IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
[ARUSHA DISTRICT REGISTRY]
AT ARUSHA.

CRIMINAL APPEAL NO. 15 OF 2020

(Originating from the District Court of Longido, Criminal Case No. 9 of 2018)

LEMBRIS MOLLEL @MBARIO ..... APPELLANT

Versus

THE REPUBLIC ..... RESPONDENT

JUDGMENT

23rd August & 1st October, 2021

Masara, J.

1.0 Introduction

Before the District Court of Longido (the trial court), **Lembris Mollel @Mbario**, the Appellant herein, stood charged with two offences; namely, Rape, contrary to Sections 130(1) and 131 (1) of the Penal Code, Cap. 16 [R.E 2002] and Impregnating a School Girl, contrary to Section 35(3) of the Education Act, No. 25 of 1995 read together with Rule 5 of Government Notice No. 265 of 2003 and section 60A (3) of the Written Laws (Miscellaneous Amendment Act No. 2) of 2016. It was alleged that on 9/12/2017 at about 22:00hrs, at Tingatinga Village within Longido District, in Arusha Region, the Appellant did have carnal knowledge of the victim **NAL** (name withheld), a school girl of 17 years old which led to her becoming pregnant. The trial court found the Appellant guilty of the two offences, whereby he was convicted and sentenced to serve 30 years imprisonment for the first count and 5 years imprisonment for the second count. The sentences were ordered to run concurrently. He was dissatisfied whereby he preferred this appeal on the following grounds:

a) *That, the charge sheet was defective. The omission to cite the specific category under section 2(e) of section 130 of the Penal Code was contrary to provisions of section 135 of the CPA Cap. 20 [R.E 2002], which govern the mode in which the charges should be drawn;*

b) *That, the trial court erred in law and in fact in holding that the identification environment was conducive for proper identification of the accused person;*
c) *That, the trial Court erred in law and in fact in not finding that the Prosecution evidence was full of doubts and failed to prove the charge against the appellant beyond reasonable doubt;*
d) *That, the PF3 which contained the report of the doctor on the alleged penetration of the male organ into the victim's vagina was not read over after it was admitted as exhibit P.2; and*
e) *That, the trial Court erred in law and in fact in not drawing adverse inference against the Prosecution for failing to summon the material witnesses.*

2.0 The Prosecution Evidence

The prosecution evidence which led to the findings of the trial court and consequently leading to this appeal can be summarised as follows: On 9/12/2017 at 19:00hrs, the victim, NAL, who testified as PW1, was at home cooking. The accused went there and requested to have sex with her but she declined. She told him that her examination results were out and she was about to join secondary school. The Appellant left. However, he went back there at about 22:00hrs. He found the victim with her siblings only. Her parents were not around. The Appellant decided to muzzle the victim's mouth, took off her clothes and started to rape her. The victim managed to identify the Appellant through moonlight that was shining. After quenching his lust, the Appellant disappeared. Thereafter, the victim shut the door and slept. The next morning the victim woke up feeling stomach pain but did not report the incident.

In January 2018, PW1 joined Form I at Enduimet Secondary School. After reporting, all girls were subjected to pregnant tests. The victim was suspected pregnant. When she was taken to the hospital for examination, she was confirmed pregnant. The case was reported to the village office whereby the Appellant was arrested and arraigned before the trial court. To prove that she was pregnant, the victim tendered the RCH card which was admitted as exhibit P1.

Halima Mkumbe (PW3), the victim's teacher, supplemented the evidence of the victim. She told the court that the victim was a form I student at Enduimet Secondary School. That after opening the school, the school decided to carry on a pregnant test exercise to female students on 31/1/2018. The victim was suspected pregnant. On 1/2/2018, PW3 took the victim to the hospital for medical examination where she was confirmed pregnant. To prove that the victim was her student, PW3 tendered TSM form which was admitted as exhibit P3. This evidence was corroborated by that of Jacabel Fulgence Mwita (PW2), an Assistant Medical Officer at Longido Health Centre, who examined the victim on 3/2/2018. According to PW2, the results revealed that the victim was 7 weeks pregnant. PW2 tendered the PF3 of the victim which was admitted as exhibit P2.

The last prosecution witness was WP 9340 DC Mwajabu (PW4) who investigated the case. She informed the Court that when she interrogated the victim, the victim unfolded to her that she was in love with the Appellant since 2016. She then decided to arraign the Appellant in court for the charges aforestated.

3.0 The Defence Evidence

In his defence, the Appellant (DW1), denied commission of the offence stating that the case was framed against him because he had no money to bribe the police. That his colleagues whom they were arrested together were discharged after giving out bribes. Contesting the allegations, the Appellant stated that on 9/12/2017 he was at his home. That he was arrested along with other two people at the market and were brought to the village office and later to the police. At the police, the other two colleagues gave money to the police and they were released. As he had no money, he stayed at the police for four days before he was taken to court. The Appellant acknowledged that he knew the

victim as they lived in the same village. He also admitted to know the victim's "husband" as he used to find them together.

The Appellant called Andrew Lakanoi (DW2), his brother-in-law to testify on his behalf. DW2 stated that he knew the victim as a student of Tingatinga Secondary School. On the material date and time, he was at his duty station at Tingatinga where he works as a guard, therefore he did not know if the Appellant had carnal knowledge of the victim or not. DW2 stated that on the other day he was at the market where three people including the Appellant were arrested, taken to the village office where they found the victim. The victim was shown one person after another but did not point any one of them as the rapist. What she said is that the accused approached her but she refused him. The accused was arrested and the other two were released. That the victim mentioned three people who had carnal knowledge of her. Shipapa Lekenyi (DW3), the Appellant's brother, did not know anything about the incident.

4.0 Representation

At the hearing, the Appellant appeared in Court in person unrepresented, while the Respondent Republic was represented by Ms. Tusaje Samwel, learned State Attorney.

5.0 Submissions by the Appellant

Submitting in support of the appeal, the Appellant stated that he was convicted based on the evidence of PW1 (the victim), but there was no evidence to prove the intensity of the moonlight which aided his identification. He added that PW1's evidence was wrongly admitted as she was not sworn. Further, that the trial magistrate ought to have realised that PW1's evidence was full of doubts, insisting that PW1 was not raped. According to the Appellant, after being raped

she did not report to anyone that she was raped, therefore she was not trustworthy.

6.0 Submissions by the Respondent

On her part, Ms Tusaje, initially appeared to oppose the appeal submitting that the errors in the charge sheet is curable because the Appellant knew the charge facing him and prepared his defence. That the particulars of offence were explicit and the Appellant called witnesses. She insisted that the Appellant was not prejudiced, supporting her contention with the decision of the Court of Appeal in ***Jamali Ally @ Salum Vs. Republic***, Criminal Appeal No. 52 of 2017 (unreported).

Regarding identification of the Appellant, the learned State Attorney submitted that the victim knew the Appellant before the date of the incident; thus, he was properly identified. She added that the Appellant had gone to her at 19hrs asking to have sex with her and he returned back at 23hrs when he was identified by moonlight which was shining.

Submitting on the issue of being sworn, the learned State Attorney admitted that it is true that PW1 gave unsworn evidence, but she pointed out that such irregularity is curable under section 388 of the CPA. She maintained that PW1's evidence required corroboration, which they did not have as it is unsworn. She also conceded that the PF3 was not read after it was admitted as exhibit; thus, it ought to be expunged.

In a twist of event, Ms Tusaje later made up her mind and changed her initial position. This time around, she supported the appeal on the ground that the age of the victim was not proved. She urged this Court to allow the appeal on that basis.

7.0 Court's Determination

In arriving at the Court's decision, I have considered the grounds of appeal, the submissions of the Appellant and that of the learned State Attorney and I have also examined the trial court records. The main issue apparent in this appeal is whether statutory rape was proved against the Appellant.

According to the Appellant, the charge was defective for failure to cite specific subsection 2(e). Such omission contravenes section 135 of the Criminal Procedure Act, Cap. 20 [R.E 2019]. Ms Tusaje conceded that the charge was defective but she quickly pointed out that the Appellant was not prejudiced, as he knew the charge that faced him and he readily prepared his defence. I have examined the charge that faced the Appellant in the trial court. The Appellant on the first count was charged with the offence of Rape, contrary to section 130(1) and 131(1) of the Penal Code, Cap. 16 [R.E 2002]. The particulars of the offence read as follows:

> *"That, Lembris s/o Mollel @ Mbario charged (sic) on 9th day of December, 2017 at about 22:00hrs Tingatinga Village within Longido District in Arusha Region, did have carnal knowledge to (sic) one NAL a school girl of Enduiment Secondary School aged 17 years old."*

From the wording of the charge, it is noteworthy that the Appellant was charged with statutory rape. As correctly pointed out by the Appellant, statutory rape is prefaced under section 130(1) (2) (e) and 131 (1) of the Penal Code, Cap. 16 [R.E 2002]. Section 130(1) is the provision creating the offence. Subsection 2(e) is the provision specifying the type of rape, which is rape against a woman below the age of 18 years old (statutory rape). It was the Appellant's contention that he was prejudiced as he did not know the type of rape he was facing, which denied him fair trial. I am alive to the fact that section 135 (a) (ii) of the CPA requires the statement of the offence to cite a correct reference of section of the law which sets out or creates a particular offence alleged to have been committed.

However, in order to appreciate whether the Appellant was prejudiced for the defects manifest in the charge sheet, recourse is made to the particulars of the offence and the Appellant's defence. The particulars of the offence as above reproduced are clear that the Appellant was charged of raping a school girl of 17 years old and impregnating her. In this respect, the Appellant was well informed of the offence that was facing him.

I am at one with the submission by the learned State Attorney that the defects in the charge sheet did not prejudice the Appellant as the particulars of the offence on the said charge sheet were explicit enough to inform the Appellant the nature of the rape offence he was facing. On the same token, the Appellant entered his defence denying commission of the offence and he was able to call two witnesses. This, indeed, implies that the Appellant knew the charges that he was facing and he readily prepared his defence. Thus, there is no prejudice suffered by the Appellant and the defects are cured under section 388 of the CPA. In this stance, I am guided by the cited decision of ***Jamali Ally @ Salum Vs. Republic*** (supra) where it was held inter alia that:

> *"It is our finding that the particulars of the offence of rape facing the appellant, together with the evidence of the victim (PW1) enabled him to appreciate the seriousness of the offence facing him and eliminated all possible prejudices. Hence, we are prepared to conclude that the irregularities over non-citations and citations of the inapplicable provisions in the statement of the offence are curable under section 388(1) of the CPA"*

See also: ***Khamisi Abderehemani Vs. Republic***, Criminal Appeal No. 21 of 2017 (unreported). I fully associate myself with the above decisions which I consider proper position of the law. In light of what I have discussed above, the first complaint which rests on the first ground of appeal is devoid of merits.

The Appellant also challenged the evidence regarding his identification. According to the evidence on record, PW1 testified that the incident took place

at 22:00hrs. But prior to that, the Appellant had approached her at 19:00hrs, asked for sex but she refused. For that reason, the victim stated that she knew the Appellant before and she also identified him through a moonlight that was brightly shining. I have no hesitation to agree with the Appellant that his dentification was full of doubts for the following reasons. *First*, the victim did not explain how she identified the Appellant by using moonlight while she testified that she was raped while inside the house. How it was possible for the moonlight to aid her identification while inside the house was unexplained. *Second,* the victim did not mention the Appellant at the earliest opportunity. The incident was never reported to anyone, the Appellant was mentioned for the first time after the victim was tested pregnant. Worse still, the defence evidence was to the effect that three people were arrested in connection with the offence but only the Appellant was taken to court. This clearly suggests that the rapist was not properly identified. *Third,* she testified that she was at home with her siblings, but she could not tell what transpired that they did not witness the incident or even hear any alarm when she was being raped, while they were in the same house. Thus, identification of the Appellant was not water tight as underscored in ***Waziri Amani Vs. Republic*** [1980] TLR 250. Identification of the Appellant was thus doubtful; hence the second ground has merits.

The next matter to consider relates to the PF3 which was admitted as exhibit P2. According to the Appellant, after being admitted as exhibit, the PF3 was not read over in court. The learned State Attorney conceded this anomaly. I have scanned the trial court records; I am satisfied that the PF3 which was tendered by PW2 by Jacabel Fulgence Mwita was admitted as exhibit P2. After it was admitted, correctly as submitted by both the Appellant and the learned State Attorney, it was not read to the parties. Parties, especially the Appellant could not understand its contents. Failure to read a document after being admitted as exhibit is fatal. Such document is to be expunged from court record. That

position can be deciphered from the decision in ***Nkolozi Sawa and Another Vs. Republic***, Criminal Appeal No.574 of 2016 (unreported) where it was held:

> *"In our considered view, the essence of reading the respective exhibits is to enable the accused to understand what is contained therein in relation to the charge against them so as to be in a position of making an informed and rational defence. Thus, the failure to read out the documentary exhibits was irregular as it denied the appellants an opportunity of knowing and understanding the contents of the said exhibits."*

In light of the above position of the law, I hereby expunge exhibit P2 from the record. After expunging exhibit P2from record, the next question is whether the remaining evidence can still sustain the conviction met against the Appellant. In my view, it does not. I hold this view for the following reasons:

First, the alleged rape took place on 9/12/2017 but the victim remained silent until 1/2/2018, almost two months later, when she was confirmed pregnant. There are no reasons brought to the fore for such silence. *Second*, as submitted by the Appellant, the trial magistrate erred in taking PW1's unsworn evidence, treating her like a child of a tender age while she was not. Unsworn evidence can be given by a child of tender age after the court is satisfied that the child does not understand the duty of speaking the truth. A "child of tender age" is defined under subsection 4 of section 127 of the Evidence Act, Cap. 6 [R.E 2019]. That subsection provides:

> *"(4) For the purposes of subsections (2) and (3), the expression "child of tender age" means* ***a child whose apparent age is not more than fourteen years."*** (Emphasis supplied)

While testifying, the victim was recorded to have 15 years, while a child of tender age is one whose age does not exceed fourteen years. Thus, PW1 did not fall in the category of a child of tender age. Before testifying, the trial magistrate stated that PW1 promised to tell the truth and not tell lies u/s 26 of Act No. 2 of 2016. Surprisingly, the proceedings do not reflect how such

knowledge came into the magistrate's mind. Considering the fact that the victim was not a child of tender age, and since she gave unsown evidence, her evidence was irregularly taken. It cannot be relied upon. In sexual offences, the best evidence is that of the victim. See ***Selemani Makumba Vs. Republic*** [2006] TLR 379. Since PW1's evidence is unreliable and is bound to be expunged from the record, there is no other piece of evidence that the prosecution can rely on to prove the charges against the Appellant.

Third, there are contradictions between the charge sheet and the evidence of PW1. The charge shows that the victim at the time the offence was committed was 17 years of age. However, before her unsworn testimony was taken, she was recorded to be 15 years. *Fourth*, the Appellant was charged with statutory rape, but, as correctly conceded by the learned State Attorney, there was no evidence led by the prosecution to prove the victim's age, which is vital proof in statutory rape. The decision of the Court of Appeal in ***Andrea Francis Vs. Republic***, Criminal Appeal No. 173 of 2014 (unreported) held the following:

> *"In this case, the particulars of offence in the charge sheet indicated that PW1 was 16 years old. When she testified on 14/2/2006 the Principal District Magistrate, before putting her on oath, also indicated that she was 16 years.* ***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 of age 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."*(Emphasis added)

Likewise in the case of ***Projestus Zacharia Vs. Republic***, Criminal Appeal No. 162 of 2019 (unreported), the Court of Appeal held:

> *"In the case at hand, as earlier indicated in the particulars of the offence, the age of the victim was not stated and* ***neither was it said in the evidence of the victim or her parent as reflected at page 8 to 11 of the record of appeal ..... This was a mere citation by a magistrate regarding the age of the witness before giving her evidence and it was not part of the evidence of the victim****."*(Emphasis added).

In the appeal at hand, there was no evidence in the trial court that led to prove the victim's age, an important ingredient in the offence the Appellant stood charged. In the absence of such proof, it was unsafe to convict the Appellant. Courts of record in this country have persistently held that proof of age is the sole distinction between statutory rape and other types of rape preferred under section 130(1) (2) (a-d) of the Penal Code. This anomaly, alongside the other anomalies pointed out while determining the preceding grounds of appeal, lead me to the conclusion that the offence of rape was not proved to the hilt. Since the offence of rape was not proved, the second offence of impregnating a school girl has no legs to stand on. It follows therefore that the prosecution did not prove the charges against the Appellant on the required standard.

8.0 Conclusion

In the upshot, this appeal has merits. It is accordingly allowed. The Appellant's conviction is quashed and sentences set aside. I hereby order the Appellant's release from prison forthwith, unless he is otherwise lawfully held.

Order accordingly.

Y. B. Masara

JUDGE

15th October, 2021.