IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

IN THE SUB- REGISTRY OF MWANZA

AT MWANZA

CRIMINAL APPEAL NO. 88 OF 2023

(Arising from the Juvenile Court of Geita at Geita, in Criminal Case No. 21 of 2022)

REVELIAN WILFRED ..... APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

JUDGMENT

25th October & 17th November, 2023

MUSOKWA, J.

In the Juvenile Court of Geita sitting at Geita, the appellant was on 03/10/2022 charged and convicted of rape contrary to sections 130 (1) (2) (e) and 131 (1) of the Penal Code, Cap. 16, R.E. 2022 (Penal Code). Following the conviction, the appellant was sentenced to thirty years (30) imprisonment. The offence was allegedly perpetrated against DDY (in pseudonym) a girl aged fourteen (14) years old. Profoundly aggrieved by the conviction and sentence imposed against him, the appellant initiated the instant appeal which has four grounds which are paraphrased as follows: -

1. *That the PF3 was not tendered and the medical doctor was not called as a prosecution witness.*

2. *That the trial magistrate erred in law and fact to convict the appellant on the basis of the age of the victim (14 years) without scientific proof.*
3. *That the trial magistrate erred in law and fact to convict the appellant upon an equivocal plea of guilty in contravention of Section 192 of the Criminal Procedure Act, Cap. 20, R.E 2019.*
4. *That the prosecution failed to prove the alleged offence beyond reasonable doubt.*

The context giving rise to this appeal is summarized as follows: It was alleged that on 30th August, 2022, at Ililika village within the District of Geita, the appellant had carnal knowledge of the victim, DDY. On the fateful day, the victim while on her errands in the forest collecting firewood was ambushed by the appellant. The appellant allegedly threatened the victim before raping her. The victim reported the incident to her grandfather who reported the matter to Nyarugusu police station leading to the apprehension of the appellant and his eventual arraignment in court. The medical examination report from Nyarugusu health centre purportedly confirmed that the victim was raped. The appellant denied the allegations against him. The trial court upon conclusion of the proceedings was convinced that the guilt of the appellant had been established beyond reasonable doubt to warrant a conviction, and the respective sentence thereof.

Unrepresented, the appellant fended for himself during the hearing of the appeal. The respondent was represented by learned state attorneys Mr. Christopher Olembile assisted by Mr. John Joss. The appellant had nothing to add or clarify on his grounds of appeal and allowed the respondent to respond accordingly.

The learned state attorney, Mr. Olembile, commenced his submission by concurring with the decision of the trial court in its entirety. Mr. Olembile addressed the 1st ground of appeal which mainly had two sub-parts. In the first part, the appellant alleges that the PF3 (exhibit P1) was not tendered in court. As a result, it was not read out to him during the proceedings and therefore, the same should be expunged from the record, or no weight be afforded it. The second part concerns failure by the prosecution to summon the medical doctor as a witness during trial. In addressing the former, the learned state attorney did not dispute that the PF3 was neither tendered in court nor was it read out in the course of the proceedings. Mr. Olembile argued that the purpose of the PF3, in a case such as the present one, is not for the identification of the accused; but rather, it serves to prove whether or not there was penetration on the victim's private parts by the accused. He submitted that the absence of the PF3 form as part of the proceedings was irrelevant, as the testimony

of the victim in proving the identity of the accused, sufficed. In addressing the latter part of the 1st ground of appeal, he asserted that the law does not dictate the number of witnesses to be summoned before the court to give testimony in any given matter. Therefore, he argued, non-appearance of the doctor as a witness during the trial was irrelevant as the evidence before the court was sufficient to prove the case beyond reasonable doubt.

In substantiating his arguments, the counsel for the respondent cited section 143 of the Law of Evidence Act, Cap. 6 R.E 2022 (TEA) and the case of **Sixmund Angelus Masoud Vs. The Republic**, Criminal Appeal No. 85 of 2021, and **Yuda John Vs. The Republic**, Criminal Appeal No. 238 of 2017.

Focusing on the 2nd ground of appeal on failure to provide scientific proof with regard to the age of the victim, Mr. Olembile contended that the law provides for persons who can testify in court regarding the age of the victim. These include a parent, guardian, relative, anyone who knows the child closely; or the child himself or herself. The case of **Jafari Musa Vs. DPP***,* Criminal Appeal No. 234 of 2019 was preferred for the purpose of that argument. Mr. Olembile, invited the court to refer to page 9 of the typed proceedings of the trial court. The victim, PW1, testifying as to her

age, declared that she was born on 09.02.2008; further that she was fourteen at the time she fell victim to the crime committed against her. The testimony of PW1 was backed up by the testimony of PW2, her grandfather. In view of the foregoing, the learned state attorney submitted that the age of the victim had been sufficiently proven.

Under the 3rd ground of appeal, the appellant is asserting on the existence of procedural irregularities, in the manner in which the trial court conducted the preliminary hearing (PH). The appellant, claiming that his plea was equivocal, is faulting the honorable trial magistrate for convicting him on the same; and claiming further that it is contrary to section 192 of the Criminal Procedure Act, Cap 20. R.E 2019 (CPA). The respondent's counsel adamantly contested the assertions of the appellant. Mr. Olembile referred to **section 192 (3) of the CPA** which provides as follows: -

> *"At the conclusion of a preliminary hearing held under this section, the court shall prepare a memorandum of the matters agreed and the memorandum shall be read over and explained to the accused person in a language that he understands, signed by the accused person and his advocate, if any, and by the public prosecutor, and then filed."*

In substantiating compliance of the aforementioned provision of the CPA by the trial court, the learned state attorney invited the court to refer

to page 7 of the typed proceedings. The respondent's counsel submitted that the memorandum of the matters agreed was duly prepared by the trial court, and the appellant appended his signature thereon. The learned state attorney proceeded to state that to his utter amazement, the appellant is now contesting facts he admitted to during trial, while the same is on record.

The counsel for the respondent further submitted that the appellant was convicted on the weight of the evidence produced during the hearing of the case. It was his contention that the appellant misdirected himself by believing that his conviction was solely dependent upon the PH; which, according to Mr. Olembile, was properly conducted. The assertions by the appellant were therefore described by Mr. Olembile as unfounded. The case of **Bryton Kaundama Vs. Republic**, DC Criminal Appeal No. 7 of 2023, was preferred in support of his submission; to the effect that failure to conduct PH does not vitiate the trial if the accused was not prejudiced. He winded up his submission on the 3rd ground of appeal by emphasizing that the manner in which the PH was conducted at the trial by no means prejudiced the appellant.

In addressing the 4th ground, the respondent's counsel submitted that the prosecution was able to prove the case beyond reasonable doubt;

contrary to the claims of the appellant. The learned state attorney stated further that the trial court entered conviction and sentence; upon being satisfied that the case was proven beyond reasonable doubt. Mr. Olembile referred to the case of **Selemani Makumba Vs. The Republic,** [2006] TLR 380. In that case, the Court of Appeal provided guidance on the legal standards necessary to prove the offence of rape. Citing the case of **Selemani Makumba** (supra) the learned state attorney submitted that the best evidence in proving the offence of rape is the testimony of the victim. Further that; any additional evidence corroborates the testimony of the victim. Mr. Olembile, applying the principles laid down in the case of **Selemani Makumba** (supra) to the instant matter, referred to pages 3 and 9 of the trial court's typed proceedings. The pages aforementioned, he stated, detail the testimony of the victim, PW1, narrating explicit details of the manner in which the offence was committed against her.

The learned attorney further asserted that in rape cases, as provided under **section 127 (6) of TEA;** the court can convict the accused on a mere testimony of the victim. The court need only to satisfy itself that the victim is telling the truth. The trial court, he submitted, adopted the same approach. Whereby, the learned state attorney, disputing all the four grounds of appeal for want of merit, prayed that the

appeal be dismissed, the decision of the trial court be reinforced, and the court to order that the appellant should continue to serve his sentence.

The appellant was brief in his rejoinder submission, addressing each of the grounds of appeal as follows: -

On the first ground he asserted that the tendering of the PF3 to form part of the evidence was of paramount importance to the matter before the trial court. Contesting the arguments advanced by the learned state attorney that the testimony of the victim was sufficient to prove the case without the need of additional evidence such as the PF3; the appellant disputed this profusely. The appellant stated that the PF3 was necessary to corroborate the testimony of the victim. Further, that the same was supposed to be read out during the proceedings in the trial. The appellant made no mention of non-appearance of the doctor as a witness; a point that was raised in his 1st ground of appeal.

In expounding the 2nd ground of appeal, the appellant submitted that the trial court in entering conviction, took into consideration the age of the victim, therefore the age of fourteen, while the same had not been scientifically proven. The appellant emphasized that the trial court erred in law and fact by proceeding to convict him while the age of the victim had not been ascertained.

The appellant argued the 3rd ground of appeal on the basis of failure by the trial court to conduct the PH in adherence to the rules governing criminal justice. He added further that the PH was conducted in a language that was foreign to him, to wit, English language; whereas he only speaks the Kiswahili language. As a result of this, he submitted, he was prejudiced.

I hereby wish to point out that the 3rd ground as provided in the petition of appeal made no mention of the language barrier but focused on the plea being equivocal. The appellant did not submit on this point.

In concluding his submission, the appellant stated that the prosecution failed to prove the case beyond reasonable. This, he added, was a direct result of failure on the part of the prosecution to gather sufficient evidence and tender the same in court, including the exclusion of key witnesses. He prayed the court to allow this appeal, quash the conviction and sentence and to order his release from incarceration.

Having heard the respective submissions by the parties, I started composing the judgement. However, in the course of initial stage of composing the judgement, the court *suo motu* noted a number of legal issues in the trial proceedings dated 22/03/2023 which will be reproduced as hereinunder: -

Date: 22/3/2023

Coram: N.R. Bigirwa-RM

Prosecutor: Mr. Boniphace-S/A-Present

Accused: Present in person

C/Clerk: J.M. Fue-RMA

SWO-Deus Manyama**-Present I hereby inform this court according to this report on 5/8/2022 the accused was an employee in A&K Security Group Co. Ltd located at Lwamugasa at Nyarugusu.* ***By then accused had 20 years old. So, he is not the age of 17 years as it is in the charge sheet dated 29/09/2023. *(sic)*

Signed: N.R. Bigirwa-SRM

22/03/2023

Sentence

Accused is sentenced to serve ***(30) thirty years in jail.***

Signed: N.R. Bigirwa-SRM

22/03/2023.

Based on the above proceedings, the Social Welfare Officer (SWO) reported that on 05/08/2022, the accused person was aged 20 years. On the other hand, the charge sheet stated that the offence was committed on 30/08/2022 and the appellant had 17 years. As a result, the trial court passed a sentence of (30) thirty years imprisonment against the appellant.

Thus, this court *suo motu* raised a crucial issue relating to the jurisdiction of the trial court as follows: -

> *Whether or not the juvenile court of Geita had the requisite jurisdiction to pass the sentence of thirty years against the appellant upon admitting the report of the SWO which introduced a new fact that the appellant was aged 20 years.*

In that regard, on 15th November 2023, I reopened the proceedings and invited all partes to address the court regarding the aforementioned legal issue. This is in line with the holding in the case of **Hassan Kibassa Vs. Angelesia** Chang'a CAT-Civil Application No. 405/13 of 2018; and **Mbeya-Rukwa Auto Parts & Transport Limited Vs. Jestina George Mwakyoma** [2003] TLR 251.

Mr John Joss, learned state attorney was the first to take the floor as the appellant preferred this route. The learned state attorney commencing his submission, acknowledged the existence of an error on the face of the records. He submitted that upon receiving the report prepared by Deus Manyama, the SWO, the trial magistrate admitted the same; and in agreement with the contents therein, that the accused was 20 years of age and not 17 years old as contained in the charge sheet, proceeded to sentence the appellant 30 years imprisonment. The learned state attorney proceeded to state that upon receiving the report of the

SWO indicating that the accused was above the age of 18, the honourable trial magistrate had no jurisdiction to proceed with the matter before him. The juvenile court, he added, is established to adjudicate matters involving children who are below the age of 18 and not adults.

The counsel for the respondent, in support of his submission, preferred rule 12 (1) to (5) of the Law of the Child (Juvenile Court Procedure) Rules, 2016 regarding an enquiry of the age which is in dispute. Focusing on rule 12(5), he submitted further that in preparing the enquiry report, the SWO is required to interview persons who are close to the child who may have relevant information about the child. Mr. Joss asserted further that the SWO was engaged to prepare the report *in lieu* of the documents which may be submitted in court for the purpose of establishing the age of the accused, as enlisted under rule 12(2) to (4).

The counsel for the respondent contended that the sentence passed was illegal as the juvenile court did not have jurisdiction to pass the said sentence. He added that upon receiving the SWO report, the trial court ought to have transferred the matter to a court with competent jurisdiction. Finally, it was prayed that the matter should be re-mitted to a court with competent jurisdiction to proceed with it, in the manner in which this court shall deem fit to order.

On the part of the appellant, he was extremely brief and submitted that he was aged 17 years at the time of the alleged offence. He added further that on the day of pronouncement of judgment, the SWO was not present in court to read the report. The appellant added that he has been in custody since 03/10/2022. The appellant asserted that the trial court convicted and sentenced him without adherence to the requirements of the law. He prayed that the court be pleased to release him from custody as his rights have been prejudiced.

Upon hearing the submissions from the parties, I will now proceed to determine the issue raised by this court *suo motu*. Section 4(1) of the Law of the Child Act, Cap. 13 R.E 2019 (LCA) provides that:

> *"A person **below the age of eighteen years** shall be known as a child".*

In addition, **section 97(1)** of the LCA stipulates as follows:

> *"There shall be established a court to be known as the **Juvenile Court** for purposes of hearing and determining **child matters."***

In our case, the matter was instituted at the Juvenile Court in consideration of the age of the accused. As per the charge sheet, the accused was aged 17 years at the time of the alleged commission of the offence. The typed trial proceedings furthermore, do not indicate that

there was any dispute as to the age of the accused in the course of the trial. This is further evidenced by the typed trial proceedings on page 7, where the memorandum of facts not in dispute is duly signed by both parties. Furthermore, during his defence, the accused when stating his particulars on page 15 of the typed proceedings, asserted his age to be 17 years. In view of the foregoing, it is evident that until the closure of the trial, the accused was undisputedly, a child aged 17 years.

Section 100A of the LCA provides for the purpose of the submission in court of a report of the SWO in a juvenile matter. The section provides as follows: -

> *100A (1) The Juvenile Court may, during the proceedings,* ***where it considers necessary,*** *seek the opinion and recommendation of social welfare officer.*
> *(2) Where the court considers necessary to have the opinion or recommendation of a social welfare officer,* ***the court shall consider such opinion or recommendation before passing the sentence****. [Emphasis added]*

In addition to the aforementioned provisions, section 111(1) of the LCA further provides as hereinafter: -

> *111.-(1) Where the child admits the offence and the Juvenile Court accepts its plea, or after hearing the witnesses the Juvenile Court is satisfied that the offence is*

proved, the Juvenile Court shall convict the child shall then, except in cases where the circumstances are so trivial as not to justify such a procedure, ***obtain such information as to his character, antecedents, home life, occupation and health as may enable it to deal with the case in the best interests of the child,*** *and may put to him any question arising out of that information. [Emphasis added]*

It follows therefore, that the submission of the SWO report in the trial court should have solely been for the purpose of providing additional information of the child relating to his character, antecedents, home life, occupation, and health. These information helps the court to be properly guided in passing a sentence that would consider the best interests of the child. In the present case, the act of SWO to introduce new facts with regard to the appellant's age after the conviction, the fact which was not in dispute, was improper and unfounded. Again, the same was irrelevant for being out of the scope of or in violation of section 111(1) of the LCA. Therefore, the proper course which the juvenile court should have taken, was to disregard the new fact relating to the appellant's age of 20 years improperly introduced by the SWO. The juvenile court should then have proceeded to pronounce sentence against the convicted child in accordance with the requirements of the law.

I further wish to point out that sentences that can be imposed by a juvenile court to a convicted child are provided under sections 119 and 120 of the LCA as reproduced hereinbelow:

> *119.-(1) Notwithstanding any provisions of any written law,* ***a child shall not be sentenced to imprisonment.***
> *(2) Where a child is convicted of any offence punishable with imprisonment, the court may, in addition or alternative to any other order which may be made under this Act-*
> *(a) discharge the child without making any order;*
> *(b) order the child to be repatriated at the expense of Government to his home or district of origin if it is within Tanzania; or*
> *(c) order the child to be handed over to the care of a fit person or institution named in the order, if the person or institution is willing to undertake such care.*
> *120 (1) Where a child is convicted of an offence punishable which if committed by an adult would have been a to custodial sentence, the court may order that child to be committed to custody at an approved school.*

Needless to say, that the trial court, did not have the requisite jurisdiction to pass a sentence of thirty (30) years imprisonment against the appellant. This was in violation of section 119(1) of the LCA which prohibits imprisonment of a convicted child. The appropriate sentence to have been passed should have been among the alternative sentences as

provided under sections 119 and 120 of the LCA. In the case of **Furaha Johnson Vs Republic**, Criminal Appeal No. 452 of 2015, the Court of Appeal sitting in Arusha held as follows: -

> *"The Court takes judicial notice of the fact that the District Court of Moshi which tried the appellant is not a Juvenile Court. Since the appellant at the time of his arraignment and trial was a child, he was not triable by the district court, but a Juvenile Court. The trial court, therefore, lacked* ***jurisdiction ratione personae*** *to try the appellant.* ***This alone rendered his trial a nullity****. But even if the appellant had been tried by the appropriate court, the conduct of the trial in the absence of a social welfare officer* ***would have equally rendered the trial a nullity"****. [Emphasis added]*

In consequence whereof, I find merit in this appeal but only on the basis of the issue raised by this court *suo motu*. I accordingly, nullify the entire proceedings, conviction, and sentence, and proceed to set the same aside. The appellant has been in custody since 03/10/2022 and started serving an illegal sentence of 30 years imprisonment from 22/03/2023. Guided by the holding in the case of **Furaha Johnson** (supra), I further order the immediate release of the appellant from prison unless he is otherwise lawfully held.

It is so ordered.

DATED at **MWANZA** this 17th day of November, 2023.

I. D. MUSOKWA

JUDGE