THE UNITED REPUBLIC OF TANZANIA

JUDICIARY

IN THE HIGH COURT OF TANZANIA

IRINGA DISTRICT REGISTRY

AT IRINGA

(DC) CRIMINAL APPEAL NO. 22 OF 2022

(Originating from Criminal Case No. 54 of 2020, In the District Court of Ludewa, at Ludewa).

DAVID GERALD MHENGA ..... APPLICANT

VERSUS;

REPUBLIC..... RESPONDENT

JUDGMENT

15th August & 7th November, 2022.

UTAMWA, J:

The appellant, DAVID GERALD MHENGA was aggrieved by the decision (impugned judgment) of the District Court of Ludewa District, at Ludewa (trial court) in Criminal Case No. 54 of 2020. He is now, through Mr. Batista Mhelela, learned advocate appealing to this court. Before the trial court, the appellant was charged with and convicted of the offence of Rape contrary to sections 130(1)(2)(e) and 131(1) of the Penal Code, Cap. 16 R.E 2019. He was ultimately sentenced to serve in prison for 30 years. It was alleged by the prosecution that, on 2nd day of September, 2020 at Manda village within Ludewa District in Njombe region, the appellant unlawfully had carnal knowledge of the victim, a girl aged 15 years old.

The appellant pleaded not guilty to the charge, a full trial ensued, hence the conviction and sentence.

The appellant's petition of appeal is based on the following two grounds of appeal:

1. That, the trial court erred in law and fact by relying on the evidence of PW.1 despite the fact that the legal requirement in regard to the victim's age was not proved by the prosecution side.
2. That, the trial court erred in law and fact when it failed to consider the significance of the passage of time separating when the offence is alleged to have been committed on 2nd September 2020, and the medical examination of the victim on 25th September 2020, three weeks later.

The appellant thus, urged the court to quash and set aside the judgment and sentence imposed on him and he be released from the prison.

At the hearing of the appeal, the appellant appeared in person and was represented by advocate mentioned earlier. On the other side, Ms. Pienzia Nichombe, learned State Attorney represented the respondent Republic. The appeal was argued by way of written submissions.

In his written submissions in support of the first ground of appeal, the appellant's counsel argued that, it is trite law that in criminal trials, the burden of proof lies on the prosecution. He supported the legal position by

citing the decision of the Court of Appeal of Tanzania (The CAT) in the case of **Hassan Singano @ Kang'ombe v. Republic, Criminal Appeal No. 57 of 2022, CAT at Tanga** (unreported). According to the section under which the appellant is charged, the prosecution has to prove, among other things, that the age of the victim of rape is the one mentioned in the charge sheet. However, in the present case, the prosecution did not do so. He cited the case of **Maganga Udugali v. Republic, Criminal Appeal No. 144 of 2017, CAT at Tabora** (unreported) to support the contention.

It was also the contention by the appellant's learned counsel that, the appellant was also improperly sentenced since he was charged with rape contrary to section 130(2)(e) of the Penal Code. The said section does not impose the sentence imposed to the appellant by the trial court.

On the second ground of appeal, the learned advocate for the appellant contended that, the medical examination of the victim was conducted three weeks after the alleged incident. The delay in conducting the medical examination created doubts in the prosecution's case. Such doubts should be resolved in favor of the appellant as it was the position in the **Hassan Singano case** (supra).

The learned counsel for the appellant therefore, urged the court to allow the appeal, quash the judgment and sentence of the trial court and set him free from prison.

On the other hand, the learned State Attorney for the respondent supported the appellant's appeal basing on the first ground of appeal. It

was her argument that, the prosecution alleged that the victim was 15 years old at the time of the incident. However, no any proof as to her age was produced in court by either the parents, or medical practitioner or by birth certificate as required by the law. She cited the case of **Isaya s/o Ambakisye Mtawa v. Republic, Criminal Appeal No. 151 of 2020, High Court of Tanzania at Mbeya** (unreported) which followed the case of **Francis v. Republic, Criminal Appeal No. 173 of 2014, CAT at Dodoma** (unreported) to cement the legal point.

It was also the argument by the learned State Attorney that, for lack of proof of the victim's age, the prosecution failed to prove their case beyond reasonable doubt against the appellant. She thus, urged the court to allow the appeal.

I have considered the record, grounds of appeal, submissions by both parties and the law. In my settled view, the fact that the present appeal is not objected, is not the reason why this court should not test its merits. That fact is also not the sole ground for this court to allow the appeal. These views are based on the understanding that, it is a firm and trite judicial principle that, courts of law in this land are enjoined to decide matters before them in accordance with the law and the Constitution of the United Republic of Tanzania, 1977, Cap. 2 RE. 2002 (henceforth the Constitution). This is indeed, the very spirit underscored under article 107B of the Constitution. It was also underlined in the case of **John Magendo v. N. E. Govan (1973) LRT n. 60**. Furthermore, the CAT emphasized it in the case of **Tryphone Elias @ Ryphone Elias and another v.**

Majaliwa Daudi Mayaya, Civil Appeal No. 186 of 2017, CAT at Mwanza, (unreported Ruling) and . In that precedent, the CAT held, *inter alia*, that, the duty of courts is to apply and interpret the laws of the country. It added that, superior courts have the additional duty of ensuring proper application of the laws by the courts below. The CAT underscored the same principle in the case of **Joseph Wasonga Otieno v. Assumpter Nshunju Mshama, Civil Appeal No. 97 of 2016, CAT at Dar es Salaam** (Unreported). I will therefore, test the merits of the present appeal despite the fact that the respondent supports it.

On the first ground of appeal, the appellant faults the prosecution's case for failure to prove the age of the victim as one of the key ingredients of the offence at issue. The issue is therefore *whether the age of the victim was proved*. The record shows that the appellant was charged of the offence of rape contrary to sections 130(1)(2)(e) and 131(1) of the Penal Code as shown earlier. This offence is commonly termed as statutory rape. It has been the position in a number of precedents that, proof of age in such offences is of great essence. Without such proof, the case fails. In the case of **George Claud Kasanda v. Republic, Criminal Appeal No. 376 of 2017, CAT at Mbeya [2020 TZCA 76]** for example, the CAT followed its earlier decision in **Issaya Renatus v. Republic, Criminal Appeal No. 542 of 2015, CAT at Tabora, ([2016] TZCA 218)** in which it was held thus:

> 'We are keenly conscious of the fact that age is of great essence in establishing the offence of statutory rape under section 130(1)(2)(e),...under the provisions, 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 must be given by the victim, relative, parent, medical practitioner or where available by the production of a birth certificate. We are, however, far from suggesting that proof of age must; of necessity, be derived from such evidence."

It follows therefore that, for an accused person to be convicted under section 130(1)(2)(e) of the Penal Code, the prosecution must prove beyond reasonable doubts that, during the commission of the offence the victim was below the age of 18 years.

In the present appeal nonetheless, the record does not show that the prosecution proved that the victim was 15 years of age as correctly contended by both sides of the appeal. No any prosecution witness gave evidence as proof of the victim's age. Moreover, I am of the view that personal particulars availed by the victim to the trial court before being sworn or affirmed which indicated that the victim was of the age of fifteen (15) years on the day she testified, did not constitute part of the evidence since they were not given on oath. The personal particulars serve only as general information; see the case of **Rutoyo Richard v. Republic, Criminal Appeal No. 114 of 2017, CAT at Mwanza [2020] TZCA 298**.

Besides, in my settled opinion, where in criminal proceedings there is an issue on the age of a witness or any person, the mere averment by the witness or such other person on his/her own age cannot be conclusive. It is more so considering the fact that, the prosecution has the duty of proving facts against the accused beyond reasonable doubts. The above

highlighted opinion is based on the common knowledge that, a human being cannot know his own age unless he is so informed by other persons who know about his birth date or he reads that fact from authentic record. This is so because, at the time of his/her birth, a human being-infant is considered to be unconscious. This court is entitled to presume the facts highlighted above under section 122 of the Evidence Act, Cap. 6, RE 2022. These provisions guide that, 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. The spirit embodied under these provisions was underscored by the CAT in the case of **Issaya Renatus v. Republic, Criminal Appeal No. 542 of 2015** (unreported).

Furthermore, the record shows that, the prosecution tendered in evidence the PF.3 (exhibit P.1) through one PW.4 (Ann Kulola), the clinical officer who had medically examined the victim on the 25th November, 2020. The PF.3 in fact, showed that the victim had the estimated age of 15 years. However, I do not think if the PF.3 can be a reliable document in proving the age of the victim under the circumstances of the case at hand. This view is based on the unreliable way of tendering the PF.3 in evidence. In the first place, it is shown in the record (at pages 11-12 of the typed proceedings of the trial court dated 24th November, 2020,) that, when the PW.4 was testifying, the PF.3 was in the possession of the prosecutor. The prosecutor asked him if she could identify the PF.3 she had made upon examining the victim medically. The PW.4 replied that, she could identify it by her hand writing and signature. The prosecutor then asked for the leave

of the trial court to give the PF.3 to the PW.4 so that she could tender it in evidence. The PW.4 in turn tendered it.

The record further shows that, upon being tendered in evidence, the accused was recorded as showing that he had no objection to the tendering of the PF.3 by PW.4, and the same was admitted in evidence.

The record nonetheless, does not show if the PF.3 was given to the accused to assess it before he could show his reaction. Again, the record does not shown that the PW.4 in fact identified the PF.3 as the one she had made, before she could tender it in court. It is therefore, doubtful if the PF.3 tendered in court was the same made by the PW.4. It is more so because, the PW.4 did not mention in her evidence the person to whom she handed over the PF.3 upon making it. In her evidence, she also showed that, the victim was escorted to her by her sister and another person she did not mention.

Due to the above trend, it is not clear as to how the PF.3 was handled from time when the PW.4 prepared it, to whom she gave it thereafter and how it reached to the prosecutor before the same was given back to the PW.4 in court for tendering it in evidence. Again, it is not clear if what the PW.4 tendered in court was the same PF.3 she had prepared. This is because, she did not declare in court that the same was the one she had made as I observe earlier. The chain of custody of the PF.3, as an important exhibit was thus, broken. The investigator of this case did not also testify in court to show how the PF.3 was handled from the time it was made by the PW.4 to the time when it landed into her hands again in court

through the prosecutor. The PF.3 cannot thus, be a conclusive evidence on the age of the victim in the case at hand.

Owing to the above observations, I answer the issue posed above negatively that, the prosecution did not prove the age of the victim beyond reasonable doubts. I consequently uphold the appellant's first ground of appeal.

Due to the findings I have just made above, I find no need for testing the second ground of appeal since the finding I have just made in relation to the first ground of appeal is capable of disposing of the entire appeal. Otherwise testing the second ground of appeal will be tantamount to performing an academic exercise which is not the core objective of the adjudication process.

I accordingly, allow the appeal, quash the conviction and set aside the judgment of the trial court and the sentence imposed on the appellant. I further order that, the appellant shall be released immediately from the prison, unless held for any other legally justified cause. It is so ordered.

JHK UTAMWA

JUDGE

07/11/2022

07/11/2022.

CORAM; JHK. Utamwa, J.

Appellant: present in person and Mr. Batista Mhelela, advocate.

Respondent: Ms. Pienzia Nichombe, State Attorney.

BC; Gloria, M.

Court; Judgement delivered in the presence of the appellant, his counsel Mr. Batista Mhelela and Ms. Pienzia Nichombe, State Attorney for the respondent Republic, in court, this 7th November, 2022.

JHK UTAMWA
JUDGE
07/11/2022.