**IN THE HIGH COURT OF TANZANIA**

**MWANZA DISTRICT REGISTRY**

**AT MWANZA**

**HC. CRIMINAL APPEAL No. 168 OF 2021**

*(Originating from Criminal case No. 102 of 2021 of the District Court of Magu at Magu)*

**NZUMBI GEORGE @ ROBERT----------APPELLANT**

**VERSUS**

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

**JUDGMENT**

*Last Order: 23.02.2022*

*Ruling date: 07.03.2022*

**M.MNYUKWA, J.**

Initially, Nzumbi George @ Robert, the appellant, was charged before the District Court of Magu at Magu for the offence of rape contrary to sections 130(1), (2)(e) and 131(1) of the Penal Code [Cap 16 R.E. 2019]. The case for the prosecution at the trial was that; on the 12th day of August 2021 at about 17:00 Hrs at Kipeja village within Magu District, the appellant had carnal knowledge to one young girl aged 16 years, a

student of standard seven at Nyakilungi Primary school who, for purposes of concealing her identity will be referred to, in this judgment, as either the victim or PW1.

The appellant denied the charge, so the prosecution called a total of five witnesses, who proved the case against the appellant beyond a reasonable doubt according to the judgment of the trial court. The accused was accordingly convicted followed by a statutory minimum sentence of thirty years imprisonment. Dissatisfied, the accused has lodged the present appeal before this court appealing both for the conviction and the sentence.

The appellant fronted 6 grounds of appeal thus: -

1. *That the trial magistrate erred in law and fact to convict and sentence the appellant without the case being proved beyond reasonable doubt as required by law.*
2. *That the trial magistrate erred in law and fact to convict and sentence the appellant without any evidence of the police officer who investigates the offence and prove through his investigation that the appellant committed the alleged offence.*
3. *That, there was no any electronic message (SMS) in the victim's cell phone which was tendered as an exhibit before the court to show that the appellant have a sexual relationship with the victim.*
4. *That the trial magistrate erred in law and fact to convict and sentence the appellant without any phone number which was*

*registered for the name of the appellant which tendered as an exhibit to show that he communicates with the victim.*

5. *That the trial magistrate erred in law and fact to convict and sentence the appellant without considering the appellant's cross-examination to the victim on the matter of the identification of the place in which sexual intercourse took place.*
6. *That the PF3 does not disclose the committed offence after the medical test like spams which remained in the vagina.*

It goes briefly as stated by the PW1 that, she was a standard VII student of the Nyalikengo primary school and lived with her parents. The accused, a mechanic was her lover who, way back in August 2021 stopped her by the road and asked for her phone number and he called her and told her that he was in love with her. They arranged to meet and she visited the accused in his room which she describes as having only the mattress. The victim's parents found the phone and retrieved the conversation between the victim and the accused and decided to report the matter to the police station and the accused was apprehended and charged for rape.

The appeal was heard by way of oral submissions where the appellant appeared in person, unrepresented while the republic had the service of Ms. Magreth Mwaseba, Senior State Attorney (SSA). When asked to elaborate on his grounds of appeal, the appellant requested that

the Court be pleased to permit the learned Senior State Attorney to reply to his grounds of appeal, so that, if necessary, he would re-join.

Following that prayer, the respondent was the first to submit and she straight support the conviction and sentence imposed by the trial court to the appellant.

On the first ground, she avers that the case was proved beyond doubts. Referring to the evidence of PW1 on page 6 of the trial court judgment, she insisted that the case was proved beyond doubts as the appellant was the lover to PW1 for a period of time and PW1 was familiar to the appellant. She insisted that, the offence is the statutory rape, as PW1 was 16 years old, which was also rightly proved by PW2.

She went on that; the case was proved to hilt for PW1 managed to describe appellant's room when she claims they had carnal knowledge. Insisting, she cited the case of **Suleiman Makumba vs Republic,** [2006] TLR 379 (unreported) quoted in the case of **Minani Evarist vs Republic,** Criminal Appeal No. 124 of 2017 (unreported) which held that the true evidence comes from the victim. She therefore, insists that the cited case is relevant to the case at hand for the evidence of the victim proved the offence against the appellant. He went further that, the

evidence of PW5 corroborated the evidence of PW1 as reflected on page 14. She insisted that the case was proved to hilt.

On the 2nd ground of appeal, she insisted that the assertion by the appellant that the case was not proved for the failure to call a police officer who investigated the offence is unfound insisting that the best evidence comes from the victim. She therefore, maintains that the case was proved and therefore prays this ground to be dismissed.

On the 3rd and 4th ground of appeal, she refuted the assertion by the appellant maintaining that in rape cases, the best evidence is from the victim and when the court believes the evidence of PW1 to be credible, it is enough to convict the appellant. She therefore, prays the grounds to be dismissed.

On the 5th ground of appeal, that the trial magistrate erred in law and fact to convict and sentence the appellant without considering the appellant's cross-examination to the victim on the matter of the identification of the place which sexual intercourse takes place, she refuted the assertion claiming that, in rape cases what is required to be proved is penetration, as the victim was below the age of 18 years, she was not placed to form consent. She insisted that, since penetration was

proved, the offence of rape was proved and the appellant was properly convicted at the trial court.

On the 6th ground that the PF3 does not disclose the committed offence after the medical test like sperms which remained in the vagina, Ms Magreth Mwaseba insisted that the victim was not immediately sent to the hospital so it was difficult to find sperms but she maintains that in rape cases, penetration however slight suffice to prove the offence of rape. She therefore, prays this ground to be dismissed for lack of merit. She maintains that the appellant was properly convicted and sentenced.

In rejoinder, the appellant alleged to be unaware of the offence for which he was serving the sentence in prison. He beseeched this court to critically review his grounds of appeal and fault the decision of the trial court and ultimately set him free.

After both parties' submissions, this court remains with one issue as to whether this appeal is merited. Going to the grounds of appeal as fronted by the appellant, I found that all the six fronted grounds of appeal could be held in the 1st ground of appeal which I will proceed to determine as to *whether the trial magistrate erred in law and in fact to convict the appellant without the case being proved beyond reasonable doubts as required by the law.*

At the outset, and to put myself in a proper alignment as I start to determine the appeal, I wish to highlight one underlying feature of the offence for which the appellant was charged. According to the charge sheet, the appellant was charged under sections 130(1) and (2)(e) and 131(1) of the Penal Code, Cap 16 R.E 2019. That means the appellant was charged with the offence of statutory rape, which is described generally as having carnal knowledge of a girl or woman of below 18 years. The unique character of the offence is that, the defence of consent of the victim is not available to the suspect. Section 130(I)(2)(e) of the Penal Code, which creates the offence of statutory rape for which the appellant was charged provides as follows:

> *"(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) to (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."*

In an endeavour to describe it, this Court in the case of **George Claud Kasanda v. R,** Criminal Appeal No. 376 of 2017 (unreported), had this to say:

> *"In essence that provision (section 130(2)(e) of the Penal Code) creates an offence now famously referred to as statutory rape. It is termed so for a simple reason that it is an offence to have carnal knowledge of a girl who is below 18 years whether or not there is consent. In that sense age is of great essence in proving such an offence."*

In this appeal, the appellant was charged for that offence because according to the charge sheet, the victim was a young girl of 16 years at the time the offence was committed on 12th August 2021. It goes thus, proof of age in statutory rape is of great essence, without which the case must fail.

On the aspect of age in statutory rape cases, the Court of Appeal in the case of **Solomon Mazala v. Republic,** Criminal Appeal No. 136 of 2012 (unreported), which was quoted with authority in the case of **Raphael Ideje @ Mwanahapa Vs The Director Of Public Prosecutions, Criminal** Appeal No. 230 Of 2019 (decided on 22 Feb 2022) it was held that:

*"The cited provision of law makes it mandatory that before a conviction is grounded in terms of section 130(2)(e), above, there must be tangible proof that the age of the victim was under eighteen years at the time of the commission of the offence..."*

(See also: **Alyoce Maridadi v. R,** Criminal Appeal No. 208 of 2016 and **Alex Ndendya v. R,** Criminal Appeal No. 340 of 2017 (all unreported)

Going to the appeal at hand, the appellant did not dispute the age of the victim as to whether she was not below the age of 18 or else her age was not proved. As it is evident in the court records, the age of PW1 was rightly stated to be 16 years and was well stated by PW2, the parent of the PW1. As stated in the case of **Isaya Renatus v. Republic,** Criminal Appeal No. 542 of 2015 CAT (unreported), which held that:

*"We are keenly conscious of the fact that age is of great essence in establishing the offence of statutory rape under section 130(l)(2)(e)...the evidence as to proof of age may be given by the victim relative, parent; a medical practitioner or where available, by the production of a birth certificate."*

In this case, through the evidence of PW1 and PW2, I am settled that the age of the victim was proved to be 16 years of age and therefore the offence of statutory rape was properly before the court.

Again, taking into consideration that the age of the victim was undisputed, that it was below 18 years and could not form free consent, it is a basic requirement that penetration must be proved to show that the act of sexual intercourse really occurred. The same was stated in the case of **Mathayo Ngalya@ Shaban V Republic,** Criminal Appeal No. 170 of 2006 that it was held that: -

> *"...For the offence of rape, it is of utmost importance to lead evidence of penetration and not simply to give a general statement alleging that rape was committed without elaborating what actually took place. It is the duty of the prosecution and the court to ensure that the witness gives the relevant evidence which proves the offence"*

In the evidence on record, it was the evidence of PW1 who testified that she had sexual intercourse on different dates, the evidence which was also corroborated by the evidence of PW5 a medical doctor from Magu hospital who observed the victim and his remarks as stated on the PF3 exhibit "C1" were that "*the pupil examined and confirmed that she already practised sexual intercourse for a long time...*".

From what is stated in evidence by PW1 and PW5, and exhibit "C1" it is with no doubt that the victim was penetrated, and based on her age, being it was the act of a man, it was an offence of a statutory rape.

It is from this point that I proceed to subject the evidence on record to test as against the grounds so advanced by the appellant as to whether the case was proved beyond reasonable doubts as required by the law against him.

Based on the genesis of the accusation of the appellant being that PW2 and PW3 found the mobile phone used by the victim, which on examining the SMS they discovered that there was communication between PW1 and the appellant. That the appellant was convincing the victim to visit his house and suspecting that there was a love affairs. PW2 and PW3 trapped the appellant who was managed to be apprehended and upon interrogation of both PW1 and the appellant, the appellant was accused of the offence of rape, arraigned and when the matter was heard, the appellant was consequently convicted and sentenced. He insisted that, the case was not proved beyond reasonable doubts and on his 3rd and 4th grounds of appeal alleged that, the prosecution did not bring before the court evidence of SMS from the victim's phone implicating the appellant

to have sexual intercourse with the victim and, or the appellant phone number to confirm it was the appellant in exclusion of another.

I agree with Ms. Mwaseba on the cited cases of **Selemen Makumba vs Republic** (supra) quoted in the case of **Minani Evarist vs Republic,** (supra) that in rape cases, the best evidence is that of the victim but further, that evidence alone is not absolute based on the circumstance of each case. In this case, it is undisputed that PW1 was below the age of 18 as it was proved by PW5, a medical doctor with exhibit C1 that she practised sexual intercourse, therefore, there was a proof of penetration but the question remain as to who did penetrate PW1 who was below the age of 18 to constitute an offence of rape.

The evidence of PW2, PW3 and PW6 testified to have found the SMS in the mobile phone and how they managed to track the appellant to procure his arrest. The appellant denied having raped the victim before the police station and to the trial court as he now denies in this appeal. Based on the evidence on record, I am settled that the offence of statutory rape can not only be proved by proof of age and penetration alone, rather, there must be a piece of clear evidence that directly implicates the accused to having committed the offence.

First, for the circumstance of this case being that the accusation was a result of the text messages claiming to be sent by the appellant, it was expected for the prosecution to present the SMS printout to prove the same against the appellant, but this was not done.

Secondly, based on the doubt raised by the appellant that he did not make communications to PW1, the appellant's mobile number was to be presented for verification to clear doubt that it was the appellant who was communicating to the victim convincing her to have sexual intercourse while she was below the age of 18 and not able to make free consent.

Thirdly, PW1 testified before the trial court that they had love affairs with the appellant and on different occasions, she visited the appellant's room and they used to have sexual intercourse and she managed to describe the room of the appellant that there was a mattress only. I find the 2nd and 5th ground of appeal genuine in this regard. The prosecution though investigated the matter, fail to prove before the court that the room which was described by PW1 was indeed the room of the accused.

In criminal cases, it is settled that the prosecution is duty bound to prove the case beyond reasonable doubts and a slight doubt is in favour of the accused. The same was insisted in the case of **Joseph John**

**Makune vs Republic**, [1986] TLR 44 quoted with authority in **Hasan Rashid Gomela vs Republic,** Criminal appeal No. 271 of 2018 CAT that the burden of proof in criminal cases lies squarely to the prosecution side and are required to prove the case beyond reasonable doubts against the accused person. That being the case, it is clear that prosecution failed to prove the case. In the case of **Woolmington vs Director of Public Prosecution** [1935] AC and **Mohamed Said Matula vs Republic** [1995] TLR 3 among others, the principle was expounded in the following terms;

> *"While the prosecution must prove the guilt of the prisoner, there is no such burden laid down on the prisoner to prove his innocence and it is sufficient for him to raise a doubt as to his guilt; he is not bound to satisfy the jury of his innocence...through the English Criminal Law, one golden thread is always to be seen, that it is the duty of the prosecuting to prove the prisoners guilt".*

In regard of what has been discussed above, the prosecution failed to show and prove in their evidence that, it was the accused who raped the victim for the appellant managed to raise doubts as to his guiltiness. For the above reasons, as rightly contended by the appellant, the appeal

is meritorious and I thus allow the appeal. Consequently, i quash the conviction, set aside the sentence and orders. The appellant is to be released from custody immediately unless otherwise lawfully held.

It is so ordered.

The right of appeal explained to the parties


**M.MNYUKWA**
**JUDGE**
**7/3/2022**

**Court:** Judgement delivered in the presence of the appellant and the counsel for the respondent.

**M.MNYUKWA**
**JUDGE**
**7/3/2022**