IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

IN THE DISTRICT REGISTRY OF DAR ES SALAAM

AT DAR ES SALAAM

CRIMINAL APPEAL No. 289 OF 2020

(Being an appeal against the conviction and sentence of MKURANGA District Court in Court criminal case No. 10 of 2020 by Hon, KASWAGA RM)

BETWEEN

JAFARI S/O ATHUMANI @ NG'ONGE.....APPELLANT

Versus

THE REPUBLIC.....RESPONDENT

JUDGMENT

MRUMA J.

The Appellant Jafari s/o Athuman @ Ngonge was charged with and convicted of the offence of rape of a child aged 16 years old contrary to section 130(1)(2)(e) and (3) of the Penal Code [Cap 16 R.E. 2002). The victim being a child under the age of 18, her names were hidden for purposes of disguising her identity.

It was alleged by the prosecution that the accused person who was 21 years at the time of commission of the alleged offence did on 8th day of December, 2018 had sexual intercourse with Fatuma d/o Said @ Rashid, hereinafter to be referred to as TT, a school girl aged 16 years.

Upon convicting the Appellant on that count, the trial Court sentenced him to imprisonment for 30 years and 10 strokes of the cane. In his judgment the learned trial magistrate ruled as follows:

> *"The only issue subject for this decision is:*
>
> *(1) Whether DWI committed the offence of (statutory rape) contrary to section 130(1) and (2)(e) and Section 131(1) and (3) of the Penal Code"*

Thereafter the learned trial Magistrate felt obliged to restate what statutory rape is in relation to the case which was before him. He stated that in terms of Section 130 (2)(e) of the Penal Code statutory rape consists of sexual intercourse where the victim is younger than the age of consent (i.e. 18 years) and where the parties involved were not married, (for male, unless the woman is his wife who is fifteen years old or more of age and is not separated from him). The learned trial magistrate went on

and stated that "to prove statutory rape, the prosecution needs to establish three facts beyond reasonable doubt. He mentioned the facts as:-

i. Sexual intercourse occurred;

ii. Parties were not married, and;

iii. The victimized party was below the age of consent at the time.

The learned trial Magistrate concluded that following the above three elements, then statutory rape is committed when an individual has consensual sexual contact with a person under the age of 18 years. I would simply add one more fact which in my view needs to be established too and that is; "where the victim is of apparent age of consent; the prosecution will be to prove required that the accused knew or had reason to know that the victim is or might be of the age below the age of consent".I deduce this from the provisions of Sections 10 and 11 of the Penal Code [Cap 16 R.E. 2019]. **Section 10 of the Penal Code** requires court to consider relevance of *intention* and/or motive in committing any offence. While the term **intention** means the purpose of doing something, **motive** on the other hand determines reason for doing that thing**.** I will revert back to these points at a later stage of this judgment.

In finding the Appellant guilty, the learned trial magistrate had this to say:

> *"PW1 mentioned no any other man she had sex with, other than DW1 at all the places they went to including here in court and at PW3's offices and this proves that the hymen was removed by DW1 through sexual intercourse which was done more than once, an act which is prohibited under section 130(1)(2)(e) considering the status of DW1 and PW1"*

The learned trial Magistrate went on to hold that:

> *"The knowledge of PW4 whether DW1 was the perpetrator of the offence or not is immaterial because she proved that she found the girl had already had sex for more than once and the girl herself admitted that fact in this court and she even mentioned that DWI was her only sexual partner. That suffices to conclude that DW1 violated the provisions of section 130(1)(2)(e)....even PW1 in addition asserted to have had medical examination conducted on her and PW2 and PW3 have testified that all at all government offices DW1 admitted to have sexual affairs with PW1 and this court agrees*

with them as DW1 has not attacked this piece of evidence at all in his defence...."

The appellant has appealed to this court appealed and urged 6 grounds of Appeal as follows:

1. That the learned trial Magistrate erred in law and in fact by convicting Appellant without considering that the trial was vitiated as;

(a) It was influenced by the presence of a Social Worker who appeared in the Coram of the Court on 8th April 2019 and was given opportunity to cross-examine PW1 the act which is un-procedural;

(b) The Social Worker who was not featured in the Coram of 23. 4. 2019 was granted leave to cross-examine PW2 which is un-procedural ;

2. That the learned trial Resident Magistrate erred in law and in fact to convict the Appellant without considering that he was not accorded fair hearing when the prosecution failed to furnish him with former statement of the complainant despite being ordered by the court to do so, as a result he could not cross-examine PW1 and PW2 so that as to impeach them;

3. That the learned trial Magistrate erred in law and in fact to convict the Appellant without

considering the principle of substantive justice as:

(a) The victim stated that it was consensual sex and there is no evidence that she was prejudiced;

(b) The victim enjoyed her right to have sex, thus why she never reported and she readily admitted when questioned by her mother;

4. That the learned trial Magistrate erred in law and fact convict the Appellant believing that differences in dates between prosecution witnesses were minor and didn't occasion miscarriage of justice while:

(a) They are material discrepancies which violated the chain of events;

(b) They dented the truthfulness of their oral evidence as it seems they testified of different incidents (i.e. they lied);

5. *That the learned trial Magistrate erred in law and in fact to convict the Appellant in a prosecution case that was not proved beyond reasonable doubt as:*

(a) The PF3 (Exhibit P1) was not read out in court;

(b) The age of the victim was not proved beyond reasonable doubt either by PW1 or PW2;

(c) One David who initiated the allegations by telling PW2 (i.e. mother of the victim) that PW1 had an affairs with the Appellant was not called to testify to corroborate other prosecution witnesses and to impeach the Appellant;

6. That the learned trial Magistrate erred in law and in fact to convict the Appellant while he failed to realize that the evidence of PW1 required to corroborates with the evidence of other prosecution witness but in fact they contradicted as;

(a) PW2 (mother of victim), testified that she severally (3-times), warned the Appellant of his relationship with the victim while before she denied to know nothing until when she was told by her brother one David;

(b) PW1 testified that she had only one boyfriend (the Appellant) and they made sex only twice which is contrary to the evidence of PW4 (Medical Doctor) which indicated that the victim is experienced in sex and her genital part was not truthful witness.

The Appellant urged his appeal by way of written submissions, following the order of this court (Ebrahim J), but for reasons not very clear to this court the Respondent/Republic didn't file their reply even when time was enlarged for them to do so.

Submitting on the strength of the evidence of the case for the prosecution the Appellant submitted to the effect that the prosecution witnesses' evidence was contradictory and incredible and could barely be relied on and be used as a basis for conviction. He singled out the testimony of PW2 regarding how she came to know about existence of sexual relationship of PW1 and the Appellant.

According to the Appellant whereas in her evidence in chief PW2 told the court that she came to know about the alleged relationship through the information she received form her brother one David, and that immediately after receiving such information she reported the incident to the local authority and legal machinery started to operate, In cross-examination she stated that she had warned the Appellant three times about having affairs with her daughter. This, in my view was material contradiction. Had the trial court considered this contradiction in relation to the circumstances of

this case, probably it would have not arrived in the conclusion it did on this particular issue.

In this case no witness saw the Appellant having sex with the victim and to be precise no witness testified to have seen the Appellant and PW1 together and in the circumstance suggesting intimacy relationship between them. Even the medical doctor who examined PW1 didn't her evidence of PW1 being raped. He simply observed that the victim had normal female genitalia with no hymen that shows the evidence that she was involved in sexual intercourse.

Another contradiction which I think is material is on the dates the incident was reported to the Police. According to PW2 she received the information from her brother David on 26th December 2018 at around 12:00 noon. Similar version of the story was given by PW1, the victim. According to PW2 immediately after getting the information (which means the same day) she reported to the village offices whereupon the Village chairman summoned the Appellant and interrogated him. It was the testimony of PW2 that upon being interrogated the Appellant confessed to have sexual relationship with PW1. PW2 testified further that the village chairman called police on phone and the Appellant was arrested and taken

to the Police station and they were issued with a Police Form No. 3 for Medical Examination. However, another village leader one Gasper Patrick (PW3), a village Executive Officer of Tambani Village, the incident was reported to his office by the victim's mother (PW2) on 8th December 2018 at about 11.30hours. He summoned the suspect (i.e. Appellant), who came on the following day (which means he came on 9th December 2018). PW1 and PW2 also came. He interrogated the Appellant who claimed that PW1 was his fiancée the claim which PW1 admitted. He then phoned the police who came and arrested the Appellant. If we go by the evidence of PW1 and PW2 it follows that the incident was reported to village leaders over two weeks before it was known to PW2.

On the other hand there is evidence of Dr. Huba Kumrwa (PW4) who told the Court she received and medically examined PW1 on 24th December, 2018. The PF3 (Exhibit P1) tendered proves that PW1 was sent to the District Hospital and was received and attended on 24th December, 2018. Neither David who according to PW2 was the first person to inform her about the alleged relation between the Appellant and PW1 nor the Police officer who arrested the Appellant was called to testify and clarify this contradiction in this case. Their testimonies were very crucial in this

case for purposes of clearing the contradictions which arose regarding the date of reporting, the date of arrest and the date of medical examination. If we take the evidence of PW1 and PW2 that the incident was reported to the Village authorities on 26th December, 2018, then it will mean that PW1 was examined two days before the incident was reported. This is so because according to the testimony of PW4 and the PF3 she examined PW1 on 24th December, 2018.

Again if we believe the testimony of the Village Executive Officer of Tambani PW3 that the incident was reported to the Village authority and to the Police on 8th December, 2018, then taking into account the evidence of the victim herself which is to the effect that she had sexual intercourse with the Appellant twice, i.e. on 9th September 2018 and again on 8th December, 2018 it follows that the incident was reported on the same day she had second round of sex with the Appellant. But it took the police 16 days, that is to say on 24th December, 2018 before referring her to the hospital for medical examination. No witness was called to explain this and to make it worse the defence was denied to be availed with a copy of the statement the complainant made to the police when she reported the

matter for the first time.. In ***Bukenya and another v Uganda*** **(1972) E.A 549** the Court of Appeal of Uganda held that;

> *"the prosecution is duty bound to make available all witnesses necessary to establish the truth, even is their evidence may be inconsistent to its case, otherwise failure to do so many in an appropriate case lead to an inference that the evidence of uncalled witnesses would have tendered to be adverse to the prosecution's case."*

In another Ugandan case of ***John Kenga v Republic*** **Cr App 1126 of 1984** the Court of Appeal acquitted the appellant due to the fact that some of the mentioned witnesses were not summoned to clear doubts. It may be argued that whether a witness should be called by the prosecution is a matter within the discretion of the prosecution and the court will not interfere with the discretion unless it may be shown that the prosecution was influenced by some oblique motive. However, under the provisions of Section 142 (2) of the Criminal Procedure Act court has power and a duty to ensure that it has received enough evidence that will enable it make a fair decision. The power of the court to compel attendance of witnesses

whose evidence seems crucial to the just decision of the matter before it. The said Section provides:-

> *"Where it is made to appear that material evidence can be given by or is in the possession of any person, it shall be lawful for a court to issue summons to that person requiring his attendance before the court or require him to bring and produce to the court for the purposes of evidence all documents and writings in his possession or power which may be specified or otherwise sufficiently described in the summons"*

In the present case in view of contradictions regarding the dates of reporting the incident, the dates of arrest and the dates of medical examination of PW1, it was pertinent for the court to require and receive the evidence of arresting officer, PW2's brother one David and the initial statement made by PW2 to the Police. In his judgment the trial Magistrate did not comment anything on the defense case's evidence which was to the effect that he was arrested on 18th January, 2019, over one month after PW2 had allegedly reported to the Village authority which according to PW2 reported to the police the same day. This was a crucial point that would have raised the court's eye brows.

One may be tempted to ask, if the Police knew the Appellant, his appearance and his working place why would they wait for a month to arrest him? PW2 stated that the appellant was arrested on 26.12.2018 while PW3 stated that he was arrested on the 9th December, 2018, the Appellant said that it was 18th January, 2019 and the record of proceedings states that the Appellant took his plea on the 16.1.2019. If court was minded to enter a verdict of guilty against the Appellant in any event it would have at least invoked the provisions of Section 142 of the CPA and call witnesses who could have cleared that doubt. It didn't do that. That was an error which is complained under grounds 2, 4 and 5(a) and (c) of the Appellant's grounds of appeal. I thus find those grounds to have merits.

In his first ground the Appellant complained of the presence of a Social Welfare Officer in the Coram of the Court and the fact that she was accorded right to cross-examine witnesses. The Coram of the Court on 30th January, 2019 shows that Social Worker was present. On 23rd April, 2019 the said Social Worker was permitted to cross-examine PW2. On the same day the court also cross-examined PW2. This is the procedure which prompted the first ground of appeal. Examination of witnesses in court is

governed by the provision of Section 146 of the Evidence Act [Cap 6 R.E. 2019]. Sub-section (2) of the said section provides that the examination of a witness by the adverse party is called his cross-examination. The purpose of cross-examination is to test the evidence of a witness and expose weaknesses where they exist and if so to undermine the account the witness has given including testing the reliability of their evidence and/or their credibility as a witness. I have no doubt that the Social Welfare Officer neither an adverse party to the Appellant, nor was she a party to the case. She had no room to either examine or cross-examine the Appellant and it was un-procedural for the trial court to afford him that opportunity.

The question that follows for determination here is; what is the impact of this defective procedure upon which the Appellant was convicted and sentenced by the trial court? It is trite that the remedy for defective proceedings is retrial. However, court must consider the facts and circumstances of the case to determine whether there should be an order for a retrial or whether the court should quash the conviction and set aside the sentence without more. The errors for which the proceedings are marred with were not the prosecutions' but the court's error and the

offence of rape is an extremely serious matter that would warrant a retrial. Had the charge of rape of a girl under the age of 18 years herein be proved, the Court would have directed a retrial of that charge. But since the charge was far from being proved, there cannot be an order for retrial.

Finally there is a complaint regarding age of the victim. The Appellant complains in ground 5(b) of the appeal was that the age of the victim was not proved beyond reasonable doubt. This ground has merit. According to the charge sheet the offence was committed for the first time on 8th December, 2018 when the victim was alleged to be raped she was 16 years old. When she came to testify in court in April 2019 she told the court that she was 16 years old. In absence of any clarification from the prosecution, this means that the victim's age was static. This is not possible.

In my view a circumstance like the one at hand, where the victim is a teenage girl the issue of the girl's age is a paramount issue. Her age must be proved at a reasonable standard. The prosecution must prove that the accused had reason to know that the victim may be under the age of 18 years old. This is important because when young people are dating they do

not and have no reason to ask each other for birth's certificates and since they do not have slaps on their faces as those placed in cemeteries to show their birth dates or ages, it is not fair to convict a 23-year-old boy for such a heinous act and sentence him to 30 years in prison. This may not be the case where the offender is an adult male from the age of 30 years old onwards who would be expected to at least distinguish the childish face of the victim from the face of an adult woman. Estimating a woman's age by looking at her face can be a daunting task for a 23-year-old.. boy

The Appellant in this case was 23 years old at the time he was convicted. He has been in custody for over two years. A criminal justice system must be measured by how it protects its most vulnerable of which teenagers and young men below 25 years are an obvious part. Courts should not act mechanically, especially where both the victim and the suspect are of adolescence age. Adolescence age is a transitional stage of physical and psychological development that generally occurs during the period from puberty to adulthood. It is a period which is usually associated with the teenage years and early 20s years (particularly for boys) though its physical, psychological or cultural may begin earlier and end later. Apparently when enacting Section 130 (1) (2) (e) and (3) of the Penal

Code [Cap 16 R.E. 2019], the Parliament didn't take that aspect of social behavioral changes into consideration as a result of which young men were treated as adults.

Accordingly, that said and for the reasons set out above, I allow the Appellant's appeal quash the conviction of the appellant for the offence of rape of a girl under the age of 16 contrary to section 130(1) (2) (e) and (3) of the Penal Code [Cap 16 R.E. 2019], and set aside the sentences of imprisonment for 30 years and 10 strokes imposed on the appellant. The court orders that the Appellant be released from prison unless for any other lawful course he is continued to be held.

A.R. Mruma

Judge

Dated at Dar Es Salaam, this 15th Day of March, 2022.