IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(MWANZA DISTRICT REGISTRY)

AT MWANZA

CRIMINAL APPEAL NO. 34 OF 2020

(Appeal from the Criminal Case No. 94 of 2020 in the District Court of Kwimba at Ngudu (Jagadi, RM) dated 8th of January, 2021.)

MHANGWA S/O ZACHARIA..... APPELLANT

VERSUS

THE REPUBLIC..... RESPONDENT

JUDGMENT

14th, & 18th June, 2021

ISMAIL, J.

In the District Court of Kwimba at Ngudu, Mhangwa Zackaria, the appellant herein, was arraigned on a single count of rape, contrary to sections 130 (1) (2) (e) and 131 (1) of the Penal Code, Cap. 16 R.E. 2019. The allegation, as levelled in the charge sheet, is that in the night of an unknown date in July, 2020, at Mwandu village in Kwimba District, Mwanza Region, the appellant did unlawfully have a carnal knowledge of ABC (in pseudonym), a girl of 13 years of age.

Brief facts, as deduced from the proceedings are that, in July, 2020, the victim (PW1) was looking after her ailing mother who was undergoing a

traditional therapy at the appellant's home. At some point, the victim's mother left, leaving behind the victim and the appellant, the traditional healer. It was alleged that the appellant lured the victim into a relationship and demanded that they indulge in a sexual act. PW1 alleged further that, against her will, the appellant raped her on three occasions. She further alleged that she kept this information to herself, fearing death as she had been warned that she would die if she disclosed the incident. In a manner that was not explained, news of the alleged rape incident leaked, culminating in the appellant's arrest on 2nd August, 2020. On 3rd August, 2020, the victim allegedly underwent a medical examination, carried out by PW4. The findings revealed that the victim had been raped by the appellant. On 4th August, 2020, the appellant was arraigned in court and pleaded not guilty to the charge. This necessitated a trial which saw the prosecution procure attendance of five witnesses, against one for the defence.

The appellant maintained his innocence, alleging that the charges were trumped up due to misunderstandings that existed between him and the victim's father, a Mr. Emmanuel Kasanga. He argued that the prosecution had not proved its case satisfactorily. The learned trial magistrate was convinced that guilt of the appellant had been established. He convicted him of rape and sentenced him to the statutory custodial sentence of 30 years.

This sentence has aggrieved the appellant, hence his decision to take an appeal to this Court. The petition of appeal has six grounds, paraphrased as hereunder:

1. *That, the trial court grossly erred in law and fact by convicting the appellant of rape without requiring the victim to prove that, at the time of commission of the alleged offence, she was below 18 years of age.*

2. *That, while the offence was allegedly raped in June, 2020, the incident was reported on 2nd August, 2020, two months later.*

3. *That, the trial magistrate erred in law and in fact by admitting and relying on an expert opinion which was prepared and tendered by the medical officer/doctor without warning himself of the fact that the Court is not bound by it.*

4. *That, the trial magistrate grossly erred in law by convicting and sentencing the appellant while the prosecution had failed to prove essential ingredients of the offence.*

5. *That, the trial magistrate erred in law and in fact by convicting and sentencing the appellant by relying on the victim's uncorroborated evidence.*

6. *That, the offence of statutory rape has no legs to stand against the appellant.*

Hearing of the appeal was done virtually, and it pitted the appellant who fended for himself, against Ms. Gathi Mathayo, learned State Attorney

who featured for the respondent. The appellant urged the Court to let the respondent's counsel submit first while he, would come in for a rejoinder.

Ms. Mathayo, began by supporting to the appeal. She chose to confine her submission to grounds one and four. With respect to ground four, the attorney's contention is that the prosecution case was not proved beyond reasonable doubt. Citing section 127 (6) of the Evidence Act, Cap. 6 R.E. 2019, Ms. Mathayo argued that the victim's testimony was not enough to convict. This is on account of the fact that the said testimony was neither credible nor was it reliable. The attorney contended that the victim did not state precisely when and how she was raped, and that the information about the incident was not shared with anybody. The respondent's counsel further submitted that the victim stated during cross examination that she never shared this information with anybody yet PW2 said that he got the information from the victim.

With respect to ground one, the learned counsel argued that, whereas the charge says that the victim was 13 at the time of the incident, the testimony mentions 15 years as the right age of the victim. The respondent argued that not even PW2 who gave the details of the victim's age. She took the view that age of the accused was not proved, and so is the case itself. She prayed that the appeal be allowed.

The appellant, supported the counsel's submission. He prayed that his appeal be allowed as the available evidence was too insufficient to ground a conviction. The respondent prayed that the appeal be allowed.

The unanimous contention by the parties herein is that the prosecution did not prove the case beyond reasonable doubt. As stated, times without number, conviction in criminal proceedings can only be grounded if the prosecution has led in evidence that has established the accused's culpability at the standard which is set under law. This standard is beyond reasonable doubt. See: ***The D.P.P v. Maria Joseph Somba***, CAT-Criminal Appeal No. 404 of 2007; ***George Mwanyingili v. Republic***, CAT-Criminal Appeal No. 335 of 2016 (both unreported); and ***Jonas Nkize v. Republic*** [1992] TLR 213.

Having dispassionately gone through the trial court's proceedings, the uncontroverted conclusion is that the trial proceedings and the eventual verdict were, as submitted by Ms. Mathayo, a serious travesty of justice. The trial proceedings were laden with pregnant disharmonies and half-truths that cast a serious doubt on the legitimacy of the conviction. The obvious area of concern is the question of when and how the incident occurred. The victim, who testified as PW1, admitted that she did not remember the dates on which the alleged rape incident occurred. How this information came to be

known to third parties notwithstanding her own admission that she feared sharing the information with third parties remains a mystery. It is not known, either, how PW4, Yohand Mabirika Dotto, a clinical officer, knew for sure that the victim had been raped by the appellant as he testified in court.

Mightily concerning is the fact that the question of age, a key ingredient in the offence of statutory rape, was far from certain. This is discernible from the charge sheet in which the age of the victim of the rape incident was said to be 13 years of age. Barely two months from the date or month of the alleged rape incident, the victim testified that she was 15 years old. Notably, none of the other witnesses testified in corroboration, meaning that there was no clarity, not only on whether she was 13 or 15 years of age, but also on the question as to whether the said victim was under 18 years of age.

It should be clearly understood that in statutory rape, proof that the victim of the incident is below 18 years of age constitutes a statutory requirement under section 130 (2) (e) of cap. 16, which provides as follows:

> *"A male person commits the offence of rape if he has sexual intercourse with a girl or a woman under the circumstances falling under any of the following descriptions:*
>
> *(e) with or without her consent* ***when she is under eighteen years of age****, unless the woman is his*

wife who is fifteen or more years of age and is not separated from the man."

In the absence of any certainty on the age of the victim, between 13 years stated in the charge, and 15 years deduced from the testimony; and, in the absence of any evidence that would prove either of the two numbers, and whether the victim was under 18 years of age, the trial court's finding was not based on any solid foundation. The conviction was based on a mere statement given at the time of administering an oath and the trial court felt that this was good enough to base a conclusion on and found a conviction.

It is an established position that proof of the victim's age entails going further than merely giving a preambular statement. The trial court was duty bound to demand more from the prosecution, consistent with what was held by the Court of Appeal of Tanzania in ***Andrea Francis v. Republic***, CAT-Criminal Appeal No. 173 of 2014 (Dom-unreported), in which it observed as follows:

"With respect, it is trite law that the citation in a charge sheet relating to the age of an accused person is not evidence. Likewise, 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, as it were. In other words,

in a case such as this one 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. Under normal circumstances evidence relating to the victim's age would be expected to come from any or either of the following:- the victim, both of her parents or at least one of them, a guardian, a birth certificate, etc. in this case, no evidence was forthcoming from PW1, her mother PW2, or anybody else for that matter, relating to the age of PW1. In the absence of evidence to the above effect it will be evident that the offence under section 130 (2) (e) (supra) was not proved beyond reasonable doubt."

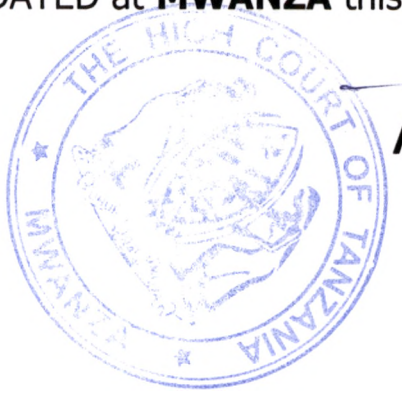
Noting that establishment of age is a condition precedent for a decision on whether statutory rape was committed, a glaring miss in this case, I join hands with Ms. Mathayo, and hold that the case against the appellant was not proved at the threshold standard which would justify the appellant's conviction and eventual sentence. The net effect of all this is simply that the prosecution did not prove its case beyond reasonable doubt.

Consequently, I find the appeal meritorious and allow it. I order that conviction and sentence passed by the trial court be and is hereby set aside.

It is ordered that the appellant be immediately set free, unless he is held for other lawful reasons.

Order accordingly.

DATED at **MWANZA** this 18th day of June, 2021.



M.K. ISMAIL

JUDGE