IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

TABORA DISTRICT REGISTRY

AT TABORA

DC. CRIMINAL APPEAL NO. 21 OF 2023

(From the Decision of the District Court of Uyui in Criminal Case No. 14 of 2022)

PATRICK S/O MTAHUNGWA ..... APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

JUDGMENT

Date of the Last Order: 19/06/2023
Date of Judgment: 30/06/2023

KADILU, J.

In the District court of Uyui, the appellant was charged with the offence of rape contrary to Section 130 (1) (2) (e) and Section 131 (1) of the Penal Code [Cap. 16 R.E. 2019]. At the conclusion of the trial, the appellant was convicted and sentenced to serve thirty years imprisonment. Aggrieved with the conviction and sentence, he filed the present appeal in this court consisting of five (5) grounds of appeal as reproduced hereunder:

1. *That, the prosecution did not prove the case against the appellant beyond reasonable doubt as required by the law.*
2. *That, penetration as stipulated under Section 130 (4) (a) of the Penal Code was not cogently established by PW1, the victim of the offence.*
3. *That, age of the victim was not established by the prosecution.*
4. *That, PW1 and PW2, being persons of tender age, did not make prior promise of telling the truth to the court as required by the law.*

5. *That, the learned trial Magistrate erred in law and facts for failure to consider defence of the appellant that the case was concocted by the victim's mother (PW4) following bad relationship between the two.*

On the strength of those grounds of appeal, the appellant has prayed this court to allow his appeal by quashing the conviction, set aside the sentence and order his release from prison. When the appeal was called on for hearing, the appellant appeared in person, unrepresented whereas the respondent enjoyed legal services of the learned State Attorneys Ms. Suzan Barnabas, Ms. Joyce Nkwabi, Ms. Upendo Florian and Ms. Aziza Mfinanga. The appellant being a lay person, had nothing substantial to submit to the court. He just prayed his grounds of appeal to be adopted and implored this court to allow the appeal.

Responding to the appellant's grounds of appeal, Ms. Suzan Barnabas stated from the outset that she was supporting the appeal because there were mandatory legal requirements which were not complied with during the trial. She prayed to submit on the third and fourth grounds only which according to her, are sufficient to dispose of the entire appeal. Regarding the third ground of appeal, the learned State Attorney conceded that age of the victim was not established in the trial court. She explained that, since the charged offence was statutory rape, it was mandatory for the prosecution to prove that the victim's age was below eighteen years.

Ms. Suzan stated that the charge sheet indicated the victim's age as 13 years, but when she started to testify, she told the court that she was

aged 14 years. The State Attorney opined that, at that stage the victim's statement was a mere general information since she did not take an oath before giving such information. The statement was not part of the victim's evidence, Ms. Suzan argued and added that throughout the trial, age of the victim was not established. She referred to the case of ***George Claud Kasanda v DPP***, Criminal Appeal No. 376 of 2017 in which the Court of Appeal considered a similar omission as serious and whose effect is to render the offence against the appellant not to have been proved to the required standard.

Concerning the fourth ground of appeal, the learned State Attorney conceded as well that PW1 and PW2 were persons of tender age, but they did not give prior promise to tell the truth to the court before testifying. She expounded that Section 127 (2) of the Evidence Act [Cap. 6 R.E. 2019] requires a witness of tender age to promise to tell the truth to the court before testifying and the same should be reflected in the proceedings. She said, PW1 and PW2 were children of 14 and 10 years respectively, but their testimonies as shown from pages 10 to 12 of the trial court's proceedings were received by the court without compliance with the Evidence Act.

To support her argument, Ms. Suzan made reference to the case of ***Godfrey Wilson v R.***, Criminal Appeal No. 168 of 2018 in which evidence of a child was improperly admitted by the court hence on appeal, it was declared evidentially valueless and unable to corroborate any other evidence. The learned State Attorney joined hands with the appellant in praying for this court to allow the appeal.

Having examined the grounds of appeal and submissions by the State Attorney, I find no need to dwell on all grounds of appeal since the observed irregularities which are evident on records of the trial court are sufficient to dispose of the whole appeal. It is undisputed that the appellant was charged of carnally knowing a girl aged 13 years. The offence is created under Section 130 (1) (2) (e) of the Penal Code and is famously referred to as statutory rape. It is termed so because it is an offence to have carnal knowledge of a girl who is below 18 years regardless of whether or not there is consent. In that sense, age of the victim is of great essence in proving the offence of statutory rape. This is to say, the prosecution is duty bound to establish among other ingredients, that the victim was under the age of eighteen years at the time of the incident.

In the case of ***Issaya Renatus v R.,*** Criminal Appeal No. 542 of 2015, the Court of Appeal held that:

> *"... age is of great essence in establishing the offence of statutory rape under Section 130 (1) (2) (e), the more so, under the provision, it is a requirement that the victim must be under the age of eighteen. That being so, it is most desirable that the evidence as to proof of age be given by the victim, relative, parent, medical practitioner or; where available, by the production of a birth certificate..."*

In the case at hand, the charge sheet was prepared in April, 2022 and it shows that the victim was aged 13 years. Two months later in June 2022 when she was called to testify, she told the court that she was 14 years old. The PF3 in which the victim was examined on 03/08/2021

indicates that the victim was aged 13 years. In such circumstances, it was crucial for the prosecution to lead cogent evidence to prove age of the victim through the victim herself, relative, parent, medical practitioner or by the production of a birth certificate. Short of that, I fully subscribe to the view by the learned State Attorney that prosecution did not establish age of the victim which is vital in every offence of statutory rape. I have also observed in passing that throughout the PF3, examination of the victim is shown to have been conducted on 03/08/2021, eight months before the alleged offence was committed. Nonetheless, I shall not dwell on it as it was not a concern of any of the parties herein.

The other complaint by the appellant is that PW1 and PW2 being children of tender age, did not promise to tell the truth to the court before they testified. I wish to state here that under Section 127 (4) of the Evidence Act, the expression, "child of tender age" is defined as a child whose apparent age is not more than fourteen years and, Section 127 (2) reads as follows concerning testimony of a child of tender age:

"A child of tender age may give evidence without taking an oath or making an affirmation but shall, before giving evidence, promise to tell the truth to the court and not to tell any lies."

As I have shown, age of PW1 who is the victim of the offence was shown in the charge sheet and PF3 to be 13 years while the proceedings indicate that PW2 was aged 10 years. Therefore, there is no dispute that PW1 and PW2 were children of tender age. However, instead of promising the court to tell the truth, they each took an oath. Thus, their testimonies were admitted without the court satisfying itself that both understood the duty of speaking the truth. The court was required to determine if PW1

and PW2 possessed sufficient intelligence to justify the admission of their testimonies. (*See*, the case of ***Kilaga Daniel v R.***, Criminal Appeal No. 425 of 2017. In the instant case, when PW1 was called to testify before the trial court, the court proceeded as follows:

PW1: "My name is Christina Peter Mabula, 14 years old, standard six student at Mhulidede Primary School, sworn and states as follows: ..."

Applying the provisions of section 127 (2) of the Evidence Act to what transpired in the trial court, it cannot be said that the law regarding testimony of a child of tender age was fully complied with. The excerpt above clearly shows that the questions asked to PW1 did not relate to whether or not she knew the meaning of telling the truth rather, they were general questions on her personal particulars only.

There is nothing to show that the trial court inquired on the PW1's understanding of the duty to speak the truth before the court. Since the omission is fatal, its effect is that in my deliberation and determination of this appeal, I shall disregard evidence of PW1 and PW2.

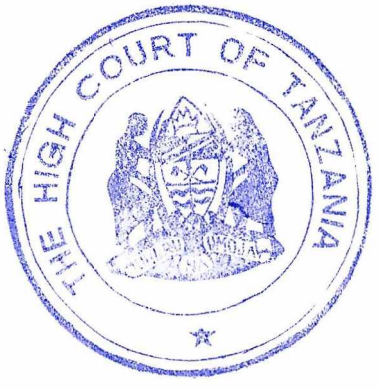
Now, since the crucial testimonies of PW1 and PW2 were invalid hence disregarded by this court, there is no evidence remaining to be corroborated by the evidence of PW3 and PW4 so as to sustain conviction of the appellant. It should be remembered that in rape cases, evidence of the victim is extremely important to justify conviction and sentence of the perpetrator. Having disregarded evidence of the victim in this case, I find the appeal having merits and I consequently allow it. Conviction of the appellant and the sentence imposed upon him are hereby quashed and

set aside. I order the appellant's immediate release from prison unless held for some other lawful cause. Right of appeal is fully explained.

Order accordingly.

KADILU, M.J.,
JUDGE
30/06/2023

Judgement delivered on the 30th Day of June, 2023 in the presence of Mr. Patrick Mtahungwa, the appellant and Ms. Upendo Florian and Ms. Joyce Nkwabi, State Attorneys, for the Respondent.



KADILU, M. J.
JUDGE
30/06/2023.