IN THE COURT OF APPEAL OF TANZANIA
AT MWANZA

(CORAM: NDIKA, J.A., KOROSSO, J.A. And KIHWELO, J.A.)

CRIMINAL APPEAL No. 252 OF 2019

JAFARI JUMA..... .....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. 238 of 2018

.....

JUDGMENT OF THE COURT

27th April & 3rd May, 2023

KIHWELO, J.A.:

The appellant, Jafari Juma was arraigned in the District Court of Misungwi at Misungwi for two counts, namely, rape contrary to section 130 (1) (2) (e) and 131 of the Penal Code, [Cap. 16 R.E. 2002] (the Code) and impregnating a secondary school girl contrary to section 60A (3) of the Education Act [Cap. 353 R.E. 2002] ("the Education Act") as amended by section 22 of the Written Laws (Miscellaneous Amendments) (No. 2) Act

No. 4 of 2016. It was alleged that, on unknown date in December 2017 during day time at Nyahiti village within Misungwi District in Mwanza Region the appellant had sexual intercourse with a girl aged 16 years who we shall henceforth identify her as "the complainant" for purposes of concealing her identity. It was alleged further that, the appellant on the same day and place within Misungwi District in Mwanza Region impregnated the complainant a secondary school girl at Igokelo Secondary School (the school).

The trial court upon hearing the prosecution and the defence, believed the prosecution's version that the case against the appellant was proved to the hilt. Accordingly, it found the appellant guilty as charged, convicted him and subsequently sentenced him to serve 30 years' imprisonment on each count. Both sentences were to run concurrently.

In protesting his innocence, the appellant lodged his first appeal before the High Court in Criminal Appeal No. 238 of 2018 (the first appellate court) which upon hearing the appeal on merit, on 3/05/2019 the High Court (Madeha, J.) dismissed the appeal for being devoid of merit. Undeterred, the appellant lodged this second appeal.

Before the trial court, the prosecution case was founded on the evidence of five (5) witnesses namely; Revocatus Mashimba (PW1), the victim (PW2), Paulina Merdad George (PW3), Upendo E. Kitwana (PW4) and WP 3283 D/C Roda (PW5). On the adversary side, the defence had the appellant himself as DW1 and Issa Jumanne (DW2).

The facts of the case as found by the lower court and on the basis of the record, are that, on 15/02/2018, PW1, the father of the complainant was summoned by the school through a letter which was sent by the complainant. In compliance, PW1 went to the school where he was shocked by the news of her daughter's pregnancy. When asked who was responsible for her pregnancy, the complainant spilled the beans by mentioning the appellant. As if that was not enough, the complainant went ahead to narrate during her testimony before the trial court, how they were in intimate relationship with the appellant since 2017, and that occasionally, the duo would meet at the appellant's rented room at Nyahiti area for sexual intercourse to quench their thirst which ultimately led to her pregnancy and suspension from school.

According to PW3, a school teacher, in February 2018, the victim along with other school girls at the school were subjected to pregnancy

test and the victim was found to be pregnant. Further test was conducted at the school dispensary and it confirmed the earlier results. Furthermore, PW1 took the victim to Misungwi Hospital where PW4, the clinical officer conducted a ultrasound examination whose results indicated that the victim was three months and four days pregnant. PW4 then prepared a PF3 which was tendered in court by PW2 and admitted as "exhibit P1". On the other hand, PW5 a police officer, recorded the cautioned statement of the appellant who was in custody and confessed to have committed the offence. The cautioned statement was tendered in court and recorded as "exhibit P2".

It is not insignificant to state that, the appellant did not cross examine the prosecution witnesses except for PW5 who he cross examined merely in passing. We shall, at a later stage of our judgment, revert to this disquieting aspect to determine its consequences.

In his sworn defence testimony before the trial court, the appellant totally distanced himself from the accusations made against him by the prosecution. He simply stated that he was not responsible for the alleged pregnancy and did not have any relationship with the victim. DW2 on his

part, defended the appellant that he did not feel that the appellant was responsible for the victim's pregnancy.

As hinted earlier on, at the height of the trial, it was found that, on the whole of the evidence, the charged offences were proven to the hilt and therefore, the appellant was convicted and sentenced as stated above.

In this appeal before us, the appellant initially amassed three (3) grounds of grievance. However, when the matter came up for hearing, he prayed and was granted leave under rule 73 (1) of the Tanzania Court of Appeal Rules, 2009 (the Rules) to lodge a supplementary memorandum of appeal containing eight (8) points of grievance which when looked at critically both points of grievance boil down to four substantive grounds as follows;

1. *That, the first appellate court erred in relying upon the cautioned statement which was irregularly obtained to sustain the conviction.*
2. *That, the first appellate court erred in relying upon the PF3 which was irregularly admitted in evidence.*
3. *That, the first appellate court erred in upholding the appellant's conviction without considering that the age of the victim was not proved.*

4. *That, the first appellate court erred in upholding the appellant's conviction without considering that the prosecution did not prove the case beyond reasonable doubt.*

At the hearing before us, the appellant was fending for himself, unrepresented, whereas, Mr. Morice Mtoi, learned State Attorney, stood for the respondent Republic. When prompted by the Court, the approach he would prefer to argue his appeal, the appellant elected to leave the learned State Attorney, begin first and he would respond at a later stage if need would arise.

Mr. Mtoi, at first, took the view that there was substance in the entire appellant's appeal. However, on reflection, he abandoned that track, and fully supported the conviction and sentence on the second count while faulting the second appellate court for sustaining conviction and sentence on the first count which to his view, was not proved to the hilt. He based his new stance on the basis that, despite the fact that there was no deoxyribonucleic acid (DNA) test conducted, it was on record that the evidence of PW2 and PW3 proved the victim to be a school girl, and that the appellant was the one responsible for her pregnancy. For in his view, the first appellate court was right in upholding both conviction and sentence in respect of the second count.

Arguing in support of ground 1 in the substantive memorandum and ground 4 in the supplementary memorandum of appeal in respect of the cautioned statement, Mr. Mtoi submitted that, the conviction of the appellant was mainly based upon the cautioned statement, exhibit P2. He however, contended that exhibit P2 was improperly admitted and wrongly relied upon by the trial court because it was recorded outside the four hours period available for interviewing a person as prescribed by section 50 (1) (a) of the Criminal Procedure Act [Cap 20 R.E.2002] (the CPA). Illustrating, the learned counsel contended that, the appellant was apprehended on 12/03/2018 but his cautioned statement exhibit P2 was recorded on 13/03/2018. He further argued that no witness testified at the trial court to prove that the provision of section 50 of the CPA was complied with one way or the other.

The learned State Attorney, further submitted that, exhibit P2, was improperly admitted and wrongly relied upon by the trial court to ground conviction of the appellant because it was not read out after being admitted in evidence and therefore, he concluded that because of the glaring flaws of exhibit P2 it should be expunged from the records. He paid homage to the most celebrated case of **Robinson Mwanjisi and Others v. Republic** [2003] T.L.R. 218 to support his proposition.

In respect of ground 2 of the substantive memorandum of appeal, the learned State Attorney pointed out that, the prosecution case was not proved to the hilt in as far as the first count is concerned and went ahead to amplify that, the PF3, exhibit P1 was improperly admitted and wrongly relied upon by the trial court to ground conviction of the appellant because it was not read out after being admitted in evidence. Reliance was placed in the earlier cited case of **Robinson Mwanjisi and Others** (supra) to drive home his proposition. Taking the argument further he humbly prayed that exhibit P1 be expunged from the record.

In further arguing ground 2 the learned counsel contended that, the age of the victim was not proved by any of the prosecution witnesses or at all. In his view, age is of great essence in proving statutory rape in terms of section 130 (2) (e) of the Code and cited the case of **Leonard Sakata v. Republic**, Criminal Appeal No. 235 of 2019 (unreported) to bolster his argument.

In respect of ground 3 of the substantive memorandum of appeal, the learned State Attorney submitted that the complaint by the appellant that he was not accorded fair trial is not meritorious. In his view, the appellant was given opportunity to enter plea, he was fully involved during

preliminary hearing, was given opportunity to cross examine witnesses and was accorded all the rights after the closure of the prosecution case where he chose to defend himself and brought one more witness to defend him. The learned State Attorney argued further that, the offence with which the appellant stood charged did not qualify for legal aid under the Legal Aid Act, 2016. He therefore, implored us to dismiss this ground for being devoid of any merit.

According to the learned State Attorney, the rest of the grounds in the supplementary memorandum of appeal namely grounds 1, 2, 3, 5, 6, 7, and 8 have been fully covered one way or the other following the submissions above. In all, the learned State Attorney, urged the Court to dismiss the appeal save for count 1 which was not proved beyond reasonable doubt as stated above.

Upon our prompting on the legality and propriety of the sentence of thirty years' imprisonment which the learned trial Magistrate imposed, the learned State Attorney admittedly argued that, in terms of section 170 (1) (a) of the CPA the learned trial Resident Magistrate had wide discretion to impose custodial term of up to thirty years as stipulated under the penal section, section 60A (3) of the Education Act. In his view, the trial Resident

Magistrate erroneously imposed the maximum punishment which is manifestly excessive. Accordingly, he implored us to intervene and revise the sentence.

The appellant had nothing in rejoinder. He urged the Court to consider his grounds of appeal in determining the appeal.

From the foregoing submissions of the learned State Attorney in response to the grounds of appeal, we propose to dispose of the appeal by deliberating on the four decisive grounds as crystalized above. Starting with the first point, the complaint is on the irregular obtaining and admission of exhibit P2.

To begin with, we are in full agreement with Mr. Mtoi that, exhibit P2 was improperly admitted and wrongly relied upon by the trial court to ground conviction of the appellant because it was recorded outside the time prescribed by section 50 (1) (a) of the CPA. That section provides that:

> *"50-(1) For the purpose of this Act, the period available for interviewing a person who is in restraint in respect of an offence is*
>
> *"(a) subject to paragraph (b), the basic period available for interviewing the person, that is to say,* ***the period of four hours commencing at the time***

when he was taken under restraint in respect of the offence." [Emphasis added]

It is on record that the appellant was apprehended on 12/03/2018 but his cautioned statement exhibit P2 was recorded by PW5 on 13/03/2018 at 13:30 Hours and, as rightly submitted by Mr. Mtoi, no witness testified at the trial court to prove that the provision of section 50 of the CPA was complied with one way or the other. This is a serious anomaly which the learned trial Magistrate ought to have discovered. It is unfortunate that, the anomaly escaped the attention of the first appellate court too. There is a litany of case law which all underscore that, non-compliance with section 50 of the CPA is a fundamental irregularity that goes to the root of the matter and renders the illegally obtained evidence inadmissible and one that cannot be acted upon by the court. See, for instance the case of **Mkwavi s/o Njeti v. Republic,** Criminal Appeal No. 301 of 2015, **Said Bakari v. Republic,** Criminal Appeal No. 422 of 2013 (both unreported).

Corresponding observations were made in the case of **Mawazo Mohamed and Others v. Republic,** Criminal Appeal No. 184 of 2018 (unreported) in which faced with analogous situation, we emphasized that, the effect of non-compliance with section 50 of the CPA is to render such

documents bad evidence liable to be expunged from record. Thus, we find and hold that the cautioned statement of the appellant exhibit P2 is bad evidence and accordingly we discard it from the record.

We wish to remark in passing that exhibit P2 was further faulted by the learned State Attorney, and rightly so in our mind that, it was improperly admitted and wrongly relied upon by the trial court to ground conviction of the appellant, because it was not read out after being admitted in evidence. However, since we have already discarded exhibit P2 from the record, we think it will be pretentiously academic to make a painstaking inquiry into this matter at this juncture. Suffice it to say that, we find considerable merit in Mr. Mtoi's submission that it was improper and irregular for the trial court to have relied upon exhibit P2 in the conviction whilst exhibit P2 was not read out after being admitted in evidence.

We will next deliberate on the complaint that exhibit P1, was improperly admitted and wrongly relied upon by the trial court to ground conviction of the appellant, because it was not read out after being admitted in evidence. It is apparent from the record that, there is considerable merit in Mr. Mtoi's submission. For clarity, we wish to let the record of appeal at page 13 speak for itself:

*"**PW2:** .....I was examined and a PF3 was filled thereat and I pray to tender it as an exhibit in Court.*
***Accused:** I do not know it.*
***Court:** PF3 of Rachel d/o Mindo is admitted and marked as exhibit P1.*
That is all"

Clearly, the above excerpt indicates that exhibit P1 upon clearance for admission and actual admission was not read out in court. This is contrary to the principle of law which we laid down in the landmark case of **Robinson Mwanjisi and Others** (supra) in which the cautioned statements of the appellants were read out in court before clearance for admission and we emphasized the need for any document which is introduced for admission in evidence to be first cleared for admission before it can be read out in court, then be actually admitted in evidence before finally reading out in court. Reading out documentary exhibits is an assurance that the accused understands the contents of the exhibit.

We are thus satisfied that, exhibit P1 was irregularly admitted and acted upon to convict the appellant and therefore, we accordingly discard it from the record.

We will now turn to the complaint that, age of the victim was not proved. In our profound opinion we find considerable merit in Mr. Mtoi's submission. It is a peremptory principle of law that in statutory rape cases like the one before us, the age of the victim must be proved. Mr. Mtoi, referred us, to the case of **Leonard Sakata** (supra) where the Court underlined in imperative terms that in cases of statutory rape, age is an important ingredient of the offence which must be proved. There is in this regard an array of authorities to support this settled position of the law, see for example **Rwekaza Bernado v. Republic**, Criminal Appeal No. 477 of 2016, **Mwami Ngura v. Republic**, Criminal Appeal No. 63 of 2014 and **Solomon Mazala v. Republic**, Criminal Appeal No. 136 of 2012 (all unreported).

In the case of **Leonard Sakata** (supra) faced with a situation similar to the one before us we referred to our previous decision in **George Claud Kasanda v. Republic**, Criminal Appeal No. 376 of 2017 (unreported) in which an attempt was made to describe statutory rape as follows:

> *"In essence that provision (section 130 (2) (e) of the Penal Code) creates an offence now famously referred to as statutory rape. It is termed so for a simple reason*

that it is an offence to have carnal knowledge of a girl who is below 18 years whether or not there is consent. In that sense age is of great essence in proving such an offence."

Yet, in another case of **Alex Ndendya v. Republic,** Criminal Appeal No. 340 of 2017 (unreported) where the appellant was charged for statutory rape but none of the witnesses proved age of the victim we emphasized that:

"In light of the above, age is of utmost importance and in a situation where the appellant was charged with statutory rape then age of the victim must be specifically proved before convicting the appellant."

Unfortunately, in the appeal before us as rightly submitted by Mr. Mtoi, the age of the victim was not proved by any of the prosecution witnesses or at all. We therefore, have no hesitation in answering this ground of grievance in the affirmative that, the first appellate court erred in upholding the appellant's conviction for the first count of rape without considering that the age of the victim was not proved. This ground therefore succeeds.

We, next move to the fourth ground of grievance that the first appellate court erred in upholding the appellant's conviction without considering that the prosecution did not prove the case beyond reasonable doubt. Mr. Mtoi contended that absence of deoxyribonucleic acid (DNA) test did not invalidate the evidence on record of the prosecution witnesses who proved the victim to be a school girl and that the appellant was the one responsible for her pregnancy. We think, with great respect, that Mr. Mtoi was right, PW1, PW2 and PW3 testified to the effect that the victim was a secondary school girl and that the appellant was the one responsible for her pregnancy.

It is very unfortunately that, the appellant did not cross examine PW1, PW2 and PW3 on this account to shake their credibility. As a matter of principle, a party who fails to cross examine a witness on a certain matter is deemed to have accepted that matter and will be estopped from asking the trial court to disbelieve what the witness said. See, for instance, **Nyerere Nyague v. Republic,** Criminal Appeal No. 67 of 2010, **Cyprian A. Kibogoyo v. Republic**, Criminal Appeal No. 88 of 1992, **Paul Yusuf Nchia v. National Executive Secretary, Chama cha Mapinduzi and Another**, Civil Appeal No. 85 of 2005 and **Khaji Manelo Bonye v. Republic,** Criminal Appeal No. 338 of 2008 (all unreported).

Further, even the appellant's cross examination of PW5 was, with due respect, not very useful and in the meantime not even relevant as it related to exhibit P2 which has been discarded from the record. As stated above, failure to cross examine a witness leaves her/his evidence to stand unchallenged.

In the case of **Khaji Manelo Bonye** (supra) we quoted a passage by **Peter Murphy** in **Blackstone's Criminal Practice** at page 1870 as we earlier on referred in **Goodluck Kyando v. Republic**, Criminal Appeal No. 118 of 2003 (unreported) thus:

"The object of cross examination is-

(i) to elicit from the witness evidence supporting the cross - examining party's version of the facts in issue;

(ii) to weaken or cast doubt upon the accuracy of the evidence given by the witness in chief; and

(iii) in appropriate circumstances, to impeach the witness' credibility."

It is instructive that, the duty of the prosecution to prove the case beyond reasonable doubt is universal. In **Woodmington v. DPP** (1935) AC 462, it was held inter alia that, it is a duty of the prosecution to prove the case and the standard of proof is beyond reasonable doubt. This is a

universal standard in criminal trials and the duty never shifts to the accused.

The term beyond reasonable doubt is not statutorily defined but case laws have defined it, in the case of **Magendo Paul & Another v. Republic** [1993] T.L.R. 219 the Court held that:

> *"For a case to be taken to have been proved beyond reasonable doubt its evidence must be strong against the accused person as to leave a remote possibility in his favour which can easily be dismissed."*

We hasten to state at this point that, the prosecution evidence in relation to count two as explained above clearly indicates that the victim was a secondary school girl and that the appellant was the one responsible for her pregnancy. PW2 testified that the duo started sexual intercourse since 2017 and the appellant did not dispute this fact. Even if we assume for the sake of argument that the appellant did not rape the victim since the victim indicated in her testimony that there was consensual sex and, even if we assume just for the sake of argument that the victim was above 18 years which is not on record, but the fact that there was evidence to prove that the appellant impregnated a secondary school girl, the appellant

cannot exonerate himself from the offence he was charged with and convicted of by the trial court on the second count and upheld by the first appellate court. We therefore think that the first appellate court rightly upheld the conviction of the appellant on the second count based upon the cogent prosecution evidence on record.

We wish now to deliberate on the legality and propriety of the sentence of thirty years' imprisonment imposed on the appellant on the second count. The learned State Attorney admittedly argued that the learned trial Resident Magistrate imposed manifestly excessive sentence of thirty years' imprisonment.

We wish to state that, the learned trial Resident Magistrate sentenced the appellant upon misapprehension of the law resulting in his failure to exercise discretion and impose an appropriate sentence commensurate with the circumstances of the case. We are mindful of the fact that, there is no record of mitigating factors, but equally there is no record that the appellant had a previous criminal record and therefore, the appellant deserved a more lenient sentence than the one which was imposed on him.

For better understanding the provision of section 60A (3) of the Education Act, we wish to restate hereunder as follows:

> *"60A-(3) Any person who impregnates a primary school or secondary school girl commits an offence and* ***shall, on conviction, be liable to imprisonment for a term of thirty years.****"* [Emphasis added]

Time and again we have emphasized that, the phrase "*shall be liable to imprisonment for a term of thirty years*" which we have emboldened above, does not impose the custodial term of thirty years as the mandatory penalty. It gives discretion to the trial court, subject to its sentencing jurisdiction, to sentence the offender up to the maximum of thirty years' imprisonment depending upon the circumstances of the case after considering all mitigating factors. See, **Sokoine Mtahali @ Chimongwa v. Republic**, Criminal Appeal No. 459 of 2018 (unreported) in which we drew inspiration from the decision by the erstwhile Court of Appeal for East Africa in **Opoya v. Uganda** [1967] E.A. 752 on an appeal originating from Uganda in which the court interpreted the phrase "*shall be liable to*" as follows:

> *"It seems to us beyond argument that the words "shall be liable to"* ***do not in their ordinary meaning require the imposition of the stated penalty but merely express the stated penalty which may be imposed at the discretion of the court****. In other words, they are not mandatory but provide a maximum sentence only and while the liability existed the court might not see fit to impose it." [Emphasis added]*

We took a similar position in the case of **Nyamhanga Magesa v. Republic**, Criminal Appeal No. 470 of 2015, **Abdi Masoud @ Iboma v. Republic,** Criminal Appeal No. 116 of 2015 and **Faruku Mushenga v. Republic,** Criminal Appeal No. 356 of 2014 (all unreported).

On the basis of the above stated reasons, and considering that this aspect went unnoticed by the first appellate court, we agree and hold that the said imposed sentence of thirty years' imprisonment for the second count was manifestly excessive and in terms of section 4 (2) of the Appellate Jurisdiction Act, Cap 141 R.E. 2002, we invoke revisional powers and set aside the sentence of thirty years' imprisonment imposed on the appellant on the second count whose conviction we have upheld. We instead, considering the circumstances of this matter and the fact that the

appellant has up to now served more than five years in jail since his imprisonment on 13/08/2018, we sentence him to such a term of imprisonment that will result into his immediate release from prison unless otherwise held for other lawful cause.

The appeal is allowed to the extent shown above.

DATED at **MWANZA** this 2nd day of May, 2023.

G. A. M. NDIKA
JUSTICE OF APPEAL

W.B. KOROSSO
JUSTICE OF APPEAL

P. F. KIHWELO
JUSTICE OF APPEAL

The Judgment delivered this 3rd day of May, 2023 in the presence of the Appellant in person and Mr. Morice Mtoi, learned State Attorney for the Respondent/Republic is hereby certified as a true copy of the original.

A. L. KALEGEYA
DEPUTY REGISTRAR
COURT OF APPEAL