IN THE HIGH COURT OF TANZANIA

(MTWARA DISTRICT REGISTRY)

AT MTWARA

CRIMINAL APPEAL NO. 11 OF 2022

(Originating from the District Court of Nanyumbu at Nanyumbu in Criminal Case No. 59 of 2019 before Hon. C.J. David, RM)

MSAFIRI MAZOEA YASSIN.....APPELLANT

VERSUS

THE REPUBLIC.....RESPONDENT

JUDGMENT

4/7/2022 & 3/10/ 2022

LALTAIKA, J.:

The appellant herein, **MSAFIRI MAZOEA YASSIN** was arraigned in the District Court of Nanyumbu at Nanyumbu (the trial court) charged with two counts. 1. Rape contrary to section 130(2) (e) and 131 (1) of the Penal Code [Cap. R.E. 2002] now R.E. 2022 and 2. Impregnating a School Girl contrary to section 60 A (3) of the Education Act, [Cap 353 R.E. 2002] as amended by section 22 of the Written Laws (Miscellaneous Amendment) Act, No.2 of 2016.

When the charges were read over to the accused, he pleaded not guilty necessitating a full trial. The prosecution, on whose onus it was to prove the allegations levelled against the appellant, marshalled in six witnesses, and produced three exhibits.

The prosecution witnesses were as follows: the victim or "'LMW" (PW1), the victim's father Mohamed White (PW2), A teacher in charge of health issues at the Victim's school particularly to female students,

Hamida Mussa Missanga (PW3) Landlord of the victim's parents Adam Issa (PW4), a clinical officer from Nanyumbu District Hospital, Daud Amlima (PW5) and Police Officer Detective Corporal DC Said (PW6). The three admitted exhibits were the attendance register [book] from Chipuputa Secondary School (Exhibit P1), the victim's PF3 (Exhibit P2) and the appellant's caution statement (Exhibit P1). On the part of the defence, three witnesses adduced their testimonies namely the appellant (DW1), Mbaraka Bakari Sudi (DW2) and Ahman Hassan Ahman (DW3).

After a full trial, the trial court was satisfied that the prosecution had proved its case against the appellant. It found him guilty on both counts and meted a sentence of thirty (30) years for the first count and three (3) years for the second count. The sentences were ordered to run concurrently.

Dissatisfied and aggrieved, the appellant has appealed to this court against both conviction and sentences. In his endeavour to impugn the trial court's decision, the appellant has filed a petition of appeal on three grounds of appeal: -

1. *That, the trial magistrate erred both in law and facts by convicting the appellant using cooked evidence.*
2. *That the prosecution witnesses failed to prove the case beyond reasonable doubt.*
3. *That, the appellant didn't know the victim and that he did never (sic!) mate her anywhere other than the trial court.*

On the 11th of May 2022, the appellant filed eight additional grounds of appeal as reproduced below: -

1. *That, the Honourable Judge, the trial Magistrate erred both in law and facts for convicting and subsequently sentencing the appellant on statutory rape while the charge was not proved beyond reasonable doubt, because the age of PW1(victim) was not exactly proved.*

2. *That, the Honourable Judge, the trial Magistrate erred grossly in law and on facts to convict and sentencing the appellant in the offence of statutory rape whereas the evidence of PW2 and PW3 contravened requirement of section 198(1) of the Criminal Procedure Act [Cap. 20 R.E. 2019] and also a requirement of provisions of the Oaths and Statutory Declaration Act.*
3. *That, the Honourable Judge, the trial Magistrate erred grossly in law and facts to convict and sentence the appellant while the exhibit P1(Attendance Register) was unprocedurally admitted by the trial court.*
4. *That, the Honourable Judge, the trial Magistrate erred in law and on fact by convicting and sentencing the appellant while the evidence of PW3 (the school teacher) and the evidence of PW2 (victim father) uncorroborated.*
5. *That, Honourable Judge, the trial Magistrate erred both in law and on facts by convicting the appellant while the typed proceedings reflect there were two accused (1st accused and 2nd accused) during the trial see page 3.*
6. *That, Honourable Judge, the trial Magistrate erred in law and on facts by relying on caution statement which was obtained involuntary and to be un-procedurally tendered by PW5 (Police officer).*
7. *Appellant prays this Honourable court to re-evaluate the prosecution evidence at the trial court and come up with its own decision.*
8. *That, Honourable Judge, it is principle of the law that, the accused can only be convicted of the offence based on the strength of the prosecution case and not the weakness of the defence case. See* ***Republic vs Kerstin Cameroon*** *[2003] TLR 83*

During the hearing of this appeal, the appellant appeared in person and unrepresented while Mr. Enosh Kigoryo, learned State Attorney appeared for the respondent Republic. The appellant prayed that the respondent be allowed to reply to the grounds of appeal hitherto filed and then he would, if need arose, re-join. Mr. Kigoryo had no objection to the prayer and he stated at the outset that he objected the appeal. He

emphasized that he supported both conviction and sentences of the decision of the trial court.

Submitting in response to the first additional ground which cantered on proof of the case beyond reasonable doubt, the learned State Attorney argued that according to the evidence adduced in the lower court, the victim was 16 years as she testified, and the court recorded on page 7-10 of the typed proceedings. The learned State Attorney stressed that the age of the victim was also proven by PW2 (father of the victim) at page 10-11 of the lower court proceedings.

It is Mr. Kigoryo's submission further that in her testimony, the victim had narrated in detail how she used to have carnal knowledge with the appellant. The learned State Attorney contended that although the = had consented to the action, such consent was immaterial in statutory rape cases as provided for under section 130(2)(e) of the Penal Code. Mr. Kigoryo averred further that going through the entire evidence adduced by the victim including during cross-examination she was speaking the truth and that's why the trial court found her evidence credible. Mr. Kigoryo argued that since her credibility as a witness was not shaken, the trial court was justified to rely on her evidence and found the appellant guilty. To cement his argument, the learned State Attorney referred this court to the case of **Abdallah Mussa Mollel @ Banjoo v. DPP**, Crim App. 31 of 2008 CAT Arusha calling this court to disregard the first additional ground.

Responding on the second additional ground, the learned State Attorney submitted that the position of the law on conviction based on the testimony of the victim is provided under section 127(6) of the Evidence Act [Cap. 6 R.E. 2019]. Mr. Kigoryo cited the celebrated case of **Selemani Makumba v. R** [2006] TLR 379.

The learned State Attorney submitted that he was aware that in his defence, the appellant had told the lower court that he had never known the victim. However, the learned State Attorney submitted, the lower court indicated that the appellant was telling lies as per his two conflicting statements one that he knew and later that he never knew her. The learned State Attorney argued that it is a legal position that falsehood on the side of the accused can be used to corroborate the prosecution case. To this end, the learned State Attorney argued that the third ground on which the appellant asserts that he did not know the victim be dismissed as baseless.

Responding to the second count, Mr. Kigoryo submitted that it was proved that the victim became pregnant from the action of the appellant. However, Mr. Kigoryo argued, the offence of causing pregnancy was an alternative to the first count. He emphasized that section 135(b)(i) of the Criminal Procedure Act [Cap.20 R.E. 2019] recognized charging alternatively. Nevertheless, the learned State Attorney reasoned, the lower court's conviction on both the original and alternative counts was erroneous and resulted in dual conviction. Mr. Kigoryo was quick to point out, however, that such an error did not affect the appellant. He stressed that this court could revise the order under section 388 of the CPA, remove the alternative count and remain with the main count.

Moreover, the learned State Attorney submitted that there are a few other errors that have been occasioned including admission of documentary evidence. Mr Kigoryo cited an example where the Public Prosecutor was the one who tendered the evidence and not the witness as required by law. To this end, the learned State Attorney prayed that such an exhibit namely students register book as recorded on page 14 of

the typed proceedings be expunged. It is the learned State Attorney's submission further that on page 20 of the proceedings PW5 a Medical Doctor tendered PF3 but the court ordered the exhibit to be read out loud before it was admitted which was contrary to the dictates of the law that it should be admitted first then read out loud later. It was Mr. Kigoryo's submission that even exhibit P3 "cautioned statement" was read before it was admitted. Thus, the learned State Attorney prayed that all these exhibits be expunged as per the case of **Robinson Mwanjisi v. R. [2003] TLR page 218.** The learned State Attorney was quick to point out that even after expunging the exhibits, the appeal still had no merit. He prayed that this court orders the appellant to continue serving the sentence of 30 years in jail as ordered by the lower court

In rejoinder, the appellant submitted that the lower court was not fair on him. He stressed that the evidence adduced by PW1 (the victim) was to the effect that she was born in 2005 and completed Primary School at **Nakatete** in 2017. The appellant went further and argued that when PW1 was testifying in 2019, she told the trial court that she was 16 years old stressing that counting the years, such evidence was incorrect.

It is the appellant's submission further that on page 9 of the typed proceedings of the lower court, PW1 had told the court that her pregnancy was tested at Nanyumbu District Hospital at Mangaka and found to be of 3 weeks and 6 days. The appellant insisted that when he was allowed to ask the victim some questions, PW1 was unable to answer him since her answers were false. The appellant urged that PW1 had told the court that the last time they were in a relationship was in August 2018. He averred that PW1 went on to testify that she could not remember having ever told him (the appellant) that she was pregnant.

Finally, the appellant submitted that on page 3 of the judgment, he failed to understand because it provided that the appellant and the victim were in a relationship from January 2019 till June 2019. He insisted that the evidence is not solid enough to convict and sentence him. The appellant further stressed that the offence of rape is difficult to prove especially on the side of the victim to allege that the appellant is responsible for the action. He added that the offence of rape is also difficult to prove based only on the evidence of the victim without corroboration. He stressed that it is difficult to believe the victim 100% because such cases can easily be used to pick up anyone especially if that person is in any conflict with the victim. The appellant prayed this court to set him free because jailing him under the age of eighteen is not right either.

I have dispassionately considered arguments by both sides. My deliberation is going to be rather brief. I will go by the saying first things first. The present case is on statutory rape where consent is immaterial to be proved. The important ingredients are proof of age and penetration. Proof of age of the victim can be proved by the victim, parents or one of them, guardian or birth certificate etc. See, **Andrea Francis vs. Republic**, Criminal Appeal No.173 of 2014(unreported). In the present case, the age of the victim (PW1) was sufficiently proved by PW1 and PW2 as envisaged on pages 8 and 11 of the typed proceedings.

On penetration, I entertain no doubt at all that it is proved by the evidence of PW1, PW3 and PW5. On the part of PW1(the victim) on page 8 of the typed proceedings testified as follows: -

> *"-I was in form two when my studies came to an end. Yes, when I was in secondary school I had a love affair with a man. The man*

I had affair with is Msafiri Mazoea. He is tall and skin dark. I started to know Msafiri Mazoea since 2018 in August. We started to have an affair in November, 2018. We were making love at Adam home at Chipuputa. I had tented(sic) a room at Adam's place. Our sexual intercourse was conducted in my own room. I don't remember how many times we had sexual intercourse with Msafiri Mazoea. We practised unsafe sex always. He was giving me money after sexual intercourse. The amount differed sometimes he was giving me 5000/= or 3000/=. Apart from my room we also had sexual intercourse at his place. We had only one had sexual intercourse was June,2019 at my room. The last time we had sexual intercourse was June,2019 at my room."

It is also undisputed that during cross-examination the appellant had not shaken the victim's testimony that they had sexual intercourse in her room in August 2018. To this end, I find the appellant's complaint is devoid of merit because what PW1 testified is that she knew him in August 2018 but their first sexual intercourse took place in November 2018 and the last sexual intercourse was in June 2019.

Those are the main issues for consideration in a statutory rape case and that is why I said I will put the first things first. This brings me to the other issues which I do not consider as important. For instance, as rightly submitted by the learned State Attorney, exhibits P2 and P3 were read over to the accused before they were admitted by the trial court. This is contrary to our procedural law. See, **Manje Yohana v. Fikirini Athuman**, Criminal Appeal No.147 of 2016 CAT and **Sumni Amma Mwenda v. Republic**, Criminal Appeal No.393 of 2013, CAT (all unreported). To this end, I do hereby expunge exhibits P1 and P2 from the record of the trial court as per the decision of **Robinson Mwanjisi v. R** (supra).

Even though exhibits P1, P2 and P3 have been expunged, I am convinced that the prosecution witnesses especially PW1, PW2, PW3 and PW5 were very credible. The prosecution case remains intact and since they were coherent and consistent with each other, their evidence is sufficient to warrant a conviction.

Before I pen off, I am aware that towards the end of his submission, the appellant tried to plead with this court to reconsider his age. I have gone through the trial court's records and nowhere had the appellant notified the trial court that he was below eighteen years old when was testifying or when he submitted his mitigation factors. It goes without saying therefore that nothing can be taken on board at the appeal stage that was not addressed at the trial court/tribunal **(see Hotel Travertine & 2 Others vs. NBC [2006] TLR 1330).** To this end, I find this complaint is devoid of merit. Hence, it is hereby dismissed.

It is also noteworthy that irrespective of the minor inconsistencies that have been highlighted, proper analysis of the evidence adduced as per the lower court's records paints a very clear picture of the offence committed against a minor who happened to be a school-going girl. It is also irrational to expect the victim to recount every event perfectly including dates out with the appellant. Those are minor issues which do not affect the main requirements of proof of a statutory rape offence as expounded herein above. It is equally irrational and utterly absurd to focus on those minor issues and in doing so, act as if the offence has not taken place. In the instant matter, I entertain no doubt that the prosecution has proved their case beyond reasonable doubt.

In the upshot, I have no justifiable reason to fault the findings of the trial court. Thus, I find no merit in this appeal. Consequently, I dismiss

the appeal in its entirety. I do hereby endorse the conviction and sentences meted by the trial court.

It is so ordered.

E.I. LALTAIKA

JUDGE

3.10.2022

Court:

This Judgment is delivered under my hand and the seal of this Court on this 3rd day of October 2022 in the presence of Mr. Wilbroad Ndunguru, learned Senior State Attorney and appellant who has appeared unrepresented.

E. I. LALTAIKA

JUDGE

3.10.2022

Court:

The right to appeal to the Court of Appeal of Tanzania is fully explained.

E. I. LALTAIKA

JUDGE

3.10.2022