IN THE HIGH COURT OF TANZANIA

(IN THE DISTRICT REGISTRY)

AT MWANZA

CRIMINAL APPEAL NO. 76 OF 2021

(Arising from Resident Magistrate Court of Geita at Geita in Criminal Case No. 389 of 2019)

INNOCENT MATABA----------APPELLANT

VERSUS

THE REPUBLIC---------- RESPONDENT

JUDGMENT

Last Order: 14.3.2022

Judgment: 18.03.2022

M. MNYUKWA, J.

The Appellant, Innocent Mataba was arraigned before the Resident Magistrate's Court of Geita at Geita facing two charges. The first charge was rape contrary to sections 130(1) and (2)(e) and 131 of the Penal Code Cap 16 R.E 2019. Whereby it was alleged that, on diverse dates and times of February 2019 and September 2019 at Buselesele area within Chato District and Region of Geita, the accused did have carnal knowledge of a young girl aged 16 years. The second charge was, impregnating a

school girl contrary to section 60A and (3)(e) of the Education Act Cap 353 R.E 2002 as amended by Section 22 of the written Laws (Misc. Amendments) Act No. 2 of 2016. It was alleged that on an unknown date and time between February 2019 and August 2019 at Buselesele area within Chato District and Region of Geita, the accused impregnated a victim who was a standard V pupil at Msasa Primary school.

During the trial, the prosecution paraded 4 witnesses. PW1, the victim (name withheld) testified to be a girl of 16 years, a standard V pupil student at Msasa Primary school. That, she was taken by the appellant to Katoro and lived in the same room where the appellant found her a job at a hotel. She further stated that, they had sexual intercourse for almost three months before she found out that she was pregnant. The appellant denied being the father of the expected child. She informed the teacher and after being medically examined, she was found to be 5 months pregnant.

PW2 (Sakara Bombo) testified to be a teacher at Msasa primary school. And that, they found out about PW1's pregnancy after she went back to school as it was easily noticeable and it was confirmed after examination done at the dispensary. PW2 in cross-examination replied

that PW1 dropped out from school on 27/3/2019 and after summoning her parents they told them that PW1 had escaped to an unknown place.

PW3 (Lazaro Elias) a doctor at Lwamgasa Dispensary, testified to have examined PW1 at Lwamgasa Dispensary and filled the PF3 which was tendered and admitted as PE1. That the examination revealed that PW1 was not a virgin and she had sexual intercourse for the past four months and she was about 4 or 5 months pregnant.

PW4 (H. 8788 DC) testified to have interviewed the appellant on 8/11/2019 who was alleged to have raped PW1. That he took appellant's statement in accordance with the law and the appellant admitted to have raped PW1. PW4 tendered the appellant's caution statement which was admitted as PE2. In cross-examination, PW4 testified that the appellant was arrested on 8/11/2019 at 16:00hrs but he doesn't know when the appellant was arraigned. PW4 further denied having forced the appellant to neither know the name of PW1 nor to have beaten him during the interview. PW2 was recalled and he tendered the attendance Register which was admitted as PE3.

The defence side afforded only one witness, the appellant himself as DW1(Innocent Mataba). DW1 testified to have known PW1 as *mama lishe* who went by the name Agness by the time he went to Katoro for

football commentaries. That, his room was near Hamis's room which gave shelter for workers including PW1. That PW1 had a relative whom he knew and he aimed to marry PW1. DW1 stated that, he left Katoro on 28/7/2020. Later on around September he found PW1 living with her sister at Kayenze and she was looking for him. DW1 denied to have sexual intercourse with PW1 who told him she will tell her parents that he is the one who impregnated her. That he went on with his life until he was arrested on 6/11/2019 and brought to court on 22/11/2019.

After the hearing of the testimonies of both sides, the trial court convicted the appellant and sentenced him to thirty years (30) imprisonment with 6 strokes of the cane. The appellant being aggrieved by the verdict of the trial court has appealed to this court with two grounds of appeal as reproduced hereunder;

1. *That, the trial court erred in law and facts by convicting the appellant basing on a cautioned statement (PE2) of the appellant while the same was recorded out of time and there were no reasons stated for it being recorded out of time.*
2. *That, the trial court erred in law and fact by convicting the appellant on the offence of rape (as per charge) while the age of*

the victim, at the time of the alleged offence was committed, was uncertain and there was no tangible proof of it.

The appellant prays for the appeal to be allowed, conviction and sentence be set aside and the appellant be set free.

In this appeal, the appellant was represented by Mr. Cosmas Mataba learned counsel while Ms. Magreth Mwaseba state attorney represented the respondent. Mr. Mataba opted to submit the two grounds of appeal as appeared in the petition of appeal.

On the first ground, Mr. Mataba's focus was on the time prescribed for taking caution statement of the accused. He submitted that the caution statement was taken beyond 4 hours as prescribed by the law. He made reference to the trial court's proceeding that there was a contradiction on the evidence given by PW4 on page 22 where PW4 testified to have interrogated the appellant on 8/11/2019 at the police station. That, PW4 testimony is contrary to the appellant's testimony when he was fending himself as reflected on page 37 of the trial court's proceeding as he testified to have been arrested on 6/11/2019.

Mr. Mataba went on to submit that, the difference in these testimonies are contradictions that were supposed to be proved by the prosecution side. And that, such contradictions create doubts which is a

benefit to the appellant. That, the prosecution had a duty to bring evidence to clear such doubt as to when the appellant was arrested, interviewed and when he was arraigned to the court. That, it was expected that the detention registers of the police to be part of the exhibit. He further avers that, there is no any evidence that shows that the police requested an extension of time to interview the appellant.

Mr. Mataba further argued that, the caution statement shows the appellant was arrested on 4:00 in the evening hrs at Kayenze village in Butundwa Ward, while his statement was taken from 4:17 and ended at 5:30 in the evening. That, taking into consideration the distance between the places which is 33 km which takes up to 45 or 60 minutes by motorcycle (*boda boda)* and 30 to 40 minutes by a motor vehicle, it is difficult for the appellant to have been arrested and interviewed within that time.

It was further stated by Mr. Mataba that, the trial magistrate relied on the caution statement were the appellant confessed, however looking at page 37 of the proceeding it shows that the caution statement was not taken voluntarily. That, since the appellant denied having sexual intercourse with the victim as seen on page 37 and 38 of the trial court proceedings then, the court could have gone further instead of relying on

the caution statement. That, the prosecution was expected to have cross-examined the appellant who was alleged to have been arrested on 6/11/2019 as reflected on page 37 of trial court's proceeding.

The appellant's counsel further submitted that; all those irregularities contravene the requirement of section 50(1)(a) of the CPA Cap 20 R.E 2019. That, non-compliance of the provision renders the caution statement inadmissible, and the court needs to expunge such evidence. That, the trial court magistrate on page 9 of the judgement, referred to Exhibit PE2 which is the caution statement to convict and sentence the appellant as he had confessed to having sexual intercourse with the victim while the evidence lacks corroboration and so he prays for the court to disregard it.

Mr. Mataba further submitted that, it is a good practice that, if an accused has confessed, he has to be taken to the justice of peace to take extra-judicial statement but that was not done.

The appellant's counsel cited the case of **Azizi Abdallah V R** [1991] TLR 71 to cement on the issue of the benefit of doubt which should be in the appellant's favour. He also cited the case of **Christopher Chengula V R,** Criminal Appeal No. 215 of 210, Iringa (unreported) to stress the effect of failure to adhere to the procedure as the caution statement

became inadmissible as it is provided for under section 50 and 51 of the Criminal Procedure Act, Cap 20 R.E 2019. He also cited the case of **Said Bakari V R,** Criminal Appeal No. 422 of 2013 Tanga (unreported) where the court stated that, if there is no enough evidence that the accused was interviewed within 4 hours and no extension of time, the caution statement becomes meaningless.

Mr. Mataba concluded on the 1st ground that the caution statement was not given voluntarily as it is evidenced on page 24 of the trial court's proceeding, PW4's statement showed that the appellant did not give his caution statement voluntarily as he uttered the words "you were not forced to know the name of the victim and you were not beaten during the interview." He averred that those words raise doubt on the mind of any reasonable man that there was no voluntary.

Arguing on the second ground, Mr. Mataba submitted that the second ground lies on the age of the victim, as PW1 testified to be 16 years as well as on the preliminary hearing it was also stated that the victim was 16 years. He went on to submit that, it is the position of law that certainty of age is very important and it can be proved by birth certificate, clinical card, or evidence of the parent. However, the victim's parents did not testify on the age of the victim. He insisted that under

section 130(2)(e) of the Penal Code Cap 16 R.E 2019 proof of age is mandatory. He cited the case of **Solomon Mazara V R**, Criminal Appeal No. 136 of 2012 CAT where it was held that, the court should satisfy if the victim was under 18. That it is the prosecution's duty to prove however, in the trial court's judgement the trial magistrate stated that the accused did not challenge the age of the victim. That the burden of proof never shifts from the prosecution to the accused in criminal cases. To support his argument, he cited the case of **Andrea Francis V R**, Criminal Appeal No. 173 of 2014, where it was held that the age of the victim shown in the charge sheet is not evidence. He also cited the case of **Boniphace Kandakila Tarimo V R**, Criminal Appeal No. 350 of 2008, that the age of the victim needs to be proved by the prosecution that the victim was below 18 years of age.

He further submitted that the prosecution failed to prove the offence of rape as the victim stated in her evidence that she was impregnated by the appellant but she is silent if she was raped. That it is doubtful as the trial court convicted the appellant on rape and not impregnated while the victim was 5 months pregnant. That in trial court's judgement it was stated that the appellant and the victim had sexual intercourse three times, but that evidence is not available in trial court's proceeding. He

further submitted that the judgement reflected that on 6/11/2019, PW2 sent PW1 at Masasa Dispensary were she was found pregnant, that such piece of evidence is not available in the proceeding.

Mr. Mataba argued on the attendance register which firstly it was not admitted as an exhibit as seen on page 15 until later on page 23 of the proceeding where the same register was admitted.

He also argued on the contradiction on the date of which PW1 was taken. PW1 stated to be March 2019, preliminary hearing showing to be February 2019 while PW2 stated to be March 17, 2019 and those are contradictions which also resulted in appellant's conviction. He finalised his submission in chief by submitting that the prosecution failed to prove age of the victim and prove the case against the appellant. He, therefore, prays this court to allow the appeal and quash the conviction and set aside the sentence and set free the appellant.

In reply, Ms Mwaseba supported conviction and sentence imposed by the trial court. She started arguing on the first ground that, the appellant's counsel wants to repudiate confession in the appellate stage. She went on that the law is clear that if there is any non-compliance with the law, the same needs to be addressed when the document is tendered, if he repudiates at that stage then the court conducts an inquiry. She

referred to page 23 of the trial court's proceeding when the appellant was asked about the admissibility of the caution statement and he stated that he has no any objection.

Ms. Mwaseba further argued that, the mere assertion that the appellant was arrested on 6/11/2019 and he was tortured is just an afterthought and that should not be entertained at this stage. That, the accused was arrested on 8/11/2019 and his caution statement was taken on 8/11/2019 and the same shows that the appellant was interviewed 47 minutes from his arrest. Therefore, the prosecution did not go against section 50 of the CPA, Cap 20 R.E 2019 and all asserted by the appellant's counsel is just an afterthought and it should not be considered.

She went on to counter argue the point of distance calculated by appellant's counsel to be new evidence which this court should not consider. She also cited the case of **Amir Ramadhani V R**, Criminal Appeal No. 228 of 2005 where in page 5 it was clearly stated that, repudiation in cross examination is an afterthought and thus repudiation in appellate stage is more that an afterthought. She therefore prays for this court to dismiss the first ground of appeal.

On the second ground, it was Ms. Mwaseba's contention that, the age of the victim was certain as it was proved by herself as reflected on

page 11 of the proceedings. She referred the case of **Andrea Francis V Republic,** (supra), where on page 5, the court stated that evidence of age of the victim can be proved by the victim herself, parent or guardian, birth certificate etc.

She also submitted that; page 12 of the trial court's proceeding shows that the victim was raped as the case of **Selemani Makumba** V R [2006] TLR 379 is clear that the evidence of victim is the best evidence in rape cases. Thus, the conviction and sentence were proper. she therefore prays this ground to be dismissed and this court to rule out that the prosecution had proved its case beyond reasonable doubt.

Re-joining, Mr. Mataba submitted that, the appellant is a layman and so he admitted the cautioned statement because he does not know the procedure. He finally rests his case as he prays this court to allow this appeal.

I appreciate both counsels for their valued submissions. Moving in to determine this appeal, considering the raised grounds of appeal together with the submission tabled before me, I will answer only one issue which is whether this appeal is merited. In answering this issue, I will determine each ground as argued.

On the first ground of appeal, the appellant raises the issue of compliance of section 50 and 51 of the Criminal Procedure Act, Cap 20 R.E 2019. The section provides that:

"S.50

(1) For the purpose of this Act, the period available for interviewing a person who is in restraint in respect of an offence is-

(a) subject to paragraph (b), the basic period available for interviewing the person, that is to say, the period of four hours commencing at the time when he was taken under restraint in respect of the offence;

(b) if the basic period available for interviewing the person is extended under section 51, the basic period as so extended.

(2) in calculating a period available for interviewing a person who is under restraint in respect of an offence, there shall not be reckoned as part of that period any time while the offence refrains from interviewing the person, or causing the person to do any act connected with the investigation of the offence-

(a) while the person is, after being taken under restraint, being conveyed to a police station or other place for any purpose connected with the investigation;

(b) for the purpose of –

(i) enabling the person to arrange, or attempt to arrange, for the attendance of a lawyer;

(ii) enabling the police officer to communicate, or attempt to communicate with any person whom he is required by section 54 to communicate in connection with the investigation of the offence;

(iii) enabling the person to communicate, or attempt to communicate with any person with whom he is, under this Act, entitled to communicate; or

(iv) arrange, or attempt to arrange, for the attendance of a person who, under the provisions of this Act is required to be present during an interview with the person under restraint or while the person under restraint is doing an act in connection with the investigation;

(c) while awaiting the arrival of a person referred to in subparagraph (iv) of paragraph (b); or

(d) while the person under restraint is consulting with a lawyer"

From the provisions, it is a mandatory requirement that the caution statement must be taken within 4 hours since the arrest of the accused and if otherwise then S. 51 has to be observed. That is to say, the provisions of sections 50 and 51 of the CPA call for strict compliance as it was observed in the case of **Anold Loishie @Leshai V R,** Criminal Appeal No. 249 of 2017.

it is also a settled law that a caution statement that has not complied with the provision of section 50 and 51 of the CPA, Cap 20 R.E 2019 is inadmissible as it was held in the case of **Lubinza Mabula and 2 others V R**, Criminal Appeal No. 226 of 2016 where the court said

"It is now settled law that non-compliance with the provisions of section 50(1) (a) of the CPA is a fundamental irregularity that goes to the root of the matter and renders the illegality obtained evidence inadmissible and one that cannot be acted upon by the court"

The court also cited the cases of **Mkwavi s/o Njeti versus Republic**, Criminal Appeal No. 301 of 2015 and **Said Bakari V Republic,** Criminal Appeal No. 422 of 2013 (all unreported). The importance of observing sections 50 and 51 of the CPA was also shown in the case of **Ngasa Sita @ Mabundu V Republic**, Criminal Appeal No. 254 of 2017, where the court scrutinized the exception of 4 hours as provided for under section 50(2) of the CPA.

Coming to our case at hand, Mr. Mataba has asserted that the caution statement which was admitted as Exhibit PE 2 was taken out of four hours. From the trial court's records, PW4 who took the appellant's caution statement testified that he interviewed the appellant on 8/11/2019 the same day he was arrested. His testimony was also corroborated with the caution statement which showed that the appellant was interviewed on 8/11/2019 from 16:47 hrs up to 17:30 hrs. Upon further going through the caution statement itself, the appellant stated that he was arrested on 8/11/2019 at 16:00hrs contrary to what he stated during his defence that he was arrested on 6/11/2019.

It is also my considered view that, the evidence given by PW4 was well corroborated by the appellant's confession that he was arrested on 8/11/2019 at 16:00 hrs and not otherwise. I will join hands with Ms.

Mwaseba that the appellant's assertion that he was arrested on 6/11/2019 was just a mere assertion that lacks proof to raise a reasonable doubt.

It is apparent that in this ground the counsel raised other facts that were not raised in the trial court and even add other issues that were not raised in the memorandum of appeal. This can be seen in his argument about the calculated distance and time from where and when the appellant was arrested and to when he arrived at the police station. I agree with Ms Mwaseba that to entertain such assertion will require new evidence of which I have no intention to adhere.

Not only that, Mr. Mataba also raised the issue of voluntariness of obtaining the caution statement, I will also not let myself discuss the assertion as I have said earlier that, the assertion was not part of the raised ground of appeal and so it contravenes the provisions of section 366(1) of CPA, Cap 20 R.E 2019 which requires the appeal to be heard on matters raised on a petition of appeal and therefore that was just an afterthought. Therefore, the first ground of appeal lacks merit, and it is hereby dismissed.

Moving on to the second ground of appeal, in sexual offences like the one in which the appellant is charged with, the age of the victim is very important. As the age helps to determine the appropriate sentence

of the offender. And the prosecution is always at the burden of proving the age of the victim. The age of the victim can be proved by the victim herself, the parent or guardian, the birth certificate or by a medical practitioner. See the case of **Elia John V Republic**, Criminal Appeal No. 306 of 2016 and **Isaya Renatus V Republic**, Criminal Appeal No. 542 of 2015. Failure to prove the victim's age renders the charge not to be proved to the required standard as it was said in the case of **Frank Benson Msongole V Republic**, Criminal Appeal No. 72'A 'of 2016.

Mr. Mataba has argued that the victim's age was not proved as the victim's parent did not testify that the victim was 16 years old. It is true that only the victim had testified in respect of her age. And it is also true that the age of the victim as stated on the charge sheet is not evidence as it was held in the cited case of **Andrea Francis** (supra). However, it is my considered view that the victim testimony was enough to prove her age as it has already been seen in cited cases above that even the victim can give evidence regarding her age. Taking into consideration that the victim was on oath and besides stating her age, when introducing herself she also stated that she was 16 after she was sworn. Also, in reminder, in rape cases the evidence that comes from the victim suffice to secure a conviction as it is considered to be the best evidence in rape cases. This

position was celebrated in the famous case of **Selemani Makumba** (supra) as it was argued by Ms. Mwaseba.

Additionally, the court of appeal in the case of **Vedastus Emmanuel @Nkwaya V R,** Criminal Appeal No. 519 of 2017 also held that, the evidence given by the victim sufficed to prove the offence of rape, as well as to the age of the victim. For that reason, I have no reason to fault the trial court's verdict based on the age of the victim where the trial court on page 6 of its judgement found that the age was properly proved by the victim herself.

From this analysis I find that this appeal lack merit and so I hereby dismiss it in its entirety, I hereby uphold the conviction and sentence by the trial court.

It is so ordered.

Right of appeal fully explained.

M. MNYUKWA
JUDGE
18/3/2022

Court: Judgement delivered in the presence of the parties' counsel

M. MNYUKWA
JUDGE
18/3/2022