

IN THE COURT OF APPEAL OF TANZANIA

AT MWANZA

(CORAM: MUGASHA, J.A., MAIGE, J.A. And KHAMIS, J.A.)

CRIMINAL APPEAL NO. 211 OF 2020

COSMAS HERMAN.....APPELLANT

VERSUS

THE REPUBLICRESPONDENT

(Appeal from the Judgment of the High Court of Tanzania, at Mwanza)

(Ismail, J.)

dated 15th Day of April, 2020

in

Criminal Appeal No. 72 of 2019

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JUDGMENT OF THE COURT

28th May, & 3rd June, 2024

MAIGE, J.A.:

At the District Court of Bukombe (the trial court), the appellant herein was charged with the offence of rape contrary to section 130(1) (2) (e) and 131(1) of the Penal Code. The rape in question was alleged to have been committed against a girl of 13 years (the victim) on 19th day of April, 2017 at about 05: 25 hrs at Msasa Village within Bukombe District in Geita Region.

In brief, the prosecution case at the trial was as follows. On the material date and time herein mentioned, the appellant took the victim into his room where he unlawfully had carnal knowledge of her. When the victim returned home, she was asked by her father one Jafari John (PW2), where had she been and disclosed that she was with the appellant. On being further interrogated, she revealed that she had been raped by the appellant. The appellant was arrested and taken to the office of the Village Executive Officer one Salome Ncharangi (PW3) where he admitted to have committed the offence. The victim was then examined by Dr. Mariam Hemed (PW5) and established as per exhibit P1 that she had been raped.

In his defence, the appellant denied the charge. He claimed that, the case against him had been framed up due to a land dispute between him and PW2.

Upon trial, the trial court convicted the appellant of the offence and sentenced him to thirty years imprisonment. His appeal to the High Court was dismissed, hence this appeal. In the initial memorandum of appeal and the supplementary memorandum of appeal, the appellant has enumerated eight grounds which in essence raise one issue namely; whether the charge against the appellant was proved beyond reasonable doubt.

At the hearing, the appellant appeared in person without being represented. The respondent Republic enjoyed the services of Ms. Revina Tibilengwa, learned Principal State Attorney assisted by Messrs. Daniel Masambu and George Ngemela, both learned State Attorneys.

When invited to address the Court on the appeal, the appellant just adopted the grounds of appeal in both the initial memorandum of appeal and the supplementary memorandum of appeal and urged us to allow the appeal.

For the respondent Republic it was Mr. Masambu who presented the arguments. He told the Court that, the respondent was supporting the appeal. He submitted that; in accordance with the record, the appellant was charged with statutory rape under section 130(2) (e) of the Penal Code. In such an offence, he submitted, the age of the victim was an essential ingredient. He clarified that, none of the prosecution witnesses disclosed the age of the victim. Therefore, like the appellant, the counsel urged us to allow the appeal and set the appellant free.

We have considered the submissions by the learned State Attorney in line with the record of appeal. We are in agreement with him that, the charge against the appellant was not proved beyond reasonable doubt.

As he correctly submitted, the appellant was charged under section 130 (2) (e) of the Penal Code. The offence under the respective provisions is committed where a male person has sexual intercourse with a girl "*with or without her consent when she is under eighteen years of age, unless the woman is his wife who is fifteen or more years of age and is not separated from the man.*"

It is plain, therefore that, for a rape under section 130(2) (e) of the Penal Code to exist, the victim must be a girl whose age is below 18 years. The age of the victim is, therefore, an essential element of the offence in the absence of which the same cannot be proved. Thus, in the case of **Sumitu Abdallah v. R** (Criminal No. 247 of 2021) [2023] TZCA 17994 (14 December 2023), it was held that; in a case where the victim's age is the determining factor in establishing the offence, evidence must be positively laid out to disclose the age of the victim. See also **Leonard s/o Sakata v. the DPP** (Criminal Appeal No. 235 of 2019) [2022] TZCA 30 (17 February 2022) and **Mathayo Laurence William Mollel v. R** (Criminal Appeal No. 53 of 2020) [2023] TZCA 52 (20 February 2023).

We have scanned the record of appeal and we entertain no doubt that, the prosecution evidence is absolutely silent on the age of the victim. Her age was only mentioned in exhibit P1. However, the said exhibit was

expunged from the record by the High Court on appeal for the reason that it was not read out after being cleared for admission. In the circumstances, the charge against the appellant was not proved beyond reasonable doubt.

In the final result and for the foregoing reasons, we allow the appeal, accordingly quash the conviction and set aside the sentence meted out against the appellant. We order his immediate release from prison unless his continued incarceration is related to other lawful cause.

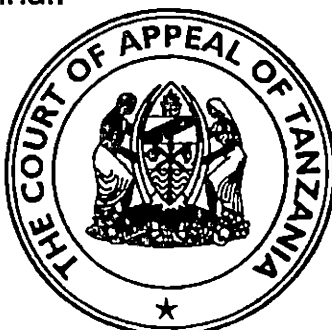
DATED at MWANZA this 31st day of May, 2024.

S. E. A. MUGASHA
JUSTICE OF APPEAL

I. J. MAIGE
JUSTICE OF APPEAL

A. S. KHAMIS
JUSTICE OF APPEAL

Judgment delivered this 3rd day of June, 2024 in the presence of the Appellant in person and Mr. Daniel Masambu, learned State Attorney for the Respondent/Republic, through video link from the Office of National Prosecution Service at Mwanza, is hereby certified as a true copy of the original.




O. H. KINGWELE
DEPUTY REGISTRAR
COURT OF APPEAL