IN THE COURT OF APPEAL OF TANZANIA

AT MBEYA

(CORAM: NDIKA, J.A., SEHEL, J.A. And KENTE, J.A.)

CRIMINAL APPEAL NO. 345 OF 2018

KULWA S/O DAJE.....APPELLANT

VERSUS

THE REPUBLIC..... RESPONDENT

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

(Mrango, J.)

dated the 27th September, 2018

in

DC. Criminal Appeal No. 34 of 2018

.....

JUDGMENT OF THE COURT

24th & 27th September, 2021

KENTE, J.A.:

In this appeal, the Court is being asked to overturn the decision of the High Court (sitting at Sumbawanga) in DC Criminal Appeal No. 34 of 2018 which dismissed the appeal by Kulwa Daje, (the appellant herein), following his conviction and sentence to thirty years imprisonment by the Nkasi District Court (at Namanyere), after he was found guilty of rape c/ss 130(1), (2) (e) and 131 (1) of the Penal Code, Cap 16 R.E. 2002 (now R.E 2019), henceforth the Penal Code.

Before the trial District Court, the particulars of the charged offence alleged that, on 12th August, 2017 at about 11.00 am at Paramawe Village within the District of Nkasi in Rukwa Region, the appellant had the carnal knowledge of a girl aged 15. In the ensuing part of this judgment, we shall simply refer to the said girl as PW1. Since the appeal essentially turns on the question of consent by PW1 to the said sexual intercourse, it is desirable to revisit the evidence led by the prosecution during the trial and the appellant's defence version in some detail.

On the material day, PW1 was in the farm harvesting maize. Suddenly the appellant appeared and strangled her while threatening to kill her if she raised an alarm. Having pulled her down, he undressed her and himself before he went on to insert his manhood into her "front bottom." PW1 told the trial court that, she managed to raise an alarm but no one appeared to her rescue. Upon satisfaction of the hots he had for PW1, the appellant released her and disappeared into thin air. From there PW1 went home and informed her mother and brother what the appellant had done to her. Accordingly, efforts to get after the appellant were made and, he was arrested and taken to Paramawe Police Post where he was booked. In the meantime, PW1 was referred to Mtenga Dispensary where she was examined and confirmed to have been raped. The appellant was

thereafter arraigned before the trial court and charged with rape as stated earlier.

However, having pleaded not guilty to the charge, in his defence evidence, the appellant did not dispute to have had sexual intercourse with PW1 on the material day. He only told the trial court that the sexual intercourse was consensual after he had successfully persuaded PW1 to have sex with him. He therefore denied the allegation that he coerced PW1 into having sex without consent.

In view of the position taken by the appellant in his defence evidence, the learned Resident Magistrate of the trial court had no reason to labour long. He went on to find guilty and convict the appellant assigning the following reasons to his decision, thus:

> *"Since the accused person is admitting to have carnal knowledge with the victim and since the victim was fifteen years old and was not the wife of the accused obviously, he committed the offence of rape in accordance with the provision of Section 130 (2) (e) of the Penal Code. (Cap 16 R.E. 2002). The court hereby find him guilty and he is convicted."*

As stated before, the appellant's appeal to the High Court was dismissed for lack of merit. Instead, and additionally, the learned Judge

of the first appellate court ordered the appellant to undergo a dozen strokes of the cane and to compensate the victim to the tune TZS. 500,000.00.

Deeply aggrieved by the decision of the first appellate court, the appellant has appealed to this Court complaining in the following reworded terms thus; **one**, that, in dismissing the appeal, the learned High Court Judge did not take into account that in passing the sentence, the trial Magistrate did not cite section 235 (1) of the Criminal Procedure Act Cap 20 R.E 2002 (now R.E 2019); **two**, that he was convicted and his appeal was subsequently dismissed by the High Court relying on the evidence of PW1 which was however, not corroborated; **three**, that there was no qualified doctor to prove the rape and that the police officer who investigated the case was not called to testify; **four**, that the prosecution failed to prove its case and finally that, his plea (sic) was not considered.

Before this Court, the appellant was unrepresented and therefore, he had to fend for himself. On the other hand, Ms. Safi Kashindi Amani learned State Attorney represented the respondent Republic. When we invited the appellant to highlight the grounds of appeal, he adopted them and opted to hear a reply submission by the learned State Attorney while retaining his right to rejoin, if needful.

Upon going through the grounds of appeal and in view of what transpired before the trial court, we intend to narrow down the issues and confine ourselves to the most important question which in our view, is whether the offence of rape was proved beyond reasonable doubt as to warrant the appellant's conviction and sentence. Essentially that is the question which seems to have attracted the attention of the learned Judge of the first appellate court who, upon evaluation of the evidence on the record, he came to the conclusion that the offence was proven to the required standard and that the appellant's conviction was therefore justified, in the circumstances.

Save for the fifth ground of appeal which was discarded under the provisions of s. 6 (7) of the Appellate Jurisdiction Act, Cap 141 R.E 2019 for being new and factual, the submission and all-inclusive arguments by Ms. Amani were that, the learned Judge of the first appellate court was justified in holding that in the present case, the offence of rape as created under section 130 (2) (e) of the Penal Code, was proven beyond reasonable doubt and further that, the perpetrator was none other than the appellant. Relying on **Selemani Makumba v. R** [2006] TLR 379, the learned State Attorney maintained that, it was not necessary for the prosecution to lead evidence with a view to corroborating the evidence of PW1 as in sexual offences, the best evidence is that of the victim.

Considering the fact that the appellant did not cross-examine PW1 on anything and that he did not deny to have had sex with PW1 on the material day, and as such, PW1 was then aged fifteen years, the learned State Attorney's conclusion was that, the two courts below were entitled to find, as they did that, the appellant's guilt was proven beyond doubt. Therefore, it was the submission by Ms. Amani that the learned Judge of the first appellate court cannot be criticised for dismissing the appeal which had no merit at all. She urged us to follow suit and dismiss the present appeal on the same account of want merit.

For his part, the appellant had nothing substantial to say in rejoinder. He only shook his head turning it left and right to indicate his disagreement with the submissions made by Ms. Amani. After making that gesture, the appellant, in an apparent afterthought, simply denied to have had sex with PW1. That translates into saying that, he did not rape PW1 and anyone who tried to claim so, as Ms. Amani did, was lying.

Now, Section 130 (2) (e) of the Penal Code provides that:

> *"A male person commits the offence of rape if he has sexual intercourse with a girl or a woman 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."*

In making the impugned decision, the learned Judge of the first appellate court was satisfied that PW1 was aged fifteen years and that, upon the appellant's own admission to have had sexual intercourse with her, he was guilty of rape irrespective of whether or not the sexual intercourse was consensual as pleaded by the appellant.

Without hesitation, we entirely subscribe to the position taken by the learned Judge on the first appeal. Going by the evidence on the record, the fact that the appellant had not denied to have engaged PW1 into sex is plain for all and sundry to see. As correctly submitted by Ms. Amani, the appellant did not cross-examine PW1 who told the trial court that he forced her into having sex with him and that at that time she was aged fifteen years. In **Damian Ruhele v. Republic**, Criminal Appeal No. 501 of 2007 (unreported) we held that, failure to cross-examine a witness on an important matter ordinarily implies the acceptance of the truthfulness of that matter. So, as we move on to determine this appeal, it behoves us at this point in time, to remind the appellant and any one of his type and inclination that, the pens and papers we use, keep records. Therefore, before any litigant tries to spin lies in a court of law, he better knows what is on the court record. For, as Sir John Donaldson MR put it in the **Attorney General v. Guardian Newspapers** (No. 2) [1990] 1

AC 109, it is not, and must never be allowed, to become blind to the reality of the situation, lamentable though that situation may be.

In the instant case, the court record is pungent and clear that the appellant admitted in his defence evidence that he had sex with PW1. The only thing which he qualified in the prosecution case is that the said sex intercourse was upon PW1's consent. We therefore find it rather startling for the appellant, showing how desperate he is in an attempt to get himself off the hook, that he cannot pose to remember and gracefully concede even the indisputable words which he himself told the trial court.

With due respect, we do not agree with him. Like the two courts below, we find it as an established fact that the appellant had sexual intercourse with PW1 who was a girl then aged fifteen years. Was it necessary for the prosecution to prove lack of consent by PW1 to the sexual intercourse with the appellant, given the facts and circumstances obtaining in this case? That is the most important question which we now move on to grapple with, albeit very briefly.

Dealing with the same question, the learned judge of the first appellate court, was satisfied that the issue of consent did not arise in view of the clear provisions of section 130 (2) (e) of the Penal Code under which the appellant stood charged. In holding so, the learned High Court

Judge followed the decision by Munuo, J (as she then was) in the case of the **Director of Public Prosecutions v. Jamal Waziri** [2003] TLR 324 in which the High Court Judge held that, under section 130 (2) (e) of the Penal Code, a girl who is below the age of 18 years has no capacity to consent to sexual intercourse save where she is consenting to her spouse and she is not below the age of 15 years.

We entirely agree with the correct interpretation of the law by the learned High Court Judge. As it stands, the offence of rape created under section on 130 (2) (e) of the Penal Code, does not require to be proved by the lack of consent on the part of the victim. Rather, as in the present case, the prosecution is enjoined to prove that there was an act of sexual intercourse and that the victim was below eighteen years of age and, where as in this case, the victim was not below the age of 15 years, that the accused was not her spouse with whom she could have lawfully consented to have sex. Needless to say, the appellant in the present case falls squarely within the ambit of section 130 (2) (e) of the Penal Code for the following reasons, that:

1. He had sexual intercourse with PW1.
2. At the material time PW1 was aged 15 years; and,
3. The appellant was not her spouse.

Having found the above outlined facts to have been established by the evidence on the record, we are increasingly satisfied that the learned Judge on first appeal was justified in his conclusion that the appellant had committed what is known as statutory rape under section 130 (2) (e) of the Penal Code. He was therefore properly convicted of that offence and duly sentenced to the mandatory thirty years' imprisonment.

All in all, we find no merit in this appeal. We dismiss it in its entirety.

It is so ordered.

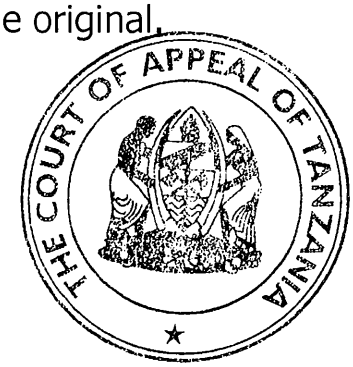
DATED at **MBEYA** this 27th day of September, 2021.

G. A. M. NDIKA
JUSTICE OF APPEAL

B. M. A. SEHEL
JUSTICE OF APPEAL

P. M. KENTE
JUSTICE OF APPEAL

The Judgment delivered on this 27th day September, 2021, in the presence appellant in person, and Ms. Annarose Kasambala, learned State Attorney for the Respondent in person is hereby certified as a true copy of the original.



H. P. NDESAMBURO
DEPUTY REGISTRAR
COURT OF APPEAL