IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(BUKOBA DISTRICT REGISTRY)

AT BUKOBA

CRIMINAL APPEAL NO. 76 OF 2020

(Originating from Criminal Case No. 184 of 2019 of District Court of Karagwe at Kayanga)

JUVENARY CHRISTIAN---------- APPELLANT

VERSUS

REPUBLIC---------- ---------- RESPONDENT

JUDGEMENT

Date of Last Order: 10/02/2022

Date of Judgment: 25/02/2022

Hon. A. E. Mwipopo, J.

The appellant namely Juvenary Christian was charged and convicted by the Karagwe District Court at Kayanga for two Counts. The first Count is for the Rape offence contrary to section 130 (1), (2) (e) and section 131(1) of the Penal Code, Cap. 16 R.E. 2019; and the second count is for the offence of impregnating a Secondary School girl contrary to section 60A (1) and (3) of Education Act, Cap. 353, as amended by section 22 of the Written Laws (Miscellaneous Amendment) Act No. 4 of 2016. It was alleged that the appellant on 10th Novemberr, 2019 at Bugene Village, within Karagwe District in Kagera Region, did unlawfully have sexual intercourse with Namala Augustine aged 19 years a student of Bugene Secondary School Form II.

convicted the appellant for both offences

charged and sentenced him to serve thirty (30) years imprisonment for each offence, the sentence which runs concurrently.

The appellant was aggrieved by the decision of the trial Court and filed the present appeal against the said decision. In his petition of appeal, the appellant has raised a total of four grounds of appeal as provided hereunder:-

1. *That, the trial Court erred in law in convicting and sentencing the appellant to serve thirty years imprisonment basing on defective charge thus causing injustice to the appellant.*
2. *That, the trial Court erred in law in convicting the appellant without specifying the offence and the law under which the appellant was convicted contrary to the requirements of the law.*
3. *That, the trial Court magistrate erred in law and facts in convicting the appellant and sentencing him to thirty years imprisonment on the prosecution evidence which did not prove the offence charged beyond reasonable doubt, contrary to the law.*
4. *That, the trial Court magistrate erred in law in shifting burden of proof and convicting the appellant on the weak evidence of the appellant, contrary to the law.*

At the hearing of the appeal, the appellant was represented by Mr. Joseph Bitakwate, Advocate, while the respondent was represented by Ms. Happyness Makungu, State Attorney.

Mr. Bitakwate submitted on ground of appeal No. 1, 2 and 3 and he abandoned ground No. 4. He argued in the first ground of appeal that the trial

court erred to convict the appellant while the charge sheet was defective. The appellant was charged for two offences. The first offence was rape Contrary to Section 130 (1) (e) and Section 131 (1) of the Penal Code Cap. 16. R.E 2002; and the second offence is impregnating a school girl contrary to section 60A of the Education Act, Cap. 353 R.E 2002 amended by section 22 of the Written Laws (Miscellaneous Amendments) Act, Act No. 2 of 2016. He said that the particulars of the first offence stated that the victim was aged 19 years at the time of the incident. For that reason, the particulars of the offence differs to the Rape offence committed under section 130 (1) (2) (e) of the Penal Code. The section provides clear that the offence which the appellant was charged with is applicable where the victim is below 18 years.

In the second offence, the counsel for the appellant said that the appellant was charged under section 60A of the Education Act, Cap. 353, R.E. 2002 as amended by Act No. 2 of 2016. The said section has a total of 7 subsection. Charging the appellant under the said section without including its subsection is contrary to Section 135 (a) (ii) of the Criminal Procedure Act, Cap. 20, R.E. 2002. Section 135 (a) (ii) of Criminal Procedure Act requires the charge sheet to specify the provision of the Law which the accused person is charged with. Basing on the defects in the charge sheet, it is clear that the Appellant was not properly informed of the offences he was charged with hence he was prejudiced. The Appellant was not in position to prepare his defence on the charges he was facing. In the case

of **Jackson Venant v. Republic**, Criminal Appeal No. 118 of 2018, CAT at Bukoba (Unreported); in **Kassimu Mohamed Seleman v. Republic**, Criminal Appeal No. 157 of 2017, CAT at Mtwara, (Unreported), at page 7 – 9; and in **Alex Medard v. Republic**, Criminal Appeal No. 571 of 2017, CAT at Bukoba (Unreported), the Court of Appeal in all these cases held that the defects in the charge sheet are not cured under section 388 of the Criminal Procedure Act.

The appellant's counsel submitted in the second ground of appeal that the trial court did not specify the offence which the Appellant was convicted of and the section of the law he was convicted for. This is contrary to section 312 (2) of the Criminal Procedure Act. Thus, it was not clear as to which offence the Appellant was convicted of.

In the third ground of appeal the Counsel argued that the court convicted the appellant without the prosecution side proved the offence on the required standard. The evidence of PF3 – Exhibit P1 was not read over to court after it was admitted. For that reason the Exhibit P1 is not valid and the same has to be expunged from the proceedings. In absence of Exhibit P1 there is no evidence at all to prove that the victim was pregnant as the remaining evidence does not prove at all that the appellant is responsible for impregnating the victim. There is no evidence at all to prove that the victim was a student. As the appellant was charged for the offence of rape under section 131 (1) and (2) (e) of the Penal Code which is statutory rape, then the victim must be below 18 years of age to prove the said

offence, the evidence which is not available in the record. The counsel supported the argument with the case of **Ally Rashid v. Republic**, Criminal Appeal No. 540 of 2016, CAT at Dodoma, (Unreported), where it was held at page 5 – 6 of the judgment that where the accused is charged with a specific offence under paragraph (e) of section 130 (2) of the Penal Code, the age of the victim of rape must be proved in order to clear the doubts on the age due to the statutory consequential effect if the offence is proved. The counsel said that there cannot be a conviction for an offence under section 130 (2) (e) of the Penal Code unless there is sufficient evidence or proof that the offence of rape was committed to the victim aged below 18 years.

In reply, Ms. Makungu, State Attorney, supported the appeal for the reason that the charge sheet was incurably defective. The statement of offence and particulars of offence in the first offence differs. She said that even the evidence adduced by prosecution failed to prove the offence. In the second count, despite the omission to cite the specified subsection, the particulars of the offence were clear hence it cured the defects. However, looking at the record of proceedings of the trial court, there is no evidence to prove that the victim was student and that she was impregnated by the Appellant. In absence of such evidence it is clear that the offence of impregnating a school girl was not proved.

From submissions and the record of appeal, the Court is called upon to determine whether the present appeal has merits.

Both counsel submitted that the charge sheet instituted in the trial Court which the appellant was charged and convicted with was defective. In the first count of the charge sheet the appellant was charged for statutory rape contrary to section 130 (1) and (2) (e) of the Penal Code, Cap. 16, R.E. 2002. In proving the offence of rape under section 130(1), (2) (e) of Cap. 16 (statutory rape), the prosecution has duty to prove that the suspect has sexual intercourse with the victim a girl under the age of 18 years. The ingredients of the offence statutory rape is the presence of the penetration and the victim was aged under 18 years. The essence of proving the offence of statutory rape was stated by the Court of appeal in the case of **Issaya Renatus V. Republic**, Criminal Appeal No. 542 of 2015, Court of Appeal of Tanzania at Tabora, (Unreported), where it held at page 8 – 9 of the judgment that, I quote:-

> *"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), the more so as, under the provision, it is a requirement that the victim must be under the age of eighteen."*

However, the particulars of the offence in the 1st count stated that the victim was aged 19 years. This means that the particulars of the offence in the first count did not disclose essential ingredient of the offence that is the age of the victim was under 18 years. As it was rightly stated by the learned State Attorney, even the

evidence in record revealed that the victim was aged 19 years. For that reason the first count was incurably defective.

In the second count, the appellant was charged for the offence of impregnating a school girl contrary to section 60A of the Education Act, Cap. 353, R.E. 2002, as amended by section 22 of the Written Laws (Miscellaneous Amendment) Act No. 4 of 2016. The said section has a total of 7 subsection among which some provides for different categories of offences of marrying or impregnating a school girl. Charging the appellant under the said section without including its subsection is contrary to Section 135 (a) (ii) of the Criminal Procedure Act, Cap. 20, R.E. 2002. The defects has prejudiced the appellant as he was not properly informed of the offence he was charged with for him to prepare his defence. The Court of appeal was of the same position in the case of **Abdalla Ally v. Republic,** Criminal Appeal No. 25 of 2013, (Unreported), where it held that being found guilty on a defective charge, based on wrong and/ or non – existent provision of law, it cannot be said that the appellant was fairly tried. The remedy where the appellant was convicted for the fatally defective charge is to quash the conviction and set aside the sentence as it was held in the cited cases of **Jackson Venant v. Republic,** (Supra); in **Kassimu Mohamed Seleman v. Republic,** (Supra); and in **Alex Medard v. Republic,** (Supra). Thus, I find that the appellant was not fairly tried.

Therefore, the appeal is found to have merits and I hereby allow it. The conviction of the appellant by the trial Court in both offences is quashed and its sentence is set aside. I order for immediate release of the appellant from the prison otherwise lawfully held for a lawful cause. As the first ground of the appeal has disposed of the matter, the remaining grounds will not be determined. It is so ordered accordingly.

A.E. Mwipopo

Judge

25.02.2022

The Judgment was delivered today, this 25.02.2022 in chamber under the seal of this court in the presence of the Appellant, Appellant counsel and the Respondent's counsel.

A. E. Mwipopo

Judge

25.02.2022