IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(IN THE DISTRICT REGISTRY OF MWANZA)

AT MWANZA

CRIMINAL APPEAL NO. 216 OF 2020

(Appeal from the Criminal Case No. 34 of 2020 in the District Court of Kwimba at Ngudu (Jagadi, RM) dated 23rd of October, 2020.)

BENEDICT MAKUBI ..... APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

JUDGMENT

8th March, & 07th June, 2021

ISMAIL, J.

The appellant was arraigned in the District Court of Kwimba, at Ngudu, facing two counts. In the first, he was accused of raping ABC (in pseudonym), a school student allegedly aged 17. The charge was founded on section 130 (2) (e) of the Penal Code, Cap. 16 R.E. 2019. The allegation is that the offence was committed in November, 2019, at Hungumalwa village within Kwimba District in Mwanza region. In the second offence, the appellant was accused of impregnating ABC, a 17-year-old girl and a student

of Kikubiji Secondary School, contrary to section 60A (1) of the Education Act, Cap. 353 R.E. 2019 (as amended).

The appellant pleaded not guilty to both of the counts. After the trial proceedings in which six witnesses appeared for the prosecution, against one for the defence, the appellant was acquitted of the second count of impregnating a school student. Luck was not on his side with respect to the first count *i.e.* rape. The trial court was convinced that a case had been made out against the appellant and, in consequence, it found him guilty of rape. Accordingly, he was convicted and sentenced to imprisonment for 30 years.

Brief facts of this case, as gathered from the proceedings are that, the appellant is a peasant, formerly a roman catholic cleric in Kikubiji village in Kwimba District. The victim was, on the other side, a form one student at Kikubiji Secondary School in Kikubiji village, Kwimba District. It is alleged that in September, 2019, the appellant saw some beauty in the victim. He proposed a relationship which culminated in a love affair. In January, 2020, the duo indulged in a sexual intercourse, allegedly committed in a room at the appellant's residence. On 4th March, 2020, the school administration decided to do a random pregnancy test on the female students. The test found that the victim was carrying a 17-week pregnancy whose occurrence

was attributed to the sexual indulgence she had with the appellant in January, 2020.

News of the pregnancy reached the victim's brother, PW3, who reported the matter to Police. The latter carried out a swoop that led to the appellant's arrest. On interrogation, the appellant denied any involvement in a sexual relationship with ABC. The appellant maintained his innocence even when he was arraigned and tried in court, much to the court's disbelief. The view taken by the appellant is that the charges were trumped up by the Ward Education Officer through it was not clear if the two had an axe to grind. He also questioned his involvement in the pregnancy of four months and two weeks while the sexual act to which the pregnancy is attributed was allegedly committed in January, 2020. This defence did not find any purchase. The stance taken by the Court meant that, while the charge on the alleged pregnancy fell through, on account of the defects apparent on the charge, the allegation of rape was sustained, leading to conviction and sentence against which this appeal lies.

The appellant's bemusement is reflected in the six grounds of appeal contained in the petition of appeal, reproduced in verbatim, as follows:

1. *That, there is nothing to indicate that proceedings prior to 18.08.2020 were ever signed by the Hon. Trial magistrate, an omission which renders the proceedings null and void.*

2. *That, the offence of rape and its ingredients, particularly penetration was never proved to the required standard.*

3. *That, age of PW5 (the victim) was never proved.*

4. *That, the alleged confession by the appellant was illegal as it was not recorded before a justice of the peace or any independent witness whatsoever.*

5. *That, the trial court erred in fact and in law by relying on the contradictory evidence by prosecution witnesses regarding authenticity of locus in quo where actual medical examination was carried out.*

6. *That, the most crucial evidence of the medical expert (PW4) does not fit into the offence by which the appellant was ultimately convicted (RAPE).*

7. *That, the trial court erred in both law and facts by failing to accord proper analysis and evaluation of the evidence brought before it proceeded to convict and sentence the appellant.*

At the hearing of the appeal, the appellant fended for himself, unrepresented, while the respondent was represented by Ms. Jovina Kinabo, learned State Attorney.

Not unexpectedly, the appellant was extremely brief. He simply urged the Court to receive his grounds of appeal and allow the appeal.

Ms. Kinabo was opposed to the appeal and in full support of the trial court's decision. With respect to ground one, her contention is that the proceedings were duly signed by the presiding magistrates. She took the view that this ground is baseless.

Submitting on ground two, the learned attorney took the view that penetration was duly proved. She held the view that this is statutory rape since the victim of the incident was below the age of 18 years. This is in terms of page 15 of the proceedings and that the said victim narrated how they indulged in sex until her pregnancy. Relying on the case of ***Isaya Renatus v. Republic***, CAT-Criminal Appeal No. 542 of 2015 (unreported), Ms. Kinabo argued that the sale testimony of a victim of rape is sufficient to ground a conviction.

With regards to ground three of the appeal, the respondent's argument is that the victim was proved to be of 17 years of age, and that it is the victim herself who proved that at page 17 of the proceedings. She said she was born in 2003. The learned attorney maintained that age of the victim can be proved by the victim, relative, parent, doctor or through issuance of a birth certificate.

With respect to ground four of the appeal, the argument by Ms. Kinabo is that there is no law that compels that confession must necessarily be made before a justice of the peace. On ground five of the appeal, the counsel's contention is that the prosecution's testimony did not have any contradictions. She argued that, with respect to the victim's pregnancy, PW2 stated that they were conducting pregnancy test and that PW5 went to Kikubiji dispensary after obtaining a PF3 from the police. She argued in the alternative that if there were any contradictions in the testimony, then the same were not significant and did not go to the root of the matter.

Submitting on ground six, Ms. Kinabo conceded that the testimony of PW4 had nothing to do with rape. She, in turn, prayed that the same be expunged from the record. The counsel further argued that casting away the said testimony would not have the effect of watering down the testimony of PW5. She referred to the case of ***Selemani Makumba v. Republic*** [2006] TLR 379, as the basis for her contention.

With regards to ground seven, the counsel's view is that evidence of the parties was properly evaluated. It is why the appellant was convicted of the offence and acquitted of the other count. The respondent prayed that the appeal be dismissed.

In his brief rejoinder, the appellant submitted on ground one that age of the victim was not proved and that PW3 failed to do that. With respect to ground five, the appellant's view is that there were contradictions on where the pregnancy test was done. The appellant contended that the testimony of PW2 was at variance with that of PW4.

With respect to ground six, the appellant's argument is that PW4 testified that the pregnancy was four months and two weeks old, while PW5 said that her sexual encounter with the appellant was in January, 2020, and the tests were done on 4th March 2020. The appellant further argued that there was no evidence that PW5 aborted the pregnancy. On ground four, the appellant's take is that the confession was flawed. He reiterated his prayer for allowing the appeal.

Having factored in the parties' contending submissions, the next broad question for restution is whether the appeal before me carries any merit.

My entry point in the disposal process is ground three of the appeal which queries the age of the victim. The view held by the appellant is that the victim's age was not proved. The question of age of the victim bears significant weight since the offence with which the appellant was charged requires proof of age as one of the ingredients of the offence. This fact can

be discerned from the substance of the charging provision *i.e.* section 130 (2) (e) of Cap. 16 which states 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."*

The argument raised by the respondent's counsel is that the testimony of the victim's age was given by the victim herself. Page 17 of the proceedings has been cited in that respect. My scrupulous review of proceedings takes me to page 15 wherein the victim, testifying as PW5, stated as she took oath that she was aged 17 years of age. Then the question regarding her age did not surface until during re-examination which features at page 17 of the proceedings. The victim stated that she was born in January, 2003. This is what triggered the appellant's consternation.

As stated earlier on, proof of age in statutory rape is a key prerequisite without which an offence of statutory rape cannot be successfully proved. Mere statement of age before adduction of evidence cannot be said to suffice. This is the position underscored by Courts. In ***Andrea Francis v.***

Republic, CAT-Criminal Appeal No. 173 of 2014 (Dom-unreported), the Court of Appeal gave the following important guidance:

> *"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."***
> [Emphasis supplied]

In the circumstances such as those obtaining in the present case, it cannot be said that this fact was not settled. The victim testified in re-examination that she was born in January, 2003, which works out to 17 years

as stated in the preamble to her testimony at page 15 of the proceedings. The testimony is corroborated by PW3, the victim's brother and guardian, whose testimony is found at page 9 of the proceedings. While conceding that he did not remember the date on which the victim was born, he recalled that she was 17 years of age. This fact is also gathered from the PF3, exhibit P4, which stated that the victim was 17 years of age when she was examined by a medical practitioner.

In my considered view, the totality of this testimony constitutes sufficient disclosure of the victim's age that proved that she was below 18 years of age. In that regard, I agree with Ms. Kinabo that this ground of appeal is baseless and I dismiss it.

Ground seven of the appeal takes exception to the trial court's handling of the testimony adduced by the parties. The argument, which is valiantly opposed by the respondent, is that proper analysis and evaluation were not accorded. It is a known legal principle that a trial court is bound to evaluate and analyze evidence adduced during the trial, with a view to coming to a finding on the guilt or otherwise of an accused person. Where the court fails to do that, the appellate court can step in and do re-evaluation of the evidence and consider all material issues involved (***Hassan Mzee Mfaume v. Republic*** [1980] TLR 167). Having unfleetingly reviewed the evidence on

record, I am inclined to agree with the appellant that material issues raised during the trial were not sufficiently looked into by the trial court before the appellant's guilt was pronounced. Taking upon that duty, I will touch on a few issues which I consider pertinent and were not sufficiently addressed.

The first relates to the question of penetration. It is common knowledge that in rape cases involving victims whose age is below 18 years of age, and in which consent is not an issue, penetration of the accused's genitalia into the victim's vagina is a key ingredient [See: ***Masomi Kibusi v. Republic***, CAT-Criminal Appeal No. 75 of 2005 (unreported)]. Significance of this fact was underscored in ***Mathayo Ngalya @ Shaban v. Republic***, CAT-Criminal Appeal No. 170 of 2006 (unreported), in which it was held:

> *"The essence of the offence of rape is penetration of the male organ into the vagina. Sub section (a) of section 130 of the Penal Code provides; for the purpose of proving the offence of rape, penetration however slight is sufficient to constitute the sexual intercourse, necessary to the offence."*

Proof of penetration, which constitutes proof of the whole offence of rape can be done through various pieces of evidence, but the established legal position is that conviction on the offence of rape can solely be based on the evidence of the prosecutrix of the rape incident. This is the import of

the case of ***Selemani Makumba*** (supra) cited by the counsel for the respondent. This astute postulation was re-stated in ***Godi Kasenegala v. Republic***, CAT-Criminal Appeal No. 10 of 2008 (unreported), in which it washeld*:*

> *"It is now settled law that the proof of rape comes from prosecutrix herself. Other witnesses if they never actually witnessed the incident, such as doctors, may give corroborative evidence."*

See also: ***Kalebi Elisamehet v. The D.P.P.,*** CAT-Criminal Appeal No. 315 of 2009; *and* ***Ramadhani Samo v Republic,*** CAT-Criminal Appeal No. 17 of 2008 (all unreported).

Application of this principle is not without any caution. It can only be applied where the important condition precedent set out in section 127 (7) of the Evidence Act, Cap. 6 R.E. 2019 in met. This is to the effect that such testimony should come from a person that the court believes she telling nothing but the truth. In the case of ***Mohamed Said v. Republic***, CAT-Criminal Appeal No. 145 of 2017 (Iringa-unreported), an incisive position which should serve as an important take away by the prosecution and the magistracy was laid out. The superior Bench guided as follow:

> *"In the end, for the reasons we have shown, we do not share with the two courts below the view that PW1 was such*

a truthful witness whose evidence would ground a conviction. With respect, we find no merit in the learned Judge's observation that it is inconceivable that PW1 would tell a lie against her father. This is a witness who told a lie that the first man she had sex with was the appellant, while the appellant's evidence that at Tunduru she had been living with a man, had not been controverted. It is settled law that a witness who tell a lie on a material point should hardly be believed in respect of other points. See, among others, the case of ***Bahati Makeja v. Republic****, Criminal Appeal No. 118 of 2006 (unreported)."*

*"We are aware that in our jurisdiction it is settled law that the best evidence of sexual offence comes from the victim [****Magai Manyama v. Republic*** *(supra)]. We are also aware that under section 127 (7) of the Evidence Act [Cap. 6 R.E. 2002] a conviction for a sexual offence may be grounded on uncorroborated evidence of the victim. However we wish to emphasize the need to subject the evidence of such victims to security in order for courts to be satisfied that what they state contain nothing but the truth...."*

"We think it was never intended that the word of the victim of sexual offence should be taken as gospel truth but that her or his testimony should pass the test of truthfulness. We have no doubt that justice in cases of sexual offences requires strict compliance with rules of evidence in general,

and s. 127 (7) of Cap. 6 in particular, and that such compliance will lead to punishing offenders only in deserving cases. We are highly persuaded by the decision of the Supreme Court of Philippines in the case of PEOPLE OF PHILLIPINES V. BENJAMIN A. ELMANCIL, G.R. No. 234951, dated March, 2019. The Court held:

> *"In reviewing rape cases, this Court has constantly been guided by three principles, to wit: (1) on accusation of rape can be make with facility; difficult to prove but more difficult for the person accused though innocent, to disprove; (2) in view of the intrinsic nature of the crime of rape where only two persons are usually involved, the testimony of the complainant must be scrutinized with extreme caution; and (3) the evidence for the prosecution must stand or fall on its own merits and cannot draw strength from the weakness of the evidence for the defence. And as a result of these guiding principles, credibility of the complainant becomes the single most important issue. If the testimony of the victim is credible, convincing and consistent with human nature and the normal course of things the accused may be convicted solely on the basis thereof."*

The question that arises from the facts of the instant case is: was PW5 a witness of truth whose testimony can be relied upon? From what I

gathered from the record, I am hardly persuaded that she, was. This stems from the fact that the testimony that she gave on the matter varies substantially with what is stated in the particulars of the offence contained in the charge. Whereas the charge that was bred from the complaint shows that the offence of rape was committed in November, 2019, the victim's testimony in court was to the effect that the offence occurred in January, 2020. Though not relevant to the question of rape, the victim's testimony that the appellant used a condom on that single encounter and yet she became pregnant serves to vindicate my misgivings about reliability of the victim's testimony. The variance which comes from the same victim conveys nothing but a clear message that the finding of guilt made against the appellant based on the victim's testimony was shrouded in a serious danger of causing an injustice.

This, therefore, calls for another set of testimony that would corroborate or address the inadequacies spotted in the victim's testimony. This is the testimony of PW4, a clinical officer who performed the pregnancy test that came up with a finding that the pregnancy was four months old for a sexual act committed in January 2020. Though this is only relevant to the question of pregnancy, its discussion is of significance in showing how the prosecution's testimony was porous and difficult to peg hopes on. It reveals,

not only some fits of unreliability, but also contradictions of no mean proportion. They are contradictions that paint a less than convincing and credible story, and the settled position is that, discrepancies and inconsistencies in the in the witness's testimony, unless they are of trifling nature, have the effect of nullifying the potency of the testimony. In ***Dickson Elia Nsamba Shapwata & Another v. Republic***, CAT-Criminal Appeal No. 92 of 2007 (unreported), the upper Bench quoted the passage in ***Sarkar's Code of Civil Procedure Code***. It was held as follows:

> *"Normal discrepancies in evidence are those which are due to normal errors of observation, normal errors of memory due to lapse of time, due to material disposition such as shock and horror at the time of occurrence and those are always there however honest and truthful a witness may be.* ***Material discrepancies are those which are normal and not expected of a normal person. Courts have to label the category to which a discrepancy may be categorized. While normal discrepancies do not corrode the credibility of a parties' case material discrepancies do.***"*[Emphasis supplied]

See also: ***Bikolimana s/o Odasi @ Bimelifasi v. Republic***, CAT-Criminal No. 269 of 2012 (unreported).

I take the view that such kind of testimony, itself a pale shadow of the true and consistent account, would not have a corroborative effect which would be relied upon as the basis for conviction.

The totality of all this gives me the view that the case against the appellant was not proved beyond reasonable doubt and that the appellant's guilt was not proved, and this ground of appeal succeeds.

In consequence of the foregoing, and on this ground alone, I find the appeal meritorious and allow it. I quash the proceedings, set aside the conviction and sentence, and order that the appellant be immediately set free, unless is held in custody for some other lawful cause.

It is so ordered.

DATED at **MWANZA** this 07th day of June, 2021.

M.K. ISMAIL

JUDGE

Date: 07/06/2021

Coram: Hon. M. K. Ismail, J

Appellant: Absent

Respondent: Ms. Ghati Mathayo, State Attorney

B/C: P. Alphonce

Court:

Judgment delivered in chamber, in the absence of the respondent but in the presence of Ms. Ghati Mathayo, State Attorney, this 07th day of June, 2021.

M. K. Ismail
JUDGE

At Mwanza
07th June, 2021