IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

MUSOMA – SUB REGISTRY

AT MUSOMA

CRIMINAL APPEAL NO. 57 OF 2021

(Appeal form the judgment/decision of the Criminal Case No. 18 of 2020

in the District Court of Musoma at Musoma)

RICKSON S/O COSMAS @ ROCKY ..... APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

JUDGMENT

7th February and 28th February, 2022

F. H. MAHIMBALI, J.:

At Nyabisare area in Tarime district, AB/ victim (her name disguised to protect her identity), a 16 years old girl and a form two student who resides with her aunt (the younger sister of her mother) started a sexual relationship with the appellant in the year 2019 and the appellant promised to marry AB. They had sexual intercourse several times until when they were caught with AB's mother and the appellant's mother. The appellant was arrested and hence the genesis of this case. The appellant was arraigned before the court and charged with two counts namely; **Rape** c/s 130 (1)(2) (e) and 131 (1) of the Penal Code **and preventing a school girl from attending school regularly** c/s

4(2) of G.N No. 280/2002 read together with s. 35 (3)(4) of the Education Act, (Cap 353 R.E 2002). The appellant denied the charge levelled against him. In proving their case the prosecution paraded five witnesses and tendered two exhibits that were admitted in court. The prosecution evidence was as follows; PW1 testified that she was born on 2/1/2003, she resides with her aunt at Nyabisarye and she is a form two student at Mogabili secondary school. She also stated that she started a relationship with the appellant (a watch man) when she went to fetch water in the year 2019. The appellant promised to marry her and they then enjoyed their sexual relationship as they were in love. On the 14/1/2020 AB left home and met the appellant at his place. They went to a guest house and they returned to the appellant's place on 15/1/2020 and they stayed there up to 20/1/2020 when the appellant's mother and her aunt found them there. AB was taken to the police and she gave her statement and was given a PF3 so as to get medical attention. The appellant was arrested on 21/1/2020 and in the presence of AB. AB went further to testify that all the time during her relationship with the appellant she did not attend school as they were cohabiting (living as husband and wife).

AB's testimony was corroborated by PW2 (AB's aunt) who stated that AB is the daughter of her sister and she was born on 2/1/2003.

When AB never returned home from school, she reported at the police station and on 16/1/2020 she was informed that AB was married to the appellant. On 20/1/2020 the appellant's mother told her that AB was living with the appellant and they went to the appellant's house and found AB sleeping. She took AB to the police station and they were given a PF3 and AB was taken to the hospital for medical attention. The appellant was arrested on 21/1/2020 in connection with this charge.

PW3's evidence was to the effect that he is the doctor who attended to AB and the final result of his report are that AB is not a virgin, she had no bruises, she was not affected by any disease, not pregnant and it showed she has been having sexual intercourse. The PF3 was admitted and marked as exhibit P1 as the appellant did not object.

PW4 who is AB's mother testified that she was informed of the incident by PW2 and PW5 who was the investigator of this case stated that he voluntarily took the statement of the appellant that he tendered the caution statement and it was admitted in court as exhibit P2 as the appellant did not object to its admission. After hearing the prosecution evidence, the court ruled that the appellant (DW1) had a case to answer. He gave his evidence under oath and stated that PW2 went to his house and locked him inside his house and the militia came to arrest

him alleging he had raped AB while he was not with AB. He also called DW2 as his witness who testified that he was at his brother's house (the appellant) where two women and people's militia came to his brother's resident and then locked him in the house and he was then arrested. DW3 testified that he was informed of the appellant's arrest.

The court after having heard the witnesses from both sides, consequently the appellant was convicted and sentenced to 30 years imprisonment in respect of the first count of rape and 3 years in respect of the second count of preventing a school girl from attending school regularly. The court ordered the sentences to run concurrently. This decision did not amuse the appellant, he has thus knocked the doors of this court through his petition of appeal that contains 5 grounds of appeal which are summarized as follows;

1. *That, the trial court erred in law and fact to rely on the testimony of PW1 which did not comply with section 127(2) of the Evidence Act, Cap 6. R.E. 2002*
2. *That, the trial magistrate erred in law and fact to convict the appellant while the age of the victim was not proved.*
3. *That, the trial Magistrate erred in law and fact to convict and sentence the appellant while there was no proof of studentship.*
4. *That, the trial magistrate erred failed to evaluate the defence evidence.*

5. *That, the trial magistrate erred in convicting and sentencing the appellant while the case was not proved beyond reasonable doubt.*

When this matter came up for hearing, the appellant was present and unrepresented while the respondent enjoyed the legal services of Mr. Malekela, learned state attorney.

Submitting in support of the appeal the appellant prayed that his grounds of appeal be adopted to form part of his appeal submission. He also stated that the prosecution case has not been properly proved. There was no proof of age of the victim, no proof that she was absent from her home from 16th January, to 20th January. The Doctor's evidence is also clear that there were no bruises or penetration to the vagina of the victim. Therefore, there was no penetration. The evidence of the victim being a student of Mogabili secondary school is wanting. He thus prayed to be acquitted.

Submitting in rebuttal Mr. Malekela learned state attorney stated as follows in respect of this appeal:

As regards to the testimony of PW1 not being in compliance with section 127 (2) of the Evidence Act, this argument does not hold water as the child stated under section 127 (2) is a child of tender age. The law has defined a child of tender age to be of 14 years and below. PW1 being of 16 years, she had no legal obligation of promising to tell truth

in court. As per page 7 of the typed proceedings the victim gave her evidence on oath, that was sufficient in law. Therefore, PW1 being not a child of tender age her evidence was properly taken as per law.

As regards to the second ground of appeal, he submitted that the age of the victim of a rape case can be proved either by the victim herself, her parents or guardian or doctor. He referred this Court to the case of **Victor Mgenzi Mlowe Vs Republic** Criminal Appeal no 354 of 2016, CAT at Iringa at page 16. As per page 8 of the typed proceedings PW1 stated to have been born on 2/01/2003. Her testimony is corroborated by PW4 (at page 11) who also stated that the victim (PW1) was born on 2/1/2003. As it is a 2019 incident, then it is proper that PW1 was 16 years in 2019 when she was testifying. Therefore, this ground of appeal is bankrupt of merit.

Responding to the 3rd ground of appeal, that the prosecution failed to establish the studentship of the victim (PW1), he concurred with that fact that there was no proof that the victim (PW1) was a student of Mogabiri secondary school. However, he begged to differ with him basing on page 8 of the typed proceedings, the appellant didn't cross examine on that fact of studentship. The law is settled that failure to cross examine on important facts means acceptance of the said fact. He reminded this Court in the case of **Bernard Thobias Joseph and Yara**

Leonard vs Republic, Criminal Appeal No 414 of 2018, CAT at Dar es Salaam. Thus, failure of the appellant to cross examine on this important fact is deemed to have accepted it and that the ground of appeal should fail as is an afterthought, thus of no any legal merit.

Turning to the fourth ground of appeal, that the trial Court failed to evaluate/analyse the evidence of defence side, he responded that it is not true as per page five of the trial court's judgment (typed). The defence was well captured and considered. However, his evidence is weaker against the prosecution's case, it didn't shake the prosecution' s case.

With the last ground of appeal, that the evidence as per testimony of PW1 – PW5 was not incriminating against him, he begged to differ with him. As per PW1, she testified how the appellant started sexual relation with her (PW1). She stated her age and how many times she had sex with the appellant at his home, guest and how she was arrested by her mother from the home of the appellant. She also stated how at the police station she was given a PF3. PW2's testimony in essence is to the effect that PW1 lied going to school instead she was meeting the appellant and how she caught her at the appellant's residence. She also testified how she took PW1 to police station and eventually to the hospital for examination.

Furthermore, PW3's testimony is to the effect that he examined PW1 and filed pf3 (exhibit PE1) which was not objected/countered by the appellant. PW4 testified that she is the parent of PW1 and that the victim's age is 16 years and how the appellant was arrested.

PW5 is the investigator of the case who investigated the whole case. It was his view that the evidence of PW1 – PW4 is well connected and that it has established the charge without any reasonable doubt.

He therefore, prayed that this appeal be dismissed.

Responding to the issue raised by the Court whether PF3 and cautioned statements were dully readout after being admitted, he replied that according to the typed proceedings at page 11, 12 and 13 established that the said exhibits were admitted and readout. However, the records establish that PF3 (exhibit PE1) was tendered by PP and not the witness. Likewise, is the tendering of exhibit PE2 which is the cautioned statement, the same has been done by the prosecutor. He therefore prayed that both exhibits (PE1 and PE2) be expunged from Court's record.

Responding to the second issue by the Court whether the evidence of each witness has been signed, he submitted that the typed records establish that section 210 (3) of CPA has been complied with. He

assumed that there has been compliance to this section even if there is no proof of signing by the trial magistrate.

In winding up his submission, he submitted that despite expunging of PE1 and PE2 records, he was comfortable that the evidence in record via the testimony of PW1, PW3 and PW4 are still intact and incriminating against the appellant. It is his humble submission that the appellant's appeal is bankrupt of no merit. He thus prayed this appeal to be dismissed.

Rejoinding to the rebuttal submission, the appellant had nothing to add and he just repeated what he prayed earlier that his appeal be allowed and that he be set at liberty by being acquitted.

Having heard the rival submission of the parties and gone through the court's records, this court will now determine if this appeal has merits.

The appellant's first complaint is that the trial magistrate erred in relying on PW1's evidence which contravened section 127(2) of the Evidence Act (supra). The respondent contested this ground. Section 127 (2) of the Evidence Act is applicable to children witnesses of tender age and that tender age as per low is 14 years and below (Section 127(4) of TEA). The victim was 16 years when the incident occurred, hence no law

was contravened. In that regard, she did not have to promise to tell the truth. I am in agreement with Mr. Malekela learned state attorney that this ground of appeal is baseless as the requirement of giving promise to tell the truth caters for children of tender age who are those of 14 years and below. That said, this ground of appeal is dismissed.

The second grief of the appellant is that the victim's age was not proved. This court is at one with the respondent that the age can be proved by the victim, parents, guardian or doctor. There a plethora of authorities on this, the case of **Victor Mgenzi Mlowe v Republic** (supra) cited by the respondent is one. In that regard, this ground is also devoid of merits.

On the third complaint, the appellant stated that the prosecution failed to establish studentship of the victim. The respondent accepted that the studentship of the victim was not established. However, he went further to state that the appellant never cross examined or objected when the victim stated that he was a student. This court is of the considered view that failure to prove a charge is a fundamental breach duty by the prosecution as provided under section 3 (a) of the TEA. It is not remedied by failure to cross – examine. The latter is only relevant on relevant facts only but not proof to fact in issue. This ground is therefore meritorious and is allowed.

On the fourth ground, the appellant's grief is that the trial court did not consider his defence. The respondent demurred this ground. I have gone through the court's record and it is my humble view that the defence case was not considered. Going through the typed judgment, the court only evaluated the prosecution's evidence and completely did not consider the defence case at all. The law is settled failure to evaluate the defence evidence is fatal and usually vitiates the conviction. See; **Nyakumwa s/o Ondare @ Okware**, Criminal Appeal no. 507 of 2019, CAT at Musoma at page 20. I am of the settled mind that the appellant did not get the benefit of a fair trial. This ground of appeal is enough to dispose of this appeal without going into the other grounds of appeal.

In exercise of its revisional jurisdiction under the provisions of section 373 of the Criminal Procedure Act, Cap 20, R.E 2019, I quash all the proceedings and conviction and set aside the sentence meted out by the trial court. As what is the way forward. I first thought of directing the trial Magistrate to re – compose his judgment so as to consider the defense testimony. Unfortunately, the trial magistrate is beyond the boarders of Mara Region. The best and speedy remedy in the circumstance is retrial for there to be fair trial. In view of the seriousness of the offence, I order that the appellant be retried by

another magistrate with vested jurisdiction and the same be done with expedition.

It is so ordered.

DATED at MUSOMA this 28th day of February, 2022.

F.H. Mahimbali

Judge

28/02/2022

Court: Judgment delivered this 28th day of February, 2022 in presence of the appellant, Mr. Frank Nchanila state attorney for the respondent and Mr. Gidion Mugoa – RMA.

Right to appeal is explained.

F.H. Mahimbali

Judge

28/02/2022