IN THE HIGH COURT OF TANZANIA

(DAR- ES- SALAAM DISTRICT REGISTRY)

AT DAR ES SALAAM

CRIMINAL APPEAL NO. 368 OF 2018

(Appeal from the decision of a District Court of Mafia in Criminal case No. 50 of 2016)

(K.J MINJA -Esq- SRM)

HUSSEIN SAID ZOMBE..... APPELLANT

Versus

THE REPUBLIC.....RESPONDENT

JUDGEMENT

4th September & 7th December 2020

A.K Rwizile, J

The appellant was charged of statutory rape contrary to section 130(1) (2) (e) and 31 of the Penal. After a full trial, he was convicted and sentenced to a minimum sentence of 30 years. It was alleged that, on 28th August 2016 2000hrs, a girl by then aged 17 years, to be referred herein as the victim (her name is concealed), disappeared from home at Kigamboni area in Mafia District. She had a meeting at Royal area with the appellant as they had agreed. Communication was done through a mobile phone which he had bought for her. They went to Kilimahewa guest house where they spent and night and had sex.

Her uncle, who lived with her, noticed her absence at home. A search for her was mounted but it proved futile. She returned in the morning.

She was caught as she was trying to get in. Upon being interrogated by her uncle Pw1, she mentioned the appellant as the person who had spent a night with at the guest house. The matter was reported to the police station. They got a PF-3 and went to the hospital. She was examined by Pw3 and was found pregnant. The appellant was hunted because had ran away. He was arrested later and charged. Upon conviction and sentence the appellant was aggrieved. He has now filed this appeal to on the following grounds.

1. *That, the learned senior magistrate erred in law and facts by admitting and considering a retracted caution statement Exh. P3 tendered by Pw4 without conducting an inquiry to determine its validity, and content of the same was not read over to the accused after it was admitted contrary to the law*
2. *That, the learned senior magistrate erred in law and fact by convicting the appellant when the prosecution failed to lead forensic evidence regarding the mobile phone and the same was not tendered in court for verification.*
3. *That, the learned senior magistrate grossly erred in law and fact by considering the victim's age on a presumption without a birth certificate hence a voire dire test ought to have been conducted before receiving her evidence in compliance with the provision of Evidence Act.*
4. *That, the learned senior magistrate grossly erred in law and in facts by considering the evidence of Pw3 against the appellant as he was not accorded an opportunity by the court to cross examine him in compliance with mandatory provision of Tanzania evidence Act.*
5. *That, the learned senior magistrate erred in law and fact by not assessing huge contradictions between PW1, PW2 and PW3 to who accompanied the victim to go for examination*
6. *That, the learned senior magistrate erred in law and facts in convicting appellant when the prosecution failed to connect the accused with the crime.*

7. *That, the learned senior Resident magistrate erred in law and in fact by convicting the appellant on the unjustified corroborated prosecution evidence.*
8. *That the learned senior resident magistrate erred in law and fact by convicting the appellant despite the prosecution failure to prove the case beyond reasonable doubt.*

At the hearing appellant appeared in person via visual court (video link) from Ukonga Prison. For the Republic was Mr Kalinga, learned State Attorney. The appeal was argued orally, and the appellant was not represented. He did not have anything to argue, he asked this court to go through the grounds of appeal and do justice to him. As for the Republic, learned state attorney supported the appeal and told this court that the appeal has merit. He supported 1st and 3rd grounds of appeal.

Submitting on the same, learned state attorney argued that exh P3 which was caution statement was received without following a due process of the law. He stated further that the same ought to be admitted after an inquiry, which he said the trial court did not do. He therefore said, failure to conduct it, the caution statement was improperly admitted.

As for the third ground, Mr. Kalinga submitted that, the evidence of Pw2 was recorded out of the procedure. He referred this court to page 6 of the typed proceeding. He said that, it was in record that Pw2 was 17 years but her evidence did not follow what is stated under section 127(2) of the Evidence Act. It was his submission that failure to comply with the law is fatal. He asserted further that no inquiry was made before her evidence was taken. He therefore prayed for the evidence to be expunged. He stated more that when that is done, they remain with a weak prosecution case.

Mr Kalinga learned referred this court to page 9 and 10 of the proceeding and argued that, the evidence of Pw3 did not prove penetration but pregnancy. He also told this court that, Exh P1 was admitted by the trial court without the same being read in court. He then suggested for the same to be expunged from the record. Mr Kalinga concluded by saying that if exh. P1 would be expunged, the evidence of Pw2, Pw3 and Pw4 will have no legs to stand on and renders the prosecution case so hopeless. He therefore said, he does not support the conviction.

Appellant rejoined by saying that, the evidence against him was fabricated and should not have been used to convict him. He also argued more that, PF3 was not read in court. He submitted further that the charge sheet was defective. He therefore prayed for acquittal.

Having considered the submission of the learned state attorney and gone through the grounds of appeal.

I propose to determine the 1st 3rd, and 4th grounds together and the 2nd, 5th, 6th, 7th and 8th grounds of appeal tending to impeach the prosecution case, that it was not proved beyond reasonable doubt, will be dealt with, generally.

To begin with the appellant alleged that the trial court presumed the age of the victim as the voire dire procedure was not conducted. As for Mr Kalinga it was submitted that the, evidence of Pw2 was recorded contrary to section 127(2) of Evidence Act. I have to say, first that voire dire test, was the procedure used to ascertain if the said child of tender age understands the duty of telling the truth and the nature of oath.

But the same is not a legal requirement since coming into force of the Written Law (Miscellaneous Amendment) (No. 2) Act, 2016 (Act No. 4 of 2016) which amended Section 127 of the Evidence. It is on record that the victim in this case was a girl of 17 years old according to her birth certificate admitted as Exh P2. In law, a person is of tender age, whose apparent age is not more than 14 years. Section 127(4) provides that;

> *(4) For the purposes of subsections (2) and (3), the expression "child of tender age" means a child whose apparent age is not more than fourteen years.*

Pw2-the victim was 17 years, she was therefore not subject of the dictated of section 127 (2). With due respect to the learned State Attorney, his argument was not legally supported. This ground has no merit, hence dismissed.

As for the first ground, learned state attorney argued that, caution statement was improperly admitted by the trial court since the same was retracted by the accused person and the trial court failed to conduct an inquiry. I agree with the state attorney that when an accused person objected the caution statement on grounds that it was not his, the trial court ought to have conducted an inquiry to ascertain if indeed it was his or otherwise, it is the position in the case of **Seleman Abdallah & 2 others vs The Republic** Criminal Appeal No. 384 of 2008 and in the case of **Dominic Cornel Kombe & Another vs Republic,** (Criminal appeal No. 287 of 2018) [2020] TZHC 2527 (TanzLii) when my learned sister Masabo J at page 10, held that;

> *When a confession is tendered for admission as evidence in criminal trial, the accused may if so wishes, object to the admissibility of the statement/ confession prior to its admission. Upon the objection being made, the court will proceed to conduct an inquiry so as to determine its voluntariness or otherwise and make a ruling to that effect. Admission of the confession statement would depend on the outcome of the inquiry.*

Since the same was not conducted during the trial in this case at hand I therefore expunge the said evidence from the record. This ground has merit. As for the fourth ground, appellant argued that he was not accorded an opportunity to cross examine Pw3. As for the learned state attorney he told this court that, evidence of Pw3 did not prove penetration, and Exh P1 was not read in court.

It is shown in the record at page 9 and 10 of the typed proceeding, Pw3, upon examining the victim, she was found pregnant. It is not clear if he examined her to see if there was penetration or made a pregnancy test. As for exh. P1, it is not in record, but at page10, it is shown that the same was explained to the accused who objected before it was admitted. At the same page it is shown that there was cross examination believed done by the accused person. But, since Pw3 did not prove whether there was penetration, his evidence becomes weak. I agree with the State Attorney that this ground has merit.

Rest of the grounds are coached on the question as to whether the prosecution proved the case beyond reasonable doubt. The appellant was charged with statutory rape of a 17 years old girl, whose consent is immaterial as provided under

section 130(2)(e) of the Penal Code**.** Pw2 told the trial court that, appellant was her lover and they were having sexual intercourse in occasions.

In this case, after expunging the caution statement and the PF3 from the record, the remaining evidence is that of Pw2. Although in law, the evidence of the victim in sexual offence may stand alone to ground conviction. But it has to be believed by the court. In this case, I hesitate to hold so, without an amount of corroboration. The whole case does not have corroborative evidence.

I say so because from her testimony, it is apparent that Pw2 has admitted to have been having sex. She was found pregnant and it was few days after the alleged incident. It was therefore difficult for the prosecution to prove penetration. If for instance, it was no pregnancy test it could be difficult to trace any other evidence in that respect. As said pregnancy does not prove rape unless there is evidence proving that the appellant was responsible for that pregnancy. Since Pw2 was not a child of tender age, she was 17 at that time, she could have remembered even a single day which she had sexual intercourse with the appellant. The evidence of the victim casts doubts to the prosecution case.

Having said so, I agree with both the appellant and the respondent that, this case was not proved beyond reasonable double. The appeal is therefore allowed. I quash the conviction and set aside the sentence of the District Court of Mafia. I order immediate release of the accused person from prison unless held for another lawful cause.

AK Rwizile

JUDGE

07.12.2020

Delivered in court, the appellant is present via video link from Ukonga prison, present in court is Imelda Mushi State Attorney

AK Rwizile

JUDGE

07.12.2020

Recoverable Signature

X

Signed by: A.K.RWIZILE

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
DAR ES SALAAM DISTRICT REGISTRY