

**THE UNITED REPUBLIC OF TANZANIA**  
**JUDICIARY**  
**IN THE HIGH COURT OF TANZANIA**  
**(DISTRICT REGISTRY OF DAR ES SALAAM)**  
**AT DAR ES SALAAM**

**CRIMINAL APPEAL NO. 7 OF 2021**

*(Originating from the Judgment of the District Court of Kilosa in Criminal Case No.30 of 2021)*

**AMANI ELIAS MWILOGOLA ..... APPELLANT**

**VERSUS**

**THE REPUBLIC..... RESPONDENT**

**JUDGMENT**

*Hearing date on:26/11/2021.*

*Judgement date on: 01/12/2021.*

**NGWEMBE, J:**

The appellant Aman Elia Mwilogola is serving a sentence of thirty (30) years imprisonment for the offence of rape of a girl below the age of majority. Being so convicted, and after finding himself in jail, he timely issued notice of appeal and appealed to this court.

According to the charge sheet, on 29<sup>th</sup> January, 2021 at Kwipipa village within Gairo District in Morogoro Region, the appellant had unlawful carnal knowledge with a girl alleged to be below the age of majority. The charge sheet indicates that the appellant at the time he committed the alleged



offence was twenty (20) years old and the girl was recorded to be 15 years old. Thereafter, the appellant was arraigned in court charged for the offence of rape contrary to sections 130 (1) (2) (e) and 131 (1) of the Penal Code Cap. 16 R.E. 2002. When the charge was read over to him, he denied it, hence the prosecution lined up six (6) prosecution witnesses, while the defence case was blessed by the appellant alone.

At the end of trial, the appellant was found guilty, consequently convicted and sentenced to a minimum statutory sentence of thirty (30) years imprisonment. The appellant came up with five grounds of appeal which for convenient purposes, may be summarized into two grounds namely

1. Whether exhibit P2 (caution statement) of the appellant was recorded and tendered in court lawfully
2. Whether the prosecution proved the case beyond reasonable doubt?

On the hearing date of this appeal, the appellant appeared in person, while the Republic was represented by the learned State Attorney Mr. Edgar Bantulaki.

Being unrepresented, the appellant had limited contributions on this appeal. He solely relied on his grounds of appeal and prayed this court to do justice to him.

In turn the learned State Attorney, supported the first ground that the caution statement of the appellant exhibit P2 was recorded totally out of statutory time frame. The appellant was arrested on 29/1/2021, while his caution statement was recorded on 2/2/2021, that is equal to four (4)



days, since he was arrested. Thus, prayed same to be expunged from the court record.

Arguing on the second ground, the learned State Attorney, strongly submitted that the age of the victim was not established and proved by prosecution. Mere allegations that the girl was 15 years is not enough. Added that even the age of the appellant was not proved if at all, was above the age of majority. This is proved on his defence, that he is premature not knowing the seriousness of the offence facing him. Rested by supporting the appeal and invited this court to consider this appeal and do justice to the appellant.

Having briefly summarized the arguments of both parties, and upon reading critically the trial court's proceedings and its judgement, I fully support the averments of the learned State Attorney that the recording of caution statement is guided by law. Section 50 (1) of Criminal Procedure Act, clearly provide four (4) hours from the time of arrest the accused must record his caution statement. Failure of which there must be an extension of time. However, in this appeal, the appellant was arrest on 29/1/2021, but his statement was recorded on 2/2/2021, without any valid reasons for that long delay. Therefore, without laboring much on it, the caution statement was wrongly admitted during trial, same is expunged from the court records.

The second fundamental issue for determination is whether the age of the victim was established and proved? Since the introduction of Sexual Offences Special Provisions Act 4 of 1998 – (SOSPA) to date, certain



ingredients constituting the offence of rape including the age of the victim and the accused is fundamental. In case the accused is found to be at the age of 18 or below, section 131 (2) (a) of Penal Code provides only one sentence which is corporal punishment. The age above 18 years will face sentence of minimum of thirty (30) years, depending on the age of the victim. When the age of the victim is below ten (10) years, the only sentence is life imprisonment when the victim's age is above ten (10) years, the convict may face sentence from thirty (30) years to life imprisonment.

It is evident that, the prosecution to succeed on rape cases, the age of the victim must be established and proved to the standard required by law. Failure to do so, amount into failure to prove the offence to the standard required by law. The reason behind it, is statutory that for a girl below the age of eighteen (18) years, consent is immaterial. The law presumes that such a girl is incapable to consent. Therefore, to prove the age of a victim and of the accused is mandatory in order to succeed in rape cases.

The Court of Appeal in the case of **Andrea Francis Vs. R, Criminal Appeal No. 173 of 2014**, at Dodoma; and in the case of **Solomon Mazala Vs. R, Criminal Appeal No. 136 of 2012**, CAT at Dodoma was confronted with similar predicament, that the age of the victim was not established and proved. Upon deep consideration on it, the Court held:-

*"The cited provision of the law makes it mandatory that before a conviction is grounded in terms of Section 130 (2) (e), above, there must be tangible proof that the age of the victim*



*was under eighteen years at the time of the commission of the alleged offence. Once the age of the victim is established to be below 18 years, it negates consent of the victim, if any."*

In the same vein it was repeated in **Criminal Appeal No. 85 of 2012 Charles s/o Makapi Vs. R**, the Court held:-

*"Taking into account that this is a statutory rape, it is important for the prosecution to give a clear evidence of age of the victim. Failure of that, will create doubt as to the real age of the victim in this alleged statutory rape"*

Certainty of age of the victim in statutory rape is mandatory. Failure to certify the age of the victim in statutory rape, create serious doubt, which will be decided in favour of the accused.

The duty of the prosecutor on statutory rape is more compelling, apart from proving the offence itself, he has to establish and prove the age of both, the victim and the accused.

In respect to this appeal, it seems the issue of age to both parties (accused and victim), escaped the attention of the prosecution as rightly pointed out by the learned State Attorney. Even the trial court failed to direct his mind on this point law. Otherwise he could have arrived to a different conclusion.

The learned State Attorney likewise, pointed out quite important point related to the nature of defence adduced by the appellant during trial. It is

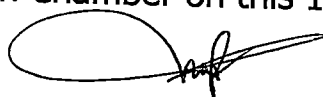
vividly clear, that the appellant was laboring between immaturity and maturity. The whole of his testimony does not demonstrate maturity of mind, rather may have attained the age of majority, but still laboring with immaturity of his state of mind. Therefore, in the whole trial, the prosecution ought to establish and prove if the appellant attained the age of majority. Mere allegations of having 20 years, without proof of it, may lead into punishing young offender's contrary to the Law of the Child.

This ground alone, is enough to arrive safely to the conclusion in this appeal. Accordingly, I find no reason to consider other grounds of appeal which won't change the already arrived conclusion.

In totality, I proceed to allow this appeal, quash the conviction and set aside the sentence meted by the trial court, consequently order an immediate release of the appellant from prison, unless otherwise lawfully held.

**I, accordingly order.**

**Dated** at Dar es salaam in Chamber on this 1<sup>st</sup> day of December, 2021



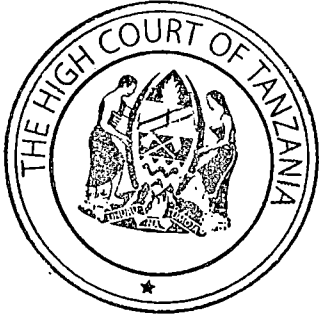
**P.J. NGWEMBE**

**JUDGE**

**01/12/2021**

**Court:** Judgement delivered at Dar es Salaam in Chambers on this 1<sup>st</sup> December, 2021 in the presence of the appellant and Ms. Mdunguru Senior State Attorney for the Republic/respondent.

**Right to appeal to the Court of Appeal explained.**



**P.J. NGWEMBE**

**JUDGE**

**01/12/2021**