

THE UNITED REPUBLIC OF TANZANIA

JUDICIARY

IN THE HIGH COURT OF TANZANIA

(DISTRICT REGISTRY OF MOROGORO)

AT MOROGORO

CRIMINAL REVISION NO. 30 OF 2023

(Originating from Criminal Case No. 39 of 2023 in the District Court of Gairo)

ALIPAKSHAD MALAKI PACK..... APPLICANT

VERSUS

THE REPUBLIC.....RESPONDENT

RULING

Ruling date on: 24/07/2023

NGWEMBE, J:

Having been convicted and sentenced to serve thirty (30) years imprisonment for the offence of having sexual intercourse with form three school girl identified as aged 16 years, while himself was recorded as 19 years old. That he complained bitterly before this court when visited Wami prison on 14th July, 2023. It is on record that the historical road to imprisonment for the period of thirty years commenced on the afternoon of 28th January, 2023 at Magoweko Village within Gairo District in Morogoro region where the girl moved from her house looking for the applicant to Miti mirefu when she found him and together went to the room of the applicant for sexual intercourse. Thereafter they accompanied each other back to her house. The story of the victim as per her testimony on page 6

of the proceedings, suggests that there was no rape but normal sexual intercourse. Her testimony is supported by PW3, a medical doctor, that he found no bruises, hymen was removed long time, no blood or semen, no HIV and no pregnancy. Above all he proved that alleged rape was committed four days before he examined her.

Notwithstanding the material facts advanced by the prosecution witnesses, yet the applicant upon this court visiting the prison where he is serving his imprisonment, he complained that in fact he is 17 years old. Even looking his face and total outlook together with explanation from prison incharge, disclosed that the boy seems to be below the age of majority. Thus triggered this court to invoke its administrative powers under section 30 of Magistrate Court Act to call for revision the whole proceedings and judgement of the trial court.

Therefore, perusing in the whole proceedings of the trial court, it is evident the age of both accused and the victim were not established and proved as required by law. Beginning with the victim, her age was not verified, equally the age of the applicant was not verified. There is every possibility that the two were either children as per the Law of the Child or the girl was matured above 18 years or both were of the age of 18 years.

Usually, age of the victim as well as of the accused must be established and proved strictly. The need to strict proof of age is born out of existence of Law of the Child as well as the current era of our society that speaking truth now is becoming a foreign vocabulary. Further, it is establish that proof of age may be done by any of the parents, certificate of birth, clinic card, and any other documentary evidence. When parents are required to prove the age of their child, there must be a standard against

which, parent's testimonies on the age of the victim may be adduced and proved. All said, unfortunate in this matter, neither parents nor relative was called to testify in court. I am troubled as to why the learned trial magistrate failed to underscore such apparent requirement prior to conviction and sentence.

The Court of Appeal in developing this good principle on the need to establish the age of the victim, did not intend to require the court to believe on general statement. The proof of age must be concrete, viable and reliable. General statement cannot be accepted at this era of statutory rape.

The Court of Appeal in respect to this point, had strict requirement of proof as was discussed and held in the case of **Leonard s/o Sakata Vs. DPP, Criminal Appeal No. 235 of 2019**, where two schools of thought regarding proof of victim's age in rape cases were discussed extensor. In the same vein, the case of **Winston Obeid Vs. R, Criminal Appeal No. 23 of 2016**; **Edson Simon Mwombeki Vs. R, Criminal Appeal No. 94 of 2016**; and **Aloyce Maridadi Vs. R, Criminal Appeal No. 208 of 2016 (all unreported)** discussed in details on the need of proof of age of the victim.

Accordingly, one school of thought, held that the victim's age must be strictly proved. The other school of thought held that, the age of the victim can be inferred from other facts, even when not directly proved. In my reasoning, the first school fits more in the circumstance of this case at hand. Failure to establish and prove the age of the victim in a statutory rape cannot establish and prove the offence beyond reasonable doubt. In this case strict proof was required to establish that the victim was not an

adult matured woman, sexually and physically active. In the current society where, speaking truth is becoming a foreign vocabulary, courts must demand more than mere assertion of age.

Strictly so to speak, the age of the applicant was necessary in this revision. The charge sheet placed him as 19 years without proof of whether he was truly of that age or otherwise. I can see an apparent danger in our society related to statutory rape which attract long sentence imprisonment. Thus, proof of age of both the victim and the accused is inevitable.

Justice to insist on the offence of rape under section 130 (1)(2)(e) of the **Penal Code**, is termed as *statutory rape*, where in the case of **George Claud Kasanda Vs. The DPP, Criminal Appeal No. 376 of 2017, (CAT at Mbeya)**, the Court of Appeal explained in clear terms that: -

"In essence that provision creates an offence now famously referred to as statutory rape. It is termed so for a simple reason that; it is an offence to have carnal knowledge of a girl who is below 18 years whether or not there is consent"

As above, certain elements are so fundamental, they must be established and proved by irresistible evidences. Those include; **one** – carnal knowledge (penis penetration to the vagina), consent is immaterial to a girl below 18 years; **two** – age of the victim (for the purpose of appropriate sentence and nature of the rape; **three** - lack of consent to a woman above 18 years is material; and **lastly**, proper identity of the rapist.

In the absence of unshakeable evidence on proof of age is fatal. Consequently, I find merit in the applicant's application, hence I proceed to quash the conviction of the trial court and set aside the sentence meted by

the trial court of thirty years imprisonment and order an immediate release of the applicant Alipakshad Malaki Pack from prison, unless held for any other lawful cause.

Order accordingly.

Dated at Morogoro this 24th July, 2023.



P. J. NGWEMBE

JUDGE

24/07/2023

Court: Judgement delivered at Morogoro in chambers on this 24th July, 2023 in the presence of both parties.

Sgd: A.W. Mmbando, DR

24/07/2023

Court: Right to appeal fully explained.

I Certify that this is a true and correct
copy of the original

Deputy Registrar

Date.....at Morogoro.

Sgd: A.W. Mmbando, DR

24/07/2023