IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

IN THE DISTRICT REGISTRY OF KIGOMA

AT KIGOMA

(APPELLATE JURISDICTION)

(DC) CRIMINAL APPEAL NO. 32 OF 2021

(Originating from District Court of Kasulu in Criminal Case No. 312/2020 Before Hon. I.D. Batenzi, RM)

BARAKA PROSPER.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

16th & 16/9/2021

A. MATUMA, J

The appellant stood charged in the District Court of Kasulu for Rape Contrary to section 130 (1) (2) (e) and 131 (1) of the Penal Code, Cap. 16 R.E 2019.

He was alleged to have raped a girl of 12 years old on 21st November, 2020 at Kavomo street at Buhigwe District in Kigoma Region.

After a full trial the Hon. Resident Magistrate Mr. I.D. Batenzi was satisfied that the prosecution case was sufficiently proved. He entered conviction against the appellant and sentenced him to suffer imprisonment of thirty (30) years.

Aggrieved with the conviction and sentence the appellant has preferred this appeal with five grounds but for the purpose of this appeal I shall determined only the first ground to the effect that;

The ingredients of the offence he stood charged were not sufficiently proved to warrant his conviction and sentence.

At the hearing of this appeal, the appellant was present in person while the Respondent had the services of M/S Edna Makala learned State Attorney.

The learned state attorney supported the appeal arguing that the offence upon which the appellant stood charged being a

statutory rape, age of the victim and penetration were necessary ingredients to be proved.

She submitted that in this case there is no evidence of the victim's age despite the fact that both parents of the victim testified during trial. She cited to me the cases of ***Robert Andondile Komba versus DPP, Criminal Appeal No. 465 of 2017*** and ***Bashir John versus Republic, Criminal Appeal No. 486 of 2016*** to the effect that in statutory rape, the age of the victim must be proved and that those who can prove such age among them are the parents or either of the parents of the victim. She thus called this court to allow this appeal and set the appellant free.

The appellant on his party joined hands with the learned state attorney without more.

Without much ado, I agree with the learned state attorney that since the appellant was charged for statutory rape under the provisions of section 130 (1) (2) (e) of the Penal Code (supra),

the ingredients of statutory rape ought to have been proved beyond reasonable doubt. These are; **the age of the victim** and **penetration**.

At page 18 of the case of Robert Andolile Kiomba (supra), the Court of Appeal was clear that;

> ***"In cases of statutory rape, age is an important ingredient of the offence which must be proved"***

Failure of the prosecution to prove the age of the victim in statutory rape cases has always been held in favour of the accused persons on the ground that the cases against them has not been proved beyond reasonable doubt.

In the instant case the learned trial Magistrate was aware of the fact that the age of the victim was not proved as it is born from his judgment on page 2 that;

> *"Essentially, I was not of the opinion that the prosecution did not establish their charges against the accused,* ***despite***

there been no evidence as to the victim's age".

That means, he found the appellant with a case to answer despite of such deficience on the vital element of the offence.

I don't know why the learned Magistrate decided to ignore completely such necessary ingredient in his findings that the appellant was guilty of the offence charged.

I therefore agree with the appellant and the learned State Attorney that the age of the victim as one of the ingredients of the offence was not proved.

Another ingredient is penetration. Although none of the parties before me submitted on it, it is apparent on record that the evidence of PW1 the victim and that of other supporting witnesses particularly her father suggested that there was full penetration in the course of rape by the Appellant against the victim.

Thus, for instance, PW1 the victim testified that the appellant having undressed her, he inserted his male organ into her female

organ. She felt pains and saw blood oozing from her female organ (vagina). She walked on pains. Such evidence no doubt suggested that there was full penetration or penetration to the extent that she was severely injured.

Her father PW3 Jumanne Mwihana, also testified that having been informed of the rape he instructed some women to inspect her if she has really been raped. They inspected her and confirmed to him that she was raped. Although he did not elaborate what were the factors stated to establish that there was really rape but his evidence suggested that those people he instructed to inspect the victim saw the vagina of the victim to have been penetrated.

Contrary to PW1 and PW3, PW4 Doctor Baraka Kemelo in his examination of the victim found her hymen intact without any blood. He however observed small bruises in the lower part of vulva and on the side of the vulva.

The presence of hymen and absence of any sign of blood in the victim's vagina negates any sort of allegation that there was full penetration or even slight penetration. This is because had there been full penetration the hymen would have been perforated. And if there would have been slight penetration which is sufficient for the purpose of rape, the small bruises should have been established to result from the rape or an attempt of rape. That would have been signified by presence of swelling of the private parts of the victim (Labia minora). There cannot be a forced penetration to the extent explained by the victim without leaving out indicators of injury to the vagina parts. I therefore, find that even penetration was not proved to the required standard. The victim's evidence is suspicious.

The learned state attorney also pointed out a very interesting fact in this case. This is the evidence of PW6 Prosper Laurent Luvubu @ Kulije. This is the accused's father but was brought in evidence by the Prosecution in its case.

In his evidence he testified that the appellant in the past suffered from mental problems although he has currently recovered. With this evidence I don't know what did the prosecution intended to achieve against the accused/Appellant but at last there is a fact that the appellant at times had mental problems.

In our Criminal Jurisprudence a person, is not punished of any criminal offence unless **mensrea** is established i.e. the mental status.

On record there is no evidence establishing whether at the time of the alleged crime, the appellant was already healed and recovered or he had still mental problems as put by the prosecution themselves.

With these observations, I join hands with both parties that the prosecution case was not proved beyond reasonable doubts against the appellant. His conviction is quashed and the sentence set aside.

I order his immediate release from custody unless held for some other lawful cause.

It is so ordered.

A. MATUMA

JUDGE

16/9/2021

Court: Judgement delivered in the presence of the appellant in person and Edna Makala State Attorney for the Respondent.

Right of Appeal explained.

Sgd: A. MATUMA

JUDGE

16/9/2021