**IN THE COURT OF APPEAL OF TANZANIA**

**AT MWANZA**

**(CORAM: MWARIJA, J.A., GALEBA, J.A. And KENTE, J.A.)**

**CRIMINAL APPEAL NO. 248 OF 2019**

**JACOB YUSUPH @ DUDE.....APPELLANT**

**VERSUS**

**THE REPUBLIC.....RESPONDENT**

**(Appeal from the decision of the High Court of Tanzania at Mwanza)**

**(Madeha, J.)**

**dated the 3rd day of May, 2019**
**in**
**Criminal Appeal No. 271 of 2018**

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## JUDGMENT OF THE COURT

6th & 13th February, 2023

**MWARIJA, JA.:**

The appellant Jacob Yusuph @ Dude was charged in the District Court of Misungwi with two counts. In the first count, he was charged with the offence of rape contrary to ss. 130 (1), 2 (e) and 131 of the Penal Code Cap. 16 of the Revised Laws. It was alleged that, at an unknown date in May 2018 at Sumbugu Village within Misungwi District in Mwanza Region, the appellant did, on several occasions, have sexual intercourse with one "V.E." (name withheld), a girl aged 16 years. In the second count, he was charged with the offence of impregnating a Secondary School girl contrary to s. 60 A (3) of the Education Act as

amended by Act No. 2 of 2016. The prosecution alleged that, at an unknown time in May 2018 the appellant impregnated the said "V.E." while having the knowledge that it was unlawful to do so. The appellant denied both counts and as a result, the case had to proceed to a full trial. At the hearing, the prosecution called five witnesses to testify while, apart from his own evidence, the appellant relied on the evidence of other two witnesses. The child (V.E) testified as PW2. Her evidence was however, taken without oath or affirmation. Before he recorded her evidence, the learned trial Resident Magistrate remarked that the witness was "not *sworn in as required by the Law of the Child."*

The substance of evidence of the other witnesses was as follows: PW2's father, Emmanuel Vicent (PW1) testified that between May, 2018 and August 2018, he was away from his home situated at Sumbugu Village. He was informed of the absence from home, of PW2. When he returned from the journey, he started to trace her. After much efforts, he found her cohabiting with the appellant at the latter's house. PW1 thus caused both of them, the appellant and PW2 to be arrested and sent to Police station. At the police Station, the appellant's cautioned statement (exhibit P2) was recorded by ASP Michael (PW5). That statement was admitted in evidence as exhibit P2.

On his part, Seka Joseph Awando (PW3), who was until the material time, a teacher at Sumbugu Secondary School, told the trial court that PW2 was a student at that school and that her registration number was 1030/2016. He said further that, PW2 was expelled from School in 2018 after she was found to be pregnant. The fact about the pregnancy was testified to by Dr. Judith Kiwango (PW4). It was her evidence that, on 17/8/2018 while on duty at Mitindo Hospital in Msungwi, she examined PW2. Upon that examination, she found that PW2 was four months pregnant. The witness posted the outcome of her examination in the PF3 which was admitted by the trial court as exhibit P1.

In his defence, the appellant, who testified as DW1, contended that he lived with PW2 as his wife after her previous marriage with another man had ended up in divorce. He went on to testify that, later on, his union with PW2, who had told him that she was 18 years old, was blessed by her parents who demanded a dowry of two cows. Upon the agreement between the appellant's mother and PW2's parents, the cattle were to be handed over in August 2018. It was DW1's further evidence that, he could not be able to buy two cows but managed to buy only one which he handed over to PW2's father within the agreed time. On the next day however, he was arrested and later charged.

The appellant's evidence on the payment of dowry was supported by Peter Cosmos (DW2) and Simon Yakobo (DW3). According to DW2, in April 2018, he attended a meeting with PW2's father at his house to agree on the payment of dowry for his daughter (PW2) who was getting married to the appellant. DW2 stated further that, at the material time, PW2 who had previously been married to another man, had been divorced. The witness added that, the appellant managed to pay part of the dowry on the agreed date. Supporting the evidence of DW1 and DW2, DW3 stated that the arrangement for payment of dowry to PW2's father was made after the issues concerning PW2 previous marriage had been settled.

Having considered the evidence, the trial court was satisfied that the prosecution had proved both counts beyond reasonable doubt. Acting on the evidence of the appellant to the effect that he was married to PW2 and being of the opinion that PW2 was 16 years old, the trial court held that the marriage was invalid and the appellant's act of having sexual intercourse with her amounted to rape. He also found that, PW2 was a Form III student, and by impregnating her, the appellant committed the offence charged in the 2nd count. He thus convicted and sentence the appellant to imprisonment for a term of

thirty years on each count with an order that the sentences be served concurrently.

Aggrieved by the decision of the trial court, the appellant appealed to the High Court. His appeal was however, unsuccessful. In its decision, the High Court (Madeha, J.) upheld the findings of the learned trial Resident Magistrate. She was of the view that, from the evidence of PW3, PW2 was a Form III Student at Sumbugu Secondary School and that in 2018, she was aged 16 years, the age which, according to the learned first appellant Judge, was not disputed by the appellant in cross-examination. On the appellant's contention that PW2 was his wife, the learned Judge was of the opinion that the appellant had the duty of making inquiry with a view to ascertaining that she was not a school girl before making the decision to marry her. Having found that the evidence had proved that PW2 was a school girl, the High Court was of the opinion that the second count had also been proved. It therefore, dismissed the appeal in its entirety.

Aggrieved further by the decision of the High Court, the appellant preferred this second appeal which is predicated on the following three grounds:

*"1. That in the absence of proof of the age of PW2,*

*the learned Appellate Judge erred in holding that the offence of rape had been established.*

2. *That there was non-direction on the part of the Appellate Judge for her failure to hold that the PF3, exh. P1, was improperly admitted in evidence.*

3. *That there is no sufficient evidence on record to prove the offence of impregnating a school girl."*

At the hearing of the appeal, the appellant was represented by Mr. Anthony Nasimire, learned counsel while the respondent Republic was represented by Ms. Magreth Mwaseba, learned Senior State Attorney.

Submitting in support of the first ground of appeal, Mr. Nasimire argued that the age of PW2, which was crucial in proving statutory rape, was not established as none of the four witnesses testified on that aspect. According to the learned counsel, proof of the age of a victim, which he termed as a golden rule as far as the offence of rape under s. 130 (2) (e) of the Penal Code is concerned, was absolutely necessary. He went on to argue that, the learned trial Resident Magistrate erred in relying on the age mentioned in the charge sheet because the prosecution was duty bound to lead evidence so as to

ascertain that age. To substantiate his argument, the learned counsel relied on the case of **Solomon Mazala v. Republic**, Criminal Appeal No. 136 of 2021 (unreported) cited by the respondent in its list of authorities

With regard to the second ground of appeal, Mr. Nasimire submitted that the medical report, that is; the PF3 (exhibit P1) tendered by PW4, was not properly admitted in evidence. It was his argument that, apart from the fact that the appellant was not given the opportunity to object its admission, the same was not read out after its admission in evidence and therefore, the same was rendered invalid. He submitted that, the learned first appellate Judge should have, for that reason, expunged it. The learned counsel cited the case of **Bulugu Nzungu v. Republic**, Criminal Appeal No. 39 of 2018 (unreported) to bolster his argument. He went on to submit that, the omission to read out a document after its admission was also made during the admission of the appellant's cautioned statement (exhibit P2).

On the third ground, the appellant's counsel submitted that the allegation to the effect that PW2 was a school girl at the time when she was allegedly impregnated by the appellant, was not proved. He argued that, the evidence of PW3 was deficient because he merely

stated that PW2's registration number was 1030/2016 without any documents such as the register or the details regarding PW2's registration at that school. The learned counsel argued further that, according to the evidence of PW4, he became aware of PW2's absence from home in May 2018, meaning that it was after she had been expelled from school. For that reason, the learned counsel argued, PW2 became pregnant after she had been expelled from school and thus the offence charged in the second count could not stand.

In the course of his submission, Mr. Nasimire raised yet another ground; that the appellant's defence was not considered. He argued that the omission denied the appellant a fair trial and for that reason, he was improperly convicted.

The learned Senior State Attorney did not oppose the appeal. She supported the arguments made by the counsel for the appellant on all the three grounds of appeal. She added that the evidence of PW2 is not valid because it was taken without oath or affirmation. According to Ms. Mwaseba, the learned trial Resident Magistrate erred in holding that the Law of the Child precludes a person aged 16 years from giving evidence on oath or affirmation. We hasten to agree with the learned Senior State Attorney and thus hereby find the evidence

of PW2 unworthy of credit for having been taken without oath or affirmation.

As for the rest of the submissions made by the learned counsel for the appellant and the learned Senior State Attorney, we agree that the prosecution did not prove, the two counts with which the appellant was charged. To start with, as submitted by Mr. Nasimire, the age of PW2, which is essential in proving the offence of rape under s. 130 (2) (e) of the Penal Code, was not proved. As stated in the case of **Andrea Francis v. Republic**, Criminal Appeal No. 173 of 2014 (unreported) cited by the respondent in its list of authorities:

> *"Under normal circumstances evidence relating to the victim's age would be expected to come from any or either of the following: the victim, both of her parents or at least one of them, a guardian, a birth certificate, etc."*

In the case at hand, although one of PW2's parents, that is; her father (PW4) testified, he did not say anything about her age. There was similarly no evidence, oral or documentary relating to the age of PW2 which was tendered by the prosecution. Clearly therefore, the High Court erred in upholding the appellant's conviction as regards the offence of rape under s. 30 (2) (e) of the Penal Code.

The position applies to the second count of impregnating a school girl. The allegation that PW2 was a student at the time when she became pregnant was not proved beyond reasonable doubt. The evidence on that allegation does not support the prosecution case. As submitted by Mr. Nasimire and supported by the learned Senior State Attorney, the evidence by the prosecution witnesses does not prove beyond reasonable doubt that PW2 became pregnant while she was still a student.

Although in his evidence, PW3 said that PW2 was expelled from school in 2018 because of pregnancy, from the evidence of PW1, who said that he became aware of PW2's absence from home in May 2018, it is doubtful that she was attending school in August, 2018, the time which PW3 said that she was expelled from school. In the circumstances, we agree with both Mr. Nasimire and Ms. Mwaseba that the prosecution did not, as well, prove the second count beyond reasonable doubt.

On the basis of the above stated reasons, we find that both courts below misapprehended the evidence. Obviously therefore, the learned first appellant Judge erred in upholding the appellant's conviction on both counts. As a result, the appeal is hereby allowed and consequently, the appellant's convictions are quashed and the

sentences imposed on him are hereby set aside. He should be set to liberty forthwith unless he is otherwise lawfully held.

**DATED** at **MWANZA** this 13th day of February, 2023.

A. G. MWARIJA
**JUSTICE OF APPEAL**

Z. N. GALEBA
**JUSTICE OF APPEAL**

P. M. KENTE
**JUSTICE OF APPEAL**

This Judgment delivered this 13th day of February, 2023 in the presence of Appellant in person and Mr. George Ngemela, learned State Attorney for the respondent /Republic, is hereby certified as a true copy of the original.

J. E. FOVO
**DEPUTY REGISTRAR**
**COURT OF APPEAL**