

IN THE UNITED REPUBLIC OF TANZANIA

JUDICIARY

IN THE HIGH COURT OF TANZANIA

(DISTRICT REGISTRY OF MBEYA)

AT MBEYA

CRIMINAL APPEAL NO. 121 OF 2021

(From the decision of the District Court of Rungwe at Tukuyu (Hon. A. V. Tarimo, DRM) in Criminal Case No. 100 of 2017)

NSAJIGWA WILFRED MWAKILASA.....APPELLANT

VERSUS

THE REPUBLIC.....RESPONDENT

JUDGMENT

Date of Hearing : 30/05/2022

Date of Judgement: 06/05/2022

MONGELLA, J.

The appellant was charged of statutory rape contrary to section 130 (1) (2) (e) and 131 (1) of the Penal Code, Cap 16 R.E. 2019. The case was tried in the district court of Rungwe at Tukuyu in Criminal Case No. 100 of 2017. The facts of the case as laid down in the charge are to the effect that on 09th June 2017 at about 15:00hrs at Ibula village within Rungwe district, Mbeya region, the appellant did have carnal knowledge of one JB (initials used to conceal the identity of the victim), a girl aged 14 years.

During the trial, the victim explained that on the fateful date, she went to fetch water. On her way she came across the appellant who pulled her into a hut owned by one Jushua. Inside the hut, the appellant laid her

down, stripped off her underwear and lay on top of her. He then inserted his male organ into her female organ. When he finished he told her not go out of the hut, but she went out. She said that she wanted to raise an alarm but the appellant calmed her.

PW2, who is a neighbour of the appellant, testified to have seen the appellant coming out of the hut followed by the victim. The victim was crying and told her that she had sexual intercourse with the appellant. PW2 then reported the incident to the victim's sister whereby they searched for the appellant and reported the incident to Kiwira police station. The police issued PF3 and at the hospital the victim was given drugs. PW4, a medical officer who examined the victim corroborated the evidence whereby she testified to have found sperm in the victim's female organ and her hymen perforated. PW4's examination concluded that the victim had sexual intercourse.

The trial court was satisfied that the charge was proved beyond reasonable doubt by the prosecution. It therefore convicted the appellant and sentenced him to serve thirty (30) years imprisonment. Aggrieved by the decision, he preferred the appeal at hand on nine grounds. The grounds of appeal were however not argued on reasons to be apparent shortly.

During the hearing the appellant preferred to hear first from the learned state attorney. Mr. Davis Msanga represented the respondent. He supported the appeal on the ground that the age of the victim was not proved. He submitted that he had gone through the proceedings of the

trial court and found that no witness talked about the age of the victim. He said that though the age was stated in the charge, it had to be proved by the witnesses and failure to prove the age prejudiced the rights of the appellant. In the premises he prayed for the Court to allow the appeal.

When given the chance to rejoin, the appellant concurred with the submission by the learned state attorney.

I have considered the submission by Mr. Msanga and gone through the trial court record. In the charge, it is clearly stated that the victim in the case at hand was 14 years of age when the incident occurred. The contents of the charge however, have to be proved by the prosecution beyond reasonable doubt. See: **Director of Public Prosecutions vs. Yussuf Mohamed Yussuf**, Criminal Appeal No. 331 of 2014 (CAT, unreported). Specific on the issue of age, the prosecution is as well charged with the duty to lead evidence to prove the same. See: **Hamisi Msitu vs. Republic**, Criminal Appeal No. 71 of 2009.

In establishing statutory rape under section 130 (1) (2) (e) of the Penal Code, Cap 16 R.E. 2019, the age of the victim is of great essence as the age of the victim must be under 18 years and proved as such. Under the law, the age of the victim can be proved through various ways being, through testimony of the victim, relative, parent, medical practitioner, or where available by the production of a birth certificate. See: **section 114(2) of the Law of the Child Act, No. 21 of 2009**; the case of **Ally Rashidi v. The Republic**, Criminal Appeal No. 540 of 2016; and **Charles Makapi v.**

Republic, Criminal Appeal No. 85 of 2012(unreported). In **Issaya Renatus vs. The Republic**, Criminal Appeal No. 542 of 2015 (CAT, reported at Tanzlii), the Court added that the court can draw an inference from **section 122 of the Evidence Act, Cap 6 R.E. 2019** by inferring existence of any facts adduced on trial to determine the age of the victim. Such facts are such as, the victim is attending school, particularly primary school, which suggests that the victim is under 18 years of age.

In the appeal at hand, none of the prosecution witnesses testified as to the age of the victim. There is also no evidence as to whether the victim was attending any school something which might have been considered by the court as inferring her age in accordance with the decision in **Issaya Renatus vs. The Republic** (supra). In the premises the charge of statutory rape against the appellant remains unproved. Given the circumstances, I allow the appeal and quash the conviction and sentence entered by the trial court against the appellant. I order for immediate release of the appellant from prison custody unless held for some other lawful cause.

Dated at Mbeya on this 06th day of June 2022.


L. M. MONGELLA

JUDGE

Court: Judgment delivered at Mbeya in Chambers on this 06th day of June 2022 in the presence of the appellant appearing in person and Mr. Saraji Ibolu, learned Principal State Attorney for the respondent.


L. M. MONGELLA

JUDGE

