

IN THE HIGH COURT OF TANZANIA
(SUMBAWANGA DISTRICT REGISTRY)
AT SUMBAWANGA

DC. CRIMINAL APPEAL NO. 11 OF 2023

(Originated from the District Court of Mlele at Mlele in Criminal Case No. 17 of 2022)

MACHIA ^{s/o} NJILE **APPELLANT**

VERSUS

THE REPUBLIC **RESPONDENT**

JUDGMENT

9th August & 29th August, 2023

MRISHA, J.

This is an appeal from the District Court of Mlele at Mlele whereby the appellant Machia Njile, was arraigned before such trial court with two counts namely Rape contrary to section 130(1)(2)(e) and 131(3) of the Penal Code, Cap 16 R.E. 2019(the Penal Code), and as an alternative to the first count, he was also charged with an offence of Attempted Rape contrary to section 132(1) and (2)(a) of the Penal Code.

It was revealed that on 9th day of February, 2022 at Ukingwamizi village within Mlele District in Katavi Region, the appellant did carnal knowledge of one KK (her name is withheld), a girl aged six (6) years old.

On material date around evening the appellant went to take the cattle for grazing, he found the victim at home; then he persuaded her to go with him in the maize farm and thrived. While at the farm, the appellant undressed KK and went on to have carnal knowledge. Thereafter, he threatened the victim that she should not tell anyone about the incident or else he could hurt her. When her mother came, she started to cry and narrated on what happened to her during the day time.

On 10th day of February, 2022 around morning hours, the appellant was restrained by the victim's father and taken to Majimoto Police station. Thereafter he was charged with the two counts as described above. After a full trial, the trial court found the appellant guilty of the second count, convicted and sentenced him to serve a term of thirty (30) years in jail.

Having being aggrieved by both conviction and sentence meted against him, the appellant knocked the doors of this court with a view of requesting this court to nullify the whole proceedings of the lower court,

quash the conviction, set aside the sentence imposed on him and order that he be released from remand custody.

His appeal is composed of four grounds namely: -

- 1. That, the trial court erred at law and fact by convicting the appellant on the basis of caution statement which was unlawfully procured.*
- 2. That, the trial court erred at law and fact by disregarding the evidence given by the Appellant concerning the matter.*
- 3. That the trial court erred at law and fact by not taking into consideration that exhibit P1 which was PF3 and the evidence of PW1, a medical doctor who concluded that there was no penetration, the man was intact no rapture or any sort of fluid as required by law.*
- 4. That the trial court erred at law and fact to convict the appellant on the case which was not proved beyond reasonable doubt as requirement of the law.*

When this appeal was called on for hearing the appellant stood alone, unrepresented, whereas the respondent Republic was represented by Mr. David Mwakibolwa, learned State Attorney. Upon being given a chance to address this court regarding his grounds of appeal, the appellant briefly

prayed to this Court to adopt his petition of appeal in order to form part of his submission in chief, allow his appeal and set him free.

On the other side, Mr. Mwakibolwa neither opposed nor supported the appeal, but drew the attention of this Court by referring to page 5 of the trial court typed proceedings where it is shown that at the Preliminary hearing the appellant disputed the fact that he was 20 years at the time he was arraigned before the trial court.

Mr. Mwakibolwa then argued that it is important for this court to look on that point because the appellant raised the issue of age and stated that he did not attain the age of 20 years, during that time and that the trial Court recorded in the memorandum of undisputed facts which form part and parcel of the proceeding.

He pointed out that the trial magistrate was supposed to conduct an inquiry in order to determine the age of the accused before proceeding with the hearing of the main case. He added that the issue of age was important for determining the jurisdiction of the Court whether the matter had to be heard in Juvenile Court or an ordinary Court.

Moreover, the said trained mind argued failure by the trial court to follow the procedure of conducting inquiry for that purpose is improper and makes the instant appeal to have merit. The learned counsel further submitted that the appellant was under the age; he referred page 29 of the typed proceeding which reveals that when adducing his defence before the trial court, the appellant claimed he was sixteen years of age. He concluded on that point by submitting that the proper forum to try the appellant ought to be the Juvenile Court which will even cause the sentence for the appellant to be affected.

On the way forward, Mr. Mwakibolwa submitted that due to such irregularity it will be proper for this court to remit the original file to the trial court and direct it to conduct an inquiry to determine whether it has jurisdiction to hear and determine the appellant's case.

I have dispassionately read the submissions by both parties in relation to this appeal. I have also gone through the trial court proceedings and findings just to get a clear picture of what the appellant is complaining of. Having done so, I have reached to a conclusive finding that the appellant raised the issue of age during preliminary hearing and his defence where

he told the trial court that his age was 16 years, instead of 20 years which was recorded in the charge sheet.

However, the trial magistrate did not conduct an inquiry in terms of section 113 and 114(2) Law of the Child Act, Cap 13 R.E. 2019 (the LCA).

The law is settled on the procedure to be adopted in the circumstance where the age of an accused person is at issue; particularly when it is alleged that the accused person is under the age of majority. I take liberty to reproduce what is provided under section 113 and 114(2) of the LCA, as follows: -

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".

Also, section 114(2) of the LCA provides guidance to the trial court which is confronted by the situation indicated under the former provision. It provides that:

*"Without prejudice to the preceding provisions of this section, **where the court has failed to establish the correct age of the person brought before it, then the age stated by that person, parent, guardian, relative or social welfare officer shall be deemed to be the correct age of that person.**"[Emphasis added].*

On the above quoted provisions, there is no gain saying that it is important for the trial Magistrate to conduct the inquiry when the issue of age is in dispute. It should also be noted here that age is an important aspect in conducting trials before a court of law. Having the above in mind, I am inclined to concur with the submission of the counsel for the respondent Republic that knowing the age of accused person help the courts of law to determine their jurisdictions and also it has an impact when it comes to sentencing of an offender.

Hence, an omission to conduct an inquiry on the accused's age is fatal as it occasions a miscarriage of justice on the part of an accused person. This position was stated in the case of **Athanas Mbilinyi vs The Republic**, Criminal Appeal No. 275 of 2020, CAT at Iringa (unreported) where the Appex Court held that:

"The trial magistrate ought to have conducted an inquiry into the age of the appellant in either of the ways and in the event of failure; he 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 of desired."

Also, the case of **Furaha Johnson v Republic**, Criminal Appeal No. 452 of 2019 (unreported) whereas the Court of Appeal held that:

*"Since the appellant at the time of his arraignment and trial was a child, he was not triable by the district court, but Juvenile court. The trial court, therefore lacked jurisdiction *ratione personae* to try the appellant and hence, the trial was declared a nullity"*

Reverting back to the present case, I am of the considered view that since trial magistrate failed to conduct an inquiry to establish the age of appellant during the trial, the sentence of 30 years meted out to the appellant is tantamount to causing more injustice to him under the circumstances of this case where his age is not established. I therefore, agree with Mr. Mwakibolwa that the proper cause to dispose of this appeal,

is to nullify the proceedings of the trial court, remit the original case file to the trial court and order it to comply with the procedure of establishing the appellant's age at the time of commission of the offence.

From what I have stated above, I allow the appeal, quash the conviction and proceedings of the trial court and set aside the sentence of 30 years imprisonment meted out on the appellant. Consequently I order for retrial of the appellant with immediate effect before another magistrate with competent jurisdiction. Meanwhile, the appellant shall remain in remand custody until final determination by the trial court in compliance with the above directions.

It is so ordered.



A.A. MRISHA
JUDGE
29.08.2023

Dated at SUMBAWANGA this 29th Day of August, 2023.



A.A. MRISHA
JUDGE
29.08.2023