IN THE COURT OF APPEAL OF TANZANIA

AT MWANZA

(CORAM: WAMBALI, J.A., MWANDAMBO, J.A. And MGONYA, J.A.)

CRIMINAL APPEAL NO. 546 OF 2019

ABEL CHANGWE.....APPELLANT

VERSUS

THE REPUBLIC..... RESPONDENT

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

(Madeha, J.)

dated the 30th day of September, 2019

in

Criminal Appeal No. 242 of 2018

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JUDGMENT OF THE COURT

15th & 21st August, 2023

MWANDAMBO, J.A.:

The appellant was tried and convicted before the District Court of Bukombe for the offence of statutory rape. Upon such conviction, the trial court sentenced the appellant of the mandatory sentence of 30 years imprisonment. His appeal to the High Court at Mwanza was dismissed for lacking in merit resulting in the instant appeal.

The facts upon which the prosecution relied in preferring a charge and prosecution, alleged that on 21/03/2017, the appellant lured a secondary school girl of 17 years age, henceforth, the victim or

PW1 into a guest house room in Ushirombo town, Bukombe District in Geita Region where he spent a night with her and had canal knowledge of the victim. Apparently, the victim's father was unaware of the victim's absence during the material night until his son (victim's brother) broke the news later on but could not do anything until early in the morning when the victim returned home. Upon being quizzed of her whereabouts, the victim gave in and led her parents to the room at Hulile guest house and, with the assistance of the police, the appellant was arrested and subsequently charged in court for the offence to which he pleaded not guilty. Satisfied with the cogency of the evidence of the prosecution witnesses, in particular, PW1 (the victim) and a medic (PW5) as well as the confessional statement (exhibit P1) and a PF3 (exhibit P2), the trial court found the case against the appellant sufficiently proved. It thus convicted and sentenced him accordingly.

The appellant's quest to challenge his conviction and sentence on appeal before the High Court at Mwanza hit a snag. The High Court (Madeha, J.) concurred with the trial court that the appellant's conviction was grounded on a water tight evidence which proved the

charge beyond reasonable doubt resulting into the dismissal of the appeal.

Before this Court, the appellant who had no legal representation, preferred an appeal upon four grounds which, upon our close examination, raise one main issue; whether the charge against him was proved to the required standard. Being a lay person, the appellant had very little in elaboration of his grounds of appeal at the hearing. He simply asked the Court to consider his grounds as meritorious and allow his appeal.

Incidentally, Mr. Castuce Clemence Ndamugoba, learned Senior State Attorney representing the respondent Republic supported the appeal. The main stay behind his stance was that the charge of statutory rape to which the appellant stood trial was unsustainable due to lack of proof of the victim's age; an essential ingredient in such a charge. Addressing the Court, Mr. Ndamugoba argued that, although the appellant was charged with rape of a girl of 17 years of age contrary to section 130 (1) and (2) (e) of the Penal Code, none of the prosecution witnesses proved her age. The learned Senior State Attorney was emphatic that, proof of the victim's age in a charge of

statutory rape was critical to the prosecution case whose absence went to the root of the case. Placing reliance upon the Court's decision in **Rutoyo Richard v. Republic** (Criminal Appeal No. 114 of 2017) [2020] TZCA 298 (16 June 2020, TanzLii), Mr. Ndamugoba stressed that, the age shown at page six of the record of appeal cannot be taken to be proof of the victim's age because it was not part of her evidence. It was further argued that, even though the victim's age could have been determined through a PF3 tendered in evidence as exhibit P2, the same cannot be true in this appeal considering that the contents of exhibit P2 were not read after its clearance for admission and thus liable to be expunged from the record.

On the other hand, Mr. Ndamugoba ruled out reliance on the appellant's cautioned statement admitted as exhibit P1 for two reasons. One, the trial court wrongly admitted it in evidence before determining its voluntariness through an inquiry after the appellant's objection to its admissibility contending in effect, that the cautioned statement did not originate from any interrogation. Two, in any event, the contents of exhibit P2 were not read after its clearance for admission. The learned Senior State Attorney urged, to which submission we agree that,

exhibit P1 ought to be expunged and, upon discarding the exhibit, there will be no evidence to prove the charge of statutory rape against the appellant resulting into an order allowing his appeal.

Having heard the arguments from the learned Senior State Attorney in the light of the issue for the determination of the appeal, we cannot but agree with him. There is no gainsaying that, statutory rape is an offence which entails proof of three ingredients; penetration, age of the victim and the culprit. We have said so in various cases including; **Idrisa Omary v. Republic** (Criminal Appeal No. 554 of 2020) [2021] TZCA 448 (27 August 2021, TanzLii). This is premised on the principle that; a girl of tender age is not capable of consenting to sexual intercourse in the same manner an adult woman would do. In other words, once it is proved that an accused had sexual intercourse with a girl below the age of 18 years, it is not a defence to say that such girl consented to such act.

According to the charge sheet, the appellant was charged with rape of a girl of 17 years. That means, apart from proving penetration and that it was the appellant who committed the act, proof of the victim's age was critical. Consistent with the Court's decisions, amongst

others, **Issaya Renatus v. Republic** (Criminal Appeal No. 54 of 2015) [2016] TZCA 218 (26 April 2016, TanzLii), proof of age could have been through, any of the following; the victim, parent, guardian, teacher, medic or birth certificate, if any. In this case, proof of the age of the victim was expected to have come from herself, her father (PW2) or the medical doctor (PW5) who examined her and tendered a PF3 (exhibit P2). As rightly submitted by Mr. Ndamugoba, none of the three witnesses proved the victim's age. The best PW1 did was to mention her age as 17 years before she took an oath which was not part of her sworn evidence in line with the Court's decisions in this regard, in particular, **George Claude Kasanda v. Director of Public Prosecutions** (Criminal Appeal No. 376 of 2017) [2020] TZCA 76 (27 March 2020, TanzLii).

The Court stated in the above case that, mere mention of age by witness at an introductory stage before taking an oath is not part of his evidence and thus it cannot be relied upon in proving age particularly in a case in which proof of it is at issue as it were in this appeal. Worse still, PW1's father who testified as PW2 did not state her age. So did PW5 who examined PW1 but said nothing in his oral testimony after

tendering the PF3 (exhibit P2) which appears to have reflected the victim's age as 17 years. Nevertheless, despite its admission, the contents of exhibit P2 were not read out after being cleared for admission. It is settled law on which no authority will be required that, failure to read the contents of a documentary exhibit after clearing it for admission is fatal to it and liable to be expunged. We can do no better in this appeal than reaffirming that position. The record of appeal is so conspicuous on what happened before the trial court regarding PW5's oral evidence on what he discovered after the examination. Ordinarily, his oral evidence would survive the expungement of exhibit P2, but, as shown earlier on, that evidence says nothing about the victim's age. Such evidence could only be relevant to prove penetration. In the absence of any evidence proving the victim's age, PW5's oral evidence on penetration was worthless so as to ground conviction.

On the other hand, we agree with Mr. Ndamugoba on the deficiencies befalling exhibit P1. It is beyond controversy that, the trial Magistrate misapprehended the appellant's objection against admission of the cautioned statement. The essence of the appellant's objection

was that he was never interrogated contrary to PW3's evidence and so he could not have made the statement sought to be admitted proving that he confessed having had sexual intercourse with the victim. That being the case, the trial magistrate was bound to conduct an inquiry to determine whether indeed the appellant made the statement upon being interrogated by PW3. This has been the law in such circumstances represented by the Court's decision in **Omari Iddi Mbezi & 3 Others v. Republic**, Criminal Appeal No. 227 of 2009 (unreported) which should have guided the learned trial magistrate. As this was not done, the admission of the purported cautioned statement (exhibit P1) was irregular and the same is hereby expunged from the record. In any case, had the admission of exhibit P1 been regular, yet, its contents were not read and so it could not have been relied upon in proving the charge against the appellant.

In the light of the foregoing, unlike the two courts below, we endorse Mr. Ndamugoba's submission that, the charge of statutory rape was not proved since one of the essential ingredients; age of the victim, was not established. That means that, the two courts below concurred on their findings of fact on the guilt of the appellant as a

result of misapprehension of the evidence; lack of proof of the victim's age. Such finding is accordingly reversed and substituted with a finding of not guilty for lack of proof. The net result is that the appeal must be and is hereby allowed. Consequently, the appellant's conviction sustained by the High Court is quashed and sentence set aside substituted with an order of acquittal. The appellant shall be released from custody forthwith unless lawfully held therein for any other cause.

DATED at **MWANZA** this 17th day of August, 2023.

F. L. K. WAMBALI
JUSTICE OF APPEAL

L. J. S. MWANDAMBO
JUSTICE OF APPEAL

L. E. MGONYA
JUSTICE OF APPEAL

The Judgment delivered this 21st day of August, 2023 in the presence of the appellant in person unrepresented and Mr. Castuce Clemence Ndamugoba, learned Senior State Attorney for the Respondent/Republic, is hereby certified as a true copy of the original.

THE COURT OF APPEAL OF TANZANIA

A. L. KALEGEYA
DEPUTY REGISTRAR
COURT OF APPEAL