IN THE COURT OF APPEAL OF TANZANIA

AT SHINYANGA

(CORAM: MKUYE, J.A., GALEBA, J.A. And KAIRO J.A.)

CRIMINAL APPEAL NO. 439 OF 2018

AMOS JACKSON.. APPELLANT

VERSUS

THE REPUBLIC .... RESPONDENT

[Appeal from the Decision of the High Court of Tanzania at Shinyanga]

(Makani, J.)

dated 9th day of November, 2017

in

Criminal Appeal No. 95 of 2016

JUDGMENT OF THE COURT

11th & 22nd July, 2022

KAIRO, J.A.:

In the District Court of Kahama at Kahama, the appellant was charged of rape contrary to sections 130 (1) (2) (a) and 131 (1) of the Penal Code, [Cap 16 R.E. 2002, now R.E. 2022] (the Penal Code). It was alleged that, on 31st day of December, 2015 at about 16.00 hrs at Bulyanhulu village within Kahama District in Shinyanga Region, the appellant did unlawfully have sexual intercourse with a girl aged 6 years.

To conceal her true identity, we shall refer to her as PW1 or the victim. The appellant denied the charge and the case proceeded to a full trial.

The prosecution side called four (4) witnesses to prove the case against the appellant. The names of the said witnesses were; the victim (PW1), Kulwa Mathias; the victim's father (PW2), Joyce Makewa; a nurse who examined the victim (PW3), and No. 6314 D/SGT Simon (PW4). The prosecution also tendered a Police Form No. 3 (PF3) which was admitted as exhibit P1. On the other hand, the defence side had only one witness who was the appellant (DW1) with no exhibit.

The prosecution case at the trial was to the effect that, the appellant and the accused were close relatives as uncle and niece, residing in the same homestead. It was alleged that, the appellant used to lure the victim by giving her some money and raped her on various occasions. In all those occasions, the appellant threatened the victim not to disclose that ordeal to anyone. It was not until on 31st December, 2015 when PW2 found him raping the victim at the maize farm, that the sexual abuse story came out in the open. PW2 raised an alarm and the appellant was apprehended and taken to Bugalama Police Station and the victim was taken to the hospital for medical examination.

After the trial, it was a finding of the trial magistrate that the prosecution failed to prove the offence of rape as charged but was satisfied that the offence of grave sexual abuse was committed and dully proved, as according to him, the offence was a minor and cognate to rape. The trial magistrate, therefore, substituted the charged offence of rape to grave sexual abuse c/s 138 C of the Penal Code and sentenced him to serve an imprisonment term of 20 years in jail.

The appellant was not amused and decided to appeal to the High Court. Again, luck was not on his part as the first appellate court dismissed the appeal, quashed and set aside the conviction of grave sexual abuse and substituted it with the earlier offence of rape he was charged of. The first appellate court further enhanced the sentence to life imprisonment in terms of the provisions of section 131 (3) of the Penal Code.

Still wishing to vindicate his innocence, the appellant has preferred this second appeal comprising of two sets of memoranda of appeal so as to challenge the decision of the High Court. The first set was lodged on 23rd April, 2019 comprising of three grounds and the second set which was lodged on 8th July, 2022 has five grounds of grievance. However,

we wish to state from the onset that we shall reproduce only the third complaint in the second set of the memorandum of appeal, which is the basis of our determination in this appeal. The same states:-

> *That, the Honorable Judge erred in law to convict and sentence the appellant without considering that he was under eighteen (18) years when was charged (see pg. 18 – 19) of the proceeding.*

When the appeal was called on for hearing, the appellant appeared in person with no legal representation. He adopted the grounds of appeal and opted to hear the response of the respondent subject to his right to make rejoinder where necessary.

On the other hand, Ms. Verediana Peter Mlenza, learned Senior State Attorney teamed up with Misses. Immaculate Mapunda and Caroline Mushi, both learned State Attorneys, to represent the respondent Republic.

Ms. Mlenza took off by declaring the respondent's position that the conviction against the offence of rape which the appellant was previously charged of still stands, but the sentence meted on the appellant was illegal.

Amplifying, Ms. Mlenza submitted that, the complaint in the said ground of appeal hinges on the age of the appellant; the issue being whether or not the appellant was below 18 years of age when he committed the offence he was charged of. She went on submitting that the charge sheet upon which the appellant was arraigned in court indicated that he was 19 years of age. However, during the Preliminary Hearing (the PH), the appellant disputed his age as stated in the charge sheet. She referred us to page 5 of the record of appeal to verify her assertion. She argued that at that stage, the prosecution was duty bound to prove that he was above 18 years of age, and the trial court was obliged to conduct an inquiry and make a finding of his exact age, but it did not.

In further clarification, Ms. Mlenza submitted that on 6th February, 2018 when the appellant was being sworn in before defending himself, he stated his age to be 17 years of age at the introductory part. Again, there was no any fact finding on his age, instead, the trial court went ahead and recorded his defence. Besides, the appellant was neither cross examined by the prosecution on the stated fact nor any material evidence from the prosecution side was adduced to contradict it. She referred us to pages 18 – 19 of the record of appeal.

Stating the legal stance of the law on failure to contradict or cross examine a witness on the stated matter, Ms. Mlenza argued that the lapse implies that the prosecution believed the veracity of the appellant's assertion regarding his age. In the premise, she invited the Court to so conclude.

She further argued that, the appellant's assertion on the matter is in line with the legal position to the effect that a child himself is among the persons who is better placed to know his/her age. She cited to us the case of **Hamis Chumba @ Hando Mhoja v. Republic**, Criminal Appeal No. 36 of 2018 (unreported) to buttress her argument. She added that, since the prosecution failed to contradict the stated fact, the appellant is entitled to the benefit of doubt, if any. As such, the appellant was below 18 years of age when the offence was committed. She contended that despite being found guilty of rape to which she subscribed to, but the life sentence meted on him is illegal considering his age and being a first offender as depicted on page 25 of the record of appeal. She argued that, in the circumstances, the proper sentence was corporal punishment under section 131 (2) (a) of the Penal Code. She finally prayed the Court to quash the life sentence imposed on the

appellant and substitute it with corporal punishment which she argued to be the proper sentence.

Ms. Mlenza however went on to argue that, since the appellant was convicted in year 2016 and was serving an illegal sentence since then, administering corporal punishment on him at this moment will occasion injustice on him. Instead, she implored the Court to release him from prison.

Given the submission by the Republic, the appellant had nothing to rejoin. He simply prayed to be released from prison.

Having considered the submission by Ms. Mlenza in response to the ground of appeal and the entire record of appeal, the issue for determination is whether the appellant was under 18 years of age when the offence was committed. If the answer is in affirmative, we will then determine whether the sentence imposed on him was proper.

There is no dispute that the charge sheet stated the age of the appellant to be 19 years. Nevertheless, the record of appeal on page 5 bears out that the appellant disputed his age as stated in the charge sheet during the PH when required to verify the matters that were not in dispute. As rightly argued by Ms. Mlenza, the trial court was required at

this juncture to conduct a fact-finding inquiry for the purpose of ascertaining the appellant's age. Unfortunately, that was not done.

The record of appeal further on page 18 reveals that on 6th February, 2016 when the appellant was sworn in before giving his defence, he gave the following explanation at the introductory part:-

> *"DW1: **AMOS JACKSON, 17 YEARS,** SUKUMA, CHRISTIAN, PEASANT OF KAKOLA, SWORN AND STATES AS FOLLOWS..."*
>
> [Emphasis supplied]

Again, neither the trial court made the required inquiry nor was the appellant cross examined on the stated age by the prosecution. It follows therefore that, the appellant's age as he stated was not disputed during the trial, which means what the appellant stated concerning his age went unchallenged and therefore was the truth. The law is long settled that failure to cross examine a witness on a certain relevant matter is deemed to have accepted the truth of the stated assertion. We have in times without number pronounced the said stance in various of our decisions including **Issa Hassan Uki v. The Republic,** Criminal Appeal No. 129 of 2017, **Nyerere Damian Ruhele v. Republic,** Criminal Appeal No. 501 of 2007, and **George Maili Kembogo v.**

Republic, Criminal Appeal No. 327 of 2013 (all unreported) to mention but a few.

In **Nyerere Damian Ruhele** (supra) we stated as follows:-

> *"We are aware that there is a useful guidance in law that a person should not cross-examine if he/she cannot contradict.* ***But it is also trite law that failure to cross examine a witness on an important matter ordinarily implies the acceptance of the truth of the witness's evidence."***
>
> [Emphasis supplied]

We are alive that in the present case, the charge sheet indicated the appellant's age to be 19 years when the offence was committed. However, the appellant, apart from objecting the stated age during the PH, went further to pronounce his age to be 17 years in an introductory clause before sworn in to give his defence. As rightly argued by Ms. Mlenza that proof of age can be given by the child witness as it happened in the matter at hand.

Though it can be argued that introductory clause before the witness testifys is not by itself an evidence, however, in the matter at hand, the appellant started by objecting his age as per the charge sheet

during PH. The prosecution was expected to lead evidence to contradict the appellant's age and not otherwise. It is our firm view that, even if he would not have objected his age during the PH, the prosecution had the obligation to contradict the stated fact, but did not. It is our conviction that would there be any doubt to the contrary, the prosecution would not have failed to cross examine him on it. On that account, even if there are doubts, the same are legally resolved in favour of the appellant [See the cases of **Chacha Ng'era v. Republic**, Criminal Appeal No. 87 of 2010 and **Clement Aloyce v. Republic**, Criminal Appeal No. 13 of 2012 (both unreported).

Flowing from what we have endeavoured to discuss above, the appellant's age as he stated was not disputed in any point in time during the trial and thereafter. We are therefore convinced that the appellant was below the age of 18 when the offence was committed as correctly argued by Ms. Mlenza.

Having found the issue in affirmative, we now turn to determine whether or not the sentence imposed upon him was proper.

It is imperative to note that, the appellant was sentenced to serve an imprisonment term of 20 years after being convicted of the offence

of grave sexual abuse. However, the said sentence was quashed and set aside by the first appellate court (High Court). In substitution thereof, the appellant was convicted of rape as previously charged and, therefore, the sentence was enhanced to life imprisonment under the provision of section 131 (3) of the Penal Code.

It was the argument of Ms. Mlenza to which we subscribe that the sentence was illegal. The law is settled that where the offender of rape is a person of 18 years and below, upon conviction he is supposed to be sentenced in terms of section 131(2) (a) of the Penal Code. The said provision states:

> *"131(1) ...... NA*
>
> *131(2) Notwithstanding the provisions of any law, where the offence is committed by a boy who is of age of eighteen years or less, he shall-*
>
> *(a) if a first offender, be sentenced to corporal punishment only".*

As to whether or not the appellant was a first offender, the last two lines on page 24 and first line on page 25 of the record of appeal quenches the thirst by giving an answer to the issue. The concerned part states:

*"**Accused Mitigation**: I pray for lenience as I don't have parents and I have no place to live.*

***PP:** No records as to accused previous conviction..."*

Gleaned from the quoted excerpt, the appellant, apart from being a boy under 18 years, he was also a first offender, as such he was required to be given a corporal punishment only as a sentence after he was found guilty of the offence of rape by the first appellate court.

It is unfortunate that the said flaw went un-noticed by the High Court, being the first appellate court mandated to re-evaluate the evidence of the trial court and draw its own inferences of fact- [see **Standard Chartered Bank of Tanzania Ltd v. National Oil Tanzania Ltd and Another,** Civil Appeal No. 98 of 2008 quoted in **The Registered Trustees of Joy in the Harvest v. Hamza K. Sungura,** Civil Appeal No. 149 of 2017 (both unreported). The pointed-out flaw therefore cannot be left to stand lest it continue occasioning miscarriage of justice to the appellant.

In the premise therefore, the imposed sentence is illegal as correctly argued by the learned State Attorney. Consequently, we hereby quash and set aside the life sentence imposed on the appellant, in lieu thereof, we pronounce that the appellant deserved corporal

punishment in terms of section 131 (2) (a) of the Penal Code as he was under 18 years of age when committing the offence. We however, subscribe to the proposition by Ms. Mlenza that considering the time the appellant has spent in prison, justice demands that he be released from custody. Accordingly, we order an immediate release of the appellant, Amos Jackson from the prison unless held for some other lawful cause.

Appeal allowed to the stated extent.

DATED at **SHINYANGA** this 22nd day of July, 2022.

R. K. MKUYE
JUSTICE OF APPEAL

Z. N. GALEBA
JUSTICE OF APPEAL

L. G. KAIRO
JUSTICE OF APPEAL

The judgment delivered this 22nd day of July, 2022 in the presence of the appellant in person, and Ms. Caroline Mushi, learned State Attorney for the Respondent/Republic is hereby certified as a true copy of the original.

W. S. Ng'humbu
For: **DEPUTY REGISTRAR**
COURT OF APPEAL