IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

[IN THE DISTRICT REGISTRY OF ARUSHA]

AT ARUSHA

CRIMINAL APPEAL NO. 49 OF 2023

(Originating from Arumeru District Court, Criminal Case No. 34 of 2022)

PRINCE CHARLES S/O CHARLES MANANG..... APPELLANT

VERSUS

THE REPUBLIC.....RESPONDENT

JUDGMENT

19th June & 21st July, 2023

TIGANGA, J.

In this appeal, the appellant was arraigned before the District Court of Arumeru at Arumeru (trial court) in Criminal Case No. 34 of 2022 (I.T. Nguvava, SRM) on 21st June 2022 where he was charged with and convicted of the offence of Impregnating a schoolgirl contrary to section 60A (3) of the **Education Act**, [Cap 353, R.E. 2002] as amended by section 22 of the **Written Laws Miscellaneous Amendment** (No. 2) Act No. 4 of 2016 (The Education Act).

The particulars of the offence as per the charge sheet are that, on 24th December, 2021, at Tengeru area within Arumeru District in Arusha Region, the appellant had carnal knowledge with **GE** (name withheld) a girl of eighteen years old and a form four student at Nkoarisambu

Secondary School and as a result, impregnated her. When he was arraigned before the court he pleaded not guilty and during the preliminary hearing he admitted to his personal particular particulars as they appear in the charge sheet and the facts. He also admitted to being arrested and arraigned before the court. Following that plea and response to the fact, the prosecution called four witnesses and tendered three exhibits. To understand what led to the arrest arraignment and conviction of the appellant I find it apt to narrate albeit briefly the historical background fact of the case. The unfortunate ordeal came to light when the victim was allegedly diagnosed pregnant by the school and when her parents cornered her, she mentioned the appellant as the one responsible. The victim who featured as PW1 during the trial told the court that, she voluntarily had sexual intercourse with the appellant two times without protection hence she was certain that he was the one responsible for her pregnancy.

The evidence also shows that, after the child was born, DNA samples were taken from the child, PW1, and the appellant and after the testing, the result showed that, the possibility of the appellant being the father was 99.99%. In other words, the DNA analysis proved the appellant as the father of the child.

In his defence, the appellant did not deny having sexual intercourse with PW1. According to him, he knew the victim from their church where they worship together but on the 24th December, 2021, she followed him to his college room as he is a student at the Institute of Accountancy Arusha – IAA where he was undertaking studies, requesting assistance in drafting a letter so that she can also join the College. While in that room, the appellant tempted and had sex with her. He also does not deny being the father to the child born out of the deed. He however claimed it was one time act and that he did not know if the victim was either underage or still a schoolgirl.

The trial court was satisfied that, the case against the appellant was proved to the required standard and hence found him guilty, convicted, and sentenced him to serve thirty (30) years imprisonment. Aggrieved by the decision, he preferred this appeal on the following three (3) grounds;

1. That, the trial magistrate erred in law and in fact in convicting the appellant while the case against him was not proved beyond reasonable doubt.
2. That, the trial magistrate erred in law and fact in failing to draw adverse inferences on the prosecution side's failure to call material witnesses and evidence.

3. That, the trial magistrate erred in law and fact in imposing a maximum term of thirty years imprisonment stipulated by section 60A (3) of the **Education Act**, Cap 353 Cap 353, R.E. 2002 as amended by section 22 of the **Written Laws Miscellaneous Amendment** (No. 2) Act No. 4 of 2016.

During the hearing of the appeal, the appellant was represented by Mrs. Aziza Shakale, learned Advocate while the respondent was represented by Ms. Akisa Mhando, learned State Attorney.

Supporting the appeal, Mrs. Shakale submitted on the 1st and 2nd grounds that, the case was not proved at the required standard because there was no evidence to prove two ingredients of the offence namely; that the victim was a student of either Primary School or Secondary School and that the appellant was the one who impregnated her. She stated that, it was the duty of the prosecution to prove the case beyond reasonable doubt as held in the case of **Augustino Emmanuel vs. The Republic,** Criminal Appeal No. 08 of 2020. In her view, the ingredients of the offence were not proved and the court relied on the evidence of the victim who told the court that, she had sexual intercourse with the appellant on 24th December, 2021. However, when she was cross-examined, she changed and said she had sex with him on 18th December, 2021. The counsel's

contention is that, apart from her testimony, no other witness corroborated this allegation.

She submitted further that, the appellant's defence that he did not know if the victim was underage and was still a school student, was not considered by the court, for had it been considered some important witnesses like a teacher/Matron who discovered the pregnancy was supposed to be called to prove that she was really a school girl and was discontinued, but were never summoned to testify in court as to whether or not the victim was a secondary school student. She asserted that, the prosecution's failure to call such witnesses should be resolved in favour of the appellant that failure the prosecution failed to prove if at all that the victim was a schoolgirl and the appellant had carnal knowledge with her on 24th December, 2021 with knowledge.

On the 3rd ground, Ms. Shakale submitted that, the Court erred in imposing the maximum sentence while the same is a discretionary and not a mandatory sentence. That, under section 60A (3) of the Education Act, the court had the discretion to sentence the appellant who is still young up to a sentence of a conditional discharge but not the maximum sentence as he did. She referred the court to the case of **Jafari Juma vs. The Republic,** Criminal Appeal No. 252 of 2019 (unreported) where

the Court of Appeal of Tanzania insisted that the penalty should not be maximum. In consonance to what she has submitted she prayed for this court to allow the appeal, to quash judgment and set aside the sentence and acquit him.

While opposing the appeal, Ms. Mhando submitted on the 1st and 2nd grounds of appeal that, the victim did prove that she was a student a fact which the appellant never disputed during cross-examination. Relying on the principle in the case of **Joseph Kanankira vs. The Republic**, Criminal Appeal No. 240 of 2019 (unreported) she submitted that failure to cross-examination amounted to an admission of facts. Further, according to her, there is no number of witnesses required to prove a case, what matters is the quality of evidence and not the quantity of witnesses. To support this argument, she referred the court to the case of **Halfan Ndubashe vs. The Republic,** Criminal Appeal No. 493 of 2017 CAT at Tabora. (unreported) Since the appellant did not disprove the fact that PW1 was a student, her evidence was therefore credible.

On the sentence imposed, the learned Senior State Attorney argued that, the trial court was justified to impose such a sentence due to the deceptions applied and on page 9 of the judgment, the trial magistrate gave his reasons. She prayed that the appeal be dismissed.

In her brief rejoinder, Mrs. Shakale reiterated her earlier position in the submission in chief and pleaded for the appellant to be acquitted as the case against him was not proved at the required standard beyond reasonable doubt.

Having gone through the trial court's records and the parties' rival submissions, I now proceed to determine the grounds of appeal which are centered on one main issue whether the case against the appellant was proved at the required standard.

Starting with the 1st and the 2nd grounds of appeal which raises the complaint that the case was not proved at the required standard, the ingredients to be proved are provided under section 60A (3) of the **Education Act** (supra) as amended by section of the **Written Laws Miscellaneous Amendment (No. 2) Act** No. 4 of 2016 provides that;

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

From this provision, two ingredients have to be proved, **first** is whether the victim was a primary or secondary schoolgirl when she was impregnated and **second**, is whether the appellant was the one responsible to impregnate her. Since the appellant does not deny the fact

that he impregnated the victim, the only issue for consideration is whether the remained ingredient was proved. That is; whether the victim was a primary or secondary school student.

In her testimony, PW1 told the court that, in 2021 she was a form three student at Ngwanesambu Secondary School when the appellant impregnated her. Following regular checks by the school authority, in 2022, when she was in form four, she was discovered to be pregnant and hence, she was discontinued by being given a letter to take to her parents informing them of that decision. She however escaped from home and run to her grandmother who later returned her home until when she delivered. She mentioned the appellant as the one responsible for the pregnancy. Now, from this narration, I find two issues wanting;

One, none of the school personnel, the parents, or even the grandmother who would have been important witnesses to prove that the victim was a schoolgirl were summoned to testify before the trial court to add weight to the victim's contention that she was indeed a schoolgirl. These in my view or any of them, were material witnesses as far as proving the ingredient of the offence is concerned. In the case of **Ahmed Salum Hassan @ Chinga vs. The Republic**, Criminal Appeal No. 386 of 2021,

CAT at Dsm, the Court of Appeal had this to say concerning the failure to call material witnesses to the case, it held thus;

> *"The position of law is that, failure to call a witness who is in a better position to explain some missing links in the prosecution case justifies an adverse inference against the prosecution. There are many decisions in support of this proposition. See for instance,* ***Boniface Kundakira Tarimo vs. R.,*** *Criminal Appeal No. 350 of 2008,* ***Issa Reji Mafuta v. R,*** *Criminal Appeal No. 337 of 2020, and* ***Yohana Chibwingu v. R,*** *Criminal Appeal No. 177 of 2015 (all unreported). In* ***Tarimo's case,*** *in particular, it was observed:*
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> > *"It is thus now settled that, where a witness who is in a better position to explain some missing links in the party's case, is not called without sufficient reason being shown by the party, an adverse inference may be drawn against that party, even if such inference is only permissible."*

Section 3(2)(a) and 110 of the Evidence Act, as interpreted by the court in the case of **Magendo Paul vs The Republic** [1993] TLR 219, requires the prosecution to prove the case at the standard beyond reasonable doubt. It is my considered opinion that, the import of section 60A (3) of the Education Act as amended by section 22 of the Written Laws Miscellaneous Amendment (No. 2) Act No. 4 of 2016, is to punish

those who cut short dreams of schoolgirls and deter perverts and the society at large from playing with a girl child's future. In the appeal at hand, the appellant told the court that, he did not know if the victim was still a schoolgirl, and as the record may imply, she no longer goes to school. However, more evidence was needed from the school, parents, or guardians to show that, she was a student and her future was ruined following the pregnancy occasioned by the appellant. Failure to call those material witnesses entitles the Court to draw an adverse inference against the prosecution but, in favour of the appellant that he indeed was not aware that the victim was still a student when they had sexual intercourse.

Two; it is not clear whether the victim was expelled or suspended from school. She just told the court that, she was given a letter which she took to her parents. Neither was the said letter tendered in court nor any documentation from the school was tendered in court to prove that, the victim was a schoolgirl and her studies were cut short due to her pregnancy.

In light of the above, I am of the firm view that, the second ingredient of the offence of impregnating a schoolgirl was not proved beyond reasonable doubt as required by law. The 1st and 2nd grounds of appeal have merit and they are allowed.

As to the 3rd ground regarding the excessive punishment imposed on the appellant, the Court of Appeal in the case of **Sokoine Mtahali @ Chimwongwa vs. The Republic**, Criminal Appeal No. 459 of 2018 CAT at Moshi (unreported) interpreted section 60A (3) of the Education Act with regard to the punishment as follows;

> *"The above phrase "shall, on conviction, be liable to imprisonment for a term of thirty years" to which we have supplied emphasis, does not impose the custodial term of thirty years as the mandatory penalty. It gives discretion to the trial court, subject to its sentencing jurisdiction, to sentence the offender up to the maximum of thirty years imprisonment depending upon the circumstances of the case after considering all mitigating and aggravating factors.*
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> *The decision by the erstwhile Court of Appeal for East Africa in* ***Opoya v. Uganda*** *[1967] E.A. 752 on an appeal originating from Uganda is quite instructive. In that case at page 754 of the report, the court interpreted the phrase "shall be liable to" as follows:*
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> > *"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 provide a maximum*

sentence only and while the liability existed the court might not see fit to impose it" [Emphasis added]

In the end, the Court of Appeal maintained that, the trial magistrate had, in terms of section 170 (1) and (2) of the **Criminal Procedure Act**, [Cap 20 R.E. 2022] a broad sentencing discretion that, he could have imposed instead of the maximum prescribed penalty as the mandatory punishment. I do not fully subscribe to the same position but am also bound by it, and therefore I join hands with the appellant that, the punishment of thirty years imprisonment imposed against him was so severe considering the fact that, the appellant was very young aged only 22 years old, a first offender, and a college student. This ground also has merit and is allowed.

Based on what has been discussed above, I find the case against the appellant was not proved to the required standard. The trial court was not justified to find him guilty and convict him. I allow the appeal, quash the trial court's judgment, and the conviction, and set aside the sentence meted. Consequent to that, I hereby order the release of the appellant unless lawfully held for another lawful course. Since the appellant does not deny being the father to the baby born out of his relations with PW1,

the latter may, if so wishes, pursue her child's right of maintenance in the appropriate family or Juvenile Court.

It is accordingly ordered.

DATED and **DELIVERED** at Arusha this 21st day of July, 2023

J.C. TIGANGA

JUDGE