IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

[MOROGORO SUB REGISTRY]

AT MOROGORO

CRIMINAL APPEAL NO. 10643 OF 2024

(*Originating from Criminal Case No. 84 of 2021 of District Court of Malinyi at Malinyi*)

PETRO KULWA ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

JUDGMENT

04/06/2024 & 06/06/2024

KINYAKA, J.:

At the District Court of Malinyi at Malinyi hereinafter "the trial court" the appellant was charged with one count of Rape contrary to sections 130(1) and (2)(e) and 131(1) of the Penal Code Cap. 16 R.E. 2019 hereinafter "the Penal Code" in Criminal Case No. 84 of 2021. It was alleged by the prosecution that the appellant had carnal knowledge with a girl of 16 years of age on 2nd September 2021 at Kiswago village within Malinyi District in Morogoro Region.

At the end of the trial, the trial court convicted the appellant of the offence of Rape and sentenced him to serve thirty years imprisonment in jail. Discontented with both the conviction and sentence against him, the

appellant preferred ten (10) grounds of appeal as reproduced herein below: -

1. That there appeared error on the face of the records that affected the end process of the case where as some of the facts recorder by the trial magistrate were not adduced by the appellant and other were not correctly recorded;
2. That the age of the victim was 19 years as testified by himself. I wonder to see the records that the age of the victim is 16 years;
3. That PW1 testified on the birth of the victim but the same was not corroborated by documentary evidence i.e. birth certificate or affidavit of birth or clinic card. Since PW1 is the father of the victim, his evidence could have been admitted by caution since there might have been a degree of concoction. The trial magistrate erred in law and facts in this regard;
4. That I was not freely or fully accorded with my right to defend myself as a result I defended alone despite a number of witnesses that could clearly inform the court about the scenario and apparent age of the victim to be above 19 years;
5. That the learned trial magistrate knowingly I was a layman and unrepresented failed to explain well to me the provision of section

214(1) of the CPA after changing of magistrate and recorded the answer which I did not reply hence occasioned unfair trial to me;

6. That the learned trial magistrate erred in law and fact to convict and sentence the appellant without consideration that there was contradiction between PW1 (father of the victim) and PW4 (head teacher) regarding the age of the victim as if there were two different victims something which was crucial to be established and proved beyond reasonable doubt;
7. That the learned trial magistrate failed to do critical analysis and evaluation of the evidence as PW2 (victim) during examination in chief did not state that she told the appellant that she was as student, she never told the appellant's relative that she was a student who was abducted by the appellant as she claims rather that she behaved so maturely and accepted to go to the appropriate place (guest house) for their love affair, in this case strict proof was required to establish that the victim was not an adult matured woman sexually and physically;
8. That the learned trial magistrate failed to evaluate PW3 evidence (doctor) who revealed that the victim's hymen was perforated long time ago hence create doubts on the age of the victim as it proves

maturity in sexual intercourse which was not expected for a child of that age;

9. That the learned trial magistrate erred in law and fact to convict and sentence the appellant without consideration of the appellant's defence that the victim's father needed 25 cattle as dowry and when the appellant failed to pay they created a case of rape against him a fact which raised doubt on the prosecution case;

10. That the learned trial magistrate erred in relying on exhibit P2 (school register) which was a photocopy without seeing or receiving explanation of the where about of the original document therefore exhibit P2 being photocopy should be expunged from the proceedings.

On the date of hearing of the appeal, the appellant appeared in person unrepresented whereas the respondent was represented by Mr. Shaban Kabelwa, learned State Attorney.

The appellant was the first to address the Court. He did not have much submit. He implored the Court to consider his grounds of appeal and set him free.

On his part, Mr. Kabelwa protested the appeal. In submission, the learned State Attorney consolidated and argued the 1st, 4th and 5th grounds, the

2nd, 3rd and 6th grounds; and the 7th, 8th and 9th grounds. He argued the 10th ground separately.

Mr. Kabelwa, learned State Counsel began with concession to the 10th ground of appeal. He admitted that PW4 tendered certified copy of school registration book of Kitiliwele primary school but he did not give reasons as to why he was tendering certified copy and the whereabouts of the original copy as evidenced on page 18 of the typed proceedings. He further stated that even the procedure of admission of the evidence was not complied with including that the document was not cleared for admission. He cited the case **Mapinduzi Mgalla v. R., Criminal Appeal No. 406 of 2020 [2024] TZCA No. 21 (6 February 2024)** where on page 8 of the decision the Court of Appeal reiterated the steps to follow in tendering a document in court and prayed that Exhibit P2 be expunged from the record.

As for the 1st, 4th and 5th grounds which boiled on the appellant's complaint against the record of proceedings of the trial court, the learned State Attorney reminded the Court that the court's record is a serious document that the law takes it as correct unless proven to the contrary and it cannot be easily impeached. In that regard, he contended that the appellant's complaint on the first ground is unmerited as he has not stated the matters that were not recorded. He made reference to page 22 to 24 of

the trial court's proceedings and informed the Court that the appellant gave his testimony which were recorded and the same was read and found to be correct in compliance with section 210(3) of the Criminal Procedure Act. As such, he said, there is no reason to impeach the trial court's proceedings as it reflects the true record of what transpired before it.

As for the appellant's complaint that he was denied with the right to call his witnesses, Mr. Kabelwa submitted that it is evident on page 25 of the typed proceedings that on 21st October 2021 when the matter was called on for hearing before the trial court, the appellant informed the court that he could not get hold of his witnesses. According to him, the records reveal that the appellant prayed to close his defence case and thereafter appended his signature to that effect, and thus the ground lacked merit.

In respect of the allegation regarding the trial court's abrogation of section 214(1) of the Criminal Procedure Act, Mr. Kabelwa submitted that it is clearly reflected on page 22 of the proceedings that the trial magistrate who took over the proceedings explained the reasons for his takeover and addressed both parties who did not object to the same. Putting reliance on the case of **Ex-D8656 CPL Senga s/o Iddi Nyembo & 7 Others v. R., Criminal Appeal No. 16 of 2018 (2020) 2 TLR 260,** Mr. Kabelwa insisted that the proceedings of the trial court is correct and there

is no reason to impeach the same. On that basis, he prayed the court to be guided by the case of **DPP v. Selemani Juma Nyigo @Mwanyigo, Criminal Appeal No. 363 of 2022** from page 7 to 12, where the Court of Appeal deliberated on the aim of section 214 of the CPA. He however submitted that in case the Court finds that the said provision was not complied with, the same can be cured by section 388 of the CPA. In the end, the learned State Counsel prayed for dismissal of the 1st, 4th and 5th grounds of appeal.

The learned State Attorney attacked the 2nd, 3rd and 6th grounds for being baseless. He said, the contradictions of PW1 and PW4 as to the victim's age do not affect the case because the aim of presenting the witnesses was to prove that the victim was a student and was below 18 years. He added that by calculation, it is clear that the victim was below 18 years which prove the offence of statutory rape. He relied on the decision of the Court of Appeal in the cases of **Isaya Renatus v. R., Criminal Appeal No. 542 of 2015 [2016] TZCA 2018 (26 April 2016)** and **Ado Aron @Mziku v. R., Criminal Appeal No. 449 of 2021 [2024] TZCA 220 (22 March 2024)** to fortify his contention that at the trial court, the only criterion for consideration was whether the victim was below 18 years or not and to that end, the evidence of the victim's father was weightier. As

such, he prayed for dismissal of the 2nd, 3rd and 6th grounds of appeal for lack of merit.

On the 7th, 8th and 9th grounds of appeal, Mr. Kabelwa was of a strong opinion that the evidence of PW2, PW1 and PW3, and that of the appellant (DW1) himself proved that the appellant raped the victim on the date of the incident. He said, DW1's testimony was similar to the testimony of PW2 that the appellant had sexual intercourse with the victim. He added that DW1 testified that he wanted to marry the victim and according to the Sukuma customs, he abducted and had sexual intercourse with the victim as the victim did not inform him that she was student. Flowing from the above testimonies, it was Mr. Kabelwa's view that the grounds have no basis as what is crucial in establishing the offence of statutory rape is the age of the victim who should be under the age of 18 years.

Regarding the claim that PW2 was perforated long time ago, Mr. Kabelwa pressed that the same has no basis and cannot exonerate the appellant from the offence committed as he admitted in his evidence on page 23 and 24 of the proceedings that he abducted and had sexual intercourse with the victim.

On the claim that the victim's father, PW1, wanted 25 cattle as dowry, it was Mr. Kabelwa's submission that the same is an afterthought as the appellant did not cross examine PW1 on the dowry when PW1 was

testifying against him at the trial. He concluded that the 7th, 8th, and 9th grounds of appeal are devoid of merit as the appellant admitted before the trial court to have had sexual intercourse with the victim. He cemented his submission by citing the cases of **Nyerere Nyague v. R., Criminal Appeal No. 67 of 2010** on page 14, and **Edward Waison Mzolopa v. R., Criminal Appeal No. 631 of 2020 [2024] TZCA 26 (12 February 2024]** on page 10 and 11 which subscribed to the former case by holding that a confession made in court is of greater effect than any other proof.

In his brief rejoinder, the appellant opposed the learned State Attorney's submissions. As regards to the victim's age, he told the Court that the victim was not a student but an adult who was a wife to a certain old man who married her after the appellant had paid 7 cows for dowry. He said it was for that reason that he became angry and took the girl away.

The appellant further complained that at the trial, it was the prosecution and his father in law who were given the right to be heard by the trial court but as for him, he was even denied to present his witnesses by the prosecution. He complained further that the appellant submitted that when he was arraigned before the trial court, he denied the offence but he had to admit later on because he was beaten and forced by the public prosecutor to admit the offence.

He went on telling the Court that the criminal charges against him were preferred by his father in law after his refusal to pay more 25 cows for dowry to him. In rounding off, the appellant insisted that the victim was not a student and beckoned upon the Court to set him free.

Despite the general submissions in support of the appellant's grounds of appeal and the respondent's consolidation of the grounds of appeal, I will determine the grounds of appeal separately.

I will not spend more time to determine the tenth ground of appeal which was conceded by the respondent. The record reveal on page 18 that the trial court's proceedings that Exhibit P2, the certified copy of the school registration book of Kitiliwele Primary School, was tendered by PW4 and admitted in evidence without the prosecution's compliance with the procedure and requirements of admission of a secondary evidence as stipulated under section 67(1) of the Evidence Act Cap. 6 R.E. 2022 hereinafter the "Evidence Act".

Not only that the procedure for admission was abrogated but also, the trial court admitted the school registration book without being informed by PW4 and being satisfied of the reasons for production of the secondary evidence contrary to section 66 of the Evidence Act which stipulates that documents must be proved by primary evidence except as provided under the Act.

On the basis of trial court's abrogation in the admission of Exhibit P2, I hereby expunge Exhibit P2 from the record of the trial court. The tenth ground of appeal is allowed.

In the second ground of appeal, the appellant complained that the victim was 19 years and not 16 years of age. Contrary to his argument in this ground, there is nowhere in the record of the trial court where it is indicated that the victim was 19 years at the time of the incident, be it through oral testimonies of witnesses including the appellant himself, or through documentary evidence. The evidence of the prosecution was clear that the victim was born in 2005 as per the testimonies of PW1 and PW4 on pages 8 and 18 of the proceedings, respectively, making her 16 years on 2nd September 2021, when the appellant and the victim had sexual intercourse. The second ground fails for being baseless.

The appellant's complaint in the third ground of appeal is that the evidence as to the birth of the victim was not corroborated by documentary evidence such as birth certificate, affidavit or clinic card. It is true that the evidence of PW1 and PW4 on the age of the victim was not supported by any documentary evidence. However, the same does not impair the oral testimonies of PW1, the victim's father as the parent of the victim, and PW4, the head teacher of the primary school in which the victim was enrolled. It is a well settled position of law that the age of

the victim can be proved through the victim herself, the parent of the victim, the guardian of the victim, the teacher of the victim, and the medic or birth certificate of the victim if it is available. This was cemented by the Court of Appeal in the case of **Abel Changwe v. Republic, Criminal Appeal No. 546 of 2019** on page 6, that:-

> *"Apart from proving penetration and that it was the appellant who committed the act, proof of the victim's age was critical. Consistent with the Court's decisions, amongst others, Issaya Renatus v. Republic (Criminal Appeal No. 54 of 2015) [2016] TZCA 218 (26 April 2016, TanzLii), proof of age could have been through, any of the following; the victim, parent, guardian, teacher, medic or birth certificate, if any.."*

It means that the documentary evidence such as birth certificate, affidavit or clinic card is not the only or strong evidence to prove age of the victim. From the above observations, the third ground of appeal is bound to fail. Turning to the fourth ground on the appellant's complaint that he was denied a free and full right to defend himself and to call witnesses who would testify that the victim was aged 19 years, the same is contrary to the proceedings of the trial court.

The proceedings of the trial court on page 24 reveal that on 20th October 2021, after the appellant finished his testimony, he requested for

adjournment for further defence hearing. The trial court adjourned the matter until the next day, the 21st day of October 2021. On 21st October 2021, the appellant informed the trial court that his witness was not reachable and he prayed to close his case. In the handwritten proceedings, it is clearly shown that the appellant signed by affixing his thumb print immediately after his prayer to close his defence case.

The above record of the proceedings reveal that the appellant was fully accorded with the right of hearing. The appellant was accorded with a right to call his witnesses but he informed the trial court that his witness was unreachable and prayed to close his defence case. Reading the entire proceedings, I have no reason to doubt or disbelieve the sanctity of the record of the trial court. The record of the court carries the true record of the proceedings and cannot be easily impeached. The appellant has not demonstrated any sufficient reason that would warrant this Court to impeach the proceedings of the trial court.

It was held by the Court of Appeal in the case of **Oscar John Bosco @ Jacob & Another v. R., Criminal Appeal No. 140 of 2018** on page 7 of the decision that:-

> *".....It is a trite law that court's records are serious documents which cannot be impeached casually. On this one, there is plethora of authorities including* ***Iddy Salum @ Fredy v.***

Republic, *Criminal Appeal No. 192 of 2018 (unreported), and* ***Abieza Chichili v. Republic*** *(1998) TLR 557. In Salum Idd @ Fredy (supra) the Court stated:*

> *"the principle as regards a court record is that the same is taken to reflect a true position of what took place during the conduct of the proceedings and cannot be lightly impeached."*

Fortified by the above decision which squarely apply in the present appeal, I find no merit in the fourth ground of appeal, and hence I proceed to dismiss the same for lack of merit.

The appellant complaint in the fifth ground of appeal is that being a lay person, the trial magistrate failed to well explain to him the provision of section 214(1) of the Criminal Procedure Act Cap. 20 R.E. 2022 hereinafter "the CPA". I will begin with reproducing section 214(1) of the CPA:-

> *214 (1) Where any magistrate, after having heard and recorded the whole or any part of the evidence in any trial or conducted in whole or part any committal proceedings is for any reason unable to complete the trial or the committal proceedings or he is unable to complete the trial or committal proceedings within a reasonable time,* ***another magistrate who has and who exercises jurisdiction may take over and continue the trial or committal proceedings, as the case***

> ***may be, and the magistrate so taking over may act on the evidence or proceeding recorded by his predecessor and may, in the case of a trial and if he considers it necessary, re-summon the witnesses and recommence the trial or the committal proceedings.*** [Emphasis added]

I have read both the typed proceedings of the trial on page 22 and its handwritten proceedings. The same reveal that the trial magistrate who took over the proceedings clearly informed the parties, including the appellant that the former trial magistrate was transferred and he will take over the proceeding. Not only that but also, the Honourable trial Magistrate informed the parties that he intended to act on the evidence previously recorded by his predecessor. Both parties had no objection and duly signed. The handwritten proceedings reveal that the appellant signed by affixing his thumb print.

The excerpt of the proceedings on page 22 reads as below:-

> *"**COURT**: Following the transfer of Hon. Kabuka RM this case has been assigned to Obasi S.J RM. This court intends to act on evidence previously recorded by my predecessor, parties are accordingly addressed in terms of section 214(1) of the CPA and they respond as follows.*
>
> ***PROSECUTION**: No objection*

***ACCUSED PERSON**: No objection"*

Scrutinizing the above excerpt of the proceedings of the trial court, it is clear to me that both the appellant and the respondent were well informed on the transfer of the previous trial magistrate and that the presiding magistrate will act on the evidence recorded by his predecessor. To me, the trial magistrate complied with the requirement under section 214(1) of the CPA. I do not see any reason to fault the Honourable trial Magistrate in the aspect. It follows that the fifth ground of appeal is bound to fail.

In the sixth ground of appeal, the appellant faults his conviction which was meted despite contradictions between the evidence of PW1 and PW4 regarding the age of the victim. Indeed, there are contradictions in the testimonies of PW1 and PW4 on the birth date and month of the victim. While PW1 testified that the victim was born on 9th October 2005 as reflected on page 8 of the proceedings, PW4 testified that the victim was born on 4th April 2005 as reflected on page 18 of the proceedings.

However, I find the contradiction immaterial in the circumstance of the present case. The reason being that despite the differences, both testimonies reveal that the victim was born in 2005 and hence her age remained to be 16 years at the time of the incident. Additionally, both testimonies lead to a conclusion that at the time of the incident the victim

was still under the age of 18 years. It would have been a material contradiction if one of the testimonies revealed the age of the victim to be 18 years or more. In the case of **Ado Aron @Mziku** (supra) cited by Mr. Kabelwa, , the Court of Appeal was faced with a scenario of variance between the charge and the evidence as to the age of the victim. While the charge indicated that the child was 8 years, the testimony of PW1 was that the child was 9 years and 5 months. Despite the variance, the Court of Appeal held as follows:-

> *"It is our finding that* ***the discrepancy between the charge and the evidence is inconsequential as the stated age is under eighteen years to establish statutory rape and below ten years for sentencing purposes****. We are satisfied that the age of the victim was proved by PW1 mother of the victim. Ground one is meritless and we dismiss it"*[Emphasis added]

Fortified by the above authority and the fact that both testimonies of PW1 and PW4 established that the victim was born in 2005, the sixth ground of appeal is dismissed for lack of merit.

The seventh ground is a complaint by the appellant that the victim did not inform the appellant that she was a student, she appeared and acted maturely and she consented to have sexual intercourse with him, and thus

strict proof was required to prove that the victim was not an adult, matured woman sexually and physically. Much as the appellant's claims may be true, but an offence of statutory rape under section 130(2) (e) is proven by evidence that the accused person had sexual intercourse with the victim whose age was under 18 years old at the time of the sexual intercourse.

Regarding the claim that the prosecution was required to strict prove that the victim was not an adult, the prosecution managed to do so through testimonies of PW1, the victim's father and PW4, the victim's teacher that the victim was born in 2005 which means that in 2021 when the appellant had sexual intercourse with her, she was 16 years old. I have held in respect of third ground of appeal above that it was not necessary for the birth of the victim to be proven by documentary evidence such as birth certificate, affidavit and clinic card but can be proved by the victim, parent, guardian or teacher as held in the case of **Abel Changwe** (supra). The seventh ground of appeal fails for being meritless.

In the 8th ground of appeal, the appellant faulted the trial magistrate for his failure to analyze the evidence of the medical doctor, PW3 contending that the victim's hymen was perforated long time ago. The appellant further contended that the same created doubt on the age of the victim

and proved that the victim was matured in sexual intercourse not expected of a child. I find the ground a misconception of the ingredients of the statutory rape under section 130(2)(e) of the Penal Code. I have held above in respect of the seventh ground of appeal that as long as there was proof that the age of victim was under 18 years on 2nd September 2021 when the appellant had sexual intercourse with her, the offence of statutory rape was proven.

The victim's express or implied consent to have sexual intercourse with the appellant, the way she conducted herself, her appearance, her previous sexual intercourse with the appellant or another person, his maturity in sexual intercourse, do not constitute a defence under the law to exonerate the accused person from conviction and sentence. What matters is that the victim was, at the time of sexual intercourse, below the age of 18 years. It was held by the Court of Appeal in the case of **George Claud Kasanda v. R, Criminal Appeal No. 376 of 2017** (unreported) that:-

> *"In essence that provision (section 130(2)(e) of the Penal Code) 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. In that sense age is of great essence in proving such an offence."

Based on the above holding and as the age of the victim was duly established by the prosecution to be 16 years, the appellant cannot be exonerated from offence of statutory rape and the consequence of the provision of section 131 (1) of the Penal Code. It follows that the 8th ground of appeal lacks merit and is also dismissed.

The appellant's ninth ground is a complaint that the trial magistrate failed to consider the appellant's evidence that he was prosecuted for rape after he failed to pay 25 cattle as dowry that was required by the victim's father. Indeed, page 23 of the proceedings reflect the testimony of the appellant, DW1 that the father of the victim demanded from the appellant 25 cattle and TZS 1,500,000 as dowry which the appellant did not afford hence prompting the criminal charges against him. I do not agree with Mr. Kabelwa that the piece of testimony was an afterthought as the appellant testified at the trial on the aspect.

I have considered the appellant's piece of evidence in line with the provision of 130(2)(e) of the Penal Code which provides:

130 (2) A male person commits the offence of rape if he has sexual intercourse with a girl or a woman under circumstances falling under any of the following descriptions:

(e) ***with or without her consent when she is under eighteen years of age, unless the woman is his wife who is fifteen or more years of age*** *and is not separated from the man.*

Though the appellant's testimony may hold water in terms of his intention to marry the victim, but he did not testify that the victim was already his wife according to the Sukuma customs. It would have constituted an exception as provided under section 130(2)(e) of the Penal code as quoted above, if it was established through evidence that the victim who was 16 years old was already the wife of the appellant.

As long as the victim was not the wife of the appellant, and was under the age of 16 years at the time of the sexual intercourse with the appellant, it was correct for the Honourable trial Magistrate to find the appellant guilty of the offence of statutory rape under section 130(2)(e) of the Penal Code. The ninth ground of appeal fails to the extent demonstrated above.

Based on the above findings, I find no reason to fault the trial court's conviction and sentence against the appellant. The present appeal is dismissed in entirety for lack of merit.

It is so ordered.

Right of appeal fully explained.

DATED at **MOROGORO** this 6th day of June 2024.

H. A. KINYAKA

JUDGE

06/06/2024