IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

IN THE DISTRICT REGISTRY OF MUSOMA

AT MUSOMA

CRIMINAL APPEAL No 152 of 2020

(Arising from District Court of Serengeti at Mugumu in Criminal Case No 14 of 2020)

ISAYA S/O GAHONO @ MAGANGA.....APPELLANT

Versus

REPUBLIC..... RESPONDENT

JUDGMENT

10th May & 28th June, 2021

Kahyoza, J.

Isaya s/o Gahono @ Maganga, the appellant, was arraigned before the District Court of Serengeti at Mugumu charged with the offence of rape contrary to section 130 (1), (2) (e) and 131(1) of the Penal Code [Cap 16 R.E 2019]. The trial court found him guilty, convicted and sentenced him to serve a sentence of 30 years' imprisonment. Aggrieved the appellant appealed to this court.

The appellant's five grounds of appeal, are paraphrased as follows:

1) That, the magistrate erred in law and fact to accept the PW4 who was not competent to testify as the expert.
2) That, the trial magistrate denied the appellant a chance to call key witness.
3) That, the trial magistrate erred in laws and fact to convict and sentence the appellant without considering the age of the accused person.

4) That the trial magistrate denied the appellant the right to be heard thus, breaching the principle of natural justice.
5) Whether the procedure to examine the victim of rape was followed.

The appellant appeared unrepresented and Mr. Temba, the State Attorney represented the respondent. At the hearing, the appellant stated that the doctor gave evidence basing on what the nurse told him.

The state attorney submitted generally that the appellant was a child of 17 years old and that he was supposed to be charged in the juvenile court. However, he was charged in the district court, which had no jurisdiction. He prayed the appellant to be tried *de novo* before the competent court with jurisdiction.

This court upon the submission of both parties invited the parties to addressed the Court on the question what sentence ought to have been passed, had the court of competent jurisdiction tried and convicted the appellant. The appellant had nothing of value to contribute. The respondent's state attorney submitted that the appellant would have been warned.

The record shows that the appellant had carnal knowledge of the girls 13 years old. The appellant denied to the charge. There was ample evidence that the prosecution witnesses almost caught the appellant in the action. The appellant and the victim were found in the house the door locked. The victim deposed that she shouted for help and the appellant put his hand on her mouth.

The charge sheet depicts that the appellant was 18 years old. The appellant while testifying stated that he was 17 years old. The prosecution did not tender evidence to prove that the appellant was 18 years old at the time he committed the offence. The appellant deposed on oath that he was 17 years old at the time he gave evidence. To my dismay the

prosecution did not cross examine the appellant regarding his age. It is settled that a party who fails to cross examine a witness on certain matter is deemed to have accepted that matter and will be estopped from asking the trial court to disbelieve what the witness said. See **Daniel Ruhere v. Republic** Criminal Appeal No. 501/2007, **Nyerere Nyauge v. R Criminal** Appeal No. 67/2010 and **George Maili Kemboge v. R** Criminal Appeal No. 327/2013. I find therefore, that the prosecution conceded that the appellant was under the age of 18 years old. The appellant was for that reason a child.

The law of the Child Act, [Cap 113 R.E. 2019] is clear that a child is a person below 18 years. Section 4 (1) of the Act provides as follows:-

> *"4-(1). A person below the age of eighteen years shall be known as a child."*

Going by section 4 and sections 97 (1) and (2) and 99 (1) (d) of the Act, I am in agreement with the learned state attorney that the trial court clothed itself with the jurisdiction it did not have of trying, convicting and imposing an illegal sentence on the child, appellant. It is also provided thus in section 97 (1) and (2):-

> *97-(1). There shall be established a court to be known as the Juvenile Court, for purposes of hearing and determining child matters relating to children.*
>
> *(2) The Chief Justice may, by notice in the **Gazette,** designate any premises used by the district court to be a Juvenile Court.*

It is the Juvenile Court which under section 98 (1) (a) of the Act, shall have power to hear and determine criminal charges against a child. It stipulates that-

> *98.-(1) A Juvenile Court shall have power to hear and determine-*

(a) criminal charges against a child; and

The juvenile court while hearing cases involving a child it was duty bound to ensure a social welfare officer is present. It is partly provided as follows in section 99 (1) (d) of the Act:-

> *99 (1). The procedure for conducting proceedings by the Juvenile Court in all matters shall be in accordance with rules made by the Chief Justice for that purpose,* ***but shall, in any case, be subject to the following conditions-***
>
> *(d) a social welfare officer shall be present.*

I am aware of the fact that the law was amended vide the **Written Laws** (Amendments) Act, No. 1/2020 to give jurisdiction to district courts and courts of resident magistrates to hear and determine matters triable by Juvenile Court. The amendments came into operation on the 14th February,2020 and the prosecution alleged that the appellant committed the offence on the 8th January, 2020. Thus, at the time the appellant is alleged to commit the offence the trial court had no jurisdiction to try *criminal charges against a child.* It was the juvenile court which had jurisdiction.

It is my considered view that the trial court had no jurisdiction. It usurped jurisdiction. It is not only that the trial court had jurisdiction but also the sentence it imposed was illegal. The sentence for the offence of rape is provided under section 131 of the Penal Code that: -

> *131.-(1) Any person who commits rape is, except in the cases provided for in the renumbered subsection (2), liable to be punished with imprisonment for life, and in any case for imprisonment of not less than thirty years with corporal punishment, and with a fine, and shall in addition be ordered to pay compensation of an amount determined by the court, to the person in respect of whom the offence was committed for the injuries caused to such person.*

(2) Notwithstanding the provisions of any law, where ***the offence is committed by a boy who is of the age of eighteen years or less, he shall-***

(a) ***if a first offender, be sentenced to corporal punishment only;***

(b) if a second time offender, be sentence to imprisonment for a term of twelve months with corporal punishment;

(c) if a third time and recidivist offender, he shall be sentenced to five years with corporal punishment.

(3) Subject the provisions of subsection (2), a person who commits an offence of rape of a girl under the age of ten years shall on conviction be sentenced to life imprisonment.

The appellant was less than 18 years old when he committed the offence and he was the first offender. Thus, it was illegal to impose a custodial sentence against him. The Court of Appeal confronted a more or less similar situation in **Paul Juma Daniel V Republic**, Criminal Appeal No 200 of 2017 (CAT unreported) and observed, thus-

> *"It is clear from the above that when the offence of rape is committed by a boy who is eighteen years or less, he should only be sentenced to corporal punishment. In the present case the appellant who was eighteen years of age when he committed the offence was sentenced to an illegal sentence of thirty years' imprisonment and compensation of TZS 6,000,000.00 to the victim of the offence in contravention of the clear provisions of section 131(2) (a) of the Penal Code. That sentence cannot be allowed to stand and so we hereby quash and set aside as it was an illegal sentence. As to the way forward, we agree with the learned State Attorney that since the appellant has been in custody for more than four years serving an illegal sentence, we do not find it appropriate to impose the correct sentence.*

The trial court convicted the appellant and imposed a jail sentence of 30 years. The sentence was illegal.

I therefore quash the proceedings and set aside the conviction and sentence on the ground that the trial court had no jurisdiction to try

criminal charges against a child, the appellant. I hesitate to order the appellant to be tried by a competent court as the appellant has been in custody serving an illegal sentence for almost a year. Had the appellant been properly charged and convicted he would not have been imprisoned. The appellant has served greater sentence than what the law imposed.

In the upshot, I order the appellant's immediate release from prison unless his continued incarceration is related to some other lawful cause.

It is ordered accordingly.

J. R. Kahyoza

JUDGE

28/6/2021

Court: Judgment delivered in the presence of the appellant and Mr. Temba, the state attorney virtually. Right of appeal explained.

THE HIGH COURT OF TANZANIA
MUSOMA

J. R. Kahyoza, J.

28/6/2021