commission of the offence charged without addressing his mind to the issue of whether PW1 2 named the Appellant in the earliest opportunity
5. That PW1 victim and PW5, the medical examiner did not establish penetration in their testimonies before the trial court, neither the contents of PF3, exhibit P2
6. That the sentence meted to the Appellant in the second count was manifestly excessive
When the appeal was placed for hearing, the Appellant appeared in person while the Republic was represented by Ms Idda Rugakingira learned State Attorney. The Court invited the Appellant to submit in respect of the grounds of appeal. The Appellant being a lay person, he only prayed to adopt his grounds of appeal to be his submission. Ms Rugakingira contested the appeal. She opted to argue the grounds of appeal starting with 2,3,4,5,6 then lastly with the first ground of appeal. On the second ground of appeal she argued that, the prosecution proved the age of the victim through testimony of the victim herself as she stated clear that she was 16 years old. She added that, the victim's testimony was supported by the testimony of her father Faraji Ramadhani who also stated that, the age of the victim was 16 years. Ms Rugakingira stated further that, the age of the victim can be proved by the victim, parent, relative or doctor, she referred this Court to the case of Shija Mathia vs Republic Criminal Appeal No. 358 of 2021 Court of Appeal of Tanzania at Tabora. It was her view that, the age of the victim was proved despite the fact that there was no birth certificate nor clinic card of the victim that was tendered as evidence. She also pointed out the fact that, the Appellant did 3 not cross examine the two witnesses regarding the age of the victim which means he had no issues with age of the victim. On the third ground of appeal the attorney submitted that, failure to mention the age of pregnancy is not fatal as it does not negate the fact that the victim was raped since the victim mentioned the Appellant to be responsible with the pregnancy. On the fourth ground of appeal, Ms Rugakingira contended that, when asked by her parents, the victim mentioned the Appellant as the person responsible with the pregnancy. She further explained that PW2, PW3 and PW4 both stated that the victim mentioned the Appellant as the person responsible with the pregnancy. On the fifth ground of appeal, the counsel submitted that the prosecution managed to prove penetration through the testimony of PW1 who stated clearly that she was raped by the Appellant. She stated that in sexual offences evidence of the victim is the best testimony. In the matter at hand the doctor, PW5 the doctor also testified that the victim was pregnancy the issue which proves that the victim was raped. She went on to submit on the sixth ground of appeal that S. 60A (3) of Education Act, provides for punishment of 30 years imprisonment for impregnating a school girl. Thus, the Appellant was properly sentenced. Coming to the first ground of appeal, it was her contention that the prosecution managed to prove age of the victim, penetration and that it was the Appellant who raped the victim. She prayed to have the appeal dismissed. 4 On his part, the Appellant prayed the Court to

consider his grounds of appeal. He insisted that, he was innocent and prayed the Court to allow his appeal. I have considered the grounds of appeal raised as well as submission from both parties. I will address the 1st, 2nd, 3rd, 4th and 5th grounds of appeal collectively since they all move the Court to assess whether the prosecution proved the case against the Appellant beyond reasonable doubt as required by law. Before I start determining grounds of appeal, I wish to address the issues brought to attention of the Court of Appeal by Mr. Ukongoji, State Attorney in respect to the age of the Appellant during commission of the offence. Records show that the Appellant was arrested and arraigned in March 2021, during his testimony in May 2021, he stated that he was 19 years old. The victim stated that they started love affairs back in June 2020. This means by that time, the Appellant was 18 years old, thus he was not a minor at the time of commission of the alleged offence. Back to determination of the appeal, the Appellant alleges that the age of the victim was not proved. It is a trite law that the age of a victim in rape may be proved by the child herself, parent, a doctor or upon production of a birth certificate. In the case of *Isaya Renatus v. R*, Criminal Appeal No. 54 of 2015 (unreported), the Court pointed out that: " We are keenly conscious of the fact that the victim must be under the age of eighteen. That being so, it is most desirable that the evidence as to proof of age be given by the victim, 5 relative, parent, medical practitioner or, where available, by the production of a birth certificate..." As correctly submitted by the learned State Attorney, the age of the victim was proved by the victim herself, PW1, and her father, Faraji Ramadhani who testified as PW3. According to the testimony of the two witnesses, HF was 16 years at the time the offence was committed. Thus, the age of the victim was proved to be 16 years. The Appellant also faults the decision of the trial court by not considering that the victim failed to name the Appellant in the earliest opportunity. Under the circumstances, a follow-up question may be whether HF can be blamed for not naming the Appellant as his ravisher at the earliest opportunity. HF being a child, she cannot be blamed for not reporting the matter much earlier. Moreover, circumstances of this case suggests that, the Appellant took advantage of HF's incapacity to make rational decisions to convince her to have sexual relationship with her. His alleged promise to marry her might have contributed to her decision to keep the illegal relationship confidential. Considering all circumstances, I find the act of HF mentioning the Appellant immediately after she was allegedly found to be pregnant to be proper and appropriate. The Appellant also challenged the prosecution for their failure to establish the age of the pregnancy. After a thoroughly look into the contents of the PF3 I find nothing which discloses the age of the victim's pregnancy at the time she was examined. The report does not even indicate if HF was found to be pregnant. This moved the court to check what was the doctor instructed to examine. The port indicates that, the doctor was instructed to 6 confirm whether HF was pregnant. After examining HF, the doctor, PW5 reported as follows: under UPTs she noted to have amenorrhoea' Unfortunately, the prosecution did not lead the witness to explain more about his findings after he has examined the victim. The American Illustrated Medical dictionary, 7th edition at page 54 defines amenorrhea to mean absence or abnormal stoppage of the menses Webster's New World Medical Dictionary, 3rd Edition at page 17 defines the term amenorrhea to mean the cessation of menstruation. It

categories the condition into two categories, primary and secondary. Primary amenorrhea is defined as failure of menstruation to occur at puberty while secondary amenorrhea which is associated with diseases, pregnancy, lactation and other reasons. The contents of the PF3 contradicts with the testimony of the doctor who examined the victim, PW5 who stated that he found there was penetration after he noted that the victim was pregnant. The PF3 states nothing about the alleged pregnancy. In such circumstances, the Court cannot rely on his statement which contradicts with his observations as indicated in the PF3. Unfortunately, there is no any piece of evidence that suggest the victim reached puberty that would have used by the Court to consider her amenorrhea was a result of abnormal reasons. The only evidence suggesting existence of penetration in this matter is that adduced by the victim herself. I understand that, evidence of the victim can be relied by the Court to convict the accused in sexual offences. However such evidence, as observed by the Court of Appeal in the case of Mohamed Said vs. Republic (Criminal Appeal 145 of 2017) [2019] TZCA 252, need to pass reliability test and should not be considered as a gospel truth. The victim in this matter stated expressly that she had sexual relationship with the Appellant. The age of the victim being 16 years, such evidence would have relied by this Court to uphold the Appellant's conviction for the offence of rape. However, the victim stated further that, she noted that she is pregnant after she was examined and found to be pregnant. Since there is no evidence that she was found to be pregnant, it creates doubts as to whether she had the alleged sexual relationship with the Appellant. In the final analysis, I find that the prosecution failed to prove the case beyond reasonable doubts. In the event, I allow the Appellant's appeal, quash his conviction and set aside the sentence of thirty (30) years meted against him in both counts. I order his immediate release from custody unless otherwise held for some other lawful cause. Dated at Tabora this 14th day of February 2025 Z. D.

MANGO JUDGE 8

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