IN THE COURT OF APPEAL OF TANZANIA

AT BUKOBA

(CORAM: MBAROUK, J.A., MKUYE, J.A. And WAMBALI, J.A.)

CRIMINAL APPEAL NO. 477 OF 2016

RWEKAZA BERNADO.....APPELLANT

VERSUS

THE REPUBLIC.....RESPONDENT

(Appeal from the decision of the High Court of Tanzania at Bukoba)

(Bongole, J.)

dated the 7th day of October, 2016

in

Criminal Appeal No. 44 of 2015

JUDGMENT OF THE COURT

21st & 30th August, 2018

WAMBALI, J.A.:

The appellant, Rwekaza Bernado appeared before the District Court of Karagwe at Kayanga where he was charged with the offence of rape contrary to sections 130 (1) (2) (e) and 131 of the Penal Code, Cap. 16 R.E 2002. The particulars laid in the charge was to the effect that on 29th January, 2015 at about 11.00 hrs. at Rwaga Kayanga area within Kagarwe District in Kagera

region, the appellant unlawfully had sexual intercourse with one Renatha D/o Lauriani, a girl aged 17 years old. It is in the record that the appellant denied the allegation that was laid in the charge.

The prosecution therefore paraded five witnesses including Renatha D/o Lauriani (PW1), the victim. The appellant gave his defence after the trial court determined that a ***prima facie*** case had been made out. He consistently denied to have committed the offence. Nevertheless, at the end of the trial, the trial District Court of Karagwe was fully convinced that the prosecution had proved its case beyond reasonable doubt. It therefore convicted him, of the offence of rape and imposed a sentence of thirty years imprisonment.

The appellant's appeal to the High Court was dismissed and the conviction and sentence of the trial court was confirmed. The appellant did not give up as he lodged the present appeal before this Court still protesting the conviction and the sentence that was imposed on him by the trial court. The appellant lodged five grounds of appeal before this Court. However at the hearing of the appeal it was agreed by both parties and the court that necessarily the complaint of the appellant in all the grounds centered on the

submission that the prosecution did not prove the case against the appellant to the required standard of proof.

At the hearing of the appeal before us, the appellant appeared in person as he was not represented by a counsel, while Mr. Nestory Paschal Nchiman, learned State Attorney appeared for the respondent Republic.

It is important to note that earlier on the respondent Republic had lodged a notice of preliminary objection on the propriety of the notice of appeal. However, after a short discussion and deliberation by the Court on the nature of the defect, the learned State Attorney prayed to withdraw the said notice and the court marked it withdrawn. He thus conceded that the appeal should proceed for hearing.

The appellant, in his submission briefly urged us to adopt the grounds of appeal which he had lodged and insisted that the prosecution did not prove the case beyond reasonable doubt. He thus prayed that his appeal be allowed, the conviction quashed and the sentence of imprisonment be set aside.

On the other hand, Mr. Nchiman, learned State Attorney for the respondent Republic did not support the conviction and the sentence that

was imposed to the appellant by the trial court. He thus supported the appeal.

In his submission, he argued that the prosecution did not prove the case as no sufficient evidence was tendered to support conviction of the appellant. His position was based on the submission that the age of the victim was not proved by witnesses, including the victim (PW1) to the required standard. He argued that even the witnesses Hassan Abdulmalick (PW4) and F3035 D/C Kenyera (PW5) who mentioned the age of the victim did so in passing during examination in chief. He was thus of the view that as age of the victim was the most important factor with regard to the offence with which the appellant was charged, the prosecution was duty bound to prove the same beyond reasonable doubt. He concluded his submission by urging the Court to allow the appeal as the charge that was laid at the door of the appellant was not proved beyond reasonable doubt.

We wish to state that having gone through the record of proceedings of the trial court and the first appellant court and the submission of the learned State Attorney for the respondent Republic, we are of the considered opinion that the issue of age of the victim which was alleged in the particulars

that described how the offence of rape was committed was a crucial matter to be proved by the witnesses who supported the prosecution case.

It is clear from the record that although the issue of age of the victim was central to the offence, there was no any witness of the prosecution who sufficiently proved the same to the required standard. The record indicates that the victim herself did not say anything concerning her age during examination in chief and cross examination. Unfortunately too, even the trial Resident Magistrate did not indicate the age of the victim when she was being sworn before she testified. The trial Resident Magistrate only indicated that the victim had completed standard seven and she knew the duty to speak the truth. The said evidence on the age of the victim did not also come from the doctor (PW3) Hilary Gabriel who examined the victim and filled the PF3 which was tendered and admitted at the trial as exhibit P1.

The witnesses who spoke about the age of the victim were PW4 (the village chairman) and PW5 (the investigator). However, both witnesses mentioned the age of the victim in passing without sufficient explanation. Indeed, they could not competently prove the age of the victim.

Unfortunately, the learned trial Resident Magistrate also mentioned the age of the victim in passing in his judgment.

In order to appreciate our emphasis that will follow, we wish to reproduce the relevant provision under which the appellant was charged, that is, section 130 (2) (e) of the Penal Code Cap. 16 R.E 2002 thus:-

> *"(2) A male person commits the offence of rape if he has sexual intercourse with a girl or a woman under circumstances falling under any of the following descriptions:-*
>
> *(a) .....*
>
> *(b) .....*
>
> *(c) .....*
>
> *(d) .....*
>
> *(e) With or without her consent when she is under eighteen years of age, unless the woman is his wife who is fifteen or more years of age and is not separated from the man."*

We need to insist that as per the quoted provision, age of the victim was an important matter to be proved by the prosecution apart from other

evidence. We hold a firm view that in the present matter, it was important for the prosecution to prove beyond reasonable doubt the case against the appellant where among others the age of the victim was a determining factor in establishing the offence. This Court has stressed in a number of decisions on the importance of ascertaining the age of a victim before arriving to the conclusion that the offence has been proved beyond reasonable doubt. It suffices to refer to the decision of this Court in **Andrea Francis v. The Republic**, Criminal Appeal No. 173 of 2014 (unreported) which was also quoted with approval by this Court in **Nalongwa John v. The Republic**, Criminal Appeal No. 588 of 2015 at Dodoma (unreported) where it was stated that:

> *"... it is trite law that the citation by a magistrate regarding the age of a witnesses before giving evidence is not evidence of that person's age. It follows that the evidence in a trial must disclose the persons age. In other words, in a case as this one where the victims age is the determining factor in establishing the offence, evidence must be positively*

laid out to disclose the age of the victim ... in the absence of evidence to the above effect it will be evident that the offence ... was not proved beyond reasonable doubt."

In view of what we have stated above, we have no doubts in our minds that the issue of age of the victim which was central to the prosecution of the appellant was not proved beyond reasonable doubt. Indeed, although there is also no dispute that there was contradiction on the evidence tendered by the prosecution, we think the issue of age was still central to the offence with which the appellant was charged, convicted and sentenced to imprisonment for thirty years.

It is in this regard that we agree with the appellant who was supported by the learned State Attorney for the respondent Republic that the prosecution did not prove the case beyond reasonable doubt. It is no wonder that Mr. Nchiman supported the appeal from the outset.

In the event, we allow the appeal, quash the conviction and set aside the sentence of thirty years imprisonment that was imposed to the appellant by the trial District Court. We accordingly order that the appellant be

released from prison forthwith and be set free unless he is otherwise lawfully held for other cause. We so order.

DATED at **BUKOBA** this 29th day of August, 2018.

M. S. MBAROUK
JUSTICE OF APPEAL

R. K. MKUYE
JUSTICE OF APPEAL

F. L. K. WAMBALI
JUSTICE OF APPEAL

I certify that this is a true copy of the original.

E. Y. MKWIZU
SENIOR DEPUTY REGISTRAR
COURT OF APPEAL