IN THE COURT OF APPEAL OF TANZANIA

AT SHINYANGA

(CORAM: MWARIJA, J.A., KITUSI, J.A. And MGEYEKWA, J.A.)

CRIMINAL APPEAL NO. 150 OF 2020

MAGANGA LUSHINGE ..... APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

(Appeal from the Judgment of the High Court of Tanzania at Shinyanga)

(Mkwizu, J.)

dated the 22nd day of January, 2020

in

Criminal Appeal No. 6 of 2019

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JUDGMENT OF THE COURT

18th & 20th July, 2023

MWARIJA, J.A.:

In the District Court of Kahama at Kahama, the appellant, Maganga Lushinde was charged with two counts. In the first count, he was charged with rape contrary to sections 130 (1) (2) (e) and 131 (1) of the Penal Code, Chapter 16 of the Revised Laws. It was alleged that on different dates and time between the months of April and July 2017 at Ilungu area within Kahama District in Shinyanga Region, the appellant did have carnal knowledge of a school girl aged 17 years. To protect her dignity, she shall hereinafter be referred to as "M.S." or the victim.

In the second count, the appellant was charged with the offence of impregnating a school girl contrary to section 60A (3) of the Education Act, Chapter 353 as amended by the Written Laws (Miscellaneous Amendments) Act No. 2 of 2016. The allegation was that, within the period, time and place stated in the first count, the appellant impregnated the said M.S., a school girl who was aged 17 years.

When the charge was read over to him, the appellant denied both counts and therefore, in the effort to discharge the duty of proving its case, the prosecution called four witnesses to testify, including the victim. On his part, the appellant gave evidence on his own behalf without calling any witness. At the conclusion of the trial, the appellant was found guilty of both counts. He was consequently sentenced to thirty (30) years imprisonment on each count with an order that the sentences should run concurrently.

The facts leading to the prosecution of the appellant may be briefly stated as follows: The victim was at the material time aged 17 years. In June 2017, she noticed that she had become pregnant because she missed her menstruation period. As the pregnancy developed, she started feeling sick and had to be taken to hospital by her paternal

uncle. It was after she had been medically examined that her paternal uncle was informed of the pregnancy. In turn, her paternal uncle informed the victim's father (PW2) her situation. Shocked by the medical examination result, PW2 demanded to know the person who was responsible for the pregnancy and the victim named the appellant, who was known to PW2 because he was his fellow villager.

On that information, PW2 went to report the incident to the ward office, Iyenze and to the school at which the victim was alleged studying. On 14/2/2018, the Ward Executive Officer caused the arrest of the appellant who was thereafter sent to Kahama Police Station. On 15/2/2018, both PW1 and PW2 went to Kahama Police Station where their statements were recorded. The appellant was consequently charged as stated above.

In her testimony PW1 stated that, between May and July 2017, the appellant used to have carnal knowledge of her on several occasions. They used to meet in the bush, near her home. She explained that, the first time when she had sexual intercourse with the appellant in May, 2017, she did not only feel severe pains but the act caused her to bleed from her vagina. Thereafter, they used to meet and

have sexual intercourse frequently in the same bush. She explained in details on how they used to meet in the bush and have sexual intercourse with the appellant. In July 2017, she missed her menstruation period and realized that she was pregnant. Later on 29/1/2019, she delivered a baby. It was her evidence further that, it was the appellant who was responsible for the pregnancy because she had never had sexual intercourse with any other man. Even when she was asked by PW2 about the child, she named the appellant as its father.

Evidence was also given by Kelvin Emilius Dalu (PW4) who was erroneously recorded as PW5. He was at the material time, a teacher of Bukamba Secondary School. He testified that, he knew the victim as one of the students at that school and that her registration number was 1306. He tendered a register (exhibit P1) to prove that, the victim was enrolled in Form II A at the said school.

In his defence evidence, the appellant who testified as DW1, distanced himself from the offences. His evidence was brief. It was to the effect that, on 13/2/2018 at about 00.00 hrs while he was asleep at his home, a group of 10 youths woke him up. They tricked him that he was required to join them in the patrol duty. They went with him to the

village office and when they reached there, he was surprised to be informed by the Village leaders that he was under arrest. He was locked up and on the next day, police officers arrived and took him to Kahama Police Station where he was kept for seven days without being informed of the reason for his arrest. Later on 20/2/2018, he was charged in court. He denied knowing the victim.

After having considered the evidence tendered by the prosecution and the defence, the trial court found that, both counts had been proved against the appellant. The learned trial Senior Resident Magistrate was of the opinion that, the victim, who testified as PW1, was a credible witness. Her evidence to the effect that, the appellant used to have carnal knowledge of her within the period specified in the charge, thereby causing her to conceive and later get a child, was nothing but the truth. The learned Senior Resident Magistrate found also that, the victim was aged 17 years and was, at the material time, a Form II student. As to the appellant's defence, the trial court found that the same did not raise any reasonable doubt against the prosecution case. As a consequence, the appellant was found guilty of both counts, convicted and sentenced to 30 years imprisonment on each count with an order that, the sentences should run concurrently.

Aggrieved by both the conviction and sentence, the appellant appealed to the High Court. His appeal was however, unsuccessful. The first appellate court was satisfied that the conviction was well founded. It upheld the findings of the trial court that PW1 was a credible witness and that her evidence sufficiently proved both counts against the appellant. It found further that, the prosecution evidence successfully proved that the victim was a school girl at the time when she was impregnated. The conviction and sentence were as a result, upheld. Undaunted, the appellant has preferred this second appeal.

In his memorandum of appeal the appellant has raised four grounds which may be paraphrased as follows:-

1. That, the learned first appellate Judge erred in upholding the appellant's conviction while the prosecution did not prove its case beyond reasonable doubt.
2. That, the learned first appellate Judge erred in upholding the decision of the trial court which was based on contradictory evidence of PW2 and PW4 as regards the name of the school at which the victim was allegedly studying.
3. That, the learned first appellate Judge erred in upholding the appellant's conviction and sentences while the trial court

had acted on the evidence of PW4 without ascertaining that he was a teacher at Bukamba Secondary School.

4. That, the learned first appellate Judge erred in upholding the appellant's conviction while the trial court's decision was based on the evidence which was cooked by the prosecution in order to incriminate the appellant.

On the date of hearing, the appellant appeared in person, unrepresented while Ms. Salome Mbughuni, learned Senior State Attorney who was being assisted by Ms. Mboneke Ndimubenya, learned State Attorney represented the respondent Republic.

When he was called upon to argue his grounds of appeal, the appellant adopted them and opted to hear first, the reply submission thereto by the learned State Attorney. In her submissions, Ms. Mbughuni started by point out that, the 2nd and 3rd grounds of appeal raise new issues which were not canvassed in the first appellate court. Citing the case of **William Ntubi v. Director of Public Prosecutions**, Criminal Appeal No. 320 of 2019 (unreported), she urged us not to consider those grounds of appeal.

Having read the two grounds of appeal in question, we agree with Ms. Mbughuni that the same are new grounds. It is a correct position

that the issue which arises in the 2nd ground of appeal, that is, whether the Secondary School at which the victim was studying is Bulamba as named by the victim or Bukamba as stated by PW2 and PW4 did not arise in the first appellate court. Similarly, as for the 3rd ground, the appellant did not challenge in the High Court, the evidence of PW4 that he was a teacher of the secondary school where the victim was studying. As observed in the case of **William Ntubi** (supra) cited by Ms. Mbughumi, where a matter was not raised and dealt with and decided in the lower courts, the same cannot be entertained by this Court in appeal unless it raises a point of law. See also the cases of **Hassan Bundala @ Swaga v. Republic**; Criminal Appeal No. 386 of 2015 and **Jafari Mohamed v. Republic**, Criminal Appeal No. 112 of 2006 (both unreported). We therefore refrain from considering the 2nd and 3rd grounds of appeal.

On the 1st ground, the learned Senior State Attorney argued that, the two counts were proved beyond reasonable doubt. On the first count, it was Ms. Mbughuni's submission that, the evidence of PW1 proved that, between the months of May and July 2017, the appellant and the victim were in a relationship out of which they used to have sexual intercourse frequently. Relying *inter alia* on the case of

Selemani Makumba v. Republic [2006] T.L.R. 379, the learned Senior State Attorney argued that, the evidence of PW1 which was believed by the two courts below sufficiently proved that fact. The learned Senior State Attorney submitted further that, since from the evidence of the victim's father (PW2) and the victim herself, her age at the material time was 17 years, the appellant committed statutory rape.

With regard to the 2nd count, again, relying on the case of **Selemani Makumba** (supra) and also the case of **Bashiru Salum Sudi v. Republic**, Criminal Appeal No. 379 of 2018 (unreported), the learned Ms. Mbughuni argued that, the evidence of PW1 proved that, she was at the material time, a school girl studying at Bukamba Secondary School. The learned Senior State Attorney relied on the evidence of PW4, arguing that, even though exhibit P1 was not read out thus deserving to be expunged from the record, the oral evidence of PW4 was credible and therefore, proved that the victim was a school girl.

While praying therefore, that exhibit P1 be expunged from the record, she urged us to uphold the finding that the evidence of PW4 had validly supported the evidence of PW1 that she was at the material time,

a student of Bukamba Secondary School. Ms. Mbughuni cited the case of **Annania Clavery Batela v. Republic**, Criminal Appeal No. 355 of 2017 (unreported) to bolster her argument that despite expungement of a document, its contents may be proved by oral evidence.

On the 4th ground, Ms. Mbughuni was brief. She argued that, the prosecution witnesses testified on what was in their own knowledge which ultimately proved the two counts against the appellant and so, there was no evidence which was cooked by the prosecution. She added that, as found by the two courts below, the witnesses were credible thus dispelling the appellant's contention that the evidence was fabricated.

After the learned State Attorney had finished making her submissions, we probed her on the propriety or otherwise of the sentence meted out to the appellant on the 2nd count. Her response was that, although the awarded sentence of 30 years imprisonment is the maximum punishment for the offence, even though the appellant was a first offender, the sentence was proper because the learned Senior Resident Magistrate exercised discretion to award it and since it is the one provided for under section 60 A (3) of Cap. 353 as amended by Act No. 2 of 2016, the same is not illegal.

In his rejoinder, the appellant did not have much to submit. He urged the Court to consider his grounds of appeal and allow his appeal.

Having considered the submissions made by the learned Senior State Attorney in reply to the 1st and 4th grounds of appeal, we hasten to state that, determination of the issues arising therefrom, rests on the credibility of the evidence tendered by the prosecution witnesses, particularly PW1 who was, in that respect, the prosecution's key witness. Both the trial court and the first appellate court found her credible and therefore, acted on her evidence to find, **first**, that between the months of May and August 2017 the appellant used to have carnal knowledge of her causing her to become pregnant and later delivered a baby. **Secondly**, that at the material time, she was a Form II student at Bukamba Secondary School. On his part, the appellant maintained his complaint that the findings of the first appellate court are erroneous.

It is trite principle that, in a second appeal like this one, the Court will not readily interfere with concurrent findings of the two courts below on matters of fact unless certain irregulates or violations were committed by the first appellate court in its decision. The principle was

reiterated in the case of **Wankuru Mwita v. Republic**, Criminal Appeal No. 219 of 2012 (unreported). The Court stated as follows:-

> *"The law is well settled that on second appeal, the Court will not readily disturb concurrent findings of facts by the trial court and first appellate court unless it can be shown that they are perverse, demonstrably wrong or clearly unreasonable or are a result of a complete misapprehension of the substance, nature or non-direction on the evidence; a violation of some principle of law or procedure or have occasioned a miscarriage of justice."*

See also the cases of **The Director of Public Prosecutions v. Jaffari Mfaume Kawawa** [1991] T.L.R. 149 and **Mussa Mwaikunda v. Republic** [2006] 387.

Having gone through the record, we are of the settled mind that, both courts below were justified to arrive at the finding that the witnesses for the prosecution were credible and therefore, properly acted on their evidence, particularly that of PW1 and PW2, that the victim was 17 years old. They also acted properly in acting on her evidence to find that, a statutory rape was committed on her by the appellant. We also agree with the decision of the first appellate court

that, from the victim's evidence, as supported by that of PW4, she was at the material time, a school girl. On the basis of the credible evidence of the witnesses, particularly PW1, PW2 and PW4 we similarly find that, the 4th ground of appeal is devoid of merit. We therefore, do not find any sound reasons to fault the decision of the High Court. In the event, we dismiss the appeal against the appellant's conviction on both counts and the sentence on the first count.

With regard to the sentence on the second count, as pointed out above, is the maximum for the offence. The punishment for the offence of impregnating a school girl is provided by sub-section (3) of section 60 A of the Cap. 353 as follows:-

> *"Any person who impregnates a primary school or a secondary school girl commits an offence and shall, on conviction, be* ***liable*** *to imprisonment for a term of thirty years."*
>
> [Emphasis added].

According to the record, the appellant was a first offender and during sentencing, the learned trial Senior Resident Magistrate recorded the mitigation and the aggravating factors as submitted by the appellant and the prosecution respectively. However, although he recorded that he

had considered that the appellant was a first offender, he proceeded to award the maximum sentence. That was with respect, patently wrong as it is against the sentencing principles.

In the case of **Nemes Myombe Ntalanda v. Republic**, Criminal Appeal No. 1 of 2019 (unreported), the Court stated that:-

> *"It is trite law, in sentencing, the trial court has to balance between aggravating factors which tend towards increasing the sentence awardable and mitigating factors which tend to towards exercising leniency. See:* ***Bernard Kapojosye v. The Republic,*** *Criminal Appeal No. 411 of 2013 (unreported)."*

The award of maximum sentence by the trial court indicates that, it did not consider the appellant's mitigation and the fact that he was a first offender. So, although the learned Senior State Attorney submitted that the trial magistrate exercised his discretion, we find that if that is the case, if at all then he did not exercise it judiciously. We think therefore that, this is a suitable case in which the Court can interfere with the awarded sentence.

In the case of **Tofiki Juma v. Republic**, Criminal Appeal No. 418 of 2013 (unreported) the Court restated the grounds upon which an appeal Court may interfere with sentence. The grounds are:-

> " *(i) Where the sentence is manifestly excessive or it is so excessive as to shock.*
>
> *(ii) Where the sentence is manifestly inadequate.*
>
> *(iii) Where the sentence is based upon a wrong principle of sentencing.*
>
> *(iv) Where a trial court overlooked a material factor.*
>
> *(v) Where the sentence has been based on irrelevant consideration such as race or religion of the offender.*
>
> *(vi) Where the sentence is plainly illegal, as for example corporal punishment being imposed for the offence of receiving stolen property.*
>
> *(vii) Where the trial court did not consider the time spent in remand by the accused person."*

What then is the appropriate sentence in the particular circumstances of this case? In our recent decision in the case of **Shagi Mangóma v. Republic**, Criminal Appeal No. 356 of 2020 (unreported) in which a similar scenario occurred, we quashed and set aside that sentence thirty

(30) years imprisonment and substituted it with the sentence of Six (6) years imprisonment. The substituted sentence is, in our view, appropriate to the case at hand. For that reason, we quash and set aside the sentence of 30 years imprisonment imposed on the appellant on the 2nd count and substitute for it the sentence of six (6) years imprisonment. The substituted sentence should run from the date of commencement of the previous sentence.

DATED at **SHINYANGA** this 19th day of July, 2023.

A. G. MWARIJA
JUSTICE OF APPEAL

I. P. KITUSI
JUSTICE OF APPEAL

A. Z. MGEYEKWA
JUSTICE OF APPEAL

The Judgment delivered this 20th day of July, 2023 in the presence of the Appellant in person and Mr. Louis Boniface, learned State Attorney for the Respondent/Republic is hereby certified as a true copy of the original.

R. W. CHAUNGU
DEPUTY REGISTRAR
COURT OF APPEAL