IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

IN THE DISTRICT REGISTRY OF KIGOMA

AT KIGOMA

APPELLATE JURISDICTION

(DC) CRIMINAL APPEAL NO. 55 OF 2020

(Arising from Criminal Case No. 165 of 2020 of Kasulu District Court Before C.A. Mushi, RM

SALUM S/O BARUAN..... APPELLANT

VERSUS

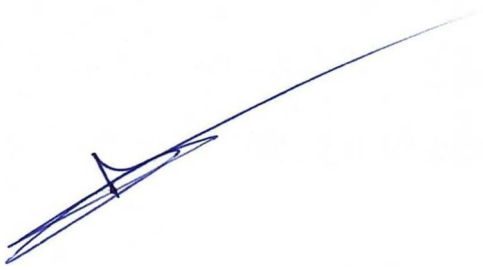
THE REPUBLIC.....RESPONDENT

JUDGMENT

11th February, 2021 & 10th March, 2021

A. MATUMA, J

The appellant Salum s/o Baruan stood charged of two counts of the charge; Rape and impregnating a School girl. He was charged in the District Court of Kasulu, convicted of rape and sentenced to a custodial sentence of thirty (30) years and in addition thereto to suffer six (6) strokes of the cane. He was however acquitted of the second count of impregnating a school girl.



He was alleged to have raped a girl of 17 years old (statutory Rape so to speak) as the facts and evidence reveals that the appellant and the victim were lovers.

Having been aggrieved with the conviction and sentence, the appellant is now before this court on appeal armed with six (6) grounds of appeal which forms only two major complaints that;

i. *The prosecution case was not proved beyond reasonable doubt.*
ii. *That the conviction was bad as his defence evidence was not considered.*

At the hearing of this appeal, the appellant was present in person, while the Respondent/Republic had the service of Mr. Benedict Kivuma learned State Attorney.

Submitting on his grounds of appeal generally, the appellant argued that since the alleged rape was connected to the pregnancy of the victim (PW1), and since he was not convicted of impregnating a school girl (the 2nd count), it was wrong to find him guilty of rape.

He further argued that even the evidence of the doctor was whole on the pregnancy and not rape, and that on the said pregnancy the victim herself

(PW1) testified to had have some other lovers and therefore he was not responsible of it.

He concluded that those who impregnated the victim ought to be responsible of the rape and not him.

The learned State Attorney on his party opposing the appeal, he argued that the prosecution case was proved beyond reasonable doubt. He argued that there was direct evidence of the victim herself (PW1) and her mother (PW2).

The learned State Attorney invited this court to consider the principle of the law stated in the case of **Selemani Makumba v. Republic** (2006) TLR 379 that the best evidence of rape comes from the victim herself.

With the herein submission of the parties, I find out that this appeal can justifiably be determined by answering one issue as to whether the prosecution case was proved against the appellant beyond reasonable doubt.

I will start with the age of both the victim and the appellant. The victim was alleged to have been raped at the age of seventeen (17) years old, and the appellant was alleged to have committed the offence at the age of 19 years old.

This being a sexual offence and a statutory rape, both the age of the victim and that of the appellant ought to have been strictly proved as they have legal effect for each, more so when each of them has only a different of one year to the alleged or stated age which might legally change the status of the case in its totality. Why do I say so?

It is because under section 130 (1) (2) (e) of the Penal Code, Cap. 16 R.E. 2019 in which the appellant was charged, a woman is said to have been raped if she did not consent to the sexual intercourse or she consented but at the time, she was under the age of eighteen years. That means; with the consent of a woman to a sexual intercourse while she is of the age of eighteen or more, no rape can be alleged nor a man to such sexual intercourse can be convicted of rape.

In the instant matter, PW1 was clear in her evidence that she consented to the sexual intercourse;

> *"On February 2020 I went to Bugaga market, on the way I met this Salum. We talked and he told me he loved me ... I returned home and left him at the market. Then he visited me at home, we talked thereafter we started to perform love with him. We were doing sexual intercourse. We performed sexual act like two or three times"*

On cross examination she was plain and strait forward on the issue of consent.

"I did not raise an alarm as we agreed".

In the circumstances, the consent was there and the appellant ought to have been convicted only if it was sufficiently proved that the victim was under eighteen years old in which consent becomes immaterial. That is the position of the law as held in a number of cases both of this court and the Court of Appeal. Thus, forinstence in the case of **Andrea Francis v. The Republic,** Criminal Appeal No. 173 of 2014 the Court of Appeal held;

> *'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'.*

Now, was the age of the victim PW1 established to the required standard?

In various case laws including that of mzee **Ally Mwinyimkuu @ Babu Seya versus the Republic,** Criminal Appeal No. 499 of 2017 (CAT), it was held that the age of the victim can be proved through; the victim herself, both or one of her parents, a guardian, a birth certificate e.t.c.

In the instant case out of the six prosecution witnesses, it was the victim herself (PW1) and her mother (PW2) who tried to talk about the victim's age. PW1 at page 12 of the proceeding regarding her age she stated;

'I am seventeen years old'

Her mother also Roza Alberto at page 14 of the proceeding testified;

'...she is my daughter... she is 17 years'.

The question is, was this enough to establish that really the victim was 17 years old? It is my firm view and finding that it was not enough. What the witnesses did was to give a general statement, a mere mentioning of the age and not evidence positively disclosing the age of the victim as the law requires. In the case of **Shamir John versus Republic,** Criminal Appeal No. 166 of 2004, the Court of Appeal giving caution to its subordinate courts including this on the evidence of recognitions, held;

> *'... but even when the witness is purporting to recognize someone he knows, the Court should always be aware that mistakes in recognition of close relatives and friends are sometime made'.*

In the like manner, a number being mathematics, even when the witness purports to name the age of the victim, the court should always be aware and cautious that mistakes in calculations of the age are sometimes made. In eliminating the possibilities of a witness to have mistaken in calculating the age of the victim, the evidence leading to his conclusion of the age must always be given. That is to say; the witness should not

merely end by making a general conclusion of the age of the victim but should go further to state when exactly the victim was born. If possible support his version with some other independent evidence like birth certificate e.t.c.

In this case the victim is alleged to be 17 years old. As I have stated earlier, if she was 18 years, the different of only one year, then in the circumstances of this case, the appellant would have not been guilty. Now how are we sure that PW1 and PW2 did not mistaken in their calculation of the age without them stating when exactly the victim was born for the court to satisfy itself independent of the witnesses' opinion (calculaltions) of the age of the victim.

The date, month and year of birth is a fact but the total number of years is a result of calculations which is subject to proof. In the instant matter we have been denied some material facts which lead to the conclusion that the victim was seventeen years old and thus it is very dangerous to rely on the mere mentioning of the age by PW1 and PW2 as they might honestly mistake. They ought to have been led to disclose the facts leading to their conclusion. And that is the law as it was held in the case of Andrea Francis supra that;

'...evidence must be positively laid out to disclose the age of the victim.'

The holding '**must be positively laid out to disclose the age of the victim'** does not mean a mere mentioning of the age but a thorough explanation of the facts relating to birth of the victim which would at least disclose the age of the victim at the time of the crime.

In refusing to act on a mere mentioning of the age of the victim when the age is a determinant factor of the offence, I had time to explain in details in the case of **Mwazara Athumani v. The Republic,** Criminal Appeal No. 261 of 2018 High court at Dar es Salaam, that;

'Unlike the mother and father of the child who can just mention when exactly was the date of birth of their child all others must state clearly how did they came to know the age of the child of another person. They must clarify clearly as most of their evidence on that fact might be hearsays which is bad in law as per section 62 of the Evidence Act, Cap. 6 R.E. 2002.'

I will do the same in this case. While I agree with the learned trial magistrate in her finding that a parent is better positioned to establish the age of his/her child than any other evidence, I disagree that a parent can establish such age by a mere mentioning the total number of years for the reasons I have herein above explained. In the circumstances, the

appellant ought to have benefitted of the doubts. I therefore rule out that this being a statutory rape, the age of the victim was not positively established.

About the age of the appellant, he was alleged to be 19 years old at the time of the crime. Under the provisions of section 131 (2) (a) of the Penal Code supra, if the offence of rape is committed by a boy who is of the age of eighteen years or less, the sentence is not imprisonment if he is the first offender. It is just a corporal punishment only. In this case, the appellant was said to be a first offender. Therefore, his age being alleged to be 19 which has no much difference with 18 ought to have been positively proved and the onus of proof lied to the prosecution and the standard as usual was beyond reasonable doubt.

I have gone through the entire records of the subordinate court, there is no any evidence relating to the age of the appellant. the age of the appellant/accused was a determinant factor of the sentence to be imposed. In that regard, it ought to have been proved before the sentence is entered.

During preliminary hearing, the facts of the prosecution alleged the age of the appellant to be 19 years old but the memorandum of agreed facts did not include the age of the appellant. It only contained the names of

the appellant and his address. His age being not among the agreed facts or matters not in dispute, ought to have been formerly established in evidence. Even though none of the prosecution witnesses gave any sort of evidence relating to the age of the appellant. Even the appellant himself did not give any evidence relating to his age. That might be the weakness of his defence but the law is very clear that an accused person should not be convicted on the weakness of his defence but on the strength of the prosecution case/evidence.

In that regard, even if it would have been held that the rape in question was proved beyond reasonable doubt, still the appellant would have been entitled to benefit doubts in his age which would affect his sentence.

I still have another observation on this matter as to whether the prosecution case was proved beyond reasonable doubt against the appellant, if we have to take the issue of age of both the victim and the appellant irrelevant.

Mr. Benedict Kivuma learned State Attorney was of the view that the prosecution case was proved beyond any reasonable doubt. He relied to the case of Selemani Makumba supra to establish the principle that the best evidence of rape comes from the victim herself. The issue is; did

PW1 the victim gave positive evidence that she was raped by the appellant?

I find not. This is because PW1 gave contradictory version as to who impregnated her. At first, she stated at page 12 of the proceedings that it was the appellant;

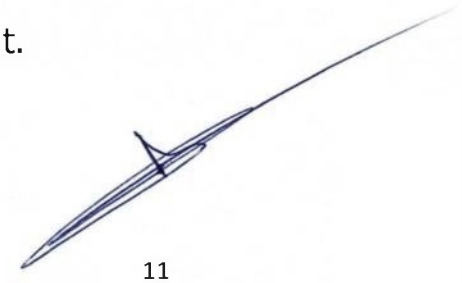
'Salum is the one who impregnated me'

But during cross examination she negated the previous version;

'I don't know whether the pregnancy is yours'

I am aware that it is on such account the appellant was acquitted of the offence relating to the pregnancy, but the same should have been scrutinized in relation to the first court of rape as well. This is because contradictory statements of the prosecution witness or witnesses affects his/her or their credibility.

As rightly lamented by the appellant, it was the pregnancy which instigated his arrest and subsequently his charges in court. The alleged rape was tied to the alleged pregnancy. To separate the two and making each independent in the circumstances of this particular case was bad and detrimental to the appellant.



The learned trial magistrate held that it was possible for the appellant to have raped the victim but not responsible of the pregnancy as the pregnancy is not always a result of sexual intercourse;

> *'... being pregnant does not necessarily mean that a woman was in relationship with a man as pregnancy can be acquired in different ways'.*

This conclusion was wrong as it was born out of facts on record. PW1 did not testify to have been impregnated by any other means other than through sexual intercourse. The learned trial magistrate ought to evaluate the change of versions by this witness as to who was responsible of the pregnancy to assess her credibility.

Also, the conduct of the victim is inconsistent with her reliability. At page 9 of the proceedings, the Prosecutor Assistant Inspector Dominick was recorded lamenting that the victim PW1 was not ready to testify and hidden herself;

> *'The case is for hearing. However, the victim is not present. We have information that she has been hidden so that she cannot testify. We pray for adjournment so that we trace her'.*

Later she was brought and testified against the appellant. her evidence in court cannot taken as a freely given evidence provided that it is not

clear on record as to why she avoided to give evidence and why finally she decided to give evidence against the appellant. It seems there was a force behind which is undisclosed and it is thus danger to act on such evidence. Her alone and no body could explain why she avoided to testify against the appellant and the kind of force applied to compel her give the evidence she gave.

As the court was not involved to compel her attendance in court as a witness in terms of section 143 or 144 of the Criminal Procedure Act, Cap. 20 R.E. 2019, the private arrangement which was made compelling her attendance should have been taken with a great caution. The possibilities that she avoided to testify against the appellant because she knew he was not a real culprit cannot be ruled out lightly.

Taking into consideration this character and the fact that she had contradictory versions on the identity of the culprit, I find that PW1 was not a reliable witness to warrant conviction of the appellant.

With all these observations and analysis, I find the prosecution case to have not been proved beyond reasonable doubt. The appellant was thus wrongly convicted and wrongly sentenced.

I quash his conviction on the offence of rape and set aside the sentence of thirty years meted against him as well as the six strokes of the cane.

I order his immediate release from prison unless held for some other lawful cause.

Right of Appeal to the Court of Appeal is explained to whoever aggrieved with this judgment.

It is so ordered.

A. Matuma

Judge

10/03/2021