IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

[ARUSHA DISTRICT REGISTRY]
AT ARUSHA.

CRIMINAL APPEAL NO. 27 OF 2020
(Originating from the District Court of Kiteto at Kibaya, Criminal Case No. 83 of 2019, Sasi, RM)

ABDUL MASHAKA ..... APPELLANT

Versus

DIRECTOR OF PUBLIC PROSECUTIONS ..... RESPONDENT

JUDGMENT

24th September & 13th November, 2020

Masara, J

In the District Court of Kiteto (the trial Court), the Appellant stood charged with the offence of Rape, contrary to Section 130(1) (2) (e) and 131 (1) of the Penal Code, Cap. 16 [R.E 2002]. The accused denied commission of the offence. It was the evidence of the Prosecution that on 8/5/2019, PW2, the victim of the alleged rape, who was a standard VII student at Juhudi Primary School went to watch video at "Richard's video show" where she found the Appellant. The Appellant convinced her to go and sleep at his place. PW2 agreed and went with the Appellant in his room, where they had sexual intercourse until the next day. At 06:00hrs, PW2 returned home where her mother made an inquiry as to where she slept the previous night. She did not reveal the truth and ran away. She was later apprehended and taken to school where she was punished until she revealed the truth. She stated that the Appellant was her boyfriend since 2018. She was taken at the Engusero

Village offices for further interrogation. The Appellant could not be found at his place at that time, so PW2 was released, and went back to school. Later on, the Appellant was apprehended, he was taken to Engusero Village offices, Matui Police station and later Kiteto Police Station. The victim was taken to Engusero Health Centre at 2200 hours on 9/5/2019 where she was examined by PW1, and it was revealed that there was penetration in her private parts, proving that she had sexual intercourse. PW1 filled in the PF3 which was admitted as exhibit P1.

In his defence, the Appellant denied commission of the offence stating that he does not know the victim. He added that on the fateful day he was sick at home. He told the court that he lived with his parents and on the material day they were at home. As already stated, the trial Court did not believe him. It held that the Prosecution had proved the case against the Appellant beyond reasonable doubts. The trial Magistrate convicted him and was sentenced to serve thirty years imprisonment. The Appellant was aggrieved by that decision, he has therefore preferred this appeal on the following grounds:

a) *That, the District Court Magistrate erred in law and fact for convicting the Appellant without taking into account that the evidence given by the prosecution witnesses was not enough to prove the case against the Appellant beyond reasonable doubt;*
b) *That, the District Court Magistrate erred in law and fact by failing to analyze and evaluate the whole evidence adduced in court;*
c) *That, the District Court Magistrate erred in law and fact for not considering the defence evidence;* and
d) *The judgment and finding of the Trial Court are all nullity for contravening the law.*

Basing on those grounds, the Appellant prays that the appeal be allowed by quashing the conviction, setting aside the sentence and set him at liberty.
At the hearing of this appeal, the Appellant appeared in person, unrepresented, while the Respondent was represented by Ms. Tusaje Samwel, learned State Attorney. The learned State Attorney supported both the conviction and sentence imposed on the Appellant.

Submitting in support of the first ground of appeal, the Appellant contended that the trial Magistrate erred in convicting him on insufficient evidence referring to pages 5, 9 and 17 of the proceedings. He added that the prosecution did not bring crucial witnesses and they failed to prove important matters including the age of the victim which could be proved by a teacher, attendance register or leader of the locality she lived.

The Appellant's submission on the second ground of appeal was that the trial magistrate failed to properly analyse evidence. He maintained that the prosecution evidence was full of contradictions, especially the evidence of the victim (PW2).

On the third ground of appeal, the Appellant contended that the trial magistrate failed to consider his evidence before the court. He raised doubts on the evidence which suggested that he took her forcefully and he had an affair for over a year. He asked the court to subject him to DNA test to compare the sperms found with the victim.

Elaborating on the fourth ground of appeal, the Appellant averred that the trial court should have called a teacher to ascertain whether the victim was a student.

Submitting against the appeal, Ms Tusaje's response to the first ground of appeal was that the prosecution proved the charge beyond reasonable doubt, referring to page 9 of the proceedings where she stated that all the elements of the offence of rape were proved. She added that the evidence of the victim in sexual offences is paramount, citing section 127(7) of the Tanzania Evidence Act. The learned State Attorney argued that under section 43 of the Evidence Act, no specific number of witnesses is required. On the age of the victim, Ms Tusaje stated that the Appellant did not ask her on the age. She made reference to the following cases to support her argument: ***Nyerere Nyague Vs. Republic***, Criminal Appeal No. 67 of 2010 and ***Seleman Makumba Vs. Republic*** [2006] TLR. It was Ms Tusaje's contention that the court in such cases may rely on evidence of the victim, citing the case of ***Goodluck Kyando Vs. Republic*** [2006] TLR 367 to support her argument.

Substantiating the second ground of appeal, Ms. Tusaje argued that this ground has no merit since the trial Court's judgment at pages 1 to 4 analysed the evidence in totality including the defence evidence.

On the third ground, it was the learned State Attorney's view that at page 3 of the judgment the trial court analysed the defence evidence concluding

that no doubt was raised on the prosecution evidence. She also discounted the issue of DNA contending that DNA test is not a legal requirement and the victim had not stated that she was forced.

Regarding the fourth ground of appeal, the learned State Attorney stated that the judgment of the trial court is in compliance with section 312 of the Criminal Procedure Act as issues were raised and responded to. Basing on those arguments, the learned State Attorney prayed that the appeal be dismissed.

In a short rejoinder, the Appellant stated that the victim had no bruises, therefore rape could not be established. He insisted that if they had had love affairs for two years, then where would the pain come from.

Having gone through the trial court record, and arguments made by the Appellant as well as the learned State Attorney, the following issues crave for determination: whether the victim (PW2) was raped by the Appellant; whether the evidence of both sides was properly evaluated and whether the prosecution proved the case beyond reasonable doubts.

Starting with the first issue, the Appellant alleged that he did not rape the victim and the prosecution evidence fall short for failure to bring crucial witnesses such as a teacher from the school where the victim studied and leaders of the locality where she lived. I agree with the Appellant. NO evidence was led to prove the age of the victim. Failure by the Prosecution

to prove the age of the victim, PW2, constituted a fatal omission whereby a conviction under Section 130 (1)(e) of the Penal Code cannot be sustained. There is a plethora of authorities to the effect that failure to prove the victim's age in statutory rape is fatal. The recent decision by the Court of Appeal in ***Robert Andondile Komba Vs. Republic***, Criminal Appeal No. 465 of 2017 (unreported), delivered on 3rd April, 2020, explained this aspect in extenso. The Court observed and held:

> *"Not only that, but in cases of statutory rape, age is an important ingredient of the offence which must be proved. We are not prepared to hold that citing of age of the victim is akin to Proving it, and this is not the first time we make such observation. In* ***Solomon Mazala v. Republic and in Rwekaza Bernado v. Republic*** *{supra) we referred to the case of* ***Andrea Francis v. Republic,*** *Criminal Appeal No. 173 of 2014 (unreported) where the Court stated:*
>
> > *"...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 that person's age."*
>
> *Before reproducing the above paragraph from the case of* ***Andrea Francis v. Republic*** *the Court stated this in* ***Solomon Mazala****:-*
>
> > *"Even if we go further and take the liberty to assume that the fact that the trial court conducted a voire dire examination after being satisfied that PW1 was under eighteen years of age, that assumption, in our view, would be contrary to the dictates of the law."*
>
> *Therefore, it is our conclusion that there was no proof of PWl's age because what was cited in the PF3, even if there was no any other defect, was not proof of her age as required by the law. In the end and with respect, although we agree with the learned State Attorney in her submissions regarding the grounds of appeal,* ***our conclusion is that there was no proof of statutory rape because there was no proof of the victim's age.*** *On that around we allow the appeal."*
> (Emphasis added)

Based on the above decision, the first ground of appeal has merits. I see no reasons to discuss other grounds of appeal. The trial Magistrate should have acquitted the Appellant when the Prosecution failed to lead evidence to prove the age of the victim. I also note that the Magistrate who concluded the trial in this case took over from the previous one. There is no record to show that he recorded reasons for taking over nor did he give the opportunity to parties to comment on the take over with a view to recall any of the witnesses. That was not proper.

Consequently, this appeal succeeds. It is allowed in its entirety for the reasons hitherto stated. The conviction met against the Appellant is quashed and the sentence set aside. The Appellant to be released henceforth unless otherwise lawfully held for another lawful cause.

Order accordingly.

Y. B. Masara
JUDGE
13th November, 2020.