

IN THE HIGH COURT OF TANZANIA

(DAR ES SALAAM SUB-REGISTRY)

AT DAR ES SALAAM

CRIMINAL APPEAL NO. 80 OF 2023

(Originating from Criminal Case No. 42 of 2021 before the District Court of Ilala at Kinyerezi before Hon. N.A BARO PRM dated 23^d June 2022 in Criminal Case No. 427 of 2021)

ASHERY ALOYCE MOHAMEDAPPELLANT

VERSUS

THE REPUBLIC.....RESPONDENT

JUDGMENT

24th April & 15th May 2024.

MWANGA, J.

In the District Court of Ilala at Ilala, the appellant **ASHERY ALOYCE MOHAMED** was charged and convicted of the offense of Rape Contrary to sections 130 (1) (2) (e) and 131 (e) of the Penal Code [Cap. 16 R.E 2019], currently [R.E 2022]. The particulars of the offense against the appellant were that; on the 9th day of April 2021 at the Vingunguti area within Ilala District in Dar es Salaam Region, the appellant had carnal knowledge with a school girl aged 14 years old (whose name is withheld). He was

arraigned in court and charged accordingly. Subsequently, he pleaded not guilty.

After the conclusion of the trial, the appellant was convicted and sentenced to 30 years imprisonment. The appellant aggrieved by both conviction and sentence, hence this appeal on the following grounds;

1. The learned trial resident magistrate erred in law by convicting the appellant when the evidence of PW1(victim) was vividly incredible and implausible for the failure to give the prior description of her assailant, such as morphological appearance, color, height, clothes, voice...for proof of identification and /recognition at the scene of the crime.
2. The learned trial resident magistrate erred in law and fact by convicting the appellant when the prosecution failed to establish the appellant's apprehension in connection with this offense as neither the said sungusungu nor the appellant's friend who gave information and or shows the appellant's home was called to testify in court, the omission which cast doubt on the prosecution case.

3. The learned trial resident magistrate erred in law and fact by convicting the appellant when erroneously failed to draw an inference adverse to the prosecution for the failure to parade and or/ trace the said Samia (PW's friend to testify in court to prove the fact in issue.
4. The learned trial magistrate erred in law and fact by convicting the appellant when wrongly failed to consider the defense evidence which raised reasonable doubt on the prosecution case particularly the defense of alibi.
5. The learned trial magistrate erred in law and fact by convicting the appellant when grossly misdirected himself by shifting the burden of proof on the appellants; shoulders to prove this innocence
6. The learned trial Resident magistrate erred in law and fact by convicting the appellant when the charge against the appellant was not proved to the tilt as required by law.
7. The learned trial Resident magistrate erred in law and in imposing the sentence of thirty years imprisonment to a child (appellant) contrary to the provision of sections 113 and 119 of the Law of Child Act, Cap. 13 R, E 2019 and section 131(2) (a) of the Penal Code, Cap. 16 [R.E 2022].

Based on the grounds of appeal, the appellant is requesting this court to quash the conviction and set aside the sentence. To appreciate what transpired in the trial let me give a brief background of the case.

The facts reveal that on 6th April 2021, the appellant and one described as the victim (whose name is withheld) were in the wedding ceremony. Subsequently, the appellant got hold of the victim's hand and went together to stay on the wood. The appellant is said to have undressed and inserted his penis in the victim's vagina.

When they completed, they went home. The victim reported the incident to her mother who testified that on the date of the incident, she saw the appellant coming home while holding pants in her hand and informed her that she has been raped by the appellant. On 10th April 2021 at about 2;00hrs the victim was taken to Buruguni Health Center for medical examination where the clinical officer received the victim. The medical report (PF3) revealed some bruises and light blood indications in the victim's vagina.

Upon leave of the court, the appeal was argued by way of written submission. The appellant appeared in person, while the respondent was represented by Phoibe Magiri, learned State Attorney.

I would prefer to start with the third ground of appeal which the appellant termed as an additional ground of appeal. This ground of appeal is about the failure of the trial court to conduct a due inquiry as to the age of the appellant who alleged that he was 17 years old when committing the offense. The appellant also added that the imposition of the sentence of thirty years to a child (appellant) violates the provision of sections 113, 119 of the Law of Child Act, Cap. 13 [R. E 2019] and section 131(2) (a) of the Penal Code, Cap. 16 [R. E 2022].

Of great importance, Ms. Magiri conceded to this ground of appeal. The learned State Attorney referred this court to page 24 of the typed proceedings where the appellant told the court that he was 17 years old but the trial court did not conduct the inquiry as the law requires. She added that since the age of the appellant was not proven, there is the possibility that even the mode of the trial and type of sentence imposed was wrong.

Hence, he prayed to this court to nullify the whole proceedings and order a trial of Denovo so that the anomaly can be resolved considering that there is sufficient evidence in support of the prosecution case.

I have considered the submissions of both parties in this ground of appeal. I find no need to waste precious time of the court on this argument. The version of their argument that inquiry as to the age of the appellant ought to be conducted is a mandatory legal requirement. Section 113(1) of the Law of Child Act provides;

"S. 113(1) Where a person, whether charged with an offense or not, is brought before any court otherwise than to give 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"

The subsequent provision of section 114(2) of the Act provides that, where the court has failed to establish the correct age of such person, then the age stated by that person shall be deemed to be the correct age of that person. The relevant section reads;

"114(2)- 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”.

Given the above, the proceedings on page 24 do not show if the trial court conducted an inquiry. The appellants told the court that during the trial particularly on page 24 of the proceedings that he was 17 years old. The relevant page 24 of the trial court proceedings provides as follows;

“DW1(Accused)

**ASHERY ALOYCE MOHAMED 17 YEARS OLD, GOGO, PETTY
BUSINESSMAN. VINGUNGUTI DARAJANI AND CRSTIAN”**

For the foregoing, and given such default, whatever was done in violation of the law is a nullity, and hence crushes even the evidence received. Section 119 of the Act, provides that a child shall not be sentenced to imprisonment but other punishment as under subsection (2). Therefore, to sentence a child to 30 years imprisonment is a grave violation of the child’s legal rights.

Taking the totality and circumstances of this case, the proceedings in Criminal Case No. 42 of 2021 are nullified. The learned State Attorney asked

for a retrial against the appellant. However, because the trial court recorded that the appellant has the age of 17 years old, and the fact that the appellant has served to imprisonment sentence contrary to the laws guiding the conduct of proceedings on child offenders I find it prudent to order the release of the appellant forthwith as I hereby do.

In light of the above, it is my profound view that the appeal is meritorious and is therefore allowed.

It is so ordered.




H. R. MWANGA

JUDGE

15/05/2024

COURT: Judgment delivered in Chambers this **15th day of May 2024**, in the presence of Mr. Cathbeti Mbilinyi, learned State Attorney for the Respondent and the Appellant in person.




H. R. MWANGA

JUDGE

15/5/2024