

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

AT TABORA

DC. CRIMINAL APPEAL NO. 119 OF 2019

(Originating from Urambo District Court Criminal Case No. 102 OF 2018)

DANIEL ALBERTOAPPELLANT

VERSUS

THE REPUBLICRESPONDENT

JUDGMENT

Date: 21/06/2021- 6/8/2021

BAHATI,J.:

The Appellant **DANIEL S/O ALBERTO** was charged before the District Court of Urambo at Tabora on rape contrary to section 130 (1) (2) (e) and 131 (1) of the Penal Code, Cap 16 [R. E. 2019]. The appellant being aggrieved by both conviction and sentence of thirty (30) years in jail imposed in the offence of rape contrary to section 130 (1) (2) (e) and 131 (1) of the Penal Code, Cap. 16 [R. E 2019].

Aggrieved by conviction and sentence, the appellant preferred this appeal on four grounds thus:-

- 1. The appellant was denied a fair trial because he was not reminded of the charge at the stage of the trial district court recording and receiving the prosecution, this went contrary with the directives*

given in the case of Naoche Ole@ Mbile Vs Republic (1994) TLR No. 253, Emmanuel s/o Malahya vs. Republic, Criminal Appeal No. 212 OF 2004, CAT Tabora, Cheko S/O Yahaya Vs Republic, Criminal Appeal No. 179 of 2013 CAT TABORA (Both unreported).

2. *The judgment of the trial court has no merit, as it's not analysis the whole evidence of the prosecution witnesses, worse still it did indicate the age of the victim on the incident of rape, all in all, the said Upendo D/O Mbaje she did not explain in court to how she was raped, the judgment in totally is silently about that issue.*
3. *That, the judgment on page 3 paragraph No, 2 line number 11 of 13 indicate and readable that "accused person Daniel S/O Alberto is a village within Urambo District in Tabora region did carnal knowledge with one Upendo D/O Mbaje. My lord judge, on page 04 of the typed copy of judgment show and readable as following inter alia:- it was the victim's statement and submission, that she was impregnated by the accused person on this case and now blessed with a child in April 2017 she met with this accused person who is the village mate, seduced her and raped her at the critical contradiction and inconsistency given by the prosecution in this case hence he reached at the wrong decision like this one, in conformity with the above facts vide the case of Joseph Sypriano Vs Republic, Criminal Appeal No. 158 of 2011 and Makelele S/O*

Kulindwa Vs Republic, Appeal NO. 175 Of 2013 CAT Tabora (Both Unreported).

- 4. The charge of rape against the appellant was not proved as the required standard of proving beyond reasonable doubt, that is to say, to prove all ingredients of the offence as directed by the highest court in the case of Jonas s/o Nkeze vs. Republic (1992) TLR NO. 213, Mochi D/O Rajab Vs Republic (1967) HCD NO. 384 and Mohamed Said Matula Vs Republic (1995) TLR NO. 3 (Emphasis is Mine).***

At the hearing of the appeal, the appellant appeared in person to support his grounds of appeal. On the other hand, the Republic, led by Mr. Rwegira Deusdedit, the learned State Attorney conceded and supported the appeal.

The learned State Attorney submitted that the appellant was convicted of rape. He submitted that having gone through the proceedings he supports this appeal since the offence was not proved beyond reasonable.

In submitting on the issue of age, Mr. Rwegira stated that the question of age was necessary to be shown in the evidence. He clarified that the age of the victim was not proved to the required standard passing through the charge sheet of Upendo Mbaye who was 17 years

when she was raped. He submitted that according to the court records, the victim also could not state her age.

Likewise, the state attorney submitted that PW2, Nicolaus Bavuna testified that the victim was his nephew however he could not disclose her age. Similarly, PW3, Flora Kaombwe, a teacher did not disclose the age of the victim. Also, during prosecution, the prosecutor did not show the age of the victim even no certificate of birth was tendered to indicate the age.

The learned State Attorney submitted that, it is a common law when a person is charged with statutory rape whereby consent is immaterial rather the age of the victim is of the essence and has to be categorically stated in the testimonies. The law provides that for the accused to be convicted of statutory rape, the victim must be below 18 years of age.

He submitted that going through PW1 evidence, the circumstance of this case was out of consent. There was a need for the prosecution to establish the age of the victim. In the absence of a birth certificate, the best evidence comes from the parents, guardian, or herself. With such uncertainties, it leaves doubts on the part of the prosecution. He reiterated his submission in chief that when it comes to statutory rape age is paramount. Hence, he supported the appeal.

In a brief rejoinder, the appellant had nothing to add other than prayed to this court to adopt the petition of appeal to form part of his submission.

Having heard from both parties, the crucial issue in this appeal is whether the prosecution has proved their case against the appellant beyond reasonable doubts.

It is not in dispute that the appellant was charged with statutory rape whereby consent is immaterial rather the age of the victim is of the essence and has to be categorically stated in the testimonies.

The law provides that for the accused to be convicted of statutory rape, the victim must be below 18 years of age. As correctly submitted by the State Attorney, the record is silent on the age of the victim. It is clear from the record that although the issue of the age of the victim was central to the offence, no witness sufficiently proved the same to the required standard. Having examined the court records I noted that although her age was jerked down when sworn in, the law is settled that swearing is not part of the testimony, indeed they could not competently prove the age of the victim.

I wish to reproduce the relevant provision under which the appellant was charged which is section 130(2)(e) of the Penal Code, Cap.16 thus ;

“(2) A male person commits the offence of rape if he had sexual intercourse with a girl or a woman under circumstances falling under any of the following;

a) “.....

b)

c)

d)

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.”

Considering the guiding provision I subscribe to the argument by the State Attorney that the age of the victim was an important matter to be proved by the prosecution apart from other evidence. This was also stressed in **Andrea Francis v the Republic, Criminal Appeal No. 173 of 2014(unreported)** which was quoted in with approval in **Nalongwa John v Republic, Criminal Appeal No. 588 of 2015 at Dodoma(unreported)** that;

“ ... It follows that the evidence in a trial must disclose the person's age. In other words, in a case like this one where the victim's age is the determining factor in establishing the offence, the evidence must be positively laid out to disclose the age of the victim... In the


absence of evidence, it will be evident that the offence was not proved beyond reasonable doubt."

In this regard, I agree with the appellant who was also supported by the respondent that the prosecution did not prove the case beyond reasonable doubt although there is also no dispute that there were other irregularities in the evidence tendered by the prosecution; at this juncture, I think the issue of age was central to the offence.

For the foregoing reasons, I allow the appeal to that extent. I further quash the conviction and set aside the sentence imposed on the appellant. I hereby order the appellant to be released from prison forthwith unless otherwise lawfully detained.

Order accordingly.




A.A.BAHATI
JUDGE
06/8/2021

Judgment delivered under my hand and seal of the court in the open court, this 6th day August, 2021 in the presence of both sides.

J. KATTO

For DEPUTY REGISTRAR

06/8/2021

Right of appeal fully explained.



J. KATTO

For DEPUTY REGISTRAR

06/08/2021

