

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

MUSOMA SUB REGISTRY

AT MUSOMA

CRIMINAL APPEAL NO 54 OF 2022

(Arising from Serengeti District Court at Mugumu CC 310 OF 2020)

NZUMBE S/O MASUNGA @ MAGURYATI

MAREMI S/O MNADA @ MASUNGA

VERSUS

..... APPELLANTS

REPUBLIC RESPONDENT

JUDGMENT

21ST & 24ND March 2023

F. H. Mahimbali, J.:

The question this court is invited to respond in this case is whether one can be liable for an offence of rape if married to a girl below 18 years as per our laws. In replying to this question there must be a thorough traverse to both laws, the law of Marriage Act Cap 29 and the penal code, Cap 16 R. E. 2019.

The facts leading to this appeal case can be put this way: The victim girl who is 13 years (PW1) after completing her primary education, was

then married to the first appellant Nzumbe Masunga @ Maguryati who dully paid a partial dowry to the father of the victim girl (2nd Appellant- Maremi Mnala @ Masunga)- five heads of cattle.

After sometime (two years), being dissatisfied with the performance of the victim girl as wife, the first appellant being husband returned the victim girl to her parent (2nd appellant) and claimed the refund of his paid dowry (five cattle). Here then came the problem: "*Ukimwaga mboga namwaga ugali*". PW2 (aunt of the victim girl) then ultimately reported the matter to the legal authority where eventually on assessment of the facts, it was fully satisfied there was rape. Then, both the husband and the appellant were arrested, prosecuted for rape and sexual exploitation offences for 1st and 2nd appellants and duly convicted respectively.

The first appellant being the husband, was sentenced to the minimum sentence of 30 years whereas the parent who authorized the said marriage was sentenced to 15 years.

Both appellants (the -in- laws) have been aggrieved by the said conviction and sentence, have now dully appealed to this court armed with

a total of six grounds of appeal which upon digest, can be paraphrased only to three grounds of appeal.

- Whether the victim girl was 13 years old.
- Whether there is a rape to a married girl below 18 years old.
- Whether the trial court afforded the appellants with the right to be heard (calling their witnesses).
- Whether PW4's evidence being the examining doctor was material to the case.

During the hearing of the appeal, the appellants appeared in person (unrepresented) whereas the respondent was dully represented by Ms. Monica Hokororo senior state attorney who vehemently resisted the said appeal claiming that the offence of statutory rape was fully established beyond reasonable doubt. Similarly, the twin offence of sexual exploitation against the 2nd appellant who is the father-in-law to the first appellant was dully established.

In arguing their appeal, both appellants (the-in-laws) prayed that their grounds of appeal be adopted by the court to form part of their appeal submission. The main concern of the first appellant being on the

fact of age of the victim girl and that as she was neither a pupil nor student, he thinks there is no rape.

On the second appellant (father-in-law to the first appellant but also biological father to the victim girl) had nothing material to add but just prayed for the court's pardon.

On her part, Ms. Monica Hokororo-senior state attorney was of the firm view that the offence of statutory rape is only established when two ingredients are established: Age of the victim girl and sexual penetration. That as per established facts of this case, especially from the victim herself (PW1), it is undisputed that the said ingredients have been fully established. There is no dispute that the said victim girl was born in 2008 and that the purported marriage was contracted in 2019 and so was its consummation. Therefore, for all means, the said victim girl was below 18 years old by 2019 and 2020 (13 years old). That is established by the evidence in the testimony of PW1, PW2 and DW2 who all testified that the victim girl was born in 2008. Therefore, there was no need of proof by birth certificate in the absence of contradictory evidence as per Court of Appeal's decision in the case of **Musa Sebastian vs Republic**, Criminal Appeal No 406 of 2018, CAT at Dar es Salaam page 7, that it is now clear

that age of the victim girl or child can be established by the victim/child herself, parent/guardian or doctor. In the circumstances of this case, that fact is fully established.

On the ingredient of sexual penetration, she submitted that the testimony of PW1 (the victim) says all and by the way it is not disputed by the 1st appellant whether after marrying her, he didn't consummate the marriage for him not to be liable of rape.

When probed by the court whether the law of Marriage Act Prohibits such a marriage, she replied that she is aware that the LMA legalizes marriage of girls below 18 years, however with the parent's consent but limited to those not below 15 years. Therefore, even under the Law of Marriage Act, the appellants were liable on conviction for marrying the victim girl of 13 years old.

In understanding the offence of rape, I better reproduce what the law says on that.

130.-(1) *It is an offence for a male person to rape a girl or a woman.*

(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) not being his wife, or being his wife who is separated from him without her consenting to it at the time of the sexual intercourse;

(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;

(c) with her consent when her consent has been obtained at a time when she was of unsound mind or was in a state of intoxication induced by any drugs, matter or thing, administered to her by the man or by some other person unless proved that there was prior consent between the two;

(d) with her consent when the man knows that he is not her husband, and that her consent is given because she has been made to believe that he is another man to whom, she is, or believes herself to be, lawfully married;

(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.

(3) Whoever-

(a) being a person in a position of authority, takes advantage of his official position, and commits rape on a girl or a woman in his official relationship or wrongfully restrains and commits rape on the girl or woman;

(b) being on the management or on the staff of a remand home or other place of custody, established by or under law, or of a women's or children's institution, takes advantage of his position and commits rape on any woman inmate of the remand home, place of custody or institution;

(c) being on the management or staff of a hospital, school, day care center, children's home or any other institution, organisation or agency where there is a duty of care, takes Penal Code [CAP. 16 R.E. 2022] 70 advantage of his position and commits rape on a girl or woman;

(d) being a traditional healer takes advantage of his position and commits rape on a girl or a woman who is his client for healing purposes;

(e) being a religious leader takes advantage of his position and commits rape on a girl or woman.

According to Law (section 130 (1), (2) (3) of the penal code), it is therefore an offence if a man has a sexual intercourse with a woman or girl without her consent. However, it is also an offence of rape if a man has

sexual intercourse with a girl below 18 years old unless the said girl is 15 years old and is lawfully married to him.

In the current case, the 1st appellant Mr. Nzumbe Masunga @ Maguryati is charged of rape contrary to section 130(1), (2)(e) and 131(1) of the Penal Code. That means, Mr. Nzumbe Masunga @ Maguryati (1st appellant), had sex with the said victim (13years) with or without her consent when she is under eighteen years of age and as she was not 15 years old, the victim could be his lawful wife. Therefore, that was statutory rape pursuant to section 130(1), (2)(e) of the Penal Code.

Interestingly in this case, is the testimony of the victim girl (PW1) whose testimony is partly reproduced:

"On sometimes in September 2019 between 18th September and 8th September 2021, I was coming from fetching firewood. I met one Nzumbe, the accused person in this case. He took off my khang dress from my body. I followed him but I could not get him. I decided to go back home. I reported the matter to my aunt whose name is Martha. We made a follow up to the said Nzumbe, the said Nzumbe then told my aunt that he wanted to marry me. The said Nzumbe then came to see my aunt and father. They agreed for a dowry of ten (10) cattle. He paid five

cattle as an advance. My father one Moremi Mnada handled me to the said Nzumbe (first accused). I used to sleep with him and we had sexual intercourse several times, I do not remember all the occasions. Later on when he failed to pay the remaining cattle as part of dowry he complained that I should go back to my parents because I am not able to work (produce). I just stayed, then he took me back to my father. He then claimed the cattle dowry he had paid to my father...”

This was the evidence of the victim girl at the trial court. For sure it is undisputed that the said victim girl had sexual intercourse with the said 1st appellant as charged. So, both criminal ingredients of being a girl of under 18 years and sexual penetration have been positively established by the prosecution’s evidence. I agree with Monica learned state attorney that the issue of age can be established either by the victim girl herself, parent or doctor (See **Musa Sebastian vs Republic**, Criminal Appeal No 406 of 2018, CAT at Dar es Salaam).

Since in sexual offences, the testimony of the victim girl/woman or boy is incriminating as it considered as the best evidence, I have no slight of doubt of differing with the PW1’s testimony at the trial court. Nevertheless, the important question to respond is whether in the

circumstances of this case where there is an alleged marriage, is there rape?

For sure I am aware of the provisions of the Law of Marriage Act which makes prohibition on the marriage age. Section 13 and 17 are relevant as well discussed in the case of the **Attorney General V. Rebecca Z. Gyumi**, Civil Appeal No. 204 of 2017, CAT at DSM.

13.- (1) No person shall marry who, being male, has not attained the apparent age of eighteen years or, being female, has not attained the apparent age of fifteen years.

(2) Notwithstanding the provisions of subsection (1), the court shall, in its discretion, have power, on application, to give leave for a marriage where the parties are, or either of them is, below the ages prescribed in subsection (1) if-

*(a) each party has attained the age of fourteen years;
and*

(b) the court is satisfied that there are special circumstances which make the proposed marriage desirable.

(3) A person who has not attained the apparent age of eighteen years or fifteen years, as the case may be, and in respect of whom the leave of the court has not been obtained under subsection (2), shall be said to be below the minimum age for marriage.

Also section 17 provides;

17.-(1) A female who has not attained the apparent age of eighteen years shall be required, before marrying, to obtain the consent-

(a) Of her father;

*(b) If her father is dead, of her mother;
or*

(c) If both her father and mother are dead, of the person who is her guardian.

(2) Where the court is satisfied that the consent of any person to a proposed marriage is being withheld unreasonably or that it is impracticable to obtain such consent, the court may, on application, give consent and such consent shall have the same effect as if it had been given by the person whose consent is required by subsection (1).

I am inspired by the position taken by the Court of Appeal in the case of **Attorney General Vs. Rebecca Z. Gyumi** on the deliberate efforts which amongst other things revisited some of the provisions envisaged in selected instruments under which Tanzania is a member. Under Article 16 of Universal Declaration of Human Rights, 1948 it is provided that:

(1) Men and women of full age without any limitation due to race, nationality or religion, have the right to marry and to found a family. They are entitled to equal rights as to marriage, during marriage and at its dissolution.

(2) Marriage shall be entered into only with the free and full consent of the intending spouses.

(3) The family is the natural and fundamental group unit of society and is entitled to protection by society and the State.[Emphasis added]

Article 1 of the Convention on the Rights of the Child, 1989 and Article 2 of the African Charter on the Rights and Welfare of the Child, 1990 define a child to mean every human being below the age of 18 years, unless under the law applicable to the child, majority is attained earlier. Under Article 6 of Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa, 2003 States Parties are obliged to ensure that women and men enjoy equal rights and are regarded as equal partners in marriage. They are also required to enact appropriate national legislation to guarantee that;

a) No marriage shall take place without the free and full consent of both parties;

b) **The minimum age of marriage for women shall be 18 years.** [Emphasis added]

The Court of Appeal in the above case of **Rebecca Z. Gyumi (supra)** observed that, the impugned provisions (sections 13 and 17 of the Law of Marriage Act, Cap 29) have failed to uphold and appreciate the true intentions of the respective international, regional and sub regional instruments.

Since the Court of Appeal in the case of **Rebecca Z. Gyumi (supra)** upheld the decision of this Court in the same case (at High Court) which declared the provisions of section 13 and 17 of the LMA null and void, the same import should now extend to the provision of section **130(2)e of the Penal Code** which takes cognizance of the married girl of 15 years not to be subject of rape. My understanding of the decision of the Court of Appeal affirming the decision of the High court in the case of Rebecca Z. Gyumi, makes the provision of section 130 (2)e now redundant to the extent of recognition of a marriage with a girl of 15 years. Otherwise the position as it was in that section, it is astonishing that it is only rape to a girl of under 18 years provided is not married, but if married (15 years old) then that is not rape. There is no any legal logic in it.

Nevertheless, in the circumstances of this case, the appellants are not saved as the said victim girl was 13 years old, unless there was no consummation sexual penetration). As it was dully done as per victim's own evidence, that was worse of the matter. I can however hardly entertain the any argument or thought that the appellants were not aware of the age of the victim girl to be of the prohibited age in contracting the said unlawful marriage.

I have keenly digested how the father in law of the 1st appellant is associated with the said charge, the said section is revisited:

138B.-(1) Any person who-

(a) knowingly permits any child to remain in any premises for the purposes of causing such child to be sexually abused or to participate in any form of sexual activity or in any obscene or indecent exhibition or show; commits an offence of sexual exploitation of children and is liable upon conviction to imprisonment for a term of not less than fifteen years and not exceeding thirty years without option of fine.

In the circumstances of this case, it is clear that the second appellant being father of the victim, knowingly that the victim girl is a minor of 13 years, caused her to be married, was aware of what was going to happen

to the said girl child. That is in law a form of sexual abuse which is legally prohibited and must be strongly rebuked by this Court.

Whether the trial court afforded the appellants with the right to be heard (calling their witnesses), the proceedings at the trial court are self-proof. Each is recorded after giving their defense testimony to have stated as having no further witness to call and each then respectively closed his case (see page 67 of the typed proceedings). That argument then sounds unbacked up.

With the evidence of PW4, all that he said is nothing but just establishing the fact that the victim was carnally known as she had no her virgin and that the vagina's opening suggested being carnally known on several times. I wonder how such a testimony should be doubted. The appellants were supposed to tell the court more on that unreliability. In addition, even the trial court magistrate didn't rely her conviction on the evidence of PW4 but the victim girl (PW1).

In the whole consideration of the prosecution's case, I find all the grounds of appeal as being baseless and unmerited. Any choice has consequences, the appellants made their good choice and they should now face its price.

That said, the appeal is dismissed in its entirety. Convicted and sentences meted out are hereby affirmed.

DATED at MUSOMA this 24th day of March, 2023.



F. H. Mahimbali

JUDGE

Court: Judgment delivered this 24th day of March, 2023 in the presence of Appellant, linked from Mugumu Serengeti, Ms. Monica Hokororo SSA and K. D. Rutalemwa, RMA.

Right of appeal is explained.

F. H. Mahimbali

JUDGE