

**IN THE HIGH COURT OF TANZANIA**

**(IN THE MWANZA SUB-REGISTRY)**

**AT MWANZA**

**CRIMINAL APPEAL NO. 30 OF 2023**

*(Originating from Criminal Case No. 24 of 2022 in Magu District Court at Magu)*

**ASHURU SURAITI.....APPELLANT**

**VERSUS**

**THE REPUBLIC.....RESPONDENT**

**JUDGMENT**

*Date of Last Order: 29/05/2023*

*Date of Judgment: 17/07/2023*

**Kamana, J:**

Ashuru Suraiti, the appellant was charged and convicted by the District Court of Magu for an offence of unnatural offence contrary to section 154(1)(a) and (2) of the Penal Code, Cap. 16 [RE.2019]. The prosecution's case was that on 2<sup>nd</sup> March, 2022 around 2330hrs at Kisesa, Magu District within Mwanza Region, the appellant did have carnal knowledge of XY, a minor against the order of nature.

The appellant denied the charges leveled against him. Upon conviction, the appellant was sentenced to thirty years in prison with hard labour. In addition, the trial court ordered the appellant to

compensate the victim to the tune of Tshs.300,000/- as medical expenses.

For reasons to come out in the course of this judgment, I will neither reproduce the summary of the evidence adduced during the trial nor all the grounds of appeal save for the first and second grounds which are:

1. That, the Presiding Magistrate unreasonably failed to comply with section 6 of the Corporal Punishment Act, Cap. 17 [RE.2019] and section 119 of the Law of the Child Act, Cap. 13 [RE.2019] considering that since during the preliminary hearing, I told the Court that I was under 18 years of age.
2. That the Trial Magistrate failed to determine my age according to my appearance as per section 7 of the Corporal Punishment Act, Cap. 17 [RE.2019] bearing in mind that even my teeth are still 28 and not 32 which indicates that at the material time I was not matured enough according to our law.

When the appeal was called on for a hearing, the appellant appeared in person. The respondent had the services of Ms. Sabina

Chogogwe, learned state attorney. The appellant adopted the grounds of appeal and left the floor to the legal mind that represented the respondent.

Smoothly, Ms. Chogogwe supported the appeal based on the two grounds reflected hereinabove. Arguing, the learned state attorney submitted that the trial court did not inquire as to the age of the appellant. She contended that according to Rule 12 of the Law of the Child (Juvenile Court Procedure), Rules, 2016, when a person appearing before the court claims to be a child and a dispute arises as to the age of that person, an inquiry as to the age of the person must be conducted. She went on to argue that since as per the records the inquiry was not done and the trial court ruled that the appellant was of 18 years of age as per the charge sheet despite his claims that he was of 16 years of age, there was a miscarriage of justice so far as the appellant was concerned.

Ms. Chogogwe argued further that there is a likelihood that the case against the appellant was heard and determined by the court with no jurisdiction as the proper court for determining cases in which the accused are children is the juvenile court. Bolstering her arguments, the learned state attorney invited the Court to consider the case of **Athanas**

**Mbilinyi v. Republic**, Criminal Appeal No. 275 of 2020. She added that despite the fact that the Court took the accused to be of 18 years of age, still penalized him contrary to the established laws so far as the offence is concerned. Ms. Chogogwe summed up her submission by imploring the Court to order a retrial so that the lower court determines the accused's age through an inquiry and the proper court to adjudicate the matter.

On his part, the appellant being a lay person had nothing useful to add other than beseeching the Court to release him.

Painstakingly, I have gone through the grounds of appeal, the submission of the learned state attorney and the records of the appeal. The question that invites the wisdom of this Court is whether the appeal is meritorious or otherwise.

Settled is the law regarding the age of the accused person when he claims to be of underage. When the accused person claims to be a child and it is disputed, Rule 12(1) of the Rules requires the Court to conduct an inquiry as per section 113 of the Law of the Child Act, Cap. 13 [RE.2019]. The Rule stipulates:

*'Where a person appearing before the court claims to be a child, and that claim is in dispute, the court shall cause an*

*inquiry to be made into the child's age under section 113 of the Act.'*

Section 113 of the Law of the Child Act states the procedure for conducting an inquiry. For ease of reference, I reproduce the same hereunder:

*113.-(1) Where a person, whether charged with an offence or not, is brought before any court otherwise than for the purpose of giving evidence, and it appears to the court that he is a child, the court shall make due inquiry as to the age of that person.*

*(2) The court shall take such evidence at the hearing of the case which may include medical evidence and, or DNA test as is necessary to provide proof of birth, whether it is of a documentary nature or otherwise as it appears to the court to be worthy of belief.*

*(3) A certificate purporting to be signed by a medical practitioner registered or licensed under the provisions of the law governing medical practice in Tanzania as to the age of a child shall be sufficient evidence and shall be*

*receivable by a court without proof of signature unless the court orders otherwise.*

*(4) An order or judgment of the court shall not be invalidated by any subsequent proof that the age of that person has not been correctly stated to the court and the age found by the court to be the age of the person so brought before it shall, for the purposes of this section, be deemed to be the true age of that person.*

*(5) Medical evidence and or collection of blood for the purpose of DNA from the child shall be conducted in the presence of a social welfare officer.'*

Deducing from the records, the appellant stated his age to be sixteen though the charge sheet stated that the appellant's age was eighteen. This, as rightly contended by Ms. Chogogwe, learned state attorney, was a clear case that invites the application of Rule 12 of the Rules. Further, my perusal of the records shows that the trial court did not conduct the required inquiry as per the letter of the law.

That being the case, I join hands with the learned state attorney that there was a miscarriage of justice for the appellant to be tried without an inquiry as to his age being conducted as per Rule 12 of the

Rules. I hold so while fortified by the decision of the Court of Appeal in the case of **Athanas Mbilinyi v. Republic (Supra)**. In the said case, the appellant Athanas Mbilinyi was charged and convicted of an offence of rape and sentenced to life imprisonment. Despite claiming to be of sixteen years of age, the trial court relied on the age stated in the charge sheet which was twenty six years. His appeal to this Court was unsuccessful. While adjudicating the matter, the Court of Appeal remarked:

*'.....the trial magistrate ought to have conducted an inquiry into the age of the appellant in either of the ways stated above and in the event of failure, she should have placed reliance on the 16 years age claimed by the appellant. Failure to do so, in our considered view, occasioned miscarriage of justice on the part of the appellant as it left a lot to be desired.'*

Had the inquiry as to the age of the appellant been conducted the trial court would have been in a position to determine the true age of the appellant and whether it had jurisdiction to try the case against him. This is due to the fact that trials against persons of less than eighteen

years of age are conducted in juvenile courts as per section 98 of the Law of the Child Act.

Given that, I nullify the trial court's proceedings and order for the retrial of the appellant before another Magistrate. Further, the conviction and the sentence meted out against the appellant are respectively quashed and set aside. Instructively, the trial court is directed to consider the appellant's age at the time of the commission of an offence as per Rule 12 of the Rules. Meanwhile, the appellant shall remain in custody pending retrial in accordance with the law upon the establishment of his age at the time of the commission of the offence.

It is so ordered.

Right to Appeal Explained.

**DATED** at **MWANZA** this 17<sup>th</sup> day of July, 2023.



**KS KAMANA**

**JUDGE**