



IN THE HIGH COURT OF UNITED REPUBLIC OF TANZANIA

AT BUKOBA

CRIMINAL APPEAL NO. 72 OF 2020

(Originating from Criminal Case No. 247 of 2017 of the District Court

of Karagwe at Kayanga)

BARIKI S/O ANATORY.....APPELLANT

VRS

THE REPUBLIC.....RESPONDENT

JUDGMENT

5/11/2020 & 12/2/2021

KAIRO, J.

This appeal was brought by Bariki Anatory challenging both conviction and sentence in criminal Case No. 247 of 2017 of Karagwe District Court delivered on 6/10/2017.

Briefly the facts are to the effect that, the Appellant was charged with the offence of rape of a child of 15 years contrary to **Sections 130 (1) (2) (e) and 131 (1) of the Penal Code Cap. 16 RE: 2002.**

It is on record that the Appellant denied the accusations laid in the charge.



The prosecution called six witnesses including the victim who was deaf, to prove their case. At the end of the trial, the court was convinced that the accused person was guilty of the offence charged with and sentenced him to serve 30 years imprisonment.

The Appellant who is still determined to prove his innocence, decided to file this appeal raising eight grounds of appeal to which I will discuss them one after another herein. The Respondent Republic didn't file the reply to the grounds of appeal and when the matter was scheduled for oral submission to amplify the grounds of appeal, the Appellant prayed to dispose this appeal by written submission, the prayer which was not objected by the Respondent Republic and accordingly the court granted the same.

By consensus a schedule was drawn but the court noted that, the Respondent didn't comply with the scheduling order, thus decided to proceed with judgment writing.

The Respondent Republic was represented by Mr. Haruna Shomari and Kahigi: the learned State Attorneys while the Appellant is self-represented.

The first ground of appeal is to the effect that the victim's age was not proved by her parent nor guardian. The Appellant's submission to amplify the said ground stated that it is the legal requirement that when the accused person is charged under the provision of **Section 130 (2) (e) of the Penal Code** (supra), the age of the victim must be proved so as to determine whether or not victim could consent. He however argued that nowhere in the proceedings the parents of the victim nor the doctor mentioned the victim's age. Further to that, they neither tendered any

exhibit like clinic card or birth certificate to prove her age, thus contrary to the legal requirement. He backed his argument with the case of **Rwekaza Bernado vrs R; Criminal Appeal No. 477 of 2016 CAT BKB** (unreported) and attached the said case. The Appellant insisted that, the age of the victim was central and an important factor when determining the commission of the said offence by the accused adding that failure to prove it by the prosecution, the court on appeal is obliged to quash the conviction and set aside the imposed sentence on the Appellant.

The Appellant further argued that, it is not in dispute that the prosecution failed to prove the victim's age in support of the charge against him which omission raised doubts adding that doubts are legally to be decided in favor of the Appellant and invited the court to decide in his favor as a result.

Having revisited the particulars of the offence in the charge sheet, I observed the same to stipulate as follows and wish to quote: -

"Bariki s/o Anatory charged on 18/6/2017 at Kamagambo village within Karagwe District in Kagera region did unlawfully have sexual intercourse with one Antiokeya d/o Dastan aged 15 years old."

However, going through the record of the proceedings of the trial court, I have observed that nowhere the victim's age was stated apart from the particulars of the offence as above quoted. None of the prosecution witnesses including the victim (PW1) has even mentioned about the age of the victim which is fatal as rightly argued by the Appellant. Very unfortunately even the trial court missed this very crucial issue. To say the

least, the whole of the prosecution testimonies was rendered useless for the said omission. The court has times and again stated that an evidence to indicate the age of a victim when the accused is charged under **Section 130 (2) (e) of the Penal Code** is crucial so as to verify that the victim cannot legally give her consent for being under age. (**Refer Section 130 (2) (e)**). It goes therefore that age being a determining factor in establishing the offence the Appellant was charged with in this case was supposed to be proved beyond reasonable doubt. The trial court in the case at hand simply stated the followings at Pg. 5 of the proceedings-

"the victim of this case is below the age of 18 years--- when examine the victim who is 15 years old, I discovered that the victim understands the nature of oath and she can speak the truth-" (sic").

In the case of **Nalongwa John vrs R; Criminal Appeal No. 588 of 2015** CAT DSM (unreported) the court had this to say in insistence of having the age of the victim be determined and wish to quote:

*"--- It is trite law that the citation by a magistrate regarding the age of a witness before giving evidence is not evidence of that person's age. It follows that the evidence in a trial must disclose the person's age. In other words, in a case as this one, where the victim age is the determining factor in establishing the offence, evidence must be positively laid at to disclose the age of a victim--- in the absence of the evidence to the above effect, it will be evident that the offence --
- was not prove beyond reasonable doubt."*



In the same vein, the absence of the disclosure of the victim's age in this case has made the prosecution to fail to prove the case beyond reasonable doubt. Instead the omission has left some doubts which doubts are to be decided in the Appellant's favor. Thus, in my view that could be the reason why the Respondent Republic didn't bother to fight to the already lost battle by opting not to file their reply to the written submission.

I am aware that the Appellant has raised eight grounds of appeal. However, since this ground alone suffices to dispose this appeal, I don't feel obliged to proceed determining other grounds.

Appeal allowed. The court further quash the conviction and set aside the sentence imposed on the Appellant. The court orders the Appellant be released from prison forthwith and be set free unless he is otherwise lawfully held for other cause.

It is so ordered.




L.G. Kairo
Judge

12/02/2021.

Date: 12/02/2021

Coram: Before Kairo, J

Appellant: Present in person

Respondent: Mr Grey Uhagille, the Learned State attorney.

B/C: Gosbert Rujika

Court: The matter is for judgment. The same is ready and read over before
the parties as per today's coram




L.G. Kairo
Judge

12/02/2021