IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(IN THE DISTRICT REGISTRY OF KIGOMA)

AT KIGOMA

APPELLATE JURISDICTION

(DC) CRIMINAL APPEAL NO. 15 OF 2021

(Arising from Criminal Case No. 78 of 2020 of Kigoma District Court Before E.B. Mushi, RM)

DIRECTOR OF PUBLIC PROSECUTIONS.....APPELLANT

VERSUS

CHINA S/O RAMADHANI @ ZUBERI.....RESPONDENT

J U D G M E N T

09th & 12th July, 2021

A. MATUMA J.

The respondent stood charged for two counts of Rape in the District Court of Kigoma at Kigoma. In both counts he was alleged to have raped a victim girl aged 17 years old. In the first count it was alleged that the rape was committed on unknow dates of September to November, 2019 at Kasingirima-Ujiji within the District and Region of Kigoma.

In the second count, the offence is alleged to have been committed on the 13th November, 2019 at the same place.

At the end of trial, the Hon. Resident Magistrate (E.B. Mushi, RM) found that the prosecution case was not proved beyond reasonable doubt as the age of the victim was not sufficiently proved, this being a statutory rape.

The appellant became aggrieved of such acquittal hence this appeal with two grounds namely;

i. *That the learned trial magistrate erred in law and in facts by acquitting the Accused/Respondent basing on hearsay evidence of PW4 and PW5 and without regarding that PW1 and PW2 proved that the victim's age was 17.*

ii. *That, the learned trial magistrate erred in law and in fact by acquitting the Accused/Respondent without regarding that victim's age contradiction based on age of minority hence still statutory rape.*

At the hearing of this appeal, Mr. Benedict Kivuma learned state attorney represented the appellant while the respondent was present in person and had the service of Mr. Daniel Rumenyela learned advocate.

The learned state attorney argued the first ground by submitting that the evidence of PW1 and PW2 who are the guardian and victim respectively proved that the age of the victim was 17 years old and had in fact mentioned the date of birth of the said victim to be 23/06/2002. He was of the further argument that in law, these two witnesses were capable

and reliable to testify on the age of the victim as it was decided in the case of ***Alli Mwinyimkuu @ Babu Seya versus Republic, Criminal Appeal no. 499 of 2017.*** He thus faulted the trial court to have relied on the evidence of PW4 and PW5 who had contradicted PW1 and PW2 on the issue of the victim's age as they testified nothing but hearsays. The learned state attorney also cited the case of ***Selemani MAkumba versus Republic (2006) TLR 379*** to the effect that true evidence of rape comes to the victim herself.

The learned state attorney on the second ground of appeal submitted that even taking into considerations the contradictions among the prosecutions witnesses, the named contradicted ages 14 years, 15 years and 17 years are all minority ages in accordance to section 131 (2) (e) of the Penal Code supra and therefore all witnesses were still in evidence that the victim was below 18 years hence statutory rape regardless the contradictions.

Mr. Daniel Rumenyela learned advocate for the Respondent then took the floor. Responding on the first ground he argued that P4 and PW5 were prosecution witnesses just like PW1 and PW2 and the prosecution brought them to testify after they had prepared them for evidence in court. They thus knew what the witnesses were going to tell the court. He further

argued that if we have to believe that the two witnesses gave hearsay evidence then it was the prosecution who brought hearsay evidence and not the respondent, his client. The learned advocate went on arguing that even though what PW4 and PW5 testified they were told by PW1 and PW2 themselves and therefore the contradictions were created by themselves.

Mr. Rumenyela also submitted that in the circumstances that the prosecution oral evidence contradicted, they ought to have brought the documentary evidence particularly the clinical card which they had claimed to possess.

On the second ground, the learned advocate contended that so long as this was a statutory rape, the age of the victim ought to have been strictly proved. It doesn't matter that the contradictions revolved within the minority ages of 14, 15 and 17 years old. He was in doubt that if the prosecution witnesses contradicted to such extent, the victim might have been 20 years old and even older than that.

The learned advocate was of the view that PW1 and PW2 were not witnesses of truth as they constantly lied. That PW1 at time she identified herself as the biological mother of the victim and sometime as aunt (mama mdogo).

Mr. Rumenyela learned advocate was of the further argument that even though the prosecution case was not proved beyond reasonable doubt. That there was no evidence of penetration since the doctor who examined the victim did not observe any bruises, blood or sperms. He doubted the evidence of the victim as a whole as she appeared to lie as reflected on record and the fact that she did not disclose the crime to anybody at all times until when she was threatened. In that respect, the victim witness had no free will evidence and cannot therefore be relied. The learned advocate cited to me the case of ***Republic versus Elizabeth Michael Kimemeta @ Lulu***, Criminal Session case no. 125 of 2012 (HC) at Dar es salaam to the effect that the actions of the victim in this case was inconsistence with her innocence as a child. To him, children have no tendency of disguising crimes and lying as PW2 did in this case. He concluded that the offence of rape under which his client has been charged attracts a very severe custodial sentence of 30 years. In that respect, it would be not fair to act on the shaken prosecution evidence to held the respondent liable to conviction.

In rejoinder, the learned advocate argued that the contradictions in the prosecution case did not go to the root of the case and that the victim concealed the crime as she was threatened by the accused/respondent.

Having heard the parties for and against the appeal it is undisputed fact that a settled law is that where the victim's age is the determinant factor in establishing the offence, evidence must be positively laid out to disclose the age of the victim. See ***Andrea Francis versus the Republic,*** Criminal Appeal No. 173 of 2014 and that of ***Babu Seya*** supra.

In the instant matter, the offence faced the respondent was **statutory rape** thus the age of the victim was an essential element to be proved. The Hon. Trial magistrate found that such age was not proved for there was contradictions among the prosecution witnesses while the appellant contends that such age was sufficiently established.

Starting with the first ground of appeal, the appellant is challenging her own witnesses PW4 and PW5 to have given hearsay evidence which contradicted the evidence of PW1 and PW2 in relation to the age of the victim. PW4 a Medical Doctor testified that the victim was 15 years old according to the information he received from PW1 who introduced to her as the biological mother of the victim. PW5 on her party testified that when the victim PW2 was being recorded her statement she said she was 14 years old but her clinical card show that she was 17 years old.

On the other hand, PW1 and PW2 the victim herself maintained that at the time the offence was committed, the victim was only 17 years old.

The question is, was the trial magistrate wrong to evaluate the evidence of PW4 and PW5 along with that of PW1 and PW2 to find out whether the age of the victim was positively proved?

The requirement of the law is for the evidence of each party to the case to be considered as a whole. See; ***Jadili s/o Muhumbi and Maswanya s/o Jackson versus Republic,*** Economic Criminal Appeal No. 4 of 2020, High Court at Kigoma in which this court held;

> *'the law requires that the statement to be considered as a whole and one cannot argue for the use of only certain parts of it in favour of the prosecution leaving or ignoring some parts of it against their favour'.*

In that respect the Hon. Trial magistrate was not wrong to consider the evidence of all prosecution witnesses as a whole. In fact, section 135 (1) of the CPA imposes such duty. I agree with Mr. Rumenyela learned advocate for the respondent that PW4 and PW5 were prosecution witnesses and the trial court could not determine the evidence of PW1 and PW2 in total disregard to that of PW4 and PW5.

When the evidence of the prosecution considered as a whole and found to contradicts itself, the available rule is that the benefit of doubt resulting from the contradictions be resolved in favour of the accused. See ***Jeremiah Shemwete versus Republic [1985] TLR 228.***

In the instant matter the contradictions between the prosecution witnesses were not minor as contended by Mr. Benedict Kivuma learned State Attorney. It went to the root of the case i.e. the age of the victim.

Although both PW4 and PW5 were told by PW1, their evidence cannot be treated as hearsay perse. It was what they were told by PW1 and PW2 themselves. In that respect, the evidence of PW4 and PW5 shakes the credibility of PW1 and PW2 as well for their changing of versions of the story. It is PW1 who informed the police and the Doctor that the victim was 15 years old. That is clearly indicated on the PF3 at the time the same was being issued, and at the time the doctor was taking the nature of complaint and estimated age of the victim.

If at all these witnesses testified contrary to what they were told exactly by PW1 and PW2 it was open for the prosecution to turn them hostile to render their evidence unusable. Provided that their evidence remained intact on record and the same contradicted other witnesses on such material element of the case, the trial magistrate was right to value their respective evidence against that of PW1 and PW2. The first ground is thus without merit and accordingly dismissed.

The second ground of appeal is also without any merit. The issue is not that the contradictions based on the minority ages of the victim. As it was

rightly argued by Mr. Rumenyela learned advocate, it is all about the age of the victim if it was sufficiently proved as required by law. In the instant matter both PW1 and PW2 stated that the victim was born on 23/06/2002 and their source was a clinical card of the victim. Such clinical card was however not tendered in evidence. Even though the two witnesses contradicted as to where such a card was. PW1 stated that the same was with the brother of the victim while the victim herself testified that the same was with her mother.

Therefore, it is uncertain where exactly the card is. That raises some doubts as to whether the two witnesses had at any time really saw such alleged clinical card.

Not only that but also it is on record that PW2 lied to PW1 on the essential fact of rape until when she was forced to disclose. During cross examination she admitted that no body coached her to lie but it was her own plan;

> *'No one who told me to say that I am going to the funeral it was my planning. I lied to my young mother'.*

In that respect she was not a witness of truth at all and could therefore not relied about her real age. I therefore agree with the learned advocate that the acts and plans of the victim who was allegedly 17 years were

inconsistent with a minor victim. She acted more than an adult could do. In the case of ***Republic versus Elizabeth Michael Kimemeta @ Lulu*** supra, my learned brother Rumanyika, J. refused to treat a 17 years old girl as a child for all intents and purpose of a child protected under the law of the child as she appeared to have been planning issues and executing them an adult could do contrary to what the child would always be expected to do.

As her mother is alive and within reach, she ought to have been summoned as a material witness for the prosecution to establish the exact age of the victim. Failure of the Prosecution to call her and assist the court to the real age of the victim is resolved against the prosecution and in favour of the respondent as it was held in the case of ***Samwel Japhet Kahaya versus Republic,*** Criminal Appeal No. 40 of 2017 (CAT) that;

> *'Be that it may, the failure of the prosecution to summon some of the important witnesses would have prompted the trial court to draw adverse inference since if a party to a case opts not to summon a very important witness he does so at his detriment and the prosecution cannot take refuge under section 143 of the Evidence Act'.*

The Hon. trial magistrate was thus right in drawing adverse inference against the prosecution for their failure to summon the mother of the

victim to testify on the age of the victim as the evidence indicated that she was just at Mahembe within the District of Kigoma.

Not only that but also, I agree with the learned advocate for the respondent Mr. Rumenyela that the prosecution case fall short sufficient evidence relating to penetration which is an essential ingredient to a rape case. The medical findings were that the victim had no vaginal bruises, no blood or sperms. The hymen perforation was old. In fact, PW4 the medical doctor concluded that there was no penetration as he could have seen the sperms coming from the vagina unless the victim had cleaned herself. There was no evidence that the victim PW1 cleaned herself and the prosecution did not bother to clear such a doubt. PW4 also testified that had there been forced penetration as purported by the victim he would have seen bruises in the vagina but there was none.

With this evidence it might be true that on that day the Victim was with the respondent but not necessarily that sexual intercourse took place. The inference is taken from the victim herself when she testified at page 15 of the proceedings that at one time the respondent called her into his bedroom. Thereat he merely played with her breasts and released her to go back home. That means he did not make sexual intercourse with her.

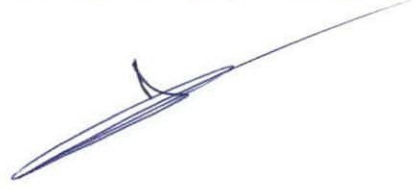
If that is the case, it is quite possible that even on the alleged 13/11/2019, the respondent did not make sexual intercourse with the victim as he once did so. Otherwise, there should have been clear explanation on how the bruises were missing, no wound or swelling and no sperms. Where do we get the inference of penetration? Lack of hymen has not at any time been evidence of penetration. In the case of ***Sanzayamungu s/o Mtupekee versus The Republic,*** (DC) Criminal Appeal No. 31 of 2020, High Court at Kigoma I had time to rule out;

> *'I agree with the learned advocate of the appellant that losing virginity has not been evidence of rape in our criminal jurisprudence. It is the manner in which virginity got lost could be established that it resulted from a rape incident. In the instant case the victim PW1 did not state whether her virginity was perforated in the alleged rape incidences nor that it was the appellant who perforated it'.*

I reiterate the same holding in the instant case.

With the herein observations, I find that the prosecution case was not proved beyond reasonable doubt as rightly held by the trial court and as rightly contended by the respondent through his advocate.

This appeal is therefore devoid of any merits and it is accordingly dismissed.



A. Matuma

Judge

12/07/2021

Court: Judgment delivered today in the presence of Mr. Benedict Kivuma (State Attorney) for the Appellant and in the presence of the Respondent in person and his advocate Mr. Daniel Rumenyela. Right of Appeal explained.

It is so ordered.

Sgd: A. Matuma

Judge

12/07/2021