

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(IN THE DISTRICT REGISTRY OF KIGOMA)

AT KIGOMA

APPELLATE JURISDICTION

(DC) CRIMINAL APPEAL NO. 51 OF 2020

(Arising from Criminal Case No. 20 of 2020 of Kasulu District Court Before: Hon. I. E. Shuli, RM)

PARTICK S/O EZRON.....APPELLANT

VERSUS

THE REPUBLIC.....RESPONDENT

JUDGMENT

15/03/2021 & 15/03/2021

A. MATUMA, J

The appellant was charged for two counts of the charge; Rape Contrary to sections 130(1)(2)(e) and 131(1) of the Penal Code, Cap 16 R.E. 2002, and Impregnating a School girl contrary to section 60A (3) of the Education Act, Cap. 353 R.E 2002 as amended by section 22 of the Written Laws Misc. Amendments Act no. 2 of 2016.

It was alleged at the trial court that, the appellant Patrick Ezron on the 16th day of January, 2020 at about 08:00 hours at Kinazi village within Buhigwe District in Kigoma Region did have Carnal knowledge of one **N d/o T** a girl aged 16 years old.

On the 23rd January, 2020 when the appellant was arraigned before the trial court pleaded guilty to the first count of the charge and not guilty to the second count of the charge. The trial court entered a Plea of Guilty in respect of the first count which was followed by the facts adduced by the Prosecutor of which the appellant replied "***Ni kweli maelezo haya ni sahihi***". Thereafter a conviction against the appellant was entered on his own plea of guilty to the first count and was sentenced to serve a custodial sentence of thirty years.

The second count was then withdrawn by the prosecutor for the appellant had already been convicted in the first count.

Aggrieved by the conviction and sentence, the appellant preferred this appeal with a total of three grounds of appeal mainly challenging the trial court's findings on the following aspects:-

- (i) Reliance on a plea which was equivocal.*
- (ii) Reliance on the facts narrated by the prosecution which does not constitute the ingredients of the offence.*
- (iii) The prosecution case was not proved ~~beyond~~ reasonable doubts.*

Before me, the appellant appeared in person unrepresented and the Respondent/Republic was represented by Edna Makala learned State Attorney.

The appellant opted the State Attorney to begin addressing the court and reserved his right so that he could reply on what the State Attorney would submit.

The learned State Attorney submitted that she was partly supporting the appeal because the facts which were adduced by the prosecutor did not sufficiently establish the age of the victim who was allegedly 16 years old. She therefore asked this court to allow the appeal by quashing the conviction and setting aside the sentence. She however argued that the circumstances of this case demands an order for a retrial to have the matter fully determined.

The appellant did not have much to say as he is ready for a retrial but stated that he preferred most an acquittal because he has stayed in custody for a long time of one year and two months.

For the purposes of determination of this appeal, I find only one pertinent issue to be determined. This is:-

- (i) Whether the narrated facts by the prosecutor disclosed the ingredients of the offence charged sufficiently to warrant a conviction.*

In the circumstances when a plea of guilty is recorded by the trial court against the accused, the facts should follow to explain in a detailed manner on how when, where and against whom the accused/appellant committed the offence. If the accused admits all the facts which the court considers to be sufficient enough to warrant a conviction, then it is when the court ensures itself that the entered plea of guilty is without ambiguity and the accused has actually intended to plea as such. Thereby a conviction is inevitable.

In the instant case after the appellant having pleaded guilty, the facts were read to him and his reply was; "Ni kweli maelezo haya ni sahihi". Part of the facts reads;

'On 16/01/2020 at 08:00 in the morning the accused was in Kinazi Village within Buhigwe District in Kigoma Region where he had canal knowledge of one a girl of 16 years old and a pupil of standard six

The charge sheet and facts indicated that the victim was a girl aged sixteen years old. That being the case the appellant faced an offence of rape categorized as '**Statutory Rape**' as rightly submitted by the learned State Attorney whose proof depends on proof of two ingredients. One, Penetration and two, the age of the victim as consent is immaterial in the circumstances of this case. The proof of penetration and age of the victim is not waived by a mere plea of guilty but it is done through the facts

which again the accused is accorded opportunity to plead admitting them or denying them. In case of admission of the facts, a conviction follows, and in the case the facts are denied, the plea is changed from that of guilty to not guilty so that the prosecution formerly proves the charges.

In the instant case the facts does not disclose the two ingredients. The age of the victim being a necessary ingredient on statutory rape must have been disclosed in the facts to accord a fair understanding of the nature and seriousness of the offence to the accused now the appellant.

In the case of **Andrea Francis vs the Republic**, Criminal Appeal no. 173 of 2014, then court of Appeal held that;

'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.'

Therefore in case of a full trial, the evidence of age would formerly be given in court. But when the matter ends with a plea of guilty the facts must disclose clearly the age of the victim once it is a determining factor in establishing the offence. The facts are therefore short of the requisite ingredient to suffice disclosing clearly the offence to the accused person.

It was not sufficient for the prosecutor to merely state that the victim was 16 years old. This is for obvious reason that the facts does not disclose the source of the information regarding the age of the victim nor the prosecutor stated how did he became aware of such age. I agree with the

learned State Attorney that there ought to have been tendered supporting documents establishing the age of the victim. In the case of **Salumu Baruani versus The Republic**, (DC) Criminal appeal no. 55 of 2020, High court at Kigoma, I had time to rule out that the court should be availed with facts relating to the age of the victim for it to form its own independent opinion about the age of the victim as a mere naming of number of years does not necessarily reflect the real age of the victim as there might be honest mathematical errors in the course of calculations of the age. The exact date, month and year of birth should therefore be stated for the court to satisfy itself that the number of years mentioned are free of mathematical errors.

I thus agree with the learned State Attorney that the facts in this case were not sufficient to warrant the conviction of the appellant.

Again the facts did not disclose any penetration as the second mandatory ingredient to statutory rape like in this case. They merely indicates that the appellant '*had canal knowlege*'. The facts do not in any manner disclose whether the victim was taken to hospital for vaginal or medical examination and whether there existed signs of penetration such as bruises. No medical report was tendered to establish the penetration.

The facts of the prosecution were thus short of the requisite ingredients of the offence which faced the appellant.

Having said so, the question now is what is the way forward. The learned state attorney quickly submitted that the available remedy to meet the end of justice is to order a retrial to have the matter fully heard. But in the circumstances that the facts which led to the conviction of the appellant did not disclose whether the victim was medically examined, I find it dangerous to order a retrial as the prosecution might use the order as an opportunity to fill in the gaps. The victim can neither be examined at this moment to establish the penetration.

In the circumstances an acquittal order shall be a just order to meet the end of justice. I therefore allow the appeal, quash the conviction and set aside the sentence meted against the appellant. I order the appellant's release from custody unless held for some other lawful cause.

I would like however to draw attention of trial magistrates to my earlier decision in the case of **Angelina Reubeni Samsoni and Another versus Waysafi Investment Company**, (DC) Civil Appeal no. 4 of 2020, High Court at Kigoma that;

Judicial officers who stand as mere observers of trials without reminding the parties to adhere to certain requirements of the law for their proper presentations of their respective cases would not be discharging their duties for the

administration of justice and if that is to happen then good technical litigants would always be using the courts to win cases to the detriment of justice'.

I have decided to draw this attention because when the appellant appeared before me, I was curious about his age. He seemed to be minor by looking his apparent age. I asked him and he told me that currently he is 18 years old. I asked the learned state attorney whether the age of 20 years reflected in the charge on January, 2020 corresponds to the apparent age of the appellant before us, she also doubted but was of the view that in case I order the retrial, I should also direct that the age of the appellant be worked upon.

I call upon trial magistrates to be curious to justice. They should inquire into whatever fact that transpires to them as a detriment to justice. They should not stand as mere observers but as administrators of justice. They are not bound by mere citations of age of accused persons in the charge nor the accused is bound to prove his age. It is the duty of the prosecution to prove that the accused is an adult and legally responsible for the alleged offence. In this case the facts just as it was to the victim, the appellant's age was also merely stated that he was 20 years old. The facts did not state the source of information relating to the age of the appellant. Age of the accused person in sexual offences is ~~is~~ vital as it has legal impact to

sentences particularly when the offence is committed by a boy of the age of 18 years or below.

Right of further appeal to the Court of Appeal of Tanzania is fully explained to whoever becomes agrieved with this decision.

It is so ordered.



A. Matuma

JUDGE

15/03/2021

Court: Judgment delivered today 15th day of March, 2021 in the presence of the Appellant in person and Edna Makala learned State Attorney for the Respondent/Republic.

Sgd: A. Matuma

JUDGE

15/03/2021