IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
IN THE SUB- REGISTRY OF MWANZA
AT MWANZA

CRIMINAL APPEAL NO.104 of 2022

GEORGE S/O ERNEST @ MSINZILIJA .....APPELLANT

Versus

REPUBLIC .....RESPONDENT

JUDGMENT

Feb. 16th & 23rd, 2023

Morris, J

Rape, age and consent are somewhat inseparable. The three aspects make a tricky friendship. If you mess up with the last two, the first one ditches you into undesirable criminal squares. George Ernest@Msinzilija – the appellant, seems to had once fallen in the same thorny verge. He is before this Court challenging both conviction and sentence earned by him from the District Court of Kwimba in Criminal Case No. 16 of 2022. A rape case, that was.

The appellant was charged for abduction [of a school girl*(sic*)] contrary to section 133 and rape under sections 130(2)(b) and 131(1); all of ***the Penal Code***, Cap 16 R.E. 2019. The District Court of Kwimba

(elsewhere, 'the trial court') found him guilty of both offences. He was consequently sentenced to a concurrent 3-year and 30-year terms in jail respectively. The crime which landed him in the trial court is recorded as having been committed between February 27th, 2022 and March 2nd, 2022. On record, the appellant abducted and raped a school-going girl aged 20 years. It did not turn out to be a picnic-like feast for him at **Pikiniki Guest House** in Ngumo-Ngudu, Kwimba District. He was arrested on the third day of the said abduction. The victim girl was later examined by the medical expert (PW5) who filled the requisite PF3 (exhibit P1).

Six (6) grounds form the basis of this appeal. I undertake to paraphrase them. This approach is in the interest of brevity given the outcome of this appeal. Grounds 1, 2 and 4 relate to prosecution's failure to tender certain evidence or procure necessary witness. Grounds 3 and 5, point to poor analysis of evidence by the trial court. The 6th ground is that the prosecution did not prove the case beyond doubts.

The appellant appeared in this Court without a legal representative. Ms. Magreth, learned Senior State Attorney, represented the respondent. Largely, the respondent's Attorney supported the appeal. To her, proof of

the offence of rape was not done sufficiently. In line with the concession of the respondent, I will address basic aspects pertaining to whether or not the offences facing the accused-appellant were fully proved at trial.

As shown above, the charges were made under sections 133, 130(2)(b) and 131(1) of ***the Penal Code***. The first provision is reproduced below for ease of grasp.

> ***Section 133***: *"Any person who with intent to marry or have sexual intercourse with a woman of* ***any age****, or to cause her to be married or to have sexual intercourse with any other person, takes her away, or detains her, against* ***her will****, is guilty of an offence and is liable to imprisonment for seven years"* [bolding rendered for emphasis].

Amongst the requisite elements of the offence from the excerpt above are **age** and **will**. I reiterate the weird friendship cited earlier. While there is no dispute in this appeal about the age of the victim, the Court will briefly discuss about her will/consent. In law, proof of age of rape victims may be proved by parents, victims, doctors or teachers. Cases in this connection are, ***Wambura Kiginga v R****,* Criminal Appeal No. 301/2008; ***Masalu Kayeye v R****,* Criminal Appeal No. 120/2017; and

Isaya Renatus v R Criminal Appeal No. 542/2015 (all unreported). In the present case, the age was proved by the victim (PW1) and the doctor (PW5) as being 19 and 20 years respectively. Either way, the victim was of age of majority.

Regarding the victim's consent/will, I am inclined to reproduce part of her testimony as documented at page 11 of the trial court's typed proceedings. She is recorded as having testifies that:

> "*George Ernest (accused) namfahamu kuwa ni* ***mpenzi wangu, mme*** *(sic)* ***wangu*** *tangu mwezi wa tatu 2021 wakati huo nilikuwa nasoma darasa la saba kwa mara ya kwanza tulikutana na mshitakiwa mtaa wa giza na aliniambia ananipenda. Alisema atanunua pia simu ya mkononi na atanioa na kunitunza kwake"….(tarehe) 27.02.2022 saa 1 jioni, nilikuwa Ngumo-Ngudu* ***nilienda*** *kwa George mshitakiwa alinipigia simu wakati huo nilikuwa nyumbani akasema* ***niende*** *guest* ***Pikiniki Guest House*** *muda wa saa 1.00 jioni na* ***aliniacha pale pale Pikiniki Guest House*** *na* ***nilibakia*** *kwa muda wa* ***siku tatu*** *(3) hapo Guest House na baadaye tulikamatwa na polisi hapo Pikiniki Guest House,* ***ahadi ya kunioa ilipotea*** *baada ya kukamatwa na polisi*(emphasis added).

In its literal paraphrase, the quoted excerpt is to the effect that the victim girl testified that the appellant was her boyfriend/husband since March 2021. She was then in standard seven when the duo met for the first time at giza street. The appellant seduced her, promised to buy for her a mobile phone and get into marriage together. On 27.02.2022 she went to Pikiniki guest house to meet him where she stayed for three days before they were arrested. To her, the appellant's promise for marriage was terminated by the police arrest.

With the above unmistakable testimony from the victim, one justifiably misses a glimmer of lack of consent from her. It is trite law that the best evidence of rape comes from the victim. See, for instance, ***Victory Mgenzi @Mlowe v R***, CA Criminal Appeal No. 354/2019; ***Vedastus Emmanuel @Nkwaya v R***, CA Criminal Appeal No. 519/2017 (both unreported); and ***Selemani Makumba v R*** [2006] TLR 379. Three observations, in my view, need to be recorded here.

Firstly; if the victim-girl, of the age of majority, confirms to had volunteered to an intimate relationship with the appellant, elasticity of the law will be stretched excessively far to accommodate the offence of rape. ***Secondly***, the law was not designed to prevent grown up people to start

intimate relationships culminating into creation of families; all other factors being constant. Economists will refer to standard variables remaining the same, as *ceteris paribus*. Thus, with adults, that is how it all start. At least for most people. ***Thirdly***, the Court is up and alive to the fact that the victim, in this case, was a school girl. At that time, she was in form one (1) – to be precise. Hence, the prosecution should have sought statutory protection of the victim (and/or her interests) under appropriate provisions of ***the Penal Code***, Cap 16 R.E. 2022; and/or ***the Education Act***, Cap. 353 R.E. 2002; and/or any other relevant penal law.

Briefly, I will now address and determine the other issue as to whether or not the trial court rightly convicted and sentenced the appellant under sections 130(2)(b) and 131(1) of ***the Penal Code***. The applicable provision of the law states as:

> *Section 130(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:*
>
> *(b) with her **consent** where the consent has been obtained by the use of **force**, **threats** or **intimidation** by putting her in **fear of death** or of*

> ***hurt*** *or while she is in* ***unlawful detention*** [with Court's emphasis].

Without repeating myself, consent of the victim herein is not an issue any more. All that remains for determination is on two limbs. ***One***; whether her consent was obtained by use of force, threats or intimidation thereby placing her in fear of death or hurt. ***Two***; whether or not such coercive pressures were inflicted on her while she was in unlawful detention. The answer to both interrogations, in my assessment, is straightforward. In line with what the Court reasoned while determining the issue regarding abduction; the prosecution did not marshal conclusive evidence that the appellant forced, threatened or intimidated the victim before, during or after having sex with her.

Further, ***the Black's Law Dictionary*** (Ninth Edition) defines detention to mean holding a person in custody, confinement or compulsory delay. Thus, even with unproven imagination by the prosecution that Pikiniki guest house equated to unlawful detention; for the second limb above to firmly stand, one needs the have proved use of force, threats or intimidation on the victim first. See, ***Kassimu Mohamed***

Selemani v R, CA Criminal Appeal No. 157/2017; and ***Nzararila Alfonce v R,*** CA Criminal Appeal No. 371/2017) (both unreported).

Consequently, in the absence of prosecution's proof of coercive pressure for sexual intercourse from the appellant to the victim; the argument for the subject victim being under unlawful detention is, in my considered judgment, accordingly feeble.

All in the fine, the appeal succeeds. Accordingly, the trial court's conviction is quashed and sentence therefrom set aside. The appellant is to be set free from custody straightaway unless he is still being held therein for another lawful cause.

I so order.

The right of appeal is duly explained.

Dr. C.K.K. Morris

Judge

February 23rd, 2023