IN THE COURT OF APPEAL OF TANZANIA

AT TABORA

(CORAM: LILA, J.A., KITUSI, J.A. And MGEYEKWA, J.A.)

CRIMINAL APPEAL NO. 51 OF 2021

EZRA JOHN ..... APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

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

(Bahati J.)

dated the 4th day of December, 2020

in

Criminal Appeal No. 12 of 2020

JUDGMENT OF THE COURT

25th September, & 02nd October, 2023

MGEYEKWA, J.A.

The District Court of Urambo sitting at Urambo convicted the appellant of rape contrary to sections 130 (1) (2) (e) and 131 (1) of the Penal Code. Upon conviction, he was sentenced to thirty (30) years imprisonment. His appeal to the High Court was dismissed in its entirety, hence the second

appeal. The factual setting as unveiled by the prosecution during trial may briefly be recapitulated:- The prosecution alleged that on 13th June, 2018 at about 21:00 hrs at Mabatini area within Urambo District in Tabora Region, the appellant had carnal knowledge of a girl aged 15 years. To conceal the victim's identity, we shall henceforth refer to the girl as 'PW1' as she so testified before the trial court.

The appellant denied the charge laid against him and therefore, the case had to proceed to a full trial. To establish its case, the prosecution relied on the evidence of six witnesses and the appellant relied on his own evidence as he did not summon any other witness.

As hinted upon, the prosecution's accusation was to the effect that on the fateful day, PW1 met the appellant and he begged her to cook food for him at his homestead. At first, she cooked food for the appellant, but one thing led to another, the appellant removed PW1's clothes and had sexual intercourse with her. She remained at the appellant's house for the rest of that night. Karolina Aliseni (PW2) testified to the effect that on the fateful date at 20:00 hrs, she told PW1 to fetch water for her grandfather to which she obeyed. Later, PW2 around 21:00hrs traced PW1 to no avail. Some more evidence of the encounter came from Raphael Mwangoda (PW3) who,

incidentally, held himself to be the person who went to the scene after being instructed by the street chairman to search for PW1, who was missing. Later on, he saw PW1 at the appellant's house and asked her what had befallen her. She initially disclosed to have been raped by the appellant.

There was further prosecution evidence from Zainabu Maulid (PW4) who was informed that PW1 was missing. That on the following day, she was passing by the appellant's house and saw PW1's sandals and she informed PW1's mother (PW2). Subsequently, PW2 and PW4 proceeded to the scene where they found the victim and demanded her to tell them the truth which the victim yielded to and disclosed the happenings. Thereafter, the matter was reported to the police station, they arrested the appellant and referred PW1 to the hospital where she was medically examined.

A woman police No. 7928 Detective Corporal Florentina (PW5), was assigned to investigate the matter. On 18th June, 2018, she interrogated the appellant who according to her denied the allegations. Juma Selemani (PW6), a Clinical Officer of Songambele Dispensary examined PW1 and confirmed that there were some bruises in her vagina and PW1 was not a virgin.

In his sworn defence evidence, the appellant denied committing the alleged offence. He claimed that on 14th June, 2018 he was on guard duty. On the following day, he went to sell clothes along the street. It is his version that, on the fateful day and time, the ten-cell leader took him to the street chairman's office. He was astonished to be placed under restraint on the allegation that he raped a school girl. Later that day, he was brought to the police station where he was locked in for eight (8) days. On the ninth (9) day, he was interrogated by a police officer, but he denied the allegations.

As alluded to above, the trial court and first appellate court were convinced by the version of the prosecution witnesses and, accordingly, the appellant's defence evidence was rejected leading to his conviction and sentence. Hence the instant appeal in which the appellant is desirous of demonstrating his innocence.

In the memorandum of appeal, the appellant has fronted five grounds of complaint; **One**, that, the trial court erred in law in convicting the appellant based on the evidence of PW1 whose testimony was taken in contravention of section 127 (7) of the Evidence Act, Cap. 6; **two** that, the lower courts erred in law to convict the appellant based on exhibit P1 which

was improperly admitted in court; **three** that, the offence against the appellant was not proved beyond reasonable doubt as PW6 was not a qualified Doctor and exhibit P1 was baseless; **four** that, the age of the victim was not proved since the Head Teacher was not summoned to testify in court and they did not tender a birth certificate; and **five** that, the defence case was not considered.

At the hearing of the appeal, the appellant appeared in person, unrepresented. Besides adopting the grounds of appeal, the appellant opted to hear first the submissions of the respondent reserving the right to rejoin if need arises.

In response, Mr. Winlucky Mangowi, learned State Attorney appeared for the respondent. At the start, the learned State Attorney supported the appeal, he predicated his stance on the bare fact that the trial court judgment was flawed with several irregularities such as the evidence did not disclose all the essential ingredients of rape. He clarified that among the ingredients of the offence of statutory rape is to prove the age of the victim. He asserted that the prosecution must lead evidence proving the age of the victim in offences of statutory rape. Mr. Mangowi cited our decision in **Victor**

Mgenzi Mlowe v The Republic, Criminal Appeal No.354 of 2019 [2021] TZCA 149 (30 April 2021) TanzLII to bolster his submission.

The learned State Attorney continued to submit that proof of age may come from either the victim or her relative, parent, medical practitioner, or by producing a birth certificate. He conceded that the prosecution did not tender adequate evidence to justify the guilt of the appellant, such as, the establishment of the age of the victim that she was below the age of 18 years. He clarified that during trial, the victim did not state her age and even her mother in her testimony did not also mention the age of her daughter. He continued to submit that the only document which mentioned the victim's age was the PF3 but the same was later expunged from the record of the court. He had a different point of view from the findings of the first appellate court which stated that the particulars of the victim can be relied upon to prove her age. Relying on the case of **Peter Bugumba @ Cherehani v. The Republic**, Criminal Appeal No. 251 of 2019 [2023] TZCA 221 (4 May 2023) TanzLII, he urged us to find that the citation of the victim's age in the charge sheet or on the victim's particulars is not proof of her age. The learned State Attorney cemented that, failure to prove the age of the victim

renders the charge against the appellant unproved to the standard warranting a conviction.

As regards the last ground, the learned State Attorney submitted that the appellant's complaint that his defence was not considered did not feature in the first appellate court judgment and that it was therefore not decided upon. He, however, invited us to consider it because it raises an issue of law. Admittedly, he conceded that the trial court did not consider the defence case as well as the first appellate court did not evaluate the appellant's defence evidence before reaching its decision which was contrary to the law. He was certain that the prosecution failed to prove the case beyond reasonable doubt and it is for that reason, he prayed the appeal be allowed, the sentence be quashed and the conviction set aside.

In his brief rejoinder, the appellant concurred with the learned State Attorney's submission and urged the Court to release him.

On our part, we have dispassionately considered the concurring arguments of the appellant and learned State Attorney. The grounds of appeal shall be determined in the same manner and style adopted by the learned State Attorney in his arguments. The main issues for consideration

are: one, whether the victim's age was proved to the standard required by law; and two, whether the lower courts considered the defence case.

On the fourth ground of complaint, the appellant is faulting the two courts below for having wrongly relied upon the evidence of PW1 (the victim) without considering the fact that her age was not proved. On the whole of the evidence, the trial court and first appellate court were concurrent in the findings that the age of the victim was proved.

The appellant's complaint in the case at hand is associated with the age of the victim at the material date. In our previous decisions, we have emphasized that establishment of the age of the complainant is significant. See **Peter Bugumba @ Cherehani** (supra) and **Issaya Renatus v. Republic,** Criminal Appeal No. 542 of 2015 [2016] TZCA 218 (26 April 2016) in the latter case, we held that:

> "*We are keenly conscious of the fact that age is of great essence in establishing the offence of statutory rape under section 130 (1) (2) (e), the more so as, under the provision, it is a requirement that the victim must be under the age of eighteen. That being so, it is most desirable that the evidence as to proof of age be given by the victim,*

relative, parent, medial practitioner or, where available by the production of a birth certificate. We are however, far from suggesting that proof of age, must, of necessity, be derived from such evidence. There may be cases, in our view, where the court may infer the existence of any fact including the age of the victim on the authority of section 122 of [the Evidence Act]...,"

As intimated above, the age of the victim in statutory rape offences is a necessary ingredient that ought to be proved beyond reasonable doubt. The record of appeal, is to the effect that, neither the victim nor her mother testified on that aspect. The particulars of the victim before she took oath show that she was fifteen (15) years old but that is not part of evidence. That being so, it was most desirable that the age of the victim may be proved by the victim, the victim's parents or guardian, relative, medical practitioner or by way of production of a birth certificate.

Incidentally, this ground was brought to the attention of the learned appellate judge and after due consideration, the first appellate judge expressed the view that the particulars of offence sufficed to prove the age of the victim. We entirely accept the learned State Attorney's submission that

the particulars of the offence or victim or citation of the age of the victim are not proof of the age of the victim. The importance of proving the age of the complainant in rape offence was emphasized in **Peter Bugumba @ Cherehani** (supra) cited with approval in **Andrea Francis v. Republic,** Criminal Appeal No. 173 of 2014 (unreported) where we held that:-

> *"... it is trite law that citation in the charge sheet relating to the age of an accused person is not evidence. Likewise, the citation by a magistrate regarding the age of a witness before giving evidence is not evidence of that person's age."*

As alluded to above, in this case und`er consideration, the age of the child was neither medically assessed nor proved through any documentation. The prosecution relied on the PF3 to prove the victim's age. The learned State Attorney argued that the said document was worthless because, as shown on page 20 of the record of appeal, its contents were not read out after it was admitted in the evidence and the same was expunged by the first appellate court. After its expungement, there is no any other piece of evidence to prove the age of the victim. We respectfully accept the learned State Attorney's submission.

In addition, we have thoroughly scrutinized the evidence on record to ascertain the issue raised by the appellant that PW1 was a student which he related with the age of the victim. The record of appeal reveals that at the material date, the victim was a Standard IV scholar, a fact which was not proved by the Head Master of Mabatini Primary School who was not summoned to testify in court. However, even, if the Head Master was called to testify and proved that PW1 was a student, it alone could not suffice to draw an inference that she was below eighteen (18) years of age as the possibility that she was an overage person cannot be ruled out. See **Peter Bugumba @ Cherehani** (supra). In our view, there is reasonable doubt over the actual age of the victim at the time of the commission of the offence.

The repercussion of it is that since the victim's age was unproven, the doubt leans in favour of the appellant. The charged offence of statutory rape cannot stand. We so find.

Next for our consideration is the fifth ground of appeal in which the appellant faulted the first appellate court for sustaining the conviction despite the fact that the trial court did not consider the defence case. As correctly stated by the learned State Attorney, this is a new ground that was

not featured before the first appellate court and determined as such, however, the same raises a point of law worthy of consideration. It is plain from the record of appeal that the trial court did not consider and evaluate the appellant's defence, while it had a duty to consider all the evidence either good or bad passionately to form an informed opinion as to its quality before a formal conclusion is arrived at. See the case of **Mkulima Mbagala v. The Republic**, Criminal Appeal No. 267 of 2006 (unreported). It is settled that failure to consider the defence evidence vitiates the trial. This was the position in **Leonard Mwanashoka** Criminal Appeal No. 226 of 2014 [2015] TZCA 294 (24 February 2015) TanzaLII. It is unfortunate, that the first appellate judge fell into the same error and did not re-evaluate the entire evidence as she was duty bound to do. However, having being satisfied that there are apparent weaknesses in the prosecution case, we find that there is no need to evaluate the defence case. We are of the firm view that, the position of the Court stated above in determination of ground four of the appeal is sufficient to dispose of this appeal.

In the premises, we find the appeal meritorious and it succeeds. Therefore, the conviction is quashed and the sentence meted out is set aside. The appellant be released forthwith unless otherwise lawfully held.

Order accordingly.

DATED at **TABORA** this 2nd day of October, 2023.

S. A. LILA
JUSTICE OF APPEAL

I. P.KITUSI
JUSTICE OF APPEAL

A. Z. MGEYEKWA
JUSTICE OF APPEAL

Judgment delivered this 2nd day of October, 2023 in the presence of Mr.Ezra John, the Appellant in person and Mr. Steven Mnzava, State Attorney for the Respondent/Republic, is hereby certified as a true copy of the original.

G. H. HERBERT
DEPUTY REGISTRAR
COURT OF APPEAL