IN THE HIGH COURT OF TANZANIA

(DAR ES SALAAM SUB DISTRICT REGISTRY)

AT DAR ES SALAAM

CRIMINAL APPEAL NO. 192 OF 2020

(*Originating from Criminal Case No 72 of 2020 of Kisarawe District Court at Kisarawe before Hon. M.X. SANGA- RM)*

SIMON STEVEN.....APPELLANT

VERSUS

THE REPUBLIC.....RESPONDENT

JUDGMENT

Date of last Order: 12th September, 2022

Date of Judgment: 21st October, 2022

E.E. KAKOLAKI, J.

The appellant herein was charged before the District Court of Kisarawe at kisarawe with two counts namely; **Rape**; Contrary to section 130 (1) and (2) (e) and 131 (1) of the Penal Code,[Cap 16 R.E 2002] now R.E 2022, and **Impregnating a School Girl**; Contrary to section 60 of the Education Act [Cap. 353 R.E 2002] as amended by section 22(3) of the Written Laws (Miscellaneous) amendment Act No.2 of 2016. It was alleged in the first count that, between June up to September, 2019 during day time at Mtamba village within Kisarawe District, coast Region appellant had carnal knowledge

to the victim, a girl of 13 years old school girl, (who shall be referred as ZP or the victim to conceal her identity). On the second count it was contended in period and place the appellant raped one ZP as a result impregnating her, while knowing is a school girl.

What led to the arraignment and conviction of the appellant can be deduced from the testimony of the prosecution witnesses. The same can be summarized as follows. The appellant who is married to DW4, is the uncle to ZP (PW1) and the two were living in the same house. At different time the appellant seduced PW1 and he succeeded to rape her twice before PW1 became pregnant, whose biological changes were notice by her teacher PW3 who upon interrogation with her was sent to the hospital for medical test by PW2. PW1 mentioned the appellant as the responsible person for her pregnancy before the matter was reported to the police where she was issued with PF3 hence, arrest of the appellant who upon interrogation denied to have committed the offences levelled against him. After full trial the court was convinced that, the victim was raped in terms of the victim's account as corroborated by PW2's evidence. As such, the appellant was convicted and sentenced to imprisonment for 30 years, while acquitted on the second count for want of proof of appellant's responsibility of PW1's pregnancy.

Displeased, appellant has preferred the present appeal raising five (5) grounds of complains going thus:

(1) That the trial magistrate erred in law in convicting the appellant without any proof of the age of the victim (PW1)

(2) That, the trial magistrate erred in law not considering the fact that appellant was not found guilty for impregnating the victim (PW1) the same the appellant is not guilty for the offence of rape

(3) That the trial magistrate erred in not considering that the prosecution failed to prove the charge of rape against the appellant beyond reasonable doubt

(4) That, the trial magistrate erred in law in its decision for convicting and sentencing the appellant basing on contradictory evidence

(5) That, the conviction was not based on the weight of the evidence since the offence was not proved beyond reasonable doubt.

On the strength of the said ground of appeal, the appellant prays this Court to allow the appeal, quash the conviction against him and set aside the sentence imposed on him.

Hearing of the appeal proceeded viva voce as all parties were represented. Appellant who was in Kwitanga prison at Kigoma, appeared through video conference and represented by Mr. Bitaho Marco learned advocate, while respondent enjoyed the legal services of Ms. Elizabeth Olomi, learned State Attorney. During his submission in support of the appeal Mr. Marco informed this court that, the appellant was dropping the 2nd, 4th and 5th grounds of appeal, hence argued on the 1st and 3rd grounds of appeal only.

In support of the first ground of appeal Mr. Marco submitted that, the prosecution case was not proved against the appellant for want of proof of victim's age. He said, when asked of her age PW1 said was 13 years old which was not enough as the doctor, PW2 merely claimed to have been in court to adduce evidence of the girl of 13 years, while PW3, the school teacher did not direct himself on the age of the victim apart from tendering the attendance register only. He argued, PW3 intended to produce two exhibits, meaning clinic card and the attendance register but ended up tendering the attendance register only. He contended, it is a cardinal principle that age of the victim must be proved in statutory rape, short of that it cannot be concluded that the case is proved beyond reasonable doubt against the accused person. Mr. Marco placed reliance in the case of **Robert**

Andondile Komba Vs. DPP, Criminal Appeal No. 465 of 2017 (CAT) where it was held that, proof of age of the victim may come from the relative, parent, medical practitioner or by providing a birth certificate. He submitted that; the court is duty bound to ascertain the age of the victim as stated in section 113 of the law of the child Act [Cap 13 R.E 2019] so as to satisfy itself that, the case of statutory rape is proved to the hilt. A case of **Elias Mpori Vs. R**, Consolidated Criminal Appeal No. 115/128 of 2019 (CAT-Unreported) was cited to that effect, where the Court of Appeal cited the case of **Solomon Mazulu Vs. R**, Criminal Appeal No.136 of 2012 (CAT-unreported) and held that, in statutory rape cases, conviction should only be grounded upon proof of the age of the victim who is under the age of 18 years. He thus argued the Court to find merit in this ground of appeal.

In rebuttal, Ms. Olomi informed the Court that, the respondent is supporting both conviction and sentence meted on the appellant. Regarding the first ground it was her submission that, the age of the victim (PW1) was proved by PW2 who is a medical doctor as depicted at page 12 of the proceedings as he is the one who examined the victim. She contended that, PW2 mentioned the age of the victim to be 13 years and he was never cross examined, thus was of a conclusion that, the victim was of that age. To

bolster her position, she cited to the Court the case of **Isaya Renatus Vs. R**, Criminal Appeal No. 242 of 2015 (CAT), where the Court of Appeal stated that, age of the victim can be proved by a victim, relative, parent medical practitioner and when available production of birth certificate. She concluded that, since PW2 was a medical practitioner, PW1's age was proved.

In a short rejoinder, Mr. Marco argued that, mere mentioning of the age does not mean proof of it. According to him, the medical practitioner (PW2) should have produced PW1's clinic card or birth certificate in proof of her age but failed to do so, instead the tendered she attendance register (exhibit P2). He cited the case of **Erick Ashery Vs. R**, Criminal Appeal No. 52 of 2021 (HC), in which the case of **Robert Andondile Kombe Vs. R,** Criminal Appeal No.405 of 2012 was cited and this Court held that, citation of age in the charge sheet and by magistrate before giving evidence is not proof of that person's age.

He contended that, in this case apart from PW2 whose evidence is challenged on age, the only document mentioning victim's age is the charge sheet, hence there is no evidence to prove that important ingredient. Before resting his submission Mr. Marco said though not forming part of the grounds

of appeal the appellant's defence was not considered by the trial court. He thus implored the Court to allow the appeal.

Having heard the contesting submission from both parties on the first ground and revisited the lower court records, it is uncontroverted fact to this Court that, the appellant was charged and convicted of the offence of raping a child of tender age of 13 years, contrary to section 130 (1), (2) (e) of the Penal code which states that,

> *130 (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 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.*

Gathered from the above cited provision, the age of the victim is one of the crucial elements in establishing the offence of rape under the said category of the offence which is statutory rape. It follows therefore that for the prosecution to prove this category of rape, apart from proving that the victim was carnally known by the appellant, has to prove that the victim was under 18 years of age. There is plethora of authorities in support the above stance such as the case of **Robert Andondile Komba** (supra), **George Claud**

Kasanda Vs. DPP Criminal Appeal No 376 of 2017 CAT at Mbeya, **Isaya Renatus** (supra), **Jackson David @ Linus Vs. R**, Criminal appeal No. 284 of 2019 (CAT-Unreported) and **Rutoyo Richard Vs. R**, Criminal Appeal No. 144 of 2017. In the case of **Isaya Renatus** (supra) the Court of Appeal amplified that, evidence on proof of age may be given by the victim, relative, parent, medical practitioner or, where available by the production of birth certificate. Stressing on that position and who can prove the age of the victim, the Court of Appeal had this to say:

> *"We are keenly conscious of the fact that age is of great essence in establishing the offence of statutory rape under section 130(l)(2)(e), the more so, under the provision, it is a requirement that the victim must be under the age of eighteen. That being so, it is most desirable that the evidence as to proof of age be given by the* ***victim, relative, parent, medical practitioner*** *or;* ***where available, by the production of a birth certificate****." (Emphasis supplied)*

The court went further to state that:

> *We are, however, far from suggesting that proof of age must; of necessity, be derived from such evidence. There may be cases, in our view, where the court may infer the existence of*

any fact including the age of the victim on the authority of section 122 of TEA which goes thus: -

*"The court may **infer** the existence of any fact which it thinks likely to have happened, regard being had to the common course of natural events, human conduct and public and private business, in their relation to the facts of the particular case."*

At page 9 of the said case, the Court of Appeal went on to observe that:

"In the case under our consideration, there was evidence to the effect that, at the time of testimony, the victim was a class five pupil at Twabagondozi Primary School. Furthermore, Pw1 was introduced into the witness box as a child of tender age, following which the trial court conducted voire dire test. Thus, given the circumstances of this case, it is, in the least, deducible that the victim was within the ambit of a person under the age eighteen. To this end, we find the first ground of appeal devoid of merit."

From the above cited authority it is noted that in establishing victim's age the Court considered the facts that, the victim was presented as a child of tender age, class five pupil and had *voire dire* conducted to her before her evidence was received, hence arrived at the conclusion that the victim was under the age of eighteen.

Going by the facts in the present appeal, it is on record that PW2 testified that, the victim was 13 years old. In so doing PW2 said and I quote his testimony at page 12 of the typed proceedings:

> "…*I am here to adduce evidence concerning a girl of 13 years old and I am here to prove that she was pregnant*."

Glancing at the records, PW2 was never cross examined on that fact hence the appellant had no doubt about PW1's age as failure to cross examine means admission. See the case of **Hatari Masharubu @ Babu Ayubu Vs. R**, Criminal Appeal No. 590 of 217 (unreported) where it was stated that:

> *"It must be made dear that failure to cross examine a witness on a* ***very crucial matter entitles the court to draw an inference that the opposite party agrees*** *to what is said by that witness in relation* ***to the relevant fact in issue***." (Emphasis supplied)

Similarly in **Sebastian Michael & Another vs. the Director of Public Prosecutions**, Criminal Appeal No. 145 of 2018 (unreported), the Court of Appeal of Tanzania observed that:

> *"It is trite law that failure to cross examine a witness on material evidence amounts to acceptance of it."*

Apart from that, the record indicates that, the victim was interviewed in compliance with section 127 (2) of Evidence Act to see whether she was promising to speak the truth and not to tell lies. That aside, in her testimony, the victim (PW1) testified to have been a standard V student at Mtamba Primary School, the evidence which was corroborated by PW3, her school teacher, who confirmed that the victim was a standard V student at the time of incident. Further to that the said PW3 tendered in Court attendance register exhibit P2, which bears the birth date of PW1 as 11/10/2006, hence a proof that at the time of commission of an offence between June up to September 2019 the PW1 was 13 years old. With all that evidence and applying the principle in the case of **Isaya Renatus** (supra) to the facts of this matter, this Court is left without grain of doubt that, the victim (PW1) was a child of tender age at the time of commission of an offence. I therefore find the first ground is wanting in merit hence dismiss it.

Next for consideration is the third ground of appeal where Mr. Marco submitted to the effect that, since the age of the victim was not established then the charge at the accused door was not proved beyond reasonable doubt. Ms. Olomi is of the Contrary view contending that, the charge of rape was proved beyond reasonable doubts against the appellant. She argued

that, since it was statutory rape, prosecution was only required prove age of the victim, penetration and causer of that penetration.

On the proof of age, I need not repeat Ms. Olomi's submission as that issue has already been determined in the first ground above to have been proved beyond reasonable doubt. With regard to penetration, she relied on the case of **Seleman Makumba Vs. R**, (2006) TLR 384, where the Court of Appeal observed that, true evidence of rape comes from the victim and that, in case of an adult proof of penetration and consent must be established, save for the child in which penetration only has to be proved. On the evidence adduced in Court, Ms. Olomi referred the court to pages 6-7 of the typed proceedings, where the victim (PW1) testified to court on how rape was perpetrated to her twice by the appellant whom they were living in the same house. She said, since the two were living in the same house the possibility of mistaken identity was eliminated as PW1 said appellant was raping her while her wife was away. She added that, PW1's evidence was corroborated by the evidence of PW2 who examined her vagina in which among other findings, she noted she had her hymen removed, hence a conclusion that, being a girl of 13 years without hymen, she was raped. According to her, PW2 confirmed that, there was penetration into the victim's vagina. Ms.

Olomi had it that, the appellant never cross-examined the victim on how the said rape was perpetrated meaning, he admitted that piece of evidence that, it was him who raped her. To fortify her stance she referred the Court to the case of **Issa Hassan Uki Vs. R**, Criminal Appeal No. 129 of 2017, where the Court of Appeal observed that, failure to cross examine a witness amounted to an admission to what has been testified by him/her. In her view thereof, the prosecution proved the charge beyond reasonable doubt thus, prayed the court to dismiss the appeal and uphold the trial court decision.

I have carefully considered the submission by both parties in terms of this ground of appeal, and the lower records which I had an ample time to scrutinize. In my opinion, this ground need not detain me much. The reasons I am so holding is obvious in that, the record is very clear as to how the offence of rape was committed by the appellant. It is in PW1's evidence that, rape was perpetrated to her by the appellant with whom she lived with in the same house but in separate rooms as the appellant was following her in her room. She explained on how she entered her room at night and told the victim to undress her underpants before he undressed his boxer too and raped her. She further testified on how the same was performed on the second day, where the appellant entered her room undressed and found her

undressed and proceeded rape her again while warning her not to tell anybody. That aside, PW1 testified further that, the appellant was her uncle and pastor whom they were living together, hence there could not be any room for mistaken identity of her rapist. In view of the principle in **Selemani Makumba v. Repulic** [2006] TLR 384, that the best evidence in sexual offences come from the victim, it is apparent to me and I am satisfied that, the detailed testimony of PW1 reflects her truthfulness on what the appellant did to her as there in no invited defence by the appellant to convince this court hold otherwise. PW1's stable and unshaken evidence corroborated by that of PW2, a medical doctor, confirming that pregnancy and absence of hymen was a proof that she was raped, leaves this court without scintilla of doubt that, indeed PW1 was raped by the appellant. The appellant's defence that, the case was concocted against him and that PW1 had unpleasant relationship that could lead her to be impregnated by someone else in my opinion did not shake the prosecution case anyhow. I like the trial court do not believe it. Thus, his assertion that prosecution case was not proved beyond reasonable doubt with such strong and unchallenged evidence demonstrated above, lacks basis. This ground also has no merit.

In the premises and for the fore stated reasons this appeal is devoid of merit hence, I dismiss it in its entirety.

It is so ordered.

Dated at Dar es Salaam this 21st October, 2022.

E. E. KAKOLAKI

JUDGE

21/10/2022.

The Judgment has been delivered at Dar es Salaam today 21st day of October, 2022 in the presence of Mr. Bitaho Marco, advocate for the appellant and Ms. Asha Livanga, Court clerk and in the absence of the appellant in person and the respondent.

Right of Appeal explained.

E. E. KAKOLAKI

JUDGE

21/10/2022.