IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

IN THE DISTRICT REGISTRY OF MWANZA

AT MWANZA

CRIMINAL APPEAL NO 174 OF 2021

(Arising from Criminal Case No. 95 of 2021, the District Court of Misungwi at Misungwi)

SUMAHILI S/O ISMAIL@ IBRAHIM......................APPELLANT

VERSUS

THE REPUBLIC..RESPONDENT

JUDGMENT

Date of last Order: 24.02.2022
Date of Judgement: 14.03.2022

M. MNYUKWA, J.

The appellant was charged with the offence of rape contrary to section 130 (1) (2) 22(e) and section 131(1) of the Penal Code (Cap 16 R.E 2019) in the district court of Misungwi at Misungwi. The prosecution side alleged that on the 24th day of July, 2021 at daytime in Fela village within Misungwi District in Mwanza region, the appellant had carnal knowledge with a girl aged sixteen (16) years (the victim or PW1) without her consent. The appellant pleaded not guilty to the offence. Hence, the

prosecution side brought two witnesses to prove its case, The prosecution side also tendered one exhibit to prove the case. On the other hand, the appellant fended himself without any exhibit.

After a full trial, the appellant was found guilty as charged and sentenced to thirty years imprisonment. Being aggrieved, the appellant lodged this appeal with ten grounds of appeal as follows:

1. *That the trial Court grossly erred in law and fact to convict and sentence the appellant without credible and cogent evidence adduced by the prosecution side which can constitute the offence of rape.*
2. *That the layman and indignant appellant was neither represented by the lawyer or counsel under Legal Aid Act nor been informed of that right of any stage at the police station and in Court, the act which led to unfair trial and inequality of law.*
3. *That the trial court erred in law when acting on the evidence of PW1 to convict the appellant while was not properly scrutinized as the evidence of rape can be proved by evidence of penetration and when you pursue the evidence of PW1 no anywhere is addressed the issue of penetration*

4. *That the appellant was convicted with no corroboration evidence to support the weak evidence adduced by PW1, the victim.*

5. *That the evidence of PW2 Tumaini s/o Kajiru the doctor was contained nothing weight to implicate the appellant in raping PW1 because the appellant was not examined by that doctor to prove that the sperms and bruises found in the vagina of the victim was relating and produced by appellant and not otherwise.*

6. *That in the absence of the alleged two men who witnessed the victim PW1 being raped by appellant in the flagranto delicto not paraded in Court as witnesses renders and put the evidence of PW1 in suspect which lack merit and should not be acted in convicting the appellant.*

7. *That the trial court erred in law to convict the appellant basing on the weak evidence of prosecution evidence which failed to connect the appellant in the offence charged with.*

8. *That the trial court turned a blind eye for failure to note that there was no direct and straight evidence which can assist the Court to convict the appellant as the person who raped the victim PW1.*

9. *That the trial court erred in law to convict the appellant without analyze and considered the weight of the defence.*

10. *That the trial court erred in law and fact to convict and sentence the appellant while the prosecution case did not prove the case beyond reasonable doubts.*

During the hearing of the appeal, the appellant appeared in person, unrepresented while Ms. Magreth Mwaseba, learned state attorney appeared for the Republic, the respondent.

When the appellant was asked to argue on his appeal, he chose to let the learned state attorney to respond to the grounds of appeal first. He nevertheless reserved his right of rejoinder in case the need would arise.

Submitting altogether on the 1st, 4th, 6th and 10th grounds of appeal the learned state attorney averred that the appellant alleged that, the prosecution side failed to prove the case on the required standard. When challenging the appellant's ground of appeal, Ms. Mwaseba submitted that the law is clear that for the offence of rape to be proved, it should be established that the victim was penetrated even if there was slight penetration and that if the victim is below the age of 18 the issue of consent is immaterial.

She went on that, in our case at hand the evidence shows that the appellant had sexual intercourse with the victim in the afternoon hours and that, the duo were familiar to each other and the victim managed to identify the appellant in court. She added that the victim's evidence was corroborated with the evidence of the medical doctor who examined her and found that there were bruises and the victim's vagina was penetrated by the blunt object. She refers this court to the case of **Omari Kijuu vs R,** Criminal Appeal No 39 of 2005 to support her argument. She retires on these grounds praying this Court to dismiss the appellant's 1st, 4th, 6th and 10th grounds of appeal since the case was proved beyond a reasonable doubt.

On the second ground, the learned state attorney submitted that the appellant was not denied to engage or hire an advocate. She added that, rape cases are not among the cases in which the court or the government is obligated to provide legal assistance. Thus, she prayed this ground to be dismissed as it lacks merit.

Arguing on the third ground, she averred that the evidence adduced at the trial court was watertight since PW1 managed to prove penetration which is corroborated with PF3. She, therefore, prayed this ground to be dismissed.

On the fifth ground, the learned state attorney submitted that it is not the requirement of the law to medically examine the sperm of the appellant because it is not one of the requirements in proving rape cases. Thus, she prayed this ground to be dismissed too.

Arguing jointly on the 7th and 8th grounds of appeal, she claimed that it was the victim who named and identified the appellant as the one who committed the offence of rape to her. She added that it is a settled position of law that the offence of rape can be proved even by a single witness. She prayed this court to dismiss these grounds because they lack merit.

On the 9th ground, she stated that the defence evidence was well considered but the court ruled that it was not watertight to set him free. She retires her submission by praying the appeal to be dismissed, the conviction and sentence of the trial court to be upheld.

Responding, the appellant prayed to adopt his grounds of appeal to form part of his submission. He briefly submitted that the victim testified that, when the offence of rape was committed, two witnesses witnessed the commission of the offence but those witnesses were not called to testify before the trial court. He claimed that, he was sent to the police

station for civil cases for failure to pay his outstanding bill of meal to *Mama Mhina* as he was not paid by his employer on time.

He retires his submission by stating that, the penetration into the victim's vagina by a blunt object was not his penis as he was not medically examined by the doctor. He, therefore, prayed the appeal to be allowed.

Upon determining this appeal, I will respond by arguing altogether the 1st, 4th,6th and 10th grounds of appeal, and for the reason to be stated in this judgement, I will not entertain the remaining grounds.

The records reveal that on the above-mentioned grounds of appeal, the appellant alleged that the prosecution side failed to prove the offence on the required standard.

In our case at hand, the appellant was charged and convicted with the offence of rape of a girl below the age of 18 years under section 130(1) and (2) (e) of the Penal Code, Cap 16 R.E 2019. The offence is popularly known as statutory rape. For this offence to be sufficiently proved, the prosecution must prove two important things; that there was penetration by the accused into the victim's vagina and the victim was below the age of 18 years. The issue of consent to this offence is immaterial as it is a settled position of law that the child below the age of 18 years cannot consent.

The issue on the emphasis of proving the age of the victim have been stated in various decisions of the Court of Appeal including the case of **Robert Andondile Komba vs DPP**, Criminal Appeal No 465 of 2017, CAT at Mbeya. In our case at hand, be it an offence of a statutory rape, it is important to subject the evidence of the prosecution so as to test as to whether the age of the victim was established and sufficiently proved to be that of below the age of 18.

In respect of the age of the victim, the Court of Appeal of Tanzania 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)

Rutoyo Richard v Republic, Criminal Appeal No 114 of 2017, CAT at Mwanza)

Going to the appeal at hand, it is neither PW1 nor PW2 who stated the age of the victim to be below the age of 18 years for the offence of statutory rape to stand. As stated in the case of **Isaya Renatus v. Republic,** Criminal Appeal No. 542 of 2015 CAT (unreported), 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."*

The same was also held in the case of **George Claude Kasanda v. Director of Public Prosecutions**, Criminal Appeal No. 376 of 2017 clearly illustrated that settled position of the law as it was stated that:-

> *"Before we proceed, we find it opportune to remind the courts below and the prosecution that preliminary answers and particulars given prior to giving evidence are not part of the evidence as the same are not given on oath Instead, they serve as general information*

(See: **Simba Nyangura v. Republic,** Criminal Appeal No. 144 of 2008 (unreported), **Nalogwa John v. Republic,** Criminal Appeal No.588 of 2015 (unreported).

In our case at hand, the victim did not disclose her age at the time she was giving evidence and the trial magistrate erred in relying on the charge sheet to establish the age of the victim. In the case of **Andrea Fransis vs Republic** Criminal Appeal No. 173 of 2014 CAT it was stated that;

> *"it is trite law that the citation in charge sheet relating to the age of the accused person is not evidence. Likewise, the citation by the magistrate regarding the age of the witness before giving evidence is not evidence of the persons age....in absence of evidence in the above effect it will be evident that the offence under section 130(2)(e) was not proved beyond reasonable doubts".*

What comes out clearly from the perusal of the record is that in the charge sheet, particulars given by the victim and the PF3 taken indicated that the appellant was 16 years old. Guided by the above authorities, that was insufficient to prove the age of the victim. I reiterate that cogent evidence relating to age from the victim may be given by the parent, close

relative, a victim, close friend and should be under oath as the law requires. In our instant case, none of the above was proved to be complied with and therefore left the age of the victim unproved.

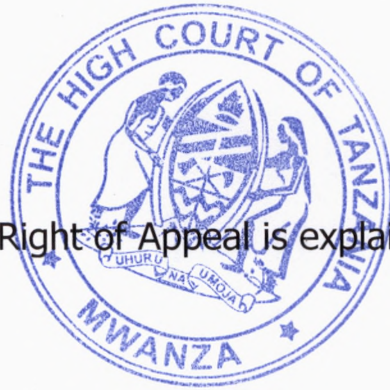
Based on what have been stated above, it goes that in our case at hand the age of the victim is the determining factor in establishing the offence as the evidence must be positively laid out to disclose the age of the victim. The offence of statutory rape cannot stand where age of the victim, which is one of the crucial ingredients of the offence, is not proved. It stands therefore, in our case at hand, the appellant's conviction of the offence was therefore not sound in law. **(See also Frenk Benson Msongole Appellant vs The Republic** Criminal Appeal No. 72'a' Of 2016).

Since the age of the victim which is one of the essential ingredients in proving the offence which the appellant was convicted with, and the same was not proved by the prosecution side, I don't see the reason to entertain other grounds of appeal as the 1st, 4th, 6th and 10th grounds dispose the appeal.

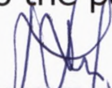
For the above reason, therefore, I allow the appeal albeit for a reason that the offence was not properly proved before the court for the failure to establish the age of the victim for the offence to qualify as a statutory

rape. In regard, I proceed to quash the conviction and set aside the sentence. The appellant to be released from the prison unless lawfully held.

M.MNYUKWA
JUDGE
14/03/2022



Right of Appeal is explained to the parties.



M.MNYUKWA
JUDGE
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Court: Judgement delivered in the presence of the parties.

M.MNYUKWA
JUDGE
14/03/2022