IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

BUKOBA SUB-REGISTRY

AT BUKOBA

CRIMINAL APPEAL NO. 65 OF 2023

(Arising from Criminal Case 89 of 2023 District Court of Missenyi)

MUGISHA INNOCENT..... APPELLANT

VERSUS

REPUBLIC..... RESPONDENT

JUDGMENT

8th and 16th February, 2024

BANZI, J.:

The appellant, Mugisha Innocent was arraigned before Missenyi District Court charged with the offence of rape contrary to sections 130 (1) (2) (e) and 131 (1) of the Penal Code [Cap.16 R.E. 2019] ("the Penal Code"). The particulars of offence indicate that, on 11th June, 2023 at Ruhija village, within Missenyi District, in Kagera Region, the appellant had sexual intercourse with girl of 17 years whom I shall refer as the "victim".

The brief facts leading to the conviction of the appellant are that, in January, 2023, the victim went to the appellant who is her neighbour. Upon reaching, the appellant asked her to remove her hymen and she agreed. She undressed herself, lay on the bed and the appellant inserted his male organ

into her female organ. In March, they did it again. According to her, the appellant had sexual intercourse with her for three times. On 16th June, 2023, ward executive officer (PW2) went to the appellant's room after receiving information that, he was with student. Upon entering, he found them on the bed. According to the victim, they did not have sexual intercourse on the day they were caught with PW2. Thereafter, PW2 informed the victim's father (PW5) and they reported the matter to the police where they were given PF3 (Exhibit P1) and took the victim to Mugana hospital. She was examined by PW3 who found her with evidence of penetration. The appellant in his defence stated that, he had no defence and left everything upon the court to decide.

At the end of the trial, trial court was satisfied that the offence of rape was proved beyond doubt and hence, it convicted and sentenced the appellant to thirty (30) years imprisonment with an order of compensation of Tshs.2,000,000/= in favour of the victim. Aggrieved with his conviction and sentence, he preferred this appeal with three (3) grounds which hinge on one complaint that, the case against him was not proved beyond reasonable doubt.

At the hearing of this appeal, the appellant appeared in person unrepresented whereas, Ms. Evarista Kimaro, the learned State Attorney appeared for the respondent.

The appellant adopted his grounds of appeal and urged this court to consider them and set him free.

On her side, Ms. Kimaro relied on the case of **Seleman Makumba v. Republic** [2006] TLR 379 and argued that, the case against the appellant was proved beyond reasonable doubt. It was her submission that, the best evidence comes from the victim and according to the testimony of the victim, the appellant had sexual intercourse with her three times. Her evidence was corroborated with the evidence of PW3 who examined her and found evidence of penetration and the cautioned statement of the appellant who confessed to have sexual intercourse with the victim six times.

Concerning proof of age of the victim, she submitted that, the prosecution produced Exhibit P3 (Baptism certificate) for purpose of proving the victim's age. However, the same is secondary evidence which was wrongly admitted as the record is silent on whereabouts of its original. Hence, she requested this court to expunge it from the record. Nevertheless, she urged this court to consider the evidence of PW3 and PW4 who said

that, the victim was 17 years old. She further submitted that, as the victim was in form two, under normal circumstances, she is below 18 years. By relying on the case of **Issaya Renatus v. Republic** [2016] TZCA 218 TanzLII she urged this court to consider section 122 of the Evidence Act [Cap.6 R.E. 2022] (TEA). She concluded her submission with a prayer of dismissal of this appeal as the case against the appellant was proved beyond reasonable doubt. In rejoinder, the appellant had nothing to say.

Having thoroughly considered the grounds of appeal and the submissions by both sides in the light of evidence on record, the main issue for determination is whether the case against the appellant was proved to the required standard.

It is settled law that, in rape cases, the prosecution is required to prove that, there was penetration and where the victim is above 18 years, there is another requirement to prove which is lack of consent. Moreover, in rape cases of persons under the age of eighteen years which is commonly known as statutory rape, a further condition of proof of age is required to be proved. See the cases of **Masanyiwa Msolwa v. Republic** [2022] TZCA 456 TanzLII and **Alex Ndendya v. Republic** [2020] TZCA 201 TanzLII. In **Masanyiwa**'s case it was stated that:

"In cases of rape of persons aged below 18 years, which is called statutory rape, a further condition on the part of the prosecution kicks in. Age must be proved."

Returning to the case at hand, it is undoubted that, the evidence of the victim and doctor (PW3) as well as Exhibit P1 proved penetration. The victim claimed that, the appellant had sexual intercourse with her for three times. PW3 found the evidence of penetration on the victim after he examined her. The appellant himself through his cautioned statement (Exhibit P2) confessed to have sexual intercourse with the victim.

Reverting to the second ingredient of proof of age, as alluded earlier, in order to prove statutory rape, there must be evidence proving the victim's age. In our case, the prosecution relied on Exhibit P3 and testimony of the doctor and investigator. So far as Exhibit P3 is concerned, as correctly submitted by learned State Attorney, the document in question is not original document. It is not even certified as the true copy of the original. In other words, it is secondary evidence which, before it is admitted, there must be evidence to establish the circumstances leading to production of the same pursuant to section 67 (1) (a) to (g) of TEA. However, there is nothing adduced by PW4 to establish the circumstances leading to the production of secondary evidence in question instead of original document. He did not

state for instance, when and how the original is lost or destroyed. Under the prevailing circumstances, it is the considered view of this court that, Exhibit P3 was wrongly admitted and it is hereby expunged from the record.

Having expunged Exhibit P3 from the record, it is now pertinent to look at the remaining evidence which proves the age of the victim. On who is eligible to prove the age of the victim, the Court of Appeal in the case of **Omary Rashid @ Milanzi v. Republic** [2023] TZCA 167 TanzLII held that:

> *"It is a settled principle of law in this country that the age of the victim can be proved by the victim, relative, parent, medical practitioner, Birth Certificate, teacher, close friend or any other person who knows the victim."*

In our case, it is very unfortunate that, neither the victim nor her father (PW5) adduced evidence to prove the age of the victim. Since the victim's father was called to testify, it was expected for him adduce evidence for purpose of proving his daughter's age. However, nothing came from him. Likewise, the victim did not adduce any evidence to establish her age. Her age of 17 years appeared on the citation by magistrate before giving her testimony. However, it is settled law that, the citation by magistrate regarding the age of a witness before giving evidence is not evidence of that

person's age. This was stated in the case of **Andrea Francis v. Republic**, Criminal Appeal No. 173 of 2014 CAT (unreported) where it was held that:

> *"It is trite law that the citation in a charge sheet relating to the age of an accused person is not evidence.* ***Likewise, the citation by a magistrate regarding the age of a witness before giving evidence is not evidence of that person's age.*** *It follows that the evidence in a trial must disclose the person's age, as it were. In other words,* ***in a case such as this one where the victim's age is the determining factor in establishing the offence, evidence must be positively laid out to disclose the age of the victim.***"(Emphasis supplied).

Moreover, Ms. Kimaro invited this court to consider the evidence of the investigator, PW4 and doctor, PW3 which to her view, proved the age of the victim. With due respect, I hesitate to accept her invitation due to the following reasons. First and foremost, the evidence of the doctor failed to prove the victim's age. There is one statement in his testimony which suggested the victim's age. At page 8 of the typed proceedings, PW3 had this to say:

> "*The victim was about 17 years.*"

It is clear from the extract above that, PW3 was not even sure of the exact age of the victim. Apart from that, he did not explain further when the victim was born before concluding that, she was about the age of 17 years. Equally, PW4 failed to state when the victim was born. He only relied on the baptism certificate. Although it has already been expunged from the record, its authenticity is also questionable. It did not have the date of baptism which is the gist of baptism certificate.

Furthermore, the learned State Attorney relying on the case of **Issaya Renatus v. Republic** (*supra*) invited this court to consider section 122 of TEA in proving the victim's age. With due respect, the cited case is distinguishable with the case at hand. In that, the victim was a class five pupil. Also, she was introduced as the child of tender age and hence, the trial court conducted *voire dire* test before her evidence was taken. These facts made the Court to conclude that, she was under the age of eighteen. However, things are different in our case. PW6 who is victim's teacher said that, the victim was a form two student during the alleged incident. There was no further evidence from her revealing the age of the victim. Under these circumstances, it cannot be said with certainty that, being a form two student, she was under the age of eighteen. Thus, it is the considered view

of this court that, the victim's age was not proved to the required standard and since it is one of the essential ingredients in statutory rape, it cannot be concluded that, the offence of rape was proved beyond reasonable doubt against the appellant.

Despite all these, the trial magistrate in his judgment was satisfied with the prosecution evidence and convicted the appellant. In his reasoning, the learned magistrate stated that, the appellant waived his right to defend himself when he told the court that he had no defence to make and left the matter to the court to decide. He concluded that, by doing so, the appellant conceded to the prosecution evidence. With due respect, the learned magistrate dived into a great error because it is settled law that, the conviction of the accused person is not based on the weakness of the defence but on the strength of prosecution case. Besides, the appellant had no duty to prove his innocence and it was the duty of the prosecution to prove the guilty of the appellant beyond reasonable doubt.

For those reasons, it is the finding of this court that, the prosecution side had failed to prove the case against the appellant beyond reasonable doubt. In that regard, I allow the appeal by quashing the conviction and setting aside the sentence and compensation order imposed against the

appellant. I order his immediate release from prison, unless otherwise lawfully held.

It is accordingly ordered.

I. K. BANZI
JUDGE
16/02/2024

Delivered this 16th February, 2024 in the presence of Ms. Evarista Kimaro, learned State Attorney for the respondent, the appellant in person, Hon. Audax V. Kaizilege, Judge's Law Assistant and Ms. Mwashabani Bundala B/C. Right of appeal duly explained.

THE HIGH COURT OF TANZANIA
BUKOBA

I. K. BANZI
JUDGE
16/02/2024