

TANZANIA / JUDGMENT

# Tadeo

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IN THE HIGH OF UNITED REPUBLIC OF TANZANIA TABORA SUB REGISTRY AT TABORA  
CRIMINAL APPEAL NO 26777 OF 2024 (From the decision of District Court of Tabora in Criminal  
Case No. 5637 of 2024) TADEO S/O ISACK..... APPELLANT VERSUS THE  
REPUBLIC..... ..RESPONDENT

## JUDGEMENT

Date of Last Order: 04/11/2024 Date of Delivery: 05/12/2024 MANGO, J The Appellant, Tadeo S/O Isack was charged with two offences namely, Rape contrary to section 130(1), subsection (2)(e) and 131(1) of the Penal Code Cap. 16 R.E 2022 and Impregnating a school girl contrary to section 60A (3) of the Education Act, [Cap. 353 R.E.2022], He was accused of raping and impregnating a girl aged 16 years old who was studying at Chang'a Secondary School. The name of the girl will not be revealed in this judgement in order to protect her dignity. The initials JM will be used to refer to the victim girl in this judgement. After full trial, the District Court of Tabora convicted the Appellant and sentenced him accordingly. Aggrieved by the decision of the trial Court, the 1 Appellant preferred the appeal at hand armed with six grounds of appeal which reads:-

1. That the Trial Court grossly erred in law and fact to find the Appellant guilty while there was inordinate delay by the victim to mention the culprit at the earliest opportunity without justification thereon
2. That the Trial Court erred in law and fact to base conviction on uncorroborated testimony of PW2
3. That the Trial Court erred in law and fact to convict the Appellant despite the Prosecution failure to call material witness one Devota Modest who was the first person to be told the incident
4. That the Trial Court failed to analyse the evidence of the prosecution and ignored the contradictory testimonies of PW2, PW3, PW4 and PW5 on the age of the pregnancy
5. That the Trial Court erred in law and fact to ignore the defence of the Appellant when composing judgement

6. That the Prosecution Case was not proved beyond reasonable doubts On the 4th day November 2024 when the matter was called for hearing, the Appellant appeared in person while the Respondent was represented by Idda Rugakingira, learned State Attorney. Being a lay person, the Appellant had nothing much to submit rather he adopted his grounds of appeal for consideration by the Court. Ms Rugakingira SA, did not support the appeal and she submitted on all grounds of appeal as follows. 2 The learned State Attorney argued that, the first ground of appeal is meritless because failure to mention the perpetrator of sexual offences is not fatal. She submitted that, the victim child in this matter mentioned the Appellant as the person responsible with her pregnancy immediately after she was found to be pregnant. In this she referred to the testimony of PW3 Modest Isack, the father of the victim child who stated that, on 13/12/2023, immediately after the victim's pregnancy tested positive, he asked her as to who is responsible with the pregnancy. According to him, the victim mentioned the Appellant as the person who is responsible with her pregnancy The learned state Attorney submitted further that, the victim child mentioned the Appellant to be responsible with her pregnancy to other people including PW4, D/ CPL Getruda when she was recording her statement and during her testimony before the Court. She insisted that, even during cross examination, the victim insisted that it was the Appellant who is responsible with the pregnancy. On the alleged delay to mention the Appellant immediately after he had canal knowledge of the victim child, she refer the Court to the case of Elia s/o Richard Shoo vs Republic (Criminal Appeal No. 196 of 2021) [2024] TZCA 422 (10 June 2024) in which the Court distinguished the requirement to mention the culprit at the earliest possible time in sexual offences and other criminal offences. On the second ground of appeal, she submitted that, it's not true that the victim's testimony was not corroborated. She argued that, PW2's evidence was corroborated by PW5 the doctor who examined her. The doctor found the victim with no hymen and pregnant. He also tendered a report (PF3) 3 which was admitted without objection. She added that, victim's evidence in sexual offences is considered to be the best evidence as held in the case of Selemani Makumba versus Republic [2006] TLR 379. She concluded in this ground that, in the case at hand, the victims evidence was corroborated by the testimony of PW5 thus, this ground of appeal is meritless On the 3rd of ground of appeal, she submitted that, the party played by Devotha in this matter does not make her a material witness as alleged by the Appellant. She explained that, Devotha Modest, the victim's elder sister merely escorted the victim to hospital, thus her testimony will be limited to their trip to hospital and what transpired at there. She argued that, such piece of evidence is not material as it does not establish anything regarding who raped the victim child. On the 4th ground of appeal, the learned state Attorney conceded that there are minor contradictions on the age of the victim's pregnancy. She highlighted that, PW2 stated that the pregnancy is of 4 months, PW3 the father of the victim, stated the pregnancy was 15 weeks old, PW4 stated that pregnancy was 15 weeks old, and the doctor stated that the pregnancy was of 15 weeks and 2 days. She argued that, the discrepancy is only centered on PW3's and PW4's failure to mention the two days which were mentioned by the doctor. She argued that, such contradictions does not go to the root of the case which concerns school girl. She referred the Court to the case of Charles Manati vs Republic

Criminal Appeal No. 286 of 2017 Court of Appeal of Tanzania at DSM. On the 5th ground of appeal, she argued that, the Court considered defence of the Appellant as it appears at page three of the trial Court's judgement. 4 She prayed that, in case the Court will find that the Trial Court has not considered defence case, it being the first appellate Court, may re-evaluate the defence evidence and come out with its own findings. She referred the Court to the case of Mosi Chacha Iranga and Another VS Republic, Criminal Appeal No. 508 of 2019 Court of Appeal of Tanzania at Musoma regarding the powers of the first Appellate Court to re-evaluate evidence in record. On the 6th ground of appeal, she argued that, the prosecution has proved the case beyond reasonable doubt. She highlighted the main ingredients of the offence and the manner evidence in record established each of them. She started with the age of the victim which is vital in proving statutory rape. She argued that, the age of the victim was proved by the PW2 and PW4 who stated that the victim was of 16 years old at the time the incident took place. She added that, the same is indicated in the PF3 and testimony of the doctor who examined the victim, PW5. The second element is Penetration which was established by testimony of PW2, the victim and PW5 who stated that when he examined the victim he found that, the victim had no hymen and was pregnant. PW2 stated clearly that the Appellant inserted his male organ into her vagina. With such evidence, the State Attorney concluded that, penetration was established. The third element that was considered by the State Attorney goes as to who is responsible with the offence. She argued that, this has been established by the victim who mentioned the appellant to be the person who raped and impregnated her. She then prayed the appeal to be dismissed 5 In his brief rejoinder, the Appellant challenged prosecution evidence to be fabricated and unreliable. He argued that, prosecution evidence was fabricated due to family disputes that exist between him and his brother, PW3, the victim's biological father. He also challenged the prosecution for failure to use DNA evidence in proving his responsibility with the victim's pregnancy. He argued that, there is no DNA test which was conducted to prove that the pregnancy is indeed mine He also insisted that, Devotha was a material witness in this matter because, she is well acquainted with her siblings' behavior including the behavior of the victim child and a family dispute between him and his paternal brother, PW3. On the alleged failure to consider defence testimony, he argued that his evidence was not thoroughly considered by the trial Court. He alluded that, he had a strong defence. He also mentioned that, he had testimony of his brother who stated clearly that, it was a family dispute that made PW3 fabricate this case against him. He then prayed that his appeal be allowed Following new issues raised by the Appellant in his rejoinder, the State Attorney was given an opportunity to respond on the same. She briefly responded on the failure to conduct DNA test that, the same couldn't be conducted since at the time of prosecuting this case, the victim was still pregnant. She added that, DNA test was not necessary in proving rape the offence which is the basis of this Appeal. She concluded that, since the Appellant did not appeal against his conviction on the offence of impregnating a school girl, absence of DNA test cannot be considered to have any effect on the prosecution case. 6 I have considered grounds of appeal adopted by the Appellant, submission by the parties and Court record. Court record does not support the allegations raised by the Appellant on the first

ground of appeal. According to Court record, the victim mentioned the Appellant to be responsible with her pregnancy immediately after she was found to be pregnant. She mentioned the names of the Appellant before the Police who interviewed her, to PW3 who is her father and during Court proceedings. Evidence on record indicates that, the victim child was not aware that she was pregnant until when she was examined by the doctor. According to her testimony, the Appellant threatened her not to inform her mother or anybody at home on the sexual intercourse that she had with the Appellant. As correctly submitted by the State Attorney, sexual offences are traumatizing and its not easy for the victims to speak of the same immediately after their commission. Circumstances in this case are even worse, it was not easy for the victim child to report the incident due to family relationship that exists between her and the Appellant and the alleged threats from the Appellant. In such circumstances, I find the victim to have mentioned the perpetrator of the crime within reasonable time. Thus, the first ground of appeal is meritless. On the second ground of appeal, it is true that the only direct evidence regarding the sexual intercourse between the Appellant and the victim came from the victim herself. Other witnesses testified as to what happened after the victim tested positive in pregnancy test. Despite that there is testimony of the doctor PW5, testified clearly that, he examined the victim and found her to have no intact hymen and that she was pregnant for 15 weeks and 2 days. In such circumstances it cannot be said that, the victim's testimony was not corroborated. In holding so I considered a well-established principle that in sexual offences the testimony of the victim if it passes the reliability test can successfully be relied upon to convict the accused person. In the case at hand the testimony of the victim was very clear. She explained expressly what happened between her and the Appellant, the explanations which establishes that the Appellant raped the victim. This moves the Court to assess whether the prosecution managed to prove their case beyond reasonable doubt. As correctly submitted by the learned state attorney, in the case at hand the Prosecution were duty bound to prove rape and impregnating a school girl. For the offence of rape to be established under section 130(1) and (2) (e) of the Penal Code, the prosecution need to prove penetration, age of the victim. The age of the victim was proved by her father PW3 who stated clearly that the victim was borne in the year 2007 which means she was only 16 at the time the offence was committed. It is well established that the age of the victim can be proved by the victim, parent, birth certificate or medical doctor. See *Mathayo Laurance William Model vs Republic* (Criminal Appeal No. 53 of 2020) [2023] TZCA 52 (20 February 2023). In that regard I find the age of the victim child to have been established that she was 16 years old at the time the offence was committed. On whether there was penetration or not, the prosecution had the testimony of the victim, PW1 and PW5, the doctor who examined the victim. The testimony of the two witnesses established that there was penetration. While PW1 testified that she was raped, the doctor testified on his findings after examination of the victim that the victim's hymen was not intact and she was pregnant. All these establish penetration and with the age of the victim being 16 years, rape under section 130(1) and (2)(e) of the Penal Code is established. The prosecution managed also to establish that the victim was a school girl via the testimony of Emmaculata Kanyala John, EX headmistress of Chang'a Secondary School and Exhibit P1

which indicates that the victim child was a student at the said secondary school with Registration No. 1199. PW1 had a similar testimony regarding her schooling at Changa secondary School. I have considered the alleged contradictions on the age of the pregnancy in which two witnesses stated the length of pregnancy to be 15 weeks; the doctor said it was 15 weeks and two days while the victim stated it was 4 months. The contradictions in my view are very minor since three witnesses stated the age to be 15 weeks. The two days that were mentioned by the doctor came from the Ultra Sound tests result which nobody is expected to mention the same except the doctor. For the victim, pregnancy is measured by missing menses and for the pregnancy which is 15 weeks, ordinary, the victim ought to have missed 4 menses. I hold so because, a month have 4 weeks, thus, 15 weeks is three months and three weeks. Moreover, the length of pregnancy cannot anyhow negate the fact that the victim child is pregnant thus, it is immaterial. In that regard I find it justifiable to ignore the contradictions and find the prosecution managed to establish that the victim was raped and was impregnated while still a school girl. The only remaining issue is whether it was the accused who committed the two offences. 9 The law requires prosecution to prove criminal accusations against the accused person beyond reasonable doubts. In the case at hand, evidence suggests that it was the Appellant who raped and impregnated a school girl. Such evidence is contained in the testimony of the victim child. I am alert that evidence of the victim is enough to convict the accused for sexual offences however, the Courts should not turn a blind eye to evidence that creates doubts in such testimony. In the case at hand I find the defence evidence to have managed to create some doubts as to who exactly raped and impregnated the victim. In his defence, the Appellant raised family disputes related to inheritance to be the reason for fabrication of the case against him. He testified on the bad behavior of PW3's children and the way he tried to discipline them as their uncle. He also pointed out his brother's accusations against him that he had extra marital affairs with his wife. His testimony is collaborated by DW2 THOMAS ISACK MATHIAS, who testified on the sour relationship between the Appellant and his brother PW3 on the reason that the Appellant punished PW3's kids for their misbehavior of communicating with their boyfriends via the Appellant's phone. According to DW2, the misunderstanding, made the Appellant to move, from PW3's house to his father's house. Immediately after moving he was accused of impregnating PW3's daughter. Thorough consideration of defence evidence reveals that, there is a possibility that, the victim child was raped and impregnated by another man as alleged by the Appellant and DW2. In such circumstances, I find it necessary to have DNA evidence collected before determining this appeal. In that regard, I hereby order DNA test of the child and the Appellant be 10 performed in order to clear doubts as to whether the Appellant was the person who raped and impregnated the victim child or not. The evidence be recorded and certified by the Trial Court via section 29(a) of the Magistrate Courts Act and be forwarded to this Court accordingly. While that is being done the Appellant should remain in custody. Dated at Ta bora this 5th day of December 2024  
Z.D.MANGO JUDGE

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