

**IN THE UNITED REPUBLIC OF TANZANIA**

**JUDICIARY**

**IN THE HIGH COURT OF TANZANIA**

**(DISTRICT REGISTRY OF MBEYA)**

**AT MBEYA**

**CONSOLIDATED CRIMINAL APPEAL NO. 115/128 OF 2019**

*(Appeal from the decision of the RMs Court of Mbeya at Mbeya in  
Criminal Case No. 110 of 2010)*

**ELIAS MPORI.....APPELLANT**

**VERSUS**

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

**JUDGEMENT**

*Date of Last Order : 24/08/2020*

*Date of Judgement: 05/10/2020*

**MONGELLA, J.**

The appellant, Elias Mpori, was convicted and sentenced to life imprisonment on the charge of rape contrary to section 130 (2) (e) and 131 (1) of the Penal Code, Cap 16 R.E. 2002. He was alleged to commit the offence on 21<sup>st</sup> September 2010 about 21 hours at Mwanjelwa village in Utengule against a girl aged 7 years. Aggrieved by this decision he has preferred this appeal on 7 grounds. However, I shall deal first with ground number two, the result of which shall determine if it shall still be necessary to deliberate on the remaining grounds. Under this ground the appellant contends that the trial Magistrate erred in law and facts by convicting him relying on the prosecution evidence that on the alleged date of rape, the victim was 7 years while there was no proof to such effect.



In the written submission filed by the appellant's advocate Ms. Irene Mwakyusa, it was argued that while in the charge it was stated that the victim was aged 7 years, the trial Magistrate in conducting *voire dire* examination found the age of the victim to be 10 years. Under the circumstances, Ms. Mwakyusa contended that a contradiction occurred and the prosecution ought to have cleared the doubts concerning the age of the victim by providing evidence as required under the law. To bolster her argument she cited a decision of the Court of Appeal in **Bashiri s/o John v. Republic**, Criminal Appeal No. 486 of 2016 (CAT at Iringa, unreported) whereby it was held that proof of age is done by either evidence from the parents, medical practitioner or by birth certificate. She argued that no proof in accordance to this decision was conducted by the prosecution. She further referred to the case of **Tano Mbika v. Republic**, Criminal Appeal No. 152 of 2016 (CAT at Dodoma, unreported) in which the Court while quoting its previous decision in **Andrea Francis v. Republic**, Criminal Appeal No. 173 of 2014, held:

*"It is trite law that the citation in a 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 the person's age."*

Ms. Mwakyusa further argued that the CAT in the same case, at page 7, while quoting its previous decision in **Solomon Mazala v. Republic**, Criminal Appeal No. 136 of 2012 (unreported) further stated that:

*"...before a conviction is grounded in terms of section 130 (2)...there must be tangible proof that the age of the victim*

*was under 18 years at the time of the commission of the alleged offence."*

On this ground, she concluded that there were contradictions on the age of the victim and the same was not proved as required under the law.

On the other hand, Ms. Sara Anesius, learned State Attorney who represented the respondent, was of the view that the prosecution proved the age of the victim. In her written submission, she argued that PW2, the victim, testified that her mother told her that she was ten years old. Agreeing on the position that age can be proved through parent testimony, medical practitioner's report or birth certificate, she referred the court to the testimony of PW4 at page 37 to 39 of the typed proceedings whereby he tendered the PF3, exhibit P2 which indicated the victims' age. In that regard she contended that the victim's age was proved by the prosecution. Referring to the case of **George Maili Kemboge v. Republic**, Criminal Appeal No. 327 of 2013 (CAT at Mwanza, unreported), she further argued that the appellant never cross examined on this aspect thus the conviction was proper.

I have considered the arguments by both parties. In rape cases where the victim is said to be below eighteen years, the determination of the age of the said victim becomes crucial. The testimony of the victim or her parent(s) stating the age or medical reports to that effect could be evidence to prove the age. However, I agree with Ms. Mwakyusa that where a contradiction occurs regarding the age of the victim between the witnesses or between the charge and the victim's evidence, as in the case at hand, an inquiry to determine further the age of the victim ought

to be conducted by the court. Non determination of the age under such circumstances is an incurable defect.

In reaching a finding, the court must make an inquiry to determine the age. **Sub section (1) of section 113 of the Law of the Child Act** provides:

*"Where a person, whether charged with an offence or not, is brought before any court otherwise than for the purpose of giving evidence, and it appears to the court that he is a child, the court shall make due inquiry as to the age of that person."*

As much as PW2 came before the court to give evidence, she was also a victim whose age ought to have been determined for a conviction against the appellant under section 130(2) (e) of the Penal Code to be entered. The CAT in the case of **Ally Rashid v. Republic (supra)** had this to say:

*"Where the accused is charged with a specific offence under paragraph (e) of section 130(2) of the Penal Code, the age of the victim of rape must be proved in order to clear the doubts on the age due to the statutory consequential effect if the offence is proved. It means that there cannot be a conviction for an offence under section 130(2) (e) of the Penal Code unless there is sufficient evidence or proof that at the commission of the offence of rape, the victim's age was below eighteen years."*



It is on record that PW1, the father of the victim failed to prove the age as he testified that he had no knowledge of the victim's age, but the victim's mother new. PW2 stated during voire dire examination that she was told by her mother that she was 10 years of age. In my settled view, PW2 did not in fact prove her age. This is because she stated being 10 years during voire dire examination which is not evidence. She also did not go further to state her birthdate so that it can be ascertained if she was really 10 years. What she testified was hearsay from her mother. Ms. Anesius argued that the PF3 tendered by PW4, a medical doctor, indicated the age of the victim being 10 years. In my considered opinion, the PF3 was not sufficient to prove the age following the contradiction between the PF3 and the charge. Under the circumstances, it was imperative for the prosecution to lead PW4 in his evidence to prove how he came about finding the said age. It is not known whether he got the age from PW2, her parents, or through medical examination.

It is therefore my conclusion that the prosecution ought to have proved on the true age of PW2, the victim. The trial court also ought to have called for proof of the age after contradictions on the same arose from the witnesses and the charge. The non-determination of the age under such circumstances vitiates the whole proceedings of the trial court leading to a conviction under section 130(2) (e) of the Penal Code, Cap 16. I also find Ms. Anesius' argument that the appellant should have raised the issue on age during trial by cross examining on the same to be unmerited. In my settled view, whether the issue was raised or not, the prosecution ought to have proved same in court to obtain a conviction



under section 130 (2)(e) of the Penal Code. I therefore uphold this ground of appeal, which vitiates the trial court's proceedings and judgment.

To this point, I find no relevance in dealing with the remaining grounds of appeal. The judgment and proceedings of the trial court are hereby quashed on the reasons I have stated hereinabove. I order the immediate release of the appellant from prison custody unless held for some other lawful cause.

Dated at Mbeya on this 05<sup>th</sup> day of October 2020

  
**L. M. MONGELLA**  
**JUDGE**

**Court:** Judgment delivered at Mbeya through video conference on this 05<sup>th</sup> day of October 2020 in the presence of the appellant, his advocate, Ms. Irene Mwakyusa and Ms. Sara Anesius, learned State Attorney for the respondent.

  
**L. M. MONGELLA**  
**JUDGE**

