

TANZANIA / JUDGMENT

CRIMINAL APPEAL NO 322 OF 2022

REMIDIUS PASTOY VS THE REPUBLIC

COURT
TANZLIIDECIDED
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IN THE COURT OF APPEAL OF TANZANIA AT BUKOBA (CO RAM: MUGAS HA. 3.A.. KHAMIS. J.A, And ISMAIL, J.A.) CRIMINAL APPEAL NO. 322 OF 2022 REMIDIUS PASTORY..... APPELLANT VERSUS THE REPUBLIC..... RESPONDENT (Appeal from the decision of the High Court of Tanzania at Bukoba) (Mwipopo, 3.) dated the 25th day of March, 2022 in Criminal Appeal No. 74 of 2021 JUDGMENT OF THE COURT 2 nd & 3 rd December, 2024 MUGASHA. J.A.: The appellant, Remidius Pastory was charged with the offence of rape contrary to section 130(1), (2) (e) of the Penal Code, Cap 16 RE. 2019; and impregnating a schoolgirl contrary to section 60A (3) of the Education Act, Cap. 353, R.E. 2019 (the Education Act). He was convicted on his own plea of guilty and sentenced to a jail term < of thirty (30) years in respect of the second count. Subsequently, the prosecution dropped the charge in respect of the first count of rape. His appeal to the High Court (Mwipopo A.E, J) was dismissed hence this appeal on the following three grounds:

1. That, the appellate court erred in law and fact to uphold the conviction and sentence against the appellants after the trial magistrate erred and contravened the requirements of section 210(3) of the Criminal Procedure Act. [CAP 20, RE; 2019].
2. That, the appellate court erred in law and in fact when it failed to address the appellant on his right to appeal. At the hearing of this appeal, the appellant appeared in person unrepresented whereas the respondent Republic had the services of Ms. Immaculate Mapunda and Ms. Wampumbulya Shani, both learned Senior State Attorneys alongside Ms. Evaresta Kimaro and Ms. Matilda Asset, both learned State Attorneys. Before the commencement of the hearing, it was brought to the attention of the appellant that, since he was convicted on his own plea of guilty to the charge, the available remedy among others is to fault the extent and legality of the sentence. On a reflection, the appellant opted to abandon the grounds of appeal and raised additional ground faulting the trial court for imposing unwarranted excessive sentence. He thus urged us to reduce the term of the imposed sentence. 2 On the other hand, the appellant's complaint was not opposed by Ms. Mapunda who as well, submitted that the term of thirty years imprisonment was on the higher side given that one, it is not the mandatory minimum but the maximum term; and

two, since the appellant was a first offender, it was unjustified to impose a punishment of the maximum jail term. According to the record, the appellant was convicted on his own plea of guilty to the charge of impregnating a schoolgirl contrary to section 60A (3) of the Education Act. Where the appellant is convicted on his own plea of guilty, section 360 (1) of the Criminal Procedure Act [CAP 20 R.E.2019] stipulates as hereunder: "An appeal shall not be allowed in the case of any accused person who has pleaded guilty and has been convicted on his own plea of guilty and has been convicted on such plea by a subordinate court except as to the extent or legality of the sentence." Although in terms of the cited provision the remedy on a conviction of own plea of guilty is to appeal against the sentence, according to case law, an accused person who has been convicted of an offence on his own plea of guilty may appeal against the conviction to a higher court where the plea is imperfect, ambiguous or unfinished. See: LAURENCE MPINGA VS REPUBLIC [1983] TLR 166 and JOSEPHAT JAMES VS REPUBLIC, Criminal Appeal No. 316 of 2010 (unreported). Given that the appellant's complaint hinges on the propriety of the sentence, the issue for our determination is whether the sentence of thirty years imprisonment meted on the appellant is excessive. The maximum custodial sentence to any person who is found guilty and convicted of impregnating a school girl is prescribed under section 60A (3) of the Education Act which stipulates: "60A (3) Any person who impregnates a primary school or secondary school girl commits an offence and shall, on conviction be liable to imprisonment for a term of thirty years." [Emphasis supplied] The meaning of the words in the bolded expression is that, the sentence of thirty years is the maximum and not a mandatory statutory minimum. This was emphasized in the case of FARUKU MUSHENGA VS REPUBLIC, Criminal Appeal No. 356 of 2014 (unreported) relying on the case of OPOYA VS UGANDA [1967] EA 4 752 whereby the Court of Appeal of East Africa had the occasion to state as follows: "It seems to us beyond argument that the words "shall be liable to" do not in their ordinary meaning require the imposition of the stated penalty but merely express the stated penalty which may be imposed at the discretion of the Court. In other words, they are not mandatory but provides a maximum sentence only and while the liability existed the court might not see fit to impose it" The cited decision was relied upon in another case of SOKOINE MTAHALI @ CHIMONGWA VS REPUBLIC, Criminal Appeal No. 459 of 2018 (unreported). The Court having considered the phrase shall, on conviction; be liable to imprisonment for a term of thirty years it emphasized that such words, do not impose custodial term of thirty years as mandatory penalty and instead, it gives discretion to the trial court, to sentence the offender up to a maximum of thirty years imprisonment depending on the circumstances of the case after considering all mitigating and aggravating factors. 5 Yet, it is now settled that, on appeal the Court does not interfere with the sentence passed by a trial court unless one or more of the following conditions is fulfilled that is, one, either, the sentence is manifestly excessive or that; two the sentencing court ignored to consider an important matter or circumstance which ought to be considered; and three, that the sentence was wrong in principle. See: KIRNAKI DAFU & ANOTHER VS R, Criminal Appeal No. 9 of 1993 (unreported), REPUBLIC VS MOHAMED JAMAL

[1948] 15 EACA 126; OGALO S/O VS OWOURA VS REPUBLIC

[1954] 21 EACA 147; LEONARD NGURUWE VS REPUBLIC (1981) TLR 66 and BERNADETA PAUL VS REPUBLIC (1992) TLR 97). Given that the custodial sentence of thirty years prescribed under section 60A (3) is the maximum term, a follow up question is whether the custodial sentence of thirty years imposed on the appellant warrants the interference of this Court. This takes us to scrutinizing what actually transpired before the subordinate court. At page 5 of the record of appeal, it is glaring that, in mitigation, the appellant pleaded that he was a youthful first offender who readily pleaded guilty and prayed for mercy. However, besides considering the mitigating circumstances, the trial magistrate imposed a 6 maximum jail term of 30 years believing the same to be the mandatory statutory minimum. This was not proper. We say so because although section 170 (1) and (2) of the CPA, mandated the trial magistrate with broad sentencing discretion, she wrongly misapprehended the law resulting into the failure to exercise her discretion to impose a sentence that was proportionate to the circumstances of the case. Apparently, the High Court which was mandated to consider and determine the propriety or otherwise of the imposed punishment, did not do so and instead, sustained the sentence imposed by the trial court. Thus, the sentence impose on the appellant was manifestly excessive. This warrants the intervention of the Court sitting as a second appellate court. Given the circumstances of this case and the settled position of the law that first offenders are entitled to lenient sentence, we are of the considered view that, the maximum custodial sentence imposed by the trial court was manifestly excessive and based on a wrong principle. Therefore, since the appellant has been behind bars for almost two years and a half, we reduce the sentence of thirty years to the extent that would result into his release from prison. 7 We allow the appeal and order the immediate release of the appellant from custody unless if held for so other lawful cause. DATED at BUKOBA this 3rd day of December, 2024. S. E. A. MUGASHA JUSTICE OF APPEAL A. S. KHAMIS JUSTICE OF APPEAL M. K. ISMAIL JUSTICE OF APPEAL The Judgment delivered this 3rd day of December, 2024 in the presence of the Appellant appeared in person and Ms. Immaculate Mapunda, Ms. Wampumbulya Shani, both learned Senior State Attorneys assisted by Ms. Evaresta Kimaro, Ms. Matilda Assey, both learned State Attorneys for the respondent / Republic, is hereby certified as a true copy of the original. 8

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