

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
(BUKOBA DISTRICT REGISTRY)
AT BUKOBA
CRIMINAL APPEAL NO. 35 OF 2021

(Originating from Criminal Case No. 227 of 2019 of District Court of Biharamulo at Biharamulo)

MASHAKA KASHINJE----- APPELLANT

VERSUS

REPUBLIC----- RESPONDENT

JUDGEMENT

Date of Last Order: 08/02/2022

Date of Judgment: 18/02/2022

Hon. A. E. Mwipopo, J.

The Appellant namely Mashaka Kashinje was charged and convicted by the Biharamulo District Court for two Counts of Rape contrary to section 130 (1), (2) (e) and section 131(1) of the Penal Code, Cap. 16 R.E. 2019; and Impregnating a Primary 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 16th October, 2019 at Busiri Village, within Biharamulo District in Kagera Region, did unlawfully have sexual intercourse with Kabula Shadrack @ Belta a girl aged 13 years as result she did get pregnant. The trial Court convicted the Appellant for both offences charged

and sentenced him to serve thirty (30) years imprisonment for both offences which runs concurrently.

Aggrieved by the decision of the trial Court, the Appellant 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 voire dire test was not properly conducted to establish the truth of the witness of the tender age as per law.*
- 2. That, the prosecution side failed to prove the case beyond reasonable doubt.*
- 3. That, the honourable trial Court failed to observe that the whole prosecution's witnesses were not credible as they contradicted themselves on the evidence adduced before the Court and it was just a pack of lies against the appellant.*
- 4. That, the learned magistrate grossly erred in law and fact to accept the evidence of PW2 who is Clinical Officer, PW4 and PW5 who contradicted themselves about the age of the victim.*

The Appellant filled additional Petition of Appeal on 7th December, 2021 which contains three grounds of appeal. These grounds of appeal are as follows:-

- 1. That, the trial Court failed to consider that the evidence adduced in Court was contradictive comprising two different victims of the rape one K.S. aged 13 years and B.S. a school girl of 15 years thus indicating chaos and bias to the whole trial, rendering it a nullity.*
- 2. That, the hon. trial Court erred in law and facts to reach such decision without proof of the forensic profiling test as required by law.*

3. That, the PF3 exhibit tendered in court was procured and admitted illegally comprised contents concerning a victim which is different to the one started on the charge laid at the appellant's door thus leading injustice.

Thus, the appellant has a total of seven grounds of appeal from his petition of appeal and additional petition of appeal.

At the hearing of the appeal, the Appellant being a laymen prayed to the Court to consider all grounds of appeal in his petition. In Response, Ms. Happyness Makungu, State Attorney appearing for the Respondent, submitted that the typed proceedings in page 8 shows that Pw1 took an oath. The incident took place in 2019 after the amendment of the law on voire dire. The act of the victim to take oath means that she knows her duty to tell the truth. In the case of **Ally Ngozi v. Republic**, Criminal Appeal No. 216 of 2018, Court of Appeal of Tanzania, at Dar Es Salaam, (Unreported), the Court of Appeal agreed that the act of the victim witness of tender age to take oath means that she agreed to tell the truth.

She submitted on the issue of the failure of the prosecution to prove their case that the appellant was charged for two counts of rape and impregnating a school girl. The evidence by the victim proved that she was under 18 years and the appellant had sexual intercourse with her as a result she got pregnant. The testimony by the victim was supported by evidence adhered by her father and the PW3 who is the teacher of the victim. Thus, there was no doubt that the Appellant did rape the victim and impregnated her. In addition, the Appellant admitted in

cross examination that he impregnated the victim who was 15 years at that moment. All of these proved the offence without doubt.

The respondent's counsel argued grounds of appeal No. 3, 4 and ground No. 1 in the additional Petition of Appeal together. She said that the age of the victim was proved by the victim's clinic card and the testimony of the victim's father. There is no proof that prosecution witnesses were not telling the truth.

On the appellant's 2nd ground of appeal from his additional petition of appeal, she said that there is no proof of the forensic profiling test. She interpreted the Appellant probably was meaning there was no DNA test which was conducted to establish that the victim's child born was of the Appellant. The Counsel said on the issue that there was no need for D.N.A test as the Appellant admitted to impregnate the victim.

The last ground of appeal in the appellant's additional petition of appeal is that PF3 was admitted illegally and its content on the age of the victim contradicts that which was stated in the charge sheet thus leading to injustice. The Counsel for the Respondent said the evidence available in record proves that PF3 was properly admitted according to the law and the content thereof was read over to the court. Thus, this ground also has no merits.

In his brief rejoinder the appellant insisted that there was contradiction on the victim's age between 13 years, 14 years and 15 years.

From submissions and the record of appeal, I'm going to determine Appellant's grounds of appeal as provided in his both petition's of appeal.

The appellant's first ground of appeal is that the voire dire test was not properly conducted to establish the truth of the witness of the tender age as per law. The proceedings of the trial Court reveals that the victim testified in trial Court in January, 2020. In his testimony, the victim's father testified that the victim was 14 years at the time of trial. Under section 127 (4) of the Evidence Act, Cap. 6, R.E. 2002, the child of tender age means a child whose apparent age is not more than fourteen years. Thus, at the time the victim was testifying she was a child of tender ages. Section 127(2) of the Evidence Act provides for conditions for taking evidence of the child of tender ages. Currently, a child of tender age may give evidence without taking an oath or making an affirmation but shall before giving evidence, promise to tell the truth to the court and not to tell lies. The present position was introduced by Written Laws (Miscellaneous Amendment) Act, Act No. 4 of 2016. Prior to the amendment of section 127 (2) of the Evidence Act, Cap. 6, R.E. 2002, the trial Court was required to conduct voire dire test for the court to satisfy itself as to whether or not the child of a tender age understands the nature of oath and the duty of telling the truth; and if he is possessed of sufficient intelligence to justify the reception of his/her evidence. The said amendments allows the child of a tender age to give evidence without oath or affirmation on condition that before giving evidence such child is required to promise to tell the

truth to the court and not to tell lies. The position was stated by the Court of Appeal in the case of **Msiba Leonard Mchere Kumwaga v. Republic**, Criminal Appeal No. 550 of 2015, (unreported).

The record of proceedings shows that the victim testified on 23/01/2020 as PW1. The testimony of the victim was recorded by the trial Magistrate after taking her oath. The changes brought by 2016 amendments to section 127 (2) allows the child of tender ages to testify upon taking oath or without taking oath on promise that she has to speak the truth and not to tell lies.

In the case of **Ally Ngozi v. Republic**, (Supra), it was held that:-

".....whenever a child of tender age is examined upon oath or affirmation, that witness undertakes to speak nothing but the truth which amounts to a promise to speak the truth and not to tell lies as envisaged under section 127 (2) of the Evidence Act. Thus, in the case at hand, since the victim a child of tender age of 13 years was examined on affirmation, she had promised to speak the truth and not to tell lies and her account has evidential value."

On the basis of the above cited case, the trial Court is not required to conduct a voire dire test before taking the evidence of victim who is a child of tender ages. What has to be done is to take his evidence on oath as it was done in the present case or without taking oath on promise that she has to speak the

truth and not to tell lies. Thus, I agree with the learned State Attorney that the testimony of victim a child of tender years was properly taken by the trial Court. Thus, the first ground of appeal has no merits.

Another issue raised by the appellant is the contradiction over the age of the victim between prosecution witnesses, charge sheet and other exhibits and their credibility. This covers appellant's ground of appeal No. 3 and 4 of the petition of appeal and grounds No. 1 and 3 of the additional petition of the appeal. The particulars on these grounds of appeal is that the evidence of PW3 who is Clinical Officer, PW4 and PW5 contradicted themselves about the age of the victim and the PF3 contents concerning a victim's age is different to the one started on the charge. Replying to this issue the Respondent's Counsel said that the age of the victim was proved by the victim's clinic card and the testimony of the victim's father-PW2.

As it was stated in the above mentioned grounds of appeal, there is discrepancies in the prosecution evidence over the age of the victim. The evidence from PF3 (Exhibit B), PW4 and PW5 is that the victim was aged 13 years. The same is stated by particulars in the charge sheet. On the other hand victim's father – PW2 and clinic card of the victim shows that victim was 14 years when the incident occurred in 2019 as she was born in 01/08/2005. The evidence available proves that the age of victim in 2019 when the crime was committed she was 14 years as it was testified by her father – PW2. The same is supported by victim's

clinic Card which shows that she was born on 01/08/2005. Thus, I find that the victim was 14 years when the incident occurred.

The said contradiction between the testimony of PW4 and PW5 and content in PF3 appear to discredit the testimony of the witnesses and the exhibits. However, since the said witnesses testimony over the age of the victim is not conclusive as they depend on the information they received which was not revealed, it cannot be said that the contradictions goes to the root of their evidence. The gist of PW4 testimony is that she investigated the case, while PW5 testified that he examined the victim and found she was penetrated. For that reason, I find the discrepancies to be minor which does not affect the gist of the respective evidence. Also, the appellant was charged for statutory rape contrary to section 130(1), (2) (e) of the Penal Code, Cap. 16, R.E. 2019, the offence which is committed where the suspect has sexual intercourse with the girl aged under 18 years. The evidence adduced still proved the ingredients of the offence. The appellant was not prejudiced by the error as he defended himself and raised the defence that the victim was his wife who is fifteen years of age and she was not a school girl. This prove that he was not prejudiced in any way. Thus, the ground No. 3 and 4 of the petition of appeal and ground No. 1 and 3 in the additional petition of appeal have no merits.

The 3rd ground of appeal raised by the appellant in additional petition of appeal is about the failure to conduct D.N.A to prove that he was the father of the

victim's child. But, as it was rightly submitted by the counsel for the Respondent the evidence in record shows that the appellant admitted in his testimony during cross examination that he impregnated the victim who was school girl. For that reason, there was no dispute that the appellant impregnated the school girl. For that reason, this ground also is wanting merits.

The remaining ground in this appeal is that the prosecution failed to prove their case without doubt. It is a settled principle that the best evidence in the sexual offences comes from the victim. In the case of **Selemani Makumba v. Republic**, [2006] TLR 379 the Court of Appeal held that:-

"True evidence of rape has to come from the victim, if an adult; that there was penetration and no consent; and in case of any other woman where consent is irrelevant, that there was penetration."

The evidence available proved by testimony of the victim that she had sexual intercourse seven times with the appellant after he took her and claimed to marry her while she was still a student. The father of the victim – PW2 proved that the victim was abducted by the appellant for 14 days who alleged to have married her. Later on he found her to be pregnant and the victim told him that it was the appellant who impregnated her. The evidence from victim's father and victim's clinic card proves that the victim was under 18 years when she had sexual intercourse with the appellant. The PW3 who is the teacher of the victim together with attendance register - Exhibit P1 proves that the appellant was a student of

Iloganzala Primary School. Thus, there was no doubt that the appellant did rape the victim a school girl aged under 18 years and impregnated her. In addition, the Appellant admitted in cross examination that he impregnated the victim who was 15 years at that moment and that she was a student of Iloganzala Primary School. All of these proved both offence's against the appellant without doubt.

Therefore, I find the appeals has no merits and I hereby dismiss it.



A.E. Mwipopo

Judge

18.02.2022

The Judgment was delivered today, this 18.02.2022 in chamber under the seal of this court in the presence of the Appellant and the Respondent's counsel.



A. E. Mwipopo

Judge

18.02.2022