THE UNITED REPUBLIC OF TANZANIA

JUDICIARY

IN THE HIGH COURT OF TANZANIA

MBEYA DISTRICT REGISTRY

AT MBEYA

CRIMINAL APPEAL NO. 26 OF 2023

(Originating from the District Court of Mbarali District at Rujewa, in Criminal Case No. 16 of 2021)

ADELHARD FREDDIE MJINDO .....APPELLANT

VERSUS

THE REPUBLIC.....RESPONDENT

JUDGMENT

Date of Last Order: 12/06/2023
Date of Judgement: 30/06/2023

Ndunguru, J.

The appellant was charged tried, convicted and sentenced to serve 20 years imprisonment for the offence of demanding sexual favour contrary to section 25 of the Prevention and Combating of Corruption Act No. 11 of 2007 (the PCCA), read together with paragraph 21 of the First Schedule to, and section 57 (1) and 60 (2) of the Economic and Organised Crime Control Act, Cap 200 R.E 2019.

It was alleged in the particulars of offence that on 22nd day of September, 2020 at Executive Guest House within Mbarali District in

Mbeya Region, the appellant being a head teacher of Nyeregete Primary School responsible for School administration, in exercise of his authority, demanded sexual favour from a standard seven pupil one H.J.M (name withheld, to be referred as the complainant or PW4 interchangeably) as a condition for giving the said HJM his grades in examination. The appellant denied the charge hence the case went to a full trial.

The facts of the case can be briefly narrated that; the appellant was the head teacher of Nyeregete Primary school whereas the complainant was a standard VII student thereat. The appellant was arrested at Executive Guest House on 22/09/2020 allegedly found with the complainant in Room No. 4 preparing for sexual intercourse with her. It was further alleged that when the appellant seduced the complainant demanding sex was intimidating her that if she denies would fail standard VII examination. The complainant being fed up of the teacher's habit she approached the PCCB office and reported the incident. That upon the report the PCCB set a trap which managed to arrest him.

At the end, the trial Court was impressed by the prosecution evidence hence convicted the appellant and sentenced him as shown above. Aggrieved with both the conviction and sentence, the appellant preferred this appeal raising four (4) ground as follows:

1. *That the trial court erred in law and fact by ignoring the appellant's defence in arriving at its decision.*
2. *That, the trial court erred in law and fact by failure to admit documentary evidence tendered by the appellant.*
3. *That the trial court erred in law and fact by convicting and sentencing the appellant basing on malice.*
4. *That the trial court erred in law and fact for convicting and sentencing the appellant while the case was not proved beyond reasonable doubts.*

He prayed the court to allow the appeal, quash the conviction and set aside the sentence and the appellant be released from the custody.

During hearing of the appeal on 12/06/2023 the appellant was represented by advocate Mathayo Mbilinyi while the respondent/Republic appeared through Ms. Elisia Paul, learned State Attorney.

Advocate Mbilinyi in amplifying the grounds of appeal he abandoned ground 3 then argued the rest as follows; on the 1st ground of appeal he contended that the appellant's defence was ignored as he denied to be at the guest house but was called there to identify the student and there was no visitor's book which was tendered to prove the allegation of him being found with the complainant at the guest house.

He added that the prosecution witnesses contradicted regarding the signing of book by the appellant. That when PW2 told the court that he did not sign, PW1 said that he recorded a wrong name. According to him such contradiction went to the root of the case which shows that the prosecution failed to prove the presence of the appellant at the scene.

On the 2nd ground he argued that the trial court erred for failure to admit the appellant's documentary evidence which intended to prove the victim's ill will she had against the appellant. He went on arguing that a document can be tendered by any person having knowledge of the same. The appellant had knowledge with the document he intended to tender he submitted. In the counsel's view the non-admission of the said document has the effect of denying the appellant's right to be heard as it formed the base of his defence.

As to the 4th ground advocate Mbilinyi submitted that the prosecution did not prove the case at the required standard since they failed to link the appellant with the offence. That the prosecution failed to prove the presence of the appellant in the guest house with the complainant as they did not produce the book. He urged this court to find the appeal meritorious so be allowed.

Ms. Paul for the respondent resisted the appeal and submitted regarding the 1st ground of appeal that the appellant defence was well analysed and considered but did not punch any hole to the stiff prosecution's evidence. Armed with the decision in the case of **Anthon Jeremiah Sorya v. R.** Criminal Appeal No. 52 of 2019 CAT (unreported) it was her contention that it is not necessarily that defence evidence be accepted.

As to the ground that the prosecution did not prove the appellant to be found with the complainant in the guest house, she submitted that the evidence of PW1, PW2, and PW3 said it all that the appellant was found thereat with soda, chips and condom. The fact that he did not sign the guest's book does not exonerate him since he was arrested there, Ms. Paul argued. Also, that PW2 told the trial court that the appellant denied to sign the book.

Regarding the 2nd ground of appeal Ms. Paul submitted that the appellant's document was rejected for being a photocopy in view of section 68 of the Evidence Act, Cap. 6. Further that the same was certified by the advocate instead of being certified by the custodian of it. Further, that the document (a letter) had neither folia number nor receipt stamp therefore was not a proper document to be admitted.

With regard to the 4th ground of appeal Ms. Paul argued that the prosecution managed to prove the case at the required standard through the four witnesses and exhibit which proved the appellant's presence at the crime scene. Further that the appellant admitted to have seduced the complainant and there was ample evidence that he was found in room No. 4 in the guest house with the complainant. She firmly submitted that PW4 told all about how she was seduced and threatened to fail examination and the way they were found in the guest house. Ms. Paul thus, prayed for the dismissal of the appeal.

In rejoinder submissions, counsel for the appellant insisted that without guest's book there was no proof that the appellant was at the guest house before he was called there. He also insisted that the prosecution witnesses contradicted themselves and the contradiction went to the root of the case. He concluded by insisting the earlier prayer.

I have considered the grounds of appeal, submissions by the parties, the record and the law. The major issue for deliberation is whether the instant appeal is meritorious. I will determine the grounds of appeal as they were conversed by the counsel for the parties save that I will start with the 2nd ground of appeal which states that the trial

court erred in law and fact by failure to admit documentary evidence tendered by the appellant.

It was the appellant's counsel contention that it was improper for the trial court to reject it on the reason that the appellant was not custodian of the same. The learned State Attorney on her part stated that the same was properly rejected for contravening section 68 of the Evidence Act as the document was a copy and it was certified by the advocate.

It is unfortunate this court has no an opportunity to see the contested document as it does not form part of the record since it was not admitted. However, the obvious facts pertaining to that documents are found at page 60 of the typed trial court proceedings. It appears that the appellant alleged that the complainant was of unbecoming behaviour at the school he headed. For that reason of unbecoming behaviour vide his position (head teacher) he wrote a letter to the Village Executive Officer (VEO) informing him of that fact. The appellant wanted to tender the said letter as an exhibit.

Unfortunately, it faced an objection by the prosecution on the reasons that, the appellant was at that time not in the office as the head teacher, thus, the letter was no longer his but of the office of head

teacher, that the letter was a photocopy certified on the same date (the date of tendering it) by the advocate instead of being certified by the public officer where it emanated in terms of section 85 of the Evidence Act.

In turn, it was maintained by the defence counsel that since the letter had reference number, dated and stamped then certified by the commission for oaths was viable for being admitted.

Conversely, considering the fact that the purported letter was addressed to the VEO as a public officer, it is of no doubt therefore that he (VEO) held it by virtual of his office hence a public document. Despite the law that a certified copy can be admitted as evidence per section 65 (1) of the Evidence Act, certification of public documents is done by a public officer, the custodian of that document. This is in accordance with section 85 of the Evidence Act. In the premises, a copy of a public document certified by the commissioner for oaths as it was the case in the matter at hand would have not admitted. Though the trial court rejected it for another reason this court finds that the same was properly rejected. The 2nd ground of appeal is therefore dismissed.

Coming to the 1st ground of appeal that the trial court erred by ignoring the appellant's defence in arriving at its decision. I need not

belaboured by that complaint. As correctly argued by the learned State Attorney, courts are not enjoined to always accept the defence evidence if; in the court's view does not punch a hole in the prosecution's evidence. The law only presses a duty to the trial court to analyse and consider defence evidence; see **Stayoo Kundai v. Republic** [2008] TLR 352 and **Hussein Idd & another v. Republic** [1986] TLR 169. Which means non-acceptance of defence evidence does not mean failure to consider it; see **Godfrey Mwandemwa v. Republic,** Criminal Appeal No. 409 of 2020 Court of Appeal of Tanzania at Mbeya (unreported). In the event, I also dismiss the 1st ground of appeal.

I have remained with the 4th ground which is the complaint that the case was not proved to the required standard. The learned State Attorney resisted the complaint on the account that the prosecution proved the charge through its witnesses and exhibit. I had time to scan the entire evidence led by both parties at the trial Court. I have also keenly read the impugned judgement.

In the verge of convicting the appellant the learned trial Magistrate was of the view that since the appellant was a headteacher (headmaster), the victim was her student the two would not be found in a room for any other purpose than the demand of sexual favour.

I am concerned to quote a paragraph containing the reasoning of the trial Magistrate which formed the base of convicting the appellant. It reads:

> *"In this case it is proved beyond doubt that the accused was found inside room Number 4 at Executive Guest House with the victim. I am trying to figure out the headmaster with his student in a four walled area, meaning the place to be serious private place* ***what was the demand if was not sexual favor****? Let me assume he wishes to teach her English subject as he is teaching English, no teaching instruments were found inside the room but rather the condoms which is used for sex and the food as the victim alleged to be hungry as delaying technique for PCCB officers to appear"* (Emphasis added).

The line of reasoning of the trial Magistrate as I understood, was that the prosecution proved the offence of demanding sexual favour as the charge stated. That is the essence of this Court adding emphasis there.

A starting point, in my view, should be the section which creates the offence of which the appellant was charged with. That is section 25 of the Prevention and Combating of Corruption Act, Cap. 329 R.E 2019. It states that:

> *"25. Any person being in a position of power or authority, who in the exercise of his authority, demands or imposes sexual favours or any other favour on any person as a condition for giving employment, a promotion, a right, a privilege or any preferential treatment, commits an offence and shall be liable on conviction to a fine not exceeding five million shillings or to imprisonment for a term not exceeding three years or to both"*

I view of the above provision, for a person to be found guilty of the offence, the following must be proved, that:

i) A person/accused is in a position of power or authority,

ii) In the exercise of his power or authority demands sexual favours

iii) Sexual favour must be demanded as a condition for giving;

a) employment,

b) a promotion,

c) a right,

d) a privilege or

e) any preferential treatment.

It should be noted however that the conditions set in (a - e) must not be in accumulative but one of them suffices. Therefore, if the evidence is led proving that the accused was in power or authority, in exercise of that authority he demanded sexual favour from a person in order to give that person either; employment, promotion, right, privilege or any preferential treatment, the accused will be found guilty of the offence.

The issue at this juncture, therefore, is whether the charge was proved against the appellant in connection with the above law.

The evidence available is that the appellant was the Head Teacher of Nyeregete Primary School. According to Regulation 12 (1) of the Local Government (Teachers' Service) Scheme, 2016 GN. No. 311 of 0216 the Head of school is the supervisor of teachers, give directives and ensure proper performance of the public service obligation in his respective school. For that no doubt that the appellant was a person in position of power.

Another evidence which is also the undisputed fact is that the complainant (PW4) was a student of standard VII at Nyeregete Primary School. This means that the complainant was under the control of the appellant. The dispute is on the allegation that the appellant demanded sexual favour from the complainant as a condition of giving the complainant high grades in examination.

The appellant denied the allegation whereas all witnesses lined up were trying to prove that the appellant demanded sexual favour from the complainant threatening her to fail standard VII examination.

In her evidence PW4 told the trial court that the appellant used to seduce her when she denied him, he said she will fail standard (7) seven examination. On his part PW1 said that as PCCB officer was told by PW4 that the appellant was threatening her to fail if his demands were not fulfilled. When he was cross examined, he said PW4 was complaining that her head teacher was demanding sex for a long time and that he threatened if she refused, he could do something to her exams.

This court doubts whether conditions improvised under item iii) (a – e) above existed. The question is whether threatening to fail can be construed as a right, a promotion, a privilege or preferential treatment. The language of the statute under section 25 of PCCA is not ambiguous.

The law requires that if language in the provision is plain it does not need other interpretations technique; see **Republic vs Mwesige Geofrey and Another**, Criminal Appeal No. 355 of 2014 CAT at Bukoba (unreported). The Court observed at page 12 that:

> *".....the starting point for interpreting statute is the language of the statute itself. Absenting a clearly expressed legislative intention to the contrary, that language must ordinarily be regarded as conclusive.....* ***"if a statute's language is plain and clear: the duty of interpretation does not arise and the rules which are to aid doubtful meaning need no discussion".***" (Bold emphasis is added)

Be as it may, threatening one to fail exam does not fit within the ambit of favours listed under section 25 of PCCA. It is neither a right, a promotion, a privilege nor preferential treatment. The nature of the privileges in the provision is gaining of an advantage as the prosecution formulated in the charge sheet that the appellant pressed a condition of giving the complainant high grades. Nevertheless, the evidence adduced was totally different since there was no witness who dared to state that

the appellant was telling the complainant that if they had sexual intercourse complainant would be given high grades. In the circumstances, intimidation to fail cannot be construed as a right, privilege or preferential treatment.

In addition, assuming without deciding that the intimidation refers to preferential treatment. The prosecution would have led evidence showing how a mere teacher be it head teacher would have influenced a standard VII examination. I take note, which the prosecution would have also taken that the responsible authority for standard VII examination is the National Examination Council of Tanzania (NECTA).

Given the circumstance, no matter how the alleged act of the appellant would have been unpleasant, any threat to the complainant to fail standard VII examination would not fall under the ambit of corruption rather a misconduct for a head teacher, a grown-up person of the age of the appellant to seduce a child of the age of the complainant.

Despite of the observation above, I am also impressed with the appellant's counsel contention that the prosecution's evidence had some contradictions which goes to the root of the case. Considering the defence evidence that the appellant was not at crime scene before he

was called by one of the PCCB officer to the place with the view of identifying the complainant. Also, considering the appellant's evidence that the complainant was a girl of unbecoming behaviour this court took a view that the evidence of PW1 and PW4 had material contradictions. For example, when PW1 told the trial court that on 22/9/2020 when the appellant called the complainant in the morning then told her about the plan of meeting at Rujewa, the complainant went to their office (PCCB office) around 1100 hour and reported the incident. Whereas, the complaint said that she made a phone call to PCCB to tell them about the incident. The question is, if she made a phone call to the PCCB as soon as she was called for the plan by the appellant where at that time got the phone. Is it that a standard VII student had a phone with her? Assuming she was given for the purpose of her to report as the PCCB had started to trap the appellant, why that was not revealed through evidence. What was the intention of PW1 avoiding the trial Court to know about the complaint to have phone. All these questions raise doubt which should be resolved in favour of the appellant.

In view of the above, it is my conviction that the prosecution did not prove the charge against the appellant beyond reasonable doubt. I hereby, therefore, allow the appeal quash the conviction and set aside

the sentence imposed on the appellant. I order the appellant be released from prison unless he is held therein for another lawful cause.

It is so ordered.

D.B. NDUNGURU

JUDGE

30/06/2023