IN THE UNITED REPUBLIC OF TANZANIA

JUDICIARY

IN THE HIGH COURT OF TANZANIA

SUMBAWANGA DISTRICT REGISTRY

AT SUMBAWANGA

DC CRIMINAL APPEAL NO. 77 OF 2020

(Originating from Criminal Case No. 175 of 2019 Nkasi District Court at Namanyere)

ALLY S/O KIBWE..... ..... APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

JUDGEMENT

Date of Last Order: 07/10/ 2021
Date of Judgement: 01/03/ 2022

NDUNGURU, J

The accused person, now the appellant Ally Kibwe was arraigned and charged in the District Court of Nkasi in Criminal Case No. 175 of 2019 with two counts, one count of rape contrary to **section 130 (1)** and **2(e)** and **section 131 (1)** of the Penal Code, Cap 16 RE 2019. Second count of impregnating a school girl contrary to **section 60 A (3)** of the Education Act as amended by section 22 of Miscellaneous amendment Act No. 4 of 2016.

It was alleged that as regards the first count that, on between 1st day of August and 15th day of August, 2018 at Ninde village within Nkasi District in Rukwa Region, accused person did have carnal knowledge to one Deborah d/o Joshua aged 16 years a pupil of Mkinga Primary School.

It was alleged that as regards the second count that on between 1st August and 15th August, 2018 at Ninde village within Nkasi District in Rukwa Region, accused person after having knowledge with Deborah d/o Joshia, impregnated her.

The accused person denied charges in respect of both counts against him and to prove the allegation, prosecution called four witnesses along with two exhibits while the appellant defended himself. Trial Court found accused person had a case to answer during closure of prosecution case. After full trial, the trial court found the appellant guilty of both counts and thereafter convicted him and consequently sentenced to serve a custodial sentence of thirty years in respect of the first count and a custodial sentence of twenty years for the second count.

Aggrieved by the conviction and sentence, appellant has preferred the present appeal based on four grounds of appeal, which this court compounded them to one ground, namely:

1. *That the Trial Court erred at law for convicting and sentencing the appellant of the case which was not proved beyond reasonable doubt as required by law.*

When the appeal was called for hearing the appellant appeared in person unrepresented whereas the Republic was represented by Ms. Irene Mwabeza, learned state attorney.

The appellant being a layperson prayed for this court to remind him of his grounds of appeal of which the court did. The appellant submitted that the grounds of appeal are self-explanatory and he prayed to adopt them and his appeal be granted.

On her part, Ms. Irene Mwabeza submitted that she has gone through the appellant's appeal, the record of appeal and judgment, she therefore supported the appellant's appeal on the following grounds: -

That PW2 tendered PF3 and PW4 tendered cautioned statement of the appellant, however all these exhibits were tendered in court without being read out in court. failure to read them causes miscarriage of justice to the appellant as per the case of **Edgar Kayumba vs DPP**, Criminal Appeal No. 498 of 2017 CAT Mbeya, unreported.

The effect of non-reading of the above exhibit is to expunge them from the records. If they are expunged the remaining evidence is that of PW1. That there was no any evidence to prove the age of the victim. She agreed to the ground two of the appellant that there is no evidence from the prosecution which proved age of the victim as per the case of **George Claud Kasanda vs DPP**, Criminal Appeal No. 378 of CAT, Mbeya at page 10-11.

Ms. Mwabeza was of the position that failure to prove age of the victim vitiates the prosecution case and she cannot pray for the retrial as per the above decided case.

Ms Mwabeza submitted that having expunged PF3 and cautioned statement, she finds that the remaining evidence was weak to prove the case against the appellant.

On the basis that the evidence on rape traces the root on the pregnancy of the victim, but there is no cogent evidence to prove that it was the appellant who raped the victim and she finally prayed for the appeal be allowed.

The appellant had nothing to rejoin.

I have keenly followed the arguments of the appellant and that of Ms. Irene Mabeza for the respondent ***cum*** republic. I have read

between the lines the appellants grounds of complaint and the entire proceedings of the trial court.

Let me, first start with the irregularities raised and addressed by the learned state attorney Ms. Irene Mwabeza during the hearing of the appeal as regard to the tendering of exhibits PF3 and cautioned statement of the appellant. Determining those irregularities alone will suffice to dispose of this appeal because the same also affects the present the appeal before me.

As correctly submitted by Ms. Irene Mwabeza the learned state attorney during hearing of the appeal, that PW2 tendered PF3 and PW4 tendered cautioned statement and the same were admitted in court without being read out which is irregularity. It is a principle of law that documentary must be read out in court to the parties after they are admitted. There are number of authorities insisting that. See the case of **Mbagga Julius vs Republic, Criminal Appeal No. 131 of 2015**, CAT, unreported, **Rashid Kazimoto and Masudi Hamis vs Republic, Criminal Appeal No. 458 of 2016**. They are all insisting that documentary evidence must be read out in court to the parties after being admitted. The non-reading of the exhibits denies the accused person with an opportunity to understand the case and make a

meaningful defense. The anomaly which goes to the root of the right to be heard. In this case at hand, looking at page 8 and 13 of the typed proceedings nowhere the exhibit P1 and exhibit P2 were read out to the accused person after it was admitted. Failure to read out documentary exhibits after its admission as it was done in this case renders the said evidence contained in that document, improperly admitted and should be expunged from record. I therefore expunge the same from the records.

Again, as correctly submitted by Ms Irene Mwabeza, learned state attorney that failure to prove age of the victim in rape cases vitiates the whole proceedings. All of the four prosecution witnesses none of them was able to testify as to the age of the victim.

In this case, the particulars of the offence in the charge sheet indicated that PW1 was 16 years old. When she testified on 26th of February 2019 the trial Resident Magistrate, before putting her on oath, also indicated that she was aged 16 years. However, it is trite law now that the citation in a charge sheet relating to the age of an accused person is not evidence, likewise, the citation by a magistrate regarding the age of a witness before giving evidence is not evidence of that person's age.

It follows therefore that the evidence in a trial must discloses the victim age. The disclosure of the age in case like this one is normally come from the victim herself or from the parent, or a teacher, or production of birth , however in this case no evidence from the either PW1 a victim or PW3 a head teacher of the victim was given. In the absence of such evidence, it will be evident that the offences under **section 130 (2)** of the Penal Code (supra) and **section 60 A (3)** of the Education Act (supra) were not proved beyond reasonable doubt as per authorities of Court of Appeal Cases of **Andrea Francis vs Republic**, Criminal Appeal No. 173 of 2014, unreported, and **Tano Mbika vs Republic**, Criminal Appeal No. 152 of 2016, unreported.

In the case of **Tano Mbika** case (supra), the Court of Appeal quoting the holding in the case of **Solomon Mazala vs Republic**, Criminal Appeal No. 136 of 2012, unreported stated that: -

> *".....before a conviction is grounded in terms of Section 130 (2), above, there must be tangible proof that the age of the victim was under 18 years at the time of the commission of the alleged offence."*

From the records, it is very clear that in this case the age of the victim was not established and proved in evidence, thus the conviction of the rape offence under **section 130 (2) (e)** of the Penal Code as

well the offence of impregnating a school girl under **section 60 A (3)** of the Education Act cannot be allowed to stand.

For the reasons stated herein, I allow the appeal, quash the conviction and set aside the sentence. Next to consider, is whether the order of a retrial is preferable in the circumstances of this case. The retrial could have been the preferable order in the circumstances of this case, however, as I have already found the trial court trial had been tainted with serious irregularities which touches the root of the matter, therefore in the circumstances, I join hand with the learned state attorney Ms Irene Mwabeza that the order for retrial is not preferable.

I order that the appellant be released from prison forthwith unless otherwise lawfully detained.

It is so ordered.

D.B NDUNGURU

JUDGE

01/03/2022

Date - 01.03.2022

Coram - Hon M. S. Kasonde - DR

Applicant - Present in person

Respondent - Ms Irene Mwabeza SA

B/C - Zuhura

Ms Irene Mwabeza SA

Your honour this mater comes for judgment today and we are ready.

Appellant : I am prepared too.

Court:

Judgment delivered this 1st day of March 2022 in the presence of Ms Irene Mwabeza S/A for the respondent and in the presence of the appellant.

M.S Kasonde,

DR,

01/03/2022.

Right of appeal fully explained.

M.S Kasonde,

DR,

01/03/2022.