THE UNITED REPUBLIC OF TANZANIA

JUDICIARY

IN THE HIGH COURT OF TANZANIA

(MOROGORO DISTRICT REGISTRY)

AT MOROGORO

CRIMINAL APPEAL NO. 27 OF 2022

(Arising from Criminal Case No. 84 of 2020, District Court of Mvomero)

FESTO LUCAS @ BABA FARAJA @ BABA KULWA ..... APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

JUDGMENT

Hearing date on: 12/09/2022

Judgment date on: 16/09/2022

NGWEMBE, J.

The appellant, Festo Lucas @ Baba Faraja @ Baba Kulwa, was arraigned in the District Court of Mvomero for statutory rape contrary to sections 130 (1) (2) (e) and 131 (1) of **the Penal Code Cap 16 R.E. 2002 (now R.E 2019)**. It was alleged that between September, 2020 at Doma – Malali village within Mvomero District, herein Morogoro region, the appellant had carnal knowledge with a school girl aged 15 years. Due to her age, her actual name is hidden to preserve her integrity and future respect, in the society, thus baptized as Victim or PW2 used interchangeably.

At trial, the prosecution built its case and the court found the appellant liable, hence convicted and subsequently sentenced him to

serve thirty (30) years imprisonment. Aggrieved therein the appellant rightly and within time filed notice of appeal and finally lodged his appeal in this court clothed with five (5) grounds. For convenient purposes, all grounds clock within one ground that *the offence of rape was not proved beyond reasonable doubt.*

Following completion of pleadings herein, on 12/09/2022 the matter was called for hearing. Unfortunate, the appellant failed to procure representation of learned advocate, hence appeared in person, while the respondent/Republic was represented by Ms. Elizabeth Mallya, learned State Attorney. Being unrepresented the appellant did not have any useful argument in support to his grounds of appeal, instead he prayed this court to consider his grounds of appeal and let him free.

The learned State Attorney strongly opposed the appeal addressing all complaints raised by the appellant. Arguing on the victim's age, conceded that her birth certificate was not produced and tendered during trial, however, she distinguished it by insisting that, the victim's father (PW1) testified the age of the victim to be 15 years. That she was born in year 2005. Referred this court to the case of **Isaya Renatus Vs. R, Criminal Appeal No. 54 of 2015,**

Observed that age of the victim in rape cases can be proved by either parent, relative, medical practitioner or birth certificate, if available.

Submitted further that not naming the school and class of the victim did not affect the conviction. Even if the victim would have been not a school girl, yet at the age of 15 years old, it would still an offence to have carnal knowledge with her.

Regarding the issue of penetration, the medical report on bruises and virginity, the victim clearly testified that, she had sexual intercourse with the appellant. Referred this court to page 7 of the trial court's proceedings and in the case of **Selemani Makumba Vs. R, [2006] T.L.R. 379,** that best evidence in rape cases comes from the victim. The fact that there were no bruises in the victim's private parts as per PF3 (Exhibit P1), the learned State Attorney cited section 130 (4)(b) of **the Penal Code** that proof of bruises in rape cases is not a legal requirement.

Countering the complaint that the trial court did not cross examine the witnesses, the State Attorney stood firm to cite section 146 (2) of the **Evidence Act [Cap 6 R.E 2019]** which illustrates the procedure of examining witnesses. Rested by pointing out that it is not the duty of the court to cross examine witnesses. In totality found this appeal to have no merits, same be dismissed and this court be pleased to uphold the trial court's judgment.

Upon summarizing the State Attorney's arguments and upon going through the proceedings and judgment of the trial court, I find the issue related to which school and class, if any, where the victim was schooling is irrelevant. However from of the victim. From the record, PW1 (at page 4) and PW2 (page 6) testified that the victim was at Standard VI, at Doma Primary School. This was neither disputed nor cross examined during trial. Therefore, this issue lacks merits.

To the best I find the major contention between the parties is on the burden of proof and standard of proof. In this point, it is a trite law that, prosecution bears the burden to establish and prove the offence

beyond reasonable doubt. Section 3 (2)(a) of **The Evidence Act** provides the standard of proof in the following words: -

> *Section 3 (2) "A fact is said to be proved when -*
> *(a) in criminal matters, except where any statute or other law provides otherwise, the court is satisfied by the prosecution **beyond reasonable doubt** that the fact exists;"*

Likewise, section 110 of **The Evidence Act**, also provide in a clear manner as quoted hereunder: -

> **Section 110 (1)** *"Whoever desires any court to give judgement as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.*
> *(2) When a person is bound to prove the existence of any fact, it is said that the burden of proof lies on that person."*

These sections received breath by the Court of Appeal in the case of **Anthony Kinanila Enock Anthony Vs. R, Criminal Appeal No. 83 Of 2021** when it held: -

> *"As to the standard of proof which we shall also have the opportunity to consider in the instant case, the prosecution has the duty to prove all the ingredients of the offence beyond reasonable doubt and here, one should not waste time trying to invent a new wheel as that is exactly what was stated by the House of Lords in England way back in 1935 in Woolmington Vs. DPP [1935] AC 462 from where our present general principles of criminal law and procedure emanate."*

In **Magendo Paul & Another Vs. R, [1993] T.L.R. 219** the Court of Appeal had the opportunity of giving an interpretation on what constitutes *"proof beyond reasonable doubt,"* in the following wording: -

> *"If the evidence is so strong against a man as to leave only a remote possibility in his favour ... the case is proved beyond reasonable doubt"*

The trial was based on sections 130 (1) (2) (e) whereby basic ingredients of the offence of rape is provided for, while punishment thereon is under in section 131 (1). For clarity, the section is quoted hereunder:-

> **Section 130 (1)** *"it is an offence for a male person to rape a girl or a woman.*
> *(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: -*
> *(a) – (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."*

Clearly, the offence of rape is established when the following ingredients are proved beyond reasonable doubt: ***One*** - there was male penis penetration to a girl reproductive organ; ***two*** – if a girl was below the age of 18 years, it is immaterial whether the girl gave consent or otherwise. If a woman was above the age of majority, that is, above 18 years old, then such penetrations should be without her consent to constitute rape.

In respect to this case, the prosecution was bound to prove that the victim was below the age of 18 years when the alleged rape was committed. Age in statutory rape is fundamental element and must be established and proved beyond reasonable doubt. As of now the issue of age goes to the root of the whole case of rape and determine the whole issue of sentence. Therefore, the Parliament has placed the age of the victim at the centre of the whole offence of rape.

That being said, the question herein is whether the age of the victim was proved as quired by law? From the evidence on record, the victim and the accused were familiar to each other as they domiciled in one street. She claimed that the appellant's first attempt to seduce her by proxies and sometimes directly was on 10/09/2020, but she refused. On the same day, she went to the farm, met the appellant who insisted on his request, again she declined. She then told the trial court that on 13/09/2020 she had sexual intercourse with the appellant twice at about 09:00 hrs and several other times when they met at the farm. At that time she was 15 years old. Thereafter she used to communicate with the appellant through her grandmother's phone. Then switched to a different story, saying she had sexual intercourse with the appellant when she was 13 years old and never told anyone.

On the other hand, there are pieces of evidences, which show that before the offence, the appellant was suspected and even brought to police station for having love affairs with the victim, but PW1 (the victim's father) forgave him. The day when the appellant was arraigned, it was because his wife complained to the victim's father on the victim's affair with her husband.

In analysing the above evidences, I am alive to the good principles reminded by the learned State Attorney, that the best evidence in rape cases come from the victim. Rightly so, I accept the age of the victim may be proved by the testimony of parents. Just along what the learned State Attorney submitted; I believe that the victim's father in our case was in a better position to establish the victim's age. However, there must be a standard against which, parent's testimonies on the age of the victim may be adduced.

The Court of Appeal in developing this good principle on the need to establish the age of the victim as per the case of **Isaya Renatus' case,** and other good precedents followed thereafter, did not intend to require the court to believe on general statements. The proof of age must be concrete, viable and reliable. General statement cannot be accepted at this era of statutory rape. For instance, at the trial court, PW1 and PW2 (the victim) allegations on the victim's age were vague. That the victim was born in year 2005. No specific date, month or even some particulars to authenticate the information. For instance, production of birth certificate, clinic card, if any, school registration and any other reliable and acceptable document proving her age.

I have had a grace of reviewing closely the Court of Appeal's judgement in respect to this point, such as in the case of **Leonard s/o Sakata Vs. DPP, Criminal Appeal No. 235 of 2019**, where two schools of thought regarding proof of victim's age in rape cases were discussed extensor. In the same vein, the case of **Winston Obeid Vs. R, Criminal Appeal No. 23 of 2016**; **Edson Simon Mwombeki Vs. R, Criminal Appeal No. 94 of 2016;** and **Aloyce Maridadi Vs. R, Criminal Appeal No. 208 of 2016 (all unreported)** discussed in details on this point.

Accordingly, one school of thought held that, the victim's age must be strictly proved. The other school of thought held that, the age of the victim can be inferred from other facts, even when not directly proved. In my reasoning, the first school of thought fits more in the circumstance of this case at hand. Failure to establish and prove the age of the victim in a statutory rape cannot establish and prove the offence beyond reasonable doubt. In this case strict proof was required to establish that the victim was not an adult matured person.

The second school of thought is more applicable when the victim is alleged to be under the age of ten years. It is unlikely for a child of either 4 up to nine years to look like an adult. In those cases, even without strict proof of age will not be hard to tell whether the victim is a child of a certain age or otherwise.

Much as I agree that the age of the victim can be proved by the parent, among others, yet the testimonies of PW1 did not justify with authenticity that the victim was of that age. It follows therefore that, where there is neither birth certificate nor School registration, nor clinic card, medical report, affidavit on the age of the victim and is only a parent being a witness of the age of the victim, he/she must give strong testimony on the date, month and year when the victim was born.

A simple mention that the victim was born in year 2005, in my considered view, can be made by any other person. Even a distant neighbour to the victim's family may end up saying so. Parent who witnessed and celebrated the birth of her daughter must give more details required to prove the age of the victim.

The victim in this case behaved not as a 15 years school girl. She had the confidence to explain brag about the purported love affairs with

the appellant. Phoned the appellant's wife and gave some instructions to pre-empt her parents' efforts to figure out her suspected behaviours, and before the trial court, she exhibited her plan to get married. Unfortunate, the trial court looked at this in one dimension. If the other dimension of credence would be considered by the trial court, would suspect both, the age of the victim and her credibility. Strict proof of her age was required, but same was not done.

Apart from that, I have considered the victim's accounts of events. She stated that the appellant's first attempt to seduce her was on 10/09/2020 at around 16:00hrs, but she refused. Likewise, on 13/09/2020 about 09:00 hours she had sexual intercourse with the appellant twice. According to her, the appellant forcefully, removed her clothes to have the intercourse, yet she made no alarm for help.

At page 8 of the proceedings, the same victim testified that, she had sexual intercourse with the appellant for the first time when she was 13 years old, which meant two years before the day of testifying in court. Also, two years before the day of the charged offence. An inevitable question would arise, if the appellant had sexual intercourse with the victim in year 2018, how could he be seducing her in year 2020 for the first time? The two facts being incompatible and contradictory, it suggests one of the two is untrue.

Generally, the existence of contradictions and inconsistencies in the evidence of a witness is a basis for finding lack of credibility, especially when the contradiction goes to the root of the case. In the circumstances, the trial court had a renowned duty to resolve the contradictions as was held in the case of **Mohamed Said Matula Vs. R, [1995] T.L.R. 3** that: -

"Where the testimony by witness contain inconsistencies and contradictions, the Court has a duty to address the inconsistencies and try to resolve them where possible, else the Court has to decide whether the inconsistencies and contradictions are only minor or whether they go to the root of the matter."

The trial court abdicated from that noble duty. Further, the medical report (PE1) among others, show that the victim not only had lost virginity, but also was used to sexual intercourse. It would suggest, that is why she did not tell anyone that she was being raped for all the two years (if at all). Over and above that, she sought to interfere with the efforts by her parents to figure out the man with whom she had an affair.

A cautioned statement (Exhibit P2) said to be recorded by the appellant also contradicted PW2's testimony. Exhibit P2 stated that the appellant started love relationship with the victim in 2019, while the victim suggested to have sexual relationship. In 2020, yet in some other time, she said it was when she was 13 years old (meaning in year 2018). Under the circumstance, it was risky for the court to put any reliance on PW2's words and overlook such glaring alarming contradictions.

Though I acknowledge the established principle that the best evidence in rape cases comes from the victim, a proper approach to deal with the victim's best evidence, is to examine the evidence properly to find credibility, coherence and compatibility of that evidences of the victim. The principle in **Selemani Makumba**'s case does not apply without consideration of the circumstances of each case. This is what

was cautioned in the case of **Fahadi Khalifa Vs. R, Criminal Appeal No. 573 of 2020, CAT at Dodoma** where it was held *inter alia: -*

> *"In sexual offences the best evidence comes from the victim - see: Selemani Makumba v. Republic [2006] TLR 149.* ***However, we should remark that it is not always the case that such evidence is taken as wholesome, believed and acted upon to convict an accused person without considering other evidence and circumstances of the case"***

With this brief analysis, I am settled in my mind that before the trial court, the age of the victim was not proved. Also, the fact that the appellant had carnal knowledge with the victim was not established and proved beyond reasonable doubt. Though I may accept that the victim may have been raped by somebody some days, the condonation of the parents and the victim altogether, add more doubt to the prosecution's case. The offence was not proved beyond reasonable doubt.

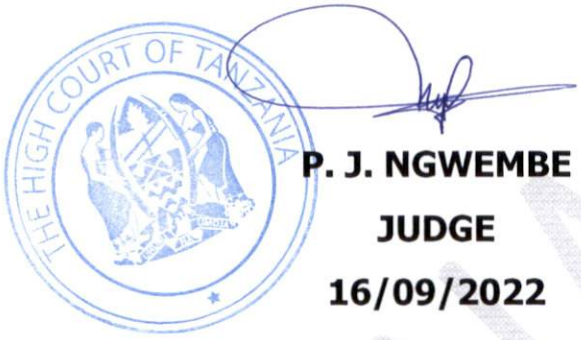
I have considered as well the fact that, the appellant defence was very weak, it was almost nothing. However, the law is clear that the court convicts the accused on the strength of the prosecution evidence not on the weaknesses of the defence case. This court ruled the same way in **R Vs. Kerstin Cameroon [2003] T.L.R. 84,** where among others, held: -

> *"The accused can only be convicted of an offence on the basis of the strength of the prosecution case and not on the basis of the weakness of the defence case"*

It is on those grounds, I allow this appeal, proceed to quash the conviction and set aside the sentence. The appellant be released from prison immediately, unless otherwise lawfully held.

I accordingly Order.

Dated at Morogoro this 16th day of September, 2022.



P. J. NGWEMBE

JUDGE

16/09/2022

Court: Judgment delivered at Morogoro in Chambers on this 16th day of September, 2022, **Before Hon. S. J. Kainda, DR** in the presence of the Appellant and in the presence of Mr. Emmanuel Kahigi Respondent.

SGD. HON. S.J. KAINDA

DEPUTY REGISTRAR

16/09/2022

I Certify that this is a true and correct copy of the original

Deputy Registrar

Date 19/9/2022 at Morogoro