

**IN THE HIGH COURT OF TANZANIA
IN THE DISTRICT REGISTRY
AT MWANZA**

HC. CRIMINAL APPEAL NO. 22 OF 2022

(Original criminal case No.118 of 2020 of the District Court of Ilemela District at Ilemela)

NTIGA NG'HABI SAMALU.....APPELLANT

VERSUS

THE REPUBLIC.....RESPONDENT

JUDGEMENT

Date of Last order 29/9/2022
Date of Judgment 06/10/2022

R. B. MASSAM, J.

The appellant Ntiga s/o Nghabi Samalu was charged before Ilemela District Court at Ilemela for the offence of Rape c/s 130 [1] and 2 [e] and 131 [1] of the Penal Code, Cap. 16 R.E 2019. The case for prosecution at trial was that on divers' days from 19th August, 2020 to 26th August, 2020 at Buswelu centre area within Ilemela District in the city and region of Mwanza had unlawful sexual intercourse with AP [identity is hidden] a girl of 13 years. The appellant denied the charge, so the prosecution called three witnesses who proved the case against the appellant.



At the trial the accused was accordingly convicted followed by a statutory minimum sentence of thirty [30] years imprisonment. Dissatisfied the appellant has lodged the present appeal before this court appealing both to the conviction and the sentence. He brought two grounds of appeal thus:-

- 1. The trial Court erred in Law and facts for failure to correctly evaluate the evidence on record.*
- 2. That, the prosecution failed to prove their case to the standard required by the law.*

When the matter was called for hearing, the appellants appeared in person while the respondent was represented by Jainess Kihwewe State Attorney. Appellant in submitting his appeal, he said that he brought two grounds of appeal, but he pray to this court to submit one additional ground of appeal and the prosecution side agreed with his prayer.

The appellant started by submitting that, in the day when he was arrested the arresting officer did not call justice of peace, also there is no proof of age of the victim, and lastly he said that he was not taken to the hospital for check-up that he raped the victim. So, he pray to this court to consider his ground of appeal and left him free, as there is no exhibit brought



to this court to prove that he raped the victim, he pray for forgiveness, as he did not rape the victim.

In her reply, Ms Jainess Kihwewe State Attorney submitted that, on their side, they are supporting conviction and sentence on the trial court.

In reply to the ground that the appellant was not taken to the Justice of peace, she said that, it is the discretion of the accused person and not mandatory. The appellant was the one who was required to tell the police that he wants to be taken to the Justice of peace if he did not tell them, they could not force him.

In reply to the 2nd ground of appeal that there was no proof of the age of the victim, she said that in page 12 of the court proceedings, PW1 mention the age of the victim to be 14 years, PW1 was the aunt of the victim who lives with her as a guardian, so she knows her age. She cement her argument with the case of **Lutuyo Richard vs. Republic** Criminal appeal No.114/2017, where it was held that, the offence of statutory rape cannot stand where the age of the victim which is one of the ingredients of the offence is not proved. The age of the victim can be proved by a parent, close relative, close friend or a teacher which she was schooling or any person who knows the victims.



So, in this case, aunt of the victim was the one who testified to the court so she is a guardian and therefore acquainted with the age of the victim.

Another ground that the appellant raised was a failure of the prosecution to take him to the hospital for a check-up to prove if he raped the victim. The prosecution side in her reply stated that was not a requirement of the law, the one who was taken to the hospital for check-up was only the victim.

In reply to the issue of failure of the trial court to evaluate the evidence, she stated that was not true, as the evidence of PW1 was well evaluated as she said that, after the victim appeared to be missing, she reported the matter to the police station and continue to look for her where the victim was found in the house of the appellant and when she was asked she told them she was living with the appellant to his home as husband and wife. She went on that, PW1 told this court how she met the appellant and PW2 told this court how she met the appellant and started to live with him as husband and wife and having sexual intercourse. She added that the evidence of PW3 collaborated with the evidence of PW1 so the appellant's ground of appeal has no merit because the evidence of the prosecution was well evaluated. Again in reply to the ground that the prosecution failed to prove their case beyond a reasonable

doubt, PW2 in her testimony said that she met the appellant on road and insisted her to go with him to his place in page 18 she told the court that she started to live with appellant from 19/8/2020 – 26/8/2020 and they were living as husband and wife having sexual intercourse. So, she avers that, the ingredient of rape in the issue of penetration was proved, and the best evidence in rape, as elaborated in the case of **Selemani Makumba vs. Republic** 2006 TLR 379, were it was held that, the best evidence comes from the victim.

Again, she said that PF3 did not tender to the court but that is not the reason to leave the appellant free. In the case **Jafary Salum@ Kikoti vs. Republic**, Criminal appeal No. 370/2017, it was held that the accused person may be convicted of rape without tendering of PF3 regardless that there is other sufficient evidence to prove that the accused person raped the victim. In the evidence, the victim told this court that, she was living with the appellant as husband and wife, having sexual intercourse for those days, PW1 also told the court that PW2 was not at home for those days. So, in their side, they prove their case beyond a reasonable doubt.

In his rejoinder appellant submitted that, all his grounds of appeal is true, but in the trial court no independent witness was called to testify, and



no Justice of peace was called so that case was cooked one, Again the day when he was arrested, he was at his garage where he works, the trial court erred in convicting him by relying on to be evidence of the family, so he prays to be left free.

After submission from both parties, I now proceed to determine this appeal where the appellant protesting it with three grounds of appeal, the centre issue to these grounds of appeal is alleging that the prosecution case was not proved to the standard required. It is the legal duty of the court to determine **whether the prosecution case was proved to the standard required** and in the process, this court will determine the grounds of appeal as consolidated by the respondent in the submission.

According to this matter at hand which is statutory rape, this court is placed to determine the ground of appeal that the age of the victim was not proved as against the claims by the appellant who claimed before this court that the age of the victim was not proved for the offence of statutory rape.

Going to the trial court records, I perused the charge sheet which goes by the appellant's claims that he was charged with statutory rape under sections 130 (1) and (2) (e) and 131[1] of penal code cap 16 R.E 2019 which



is described as having carnal knowledge with a girl of below 18 years, the law provides basic elements of the offence and defence as to the consent of the victim is not available to the suspect, section 130 (1) (2) (e) of the penal code cap 16 R.E 2019 provides

1. N/A

2. *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 description.*

(a) to (d) N/A

(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.

In this appeal at hand, the appellant was charged under the cited section 130 (1) (2) (e) of the Penal Code Cap. 16 R.E 2019 alleged to have carnal knowledge with the victim of 13 years of age, so the appellant was accused of rape and was tried convicted and equally sentenced.

Based on this offence the appellant is disputing age of the victim was not proved, and the age of the victim indeed is a vital element for the offence charged and to decide on his allegation, and it goes that proof of age in statutory rape is of great essence, without it the case must fail. In **George**



Claud Kasanda vs. Republic Criminal Appeal No. 376 of 2017 it was stated that, in the essence that provision of section 130 (2) (e) of the penal code creates an offence now famously referred to as statutory rape, it termed so for a simple reason that it is an offence to have carnal knowledge of a girl who is below 18 years whether or not there is consent. In that sense, age is of great essence in proving such an offence. The Court of Appeal maintained this principle in the case of **Solomoni Mazala vs. Republic** Criminal appeal Number 136/2012(unreported) which was quoted with authority in the case of **Raphael Ideje @ Mwana vs. Director of Public Prosecution** Criminal appeal No. 230 of 2019, it was held that: -

"The cited provision of 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 offence.."

In this appeal it reads that the accused **Ntiga Ng'habi Samalu** did have unlawful; sexual intercourse on between 19/8/2020 to 20/8/2020 with a girl of 13 years old, PW1 who is the aunt of the victim testified to the court that she lives with the victim as guardian as she is a daughter of her brother, and she was born on 09/10/2006. Also, on the side of respondent, Ms. Jainess Kihwewe state Attorney insisted that the age of the victim was proved and



cited the case of **Rutoyo Richard vs. Republic** Criminal Appeal No. 114/2016, where it was held that the age of the victim can be proved by a parent, close relative, close friend, a teacher in which she was schooling or any person who knows well the victim. In respect of what was stated in the **Rutoyo Richard vs. Republic**, it is reflected on records of the trial court that on page 12, PW1 who is the aunt of the victim testified under oath that the victim's age was 14 years old so PW1 duly proved the age of the victim, so the ground of appellant that the age of the victim was not proved could not negate their fact that PW1 the aunt testified about the age.

In another ground of appeal, the appellant complained not to be taken to the hospital for a check-up to prove that he raped the victim, in her reply, Ms Jainess SA submitted that it was not a requirement of law appellant to be taken to the hospital, but for a victim is a requirement of law, and by looking to the court record, the victim in page 13, PW1 testified that after she was found the victim with appellant, she took her to the hospital after given PF3 and tested HIV, pregnancy and no hymen[not virginity] and results showed that the victim was HIV negative, no pregnancy and no hymen (not virginity), so the victim was taken to the hospital for check-up and appellant was not.



Lastly, he said that he was not taken to the justice of peace and the respondent in her reply in that ground, she submitted that, the issue of the appellant being taken to the Justice of peace was not mandatory, it was the discretion of appellant, this court is in support of that, the appellant could not force to be taken to the Justice of peace appellant was required to consent himself, and insist to be taken to Justice of peace, so these grounds of appeal have no merit.

Having considered this appeal holistically, I am satisfied that there is neither misapprehension no misdirection of the evidence by the trial court in this appeal, as such I find no justification to interfere with the findings of the trial court. Accordingly, I find the appeal is devoid of merit and it is hereby dismissed in its entirety. I proceed to uphold the conviction and sentence of 30 years imprisonment meted to appellant Ntiga s/o Ngabi @ Samson under section 130 (1) and (2) (e) and 131 (1) of the Penal Code Cap 16 R.E 2019. It is so ordered.

Dated at Mwanza this 06th day of October, 2022



R.B. MASSAM
JUDGE
06/10/2022

COURT: The Right of Appeal Full Explained.




R.B. MASSAM

JUDGE

06/10/2022

COURT: Judgment delivered on the 06th day of October 2022 in the presence of parties' learned advocates.


R.B. MASSAM

JUDGE

06/10/2022