IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

BUKOBA DISTRICT REGISTRY

AT BUKOBA

CRIMINAL APPEAL NO. 110 OF 2020

(Originating from Criminal case No. 138 of 2018 of Karagwe District Court)

SWAMADU S/O SHARIFU.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

30/06/2022 & 13/07/2022

E. L. NGIGWANA J.

In the District Court of Karagwe sitting at Kayanga hence forth (the District Court), the Appellant was arraigned with the offence of Rape contrary to sections 130 (1) (2) (e) and 131 (1) of Penal Code Cap. 16 R: E 2002, (now R: E 2022).

At the trial court, it was alleged on 15th day of April, 2018 at Nyabionza Secondary School within Karagwe District in Kagera Region, the appellant did unlawfully have carnal knowledge of a school girl aged 17 years who for the sake of protecting her modesty and privacy, I will refer to as "the victim" or PW1, the code name by which she testified at the trial. The appellant denied the charge.

After full trial which involved five (5) prosecution witnesses and one sole defense witness, the trial court was satisfied that the offence had been proved beyond reasonable doubt. Consequently, the appellant was convicted and sentenced to thirty (30) years imprisonment.

Aggrieved with such conviction and sentence of 30 years imprisonment imposed against him, the appellant appealed to this court armed with one ground of appeal upon which he asked this court to quash the conviction, set aside the sentence and set him free. The ground of appeal was coached as follows;

"That, the Honourable trial court grossly erred in law and facts by convicting the appellant without the prosecution side proving the case beyond reasonable doubt"

At the hearing of this appeal, the appellant appeared in person and represented by Mr. Remidius Mbekomize, learned counsel whereas the Respondent/Republic was represented by Ms. Veronica Moshi, learned State Attorney.

Submitting in support of the appeal, Mr. Mbekomize stated that, in criminal cases, the onus is on the prosecution to prove the case beyond reasonable doubt. He argued that, in that respect, the accused person can only be convicted upon the strength of the prosecution case. To support his argument, the learned counsel cited the case of **Rwekiza Benard Versus R,** [1992] TLR 302.

The learned counsel, went on submitting that in the instant case, the victim (PW1) told the trial court that he was raped by one **Alex Admid** but the name appearing in the charged sheet is **Swamadu Sharifu**, hence two different names and persons all together. He added that, PW2, PW3, PW4 and PW5 have never referred the accused by the name of Alex Admid. The learned counsel acknowledged that the trial Magistrate had tried to resolve the controversy of names, but according to the learned counsel there is no evidence on record supporting the magistrate's finding.

He added that, even where the court finds that the issue of names was properly resolved, still the case had not been proved beyond reasonable doubt. He added that even if it is assumed that the case had been proved beyond reasonable doubt, still the sentence of thirty (30) years imposed against the appellant was illegal because the appellant was below 18 years. Mbekomize made reference to section 131 (2) (a) of the Penal Code which states clearly that **where the offence is committed by a boy who is of 18 years or less, he shall, if a first offender be sentenced to corporal punishment only.**

The learned State Attorney on her side did not support conviction. She reached this decision due to the fact that the age of the victim was not ascertained, without which, it cannot be said the appellant committed the offence of statutory rape. She also admitted that the sentence of 30 years imposed against the appellant was illegal because the charge revealed that the appellant at the time of arraignment was below 18 years old. She also added that, the fact that the provision providing the sentence was not cited in the charge sheet does not make the charge incurably defective. She

ended her submission arguing that when the victim said Alex Admid, he was referring to the appellant who was in the court dock, thus the issue of names was properly resolved.

Now the relevant question to be answered in this appeal is whether the appeal is meritorious. As correctly submitted by Mr. Mbekomize, learned advocate for the appellant, the cardinal principle in criminal cases places on the shoulders of the prosecution the burden of proving the guilt of the accused beyond all reasonable doubt.

Section 3 (2) (a) of the Evidence Act Cap 6 R.E 2022 provides;

"A fact is said to have been proved in criminal matters, except where any statute or other law provides otherwise, the court is satisfied by the prosecution beyond reasonable doubt that the fact exists"

The High Court of Tanzania speaking through Katiti J (as he then was) in **JONAS NKIZE V.R** [1992] TLR 213 held that,

"The general rule in criminal prosecution that the onus of proving the charge against the accused beyond reasonable doubt lies on the prosecution, is part of our law, and forgetting or Ignoring it is unforgivable, and is a peril not worth taking"

In this case, the appellant was charged under Section130 (1), (2) (e) and 131 (1) of the Penal Code.

130 (1) of the penal code Cap 16 R: E 2002 provides

"It is an offence for a male person to rape a girl or woman"

Section 130 (2) of the Penal Code provides;

"A male person commits the offence of rape if he has sexual intercourse with a girl or a woman under circumstances falling under any of the following descriptions:

(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.*

Section 131.-(1 of the Penal Code provides;

" ***Any person who commits rape is, except in the cases provided for in the renumbered subsection (2), liable to be punished with imprisonment for life, and in any case for imprisonment of not less than thirty years with corporal punishment,*** *and with a fine, and shall in addition be ordered to pay compensation of an amount determined by the court, to the person in respect of whom the offence was committed for the injuries caused to such person".*

Reading section 130 (1) (2) (e) of the Penal Code, it is apparent that, for statutory rape upon which the appellant was charged with, among the vital and apparent elements which the prosecution must prove are;

(a) Penetration of the penis into the vagina of the victim;

(b) The age of the victim;

(c) That it was the appellant who is responsible for such act.

In the case of **William Ntumbi versus Director of Public Prosecutions**, Criminal Appeal No.320 of 2019, CAT (Unreported) it was held that;

"It cannot be gainsaid that, the law requires that in statutory rape cases like the instant case, the age of the victim must be proved"

The court went on stating as follows;

"There is a considerable body of case law to show that this Court has emphasized in imperative terms that proof of age may be by parents, medical practitioners, or where available by a birth certificate-see for example, ***Bashiri John versus Republic,*** *Criminal Appeal No. 486 of 2016,* ***Isaya Renatus versus Republic,*** *Criminal Appeal No. 542 of 2015 and* ***George Claud Kasanda versus Republic,*** *Criminal Appeal No. 447 of 2016 (all unreported)".*

The Court of Appeal in the case of **Idd Amani versus the Republic,** Criminal Appeal No.184 of 2013 emphasized that, the evidence of a parent is better than that of a medical doctor as regards that parent's child age.

Being guided by the herein above authorities of the Apex Court, the pertinent issue which needs to be resolved in the instant appeal is whether the age of the victim (PW1) was proved to the required standard.

The trial court record revealed that, no birth certificate, affidavit, Clinic card, Baptism certificate or any other document tendered in court to prove the age of the victim. The only available evidence in that regard is that of

PW3 who the victim's father. His evidence in regards to the victim's age read;

"My daughter is now 18 or 17 years. I have lost memory of the exact date when she was born"

In the circumstance, I agree with the learned State Attorney, Ms. Veronica Moshi that the age of the victim which is one the major ingredient which must be proved in statutory rape cases was not proved to the required standard, meaning the offence of statutory rape was not proved beyond reasonable doubt.

Even if it is assumed, just for the sake of argument that the offence had been proved beyond reasonable doubt, still under the circumstances of this case, the sentence of 30 years imprisonment against the appellant was illegal because by April 2018, the appellant had 17 years old. Section 131 (1), (2) (a) of the Penal Code provides;

*"**131**.-(1) **Any person who commits rape is, except in the cases provided for in the renumbered subsection (2),** liable to be punished with imprisonment for life, and in any case for imprisonment of not less than thirty years with corporal punishment, and with a fine, and shall in addition be ordered to pay compensation of an amount determined by the court, to the person in respect of whom the offence was committed for the injuries caused to such person.*

*(2) Notwithstanding the provisions of any law, **where the offence is committed by a boy who is of the age of eighteen years or less, he***

shall-

(a) if a first offender, be sentenced to corporal punishment only;

The complaint by the learned counsel for the appellant that the charge was defective for want of section 131 (2) (a) of the Penal code is a baseless. Reading carefully section 131 (1) of the Penal Code as reproduced herein above; sub- section (2) was clearly referred, therefore, it was upon the trial Magistrate, to consider the same and impose a proper sentence.

It should be noted that in very recent case of the Court of Appeal in **Abdul Mohamed Namwanga @ Madago versus the Republic, Criminal Appeal 257 of 2020 (Un-reported)** it was stated that;

"It is only a matter of practice that if the punishment provision is cited in the charge or information along with the provision creating the charged offence. It is a practice that we endorse but we hesitate to equate it with an imperious legal prerequisite that would render a charge or information incurably defective"

I also agree with Mr. Mbekomize that, the victim knew the accused by the name of **Alex Admid** while the name appearing in the charge sheet is **Swamadu Sharifu**. The record revealed that PW1 in her evidence told the trial court that the appellant introduced himself to her by the name of **Alex Admid**. Under such a situation, the victim cannot be blamed. Though she mentioned the accused by the name of Alex Admid, the victim was referring to the accused and not any other person. Furthermore, the appellant in that trial court had admitted that he is also known by the name of Alex Admid, and people used to call him by that name.

In the upshot, I am constrained to allow the appeal and, respectively, quash the conviction and set aside the sentence of thirty (30) years meted against the appellant. I further order for an immediate release of the appellant from prison custody unless if he is held for some other lawful cause

Order accordingly.

E. L. NGIGWANA

JUDGE

13/07/2022

Judgment delivered this 13th day of July, 2022 in the presence of the Appellant, Ms. Veronica Moshi, learned State Attorney for the Republic, Hon. E. M. Kamaleki, Judges' Law Assistant and Ms. Grace, B/C.

E. L. NGIGWANA

JUDGE

13/07/2022