IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
IN THE DISTRICT REGISTRY
AT MWANZA

CRIMINAL APPEAL NO. 144 OF 2021

(Originating from Criminal Case No. 69 of 2021 in the District Court of Misungwi at Misungwi by, Hon. E. Marley- SRM, dated on 24.08.2021)

MAKOYE S/O NDAKI .....APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

JUDGMENT

10th August & 18th November, 2022

ITEMBA, J.

The appellant herein, Makoye Ndaki was charged with and convicted of the offence of rape contrary to section 130 (1)(2)(e) and 131(1) of the Penal Code Cap 16 R.E 2019. It was alleged that sometimes between April and May 2021 at Mondo Village within Misungwi District in Mwanza Region, the appellant had sexual intercourse with a girl of 17 years. For protection of her identity, the said girl, will be referred to interchangeably, as the victim or as PW2.

After a full trial, the appellant was sentenced to serve 30 years imprisonment. These outcomes did not amuse him, he therefore preferred this appeal armed with five grounds.

The following are the grounds as quoted from his memorandum of appeal.

1. *"THAT; the lacking of birth certificate which was the legal document to confirm that the victim PW2 actually was a girl of 18 years old rendered the charge of rape not proved as the law requires; Refer the Case of Andrew v Republic criminal Appeal No - 173 of 2014 and Robert Andolile Komba v The DPP. Criminal appeal No - 465 of 2017 CAT (both unreported).*
2. *THAT; the trial magistrate erred in law and fact to convict the appellant basing on the hearsay evidence of prosecution that PW2 was a school girl without tendering any document like school attendance register to prove that PW2 was a school girl of Nguge primary school.*
3. *THAT; the trial magistrate erred in the matter of law and facts when accepted false evidence from prosecution side which failed to prove the offence of rape against appellant instead of false words from the PWl John Joshua Mpuya that the victim was a school girl without any cogent evidence to prove those allegations.*

4. *THAT; the learned trial Court erred in law and fact when failed to prove the allegation beyond reasonable doubt but was based on suspicious evidence as testified by witnesses.*

5. *THAT; failure for the teacher of Nguge primary school, VEO who sent the people to arrest both accused (appellant) and the victim and the police investigator of this case to appear in Court to prove that PW2 was a school girl at Nguge Primary school rendered the evidence of prosecution side in question no legs to stand.*

6. *THAT; the act of the parents of the victim to receive the dowry from the parents of the appellant was enough evidence to prove that the appellant did not rape the victim.*

7. *THAT; the trial magistrate erred in law and facts for failure to evaluate the defence of the appellant together with the defence witnesses which was strong enough than the weak evidence of prosecution witnesses which failed to prove the age of the victim and how it can be easy for the parents of PW2 to take Tshs 220,000/= as the dowery while knows that PW2 is school girl."*

When the appeal was scheduled for hearing, the appellant fended for himself while the respondent republic was represented by Ms. Rehema Mbuya learned Senior State Attorney.

The appellant referred to his grounds of appeal and generally submitted that he married the victim and paid dowry to her parents who had came at his home. That; PW2 was not a student but a bar attendant and they met at the bar. He ended his submission by stating that his arrest was unlawful.

In rebuttal, the learned senior state attorney replied the 5 grounds of appeal, one by one. In the first ground she submitted that age of the victim can be proved by either the parents, a child herself or a birth certificate and that at page 6 of the proceedings it was proved by PW2 that the victim was 15 years of age.

In the second ground, she argued that there was no need for the victim to submit any evidence to support that she was a student because the offence which the accused is charged with is rape and not offences under the Education Act.

The learned senior state attorney argued the 3rd and 4th grounds jointly, in these, she insisted that there was no false evidence from prosecution evidence. She relied on the evidence of the victim herself (PW2) and her father. She argued that as the victim was under the age,

what the prosecution needed to prove was only penetration and the appellant admitted that he was living with the victim as husband and wife. She stated that the law allows marriage for an underage only upon parental consent.

In the 5th ground, she replied that it is the prosecution which chooses its witnesses and that the prosecution case was even corroborated by the appellant himself. In the 6th ground she stated that even if the appellant had paid dowry, there was no proof that there was parental consent as PW2's father had testified that his child went missing. In the last ground she reiterated what she stated in 4th ground that in proving the offence of rape the issue of dowry is immaterial. She finally prayed for the appeal to be dismissed.

The appellant, being a layman, did not have anything new to rejoin. However, upon further questions from the court the learned senior state attorney admitted that although PW2 testified to be 15 years of age, the chargesheet reads that she was 17 years. She added that be it 15 or 17 years, either way, PW2 is still under the age of 18 and therefore consent to

rape is immaterial. She strongly argued that these contradictions, if any, are still curable under section 388 of the Criminal Procedure Act.

Having apprehended the arguments from both sides, the issue is whether the appeal has merit. In responding to that, I will start with the 1st, 6th and 7th grounds. These grounds will be answered jointly due to their close similarity.

The offence of rape is created by section 130(1)(2)(3)(4) and (5) of the Penal Code, I will quote parts of the said section for ease of refence:

"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) not being his wife, or being his wife who is separated from him without her consenting to it at the time of the sexual intercourse;*
>
> *(b) with her consent where the consent has been obtained by the use of force, threats or intimidation by putting her in fear of death or of hurt or while she is in unlawful detention;*
>
> *(c) n.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.

It goes therefore, as per section 130 (1) (2) (e) and 131(1) of the Penal Code, which the appellant was charged with, the prosecution was supposed to prove **one**; that PW2 was under the age of 18 years and **two**; that PW2 had carnal knowledge with the appellant with or without her consent, **three**; if PW2 was aged 15 years or more, that she was not married to the appellant.

Based on the records and grounds of appeal one thing is clear; there is no dispute that the appellant had sexual relationship with the victim, PW2. It is also in records that the appellant admitted in his evidence that he had approached PW2 and later married her. He added that he had paid dowry to PW2's father amounting to TZS 220,000/=. For ease of reference, I will quote hereunder, the appellant's defence, as it features in the trial court's proceedings at page 17:

DEFENCE CASE BEGINS:

DW 1: Name Makoye s/o Ndaki

Age: 33 years

Tribe: Sukuma

Religion: Christian

Sworn and State as follows:

*"**XD**: I remember it was on Saturday came one person kept me under arrest and took me to Misungwi Police Post but I know the victim who I always met in a bar and approached her with an intention of marrying her and I took her in my house and started living with her as my wife and her father came and took dowry money from me but after two months is when I was arrested but the victim is not a student. That is all."*

Again, during cross examination this is what transpired:

XXD By the PP:

"It is true I married (name withheld) and she told me she is 18 years old and I met her on the bar serving customers thereat as barmaid and I have paid dowry money for her to her father a total of Tshs. 220,000/= That is all"

This evidence is highly disputed by PW1, the PW2's father, that he has never received any payments from the accused person.

In the opponent side, Constantine Mponeja, the accused's father who testified as **DW2,** corroborated DW1 evidence on the fact that the appellant had married the victim. As for his testimony, let the record speak for itself, as reflected at page 19 of typed proceedings.

> *"**XD**: I know the Accused who is my son and came with a girl at home and asked him when is she from and told me from Nguge Village and she is not a student and I went to that girl parents who said she is not a student and later that girl parents came with three Youth at my house and asked for dowry and we bargained for her dowry and that girls' father said she wanted twelve cattle's as dowry payments and told him to take some money and he said Tshs. 120,000/= and as agreed me and my neighbours went to him and gave him Tshs. 120,000/= as dowry and agreed to finales it as July 2021 but after sometime my son was arrested and told he had married a school girl. That is all.*
>
> ***XXD By the PP**: I do not know how old that girl was. That is all.*
>
> ***Re- examination**: - NIL"*

Here, DW2 is supporting the issue of the accused having married the victim and that the victim's parents were pleased with the arrangement to even receive the dowry. Surprisingly, the prosecutor cross examined DW2 only in respect of the victim's age and not the issue of marriage. If that

was not enough, there was DW3, who also testified to have attended the dowry process and testified to that effect, without being cross examined. Considering that the evidence shows that both the appellant and PW2 comes from village settings, I believe it was important for the prosecution to satisfy itself with the issue of marriage whether it existed or not. This is also in consideration of the existence of traditional marriages in our Tanzanian society which are typically accepted as lawful marriages. The evidence is silent as to whether after payment of dowry there was a marriage ceremony or not, however that was to be cleared by prosecutions through further cross examining the appellant and his father something which did not happen.

It is a legal principle that facts not cross-examined are taken as having been admitted. In the case of ***Nyerere Nyague v R,*** Cr Appeal No. 67/2010 (Arusha) the Court of Appeal held that:

> *"As a matter of principle, a party who fails to cross- examine a witness on a certain matter is deemed to have accepted that matter and will be stopped from asking the trial court to disbelieve what the witness said."*

See also the case of ***Cyprian A. Kibogoyo v.R.*** (CAT) DSM Cr. Appeal No. 88 of 1992 (unreported)].

In suffice to state that, I am highly convinced that based on the evidence from the defence witnesses, there is evidence of a traditional marriage arrangement between the appellant and the victim. That being the position, the next question to determine is the age of the victim. This has also been raised as a ground of appeal. Based on evidence in record, the charge mentions 17 years, the victim herself testified that she is 15 years and PW1 her father, testified at page 6 that the victim is 17 years. I believe that, a girl who attends a primary school at grade 7 is capable of knowing her true age correctly. As well, the parent is the right person to testify on the age of his child, therefore it was expected for both PW1 and PW2 to be consistent on the issue of age of PW2. In the contrary the prosecution evidence was contradictory in respect of age of the victim which is key in determining if there is an offence of rape or not.

The respondent was of the view that the contradiction of age of PW2 is an irregularity which can be cured under section 388 of the Criminal Procedure Code. This section states that:

"388. Subject to the provisions of section 387, no finding sentence or order made or passed by a court of competent jurisdiction shall be reversed or altered on appeal or revision on account of any error, omission or irregularity in the complaint, summons, warrant, charge, proclamation, order, judgment or in any inquiry or other proceedings under this Act; save that where on appeal or revision, the court is satisfied that such error, omission or irregularity has in fact occasioned a failure of justice, the court may order a retrial or make such other order as it may consider just and equitable."

Therefore, much as I agree on the fact that section 388 of the CPA can be relied to cure the errors or omissions in the charge, under the circumstances of this case, the section cannot be relied without occasioning a failure of justice. The following are reasons; **One**; Since the beginning of the trial, the appellant had maintained that he had married PW2 and he was informed by her that she is 18 years of age. **Two**; the sections which establish the offence of rape is very specific that age of the victim matters, be it she is married or not. Under these circumstances, the prosecution's evidence was supposed to be very clear as to what exactly was PW2's age, both in the charge sheet and in the evidence.

Apart from the issue of age, as mentioned hereinabove, the second contradiction in on the blatant fact that the appellant and the victim were

married and the victim's father had consented to the same. As mentioned above this issue was raised by the appellant and supported by his father and his neighbor (DW2 and DW3) that the appellant married PW2. This defence remained unchallenged and still raises doubts on the prosecution case.

It is trite law that the standard of proof in criminal offences is beyond reasonable doubt. In **Mwita and Others v. Republic [1977] TLR 54** the Court had this to say:

> *"The appellants' duty was not to prove that their defence was true. They were simply required to raise a reasonable doubt in the mind of the magistrate and no more."*

Again, in the case of **Mohamed Haruna @ Mtupeni & Another** v. Republic, Criminal Appeal No. 25 of 2007 (unreported) the Court stated that: -

"Of course, in cases of this nature the burden of proof is always on the prosecution. The standard has always been proof beyond reasonable doubt. It is trite law that an accused person can only be convicted on the strength of the prosecution case and not on the basis of the weakness of his defence."

Consequently, I find that there are glaring doubts which taints the prosecution case. Such evidence is not strong enough to warrant conviction on the offence of rape to the appellant.

For these reasons, this appeal is allowed, conviction is quashed and sentence imposed to the appellant is hereby set aside. I accordingly order that the appellant be forthwith set at liberty unless he is detained for a different lawful cause.

Dated at MWANZA this 18th day of November, 2022.

L. J. ITEMBA
JUDGE
18/11/2022

Judgment delivered in the presence of the appellant and Ms. R. Mbuya, Senior State Attorney, for the respondent both appearing remotely via audio.

L. J. ITEMBA
JUDGE
18/11/2022