

**THE UNITED REPUBLIC OF TANZANIA
JUDICIARY
IN THE HIGH COURT OF TANZANIA
MBEYA SUB-REGISTRY
AT MBEYA
CRIMINAL APPEAL NO. 191 OF 2023**

(Originating from the District Court of Mbozi at Vwawa, in Criminal Case No. 02 of 2022)

FRANK MAWAZO MWASHIWILI.....APPELLANT

VERSUS

THE REPUBLIC..... RESPONDENT

JUDGMENT

Date of Last Order: 22/04/2024

Date of Judgment: 14/05/2024

NDUNGURU, J.

This is purely what is in law referred to as statutory rape. When the appellant at the age of 18 years old thought had married to the victim a girl aged at 16 years old it turned a misfortune as he is now serving a term of 30 years imprisonment for the offence of rape.

In the District Court of Mbozi District at Vwawa, the appellant was arraigned, tried and convicted of the offence of rape contrary to sections 131 (1) (2) (e) and 131 (1) of the Penal Code, cape 16 R.E 2019.

It was alleged in the particulars of the offence that, on 30th December 2021 to 3rd January 2022 at Mwanjelwa village within Mbozi District in Songwe Region the appellant did have unlawfully sexual intercourse with one LWM (to disguise her identity) a girl aged 16 years. The appellant denied the charge. The case thus, went to a full trial and at the end, the trial court found the prosecution evidence sufficient, hence convicted the appellant and sentenced him as hinted above.

The prosecution evidence led to the conviction of the appellant was marshalled through six witnesses and one exhibit, that is a PF3 (exhibit P1). The gist of the prosecution evidence specifically as adduced by the victim who testified as PW1 was that, when she was selling sugar cane at Mwanjelwa area, she met the appellant who seduced her with intent to marry. That she agreed then told her sister about that fiancé and marriage plan but her sister resisted the marriage on the ground that the appellant is ugly. Then that, the said sister relayed the same information to their mother who also resisted. That, despite resistance from her sister and mother, she decided to marry the appellant as she loved him. Then that in their marriage they had been involving in sexual intercourse until when his husband (the appellant) was arrested then charged with the offence.

In his defence evidence, the appellant did not refute to have married PW1 and he said that before they entered in the marriage, he inquired on her age who said was 18 years old. That, the PW1's parents concocted the case to him since they were unhappy with PW1 marriage as they had another man whom they had planned to marry her.

At the end of the trial however, the appellant was convicted for it was proved that there was penetration by the appellant to PW1 and that she was below 18 years old. Dissatisfied, the appellant preferred the present appeal on the following grounds;

1. That the trial court erred when convicted the appellant without considering that when he and the victim entered into marriage it was impracticable to go with a birth certificate for ascertaining her age.
2. That the trial court erred when convicted the appellant without considering that the victim had completed her studies for a long time and she was doing business and that the complaint by PW4 was prompted by being unhappy with the victim to marry the appellant thus concocted a rape case.
3. That the trial court erred when failed to consider PW1 evidence and that it did not consider the Law of Marriage Act, Cap 29 R.E 2022 which

allows a girl aged 17 years to choose her own husband without objection of the parents.

4. That the trial court grossly erred in law when confirmed that PW1 was raped without considering her evidence that she volunteered to the marriage without disclosing her age and she was exposed to other life like any other person of the parent age.

5. That the defence evidence was not considered.

When the appeal was called for hearing, the appellant appeared in person, unrepresented while Ms. Prosista Paul learned State Attorney appeared for the respondent/Republic.

When the appellant was invited to expound his grounds of appeal, he just prayed to adopt his grounds of appeal and that the appeal be allowed.

On her side, Ms. Paul resisted the appeal. She submitted on the 1st ground that the appellant's complaint is unmerited since he was charged with statutory rape and the fact that the victim had no birth certificate is an ignorance of law which has no excuse. On the 2nd ground, she argued that the charge against the appellant was genuine since the

appellant lived with the victim and had sexual intercourse while she was below 18 years which connotes rape.

On the 3rd and 4th grounds, Ms. Paul submitted that since the evidence on record states that the appellant lived with the victim as his wife does not mean that he legally married her thus the claim of marriage does not hold water.

As to the 5th ground, Ms. Paul submitted that the appellant's defence evidence was considered but it supported the prosecution case as he claimed to have married the victim. However, Ms. Paul did not support the sentence meted out to the appellant on the reason that he committed the offence while at the age of 18 years where he was not supposed to be sentenced for a custodial sentence. She thus, urged this court to revise the sentence.

In his rejoinder the appellant joined hand to the prayer by Ms. Paul that the sentence be revised.

I have considered the grounds of appeal, the opposing submissions, the record and the law. The issue for determination is whether the appeal is meritorious. In resolving the issue, the guiding principle is he who alleges must prove set under section 110 of the

Evidence Act, Cap. 6 R.E 2022. Moreso, the principle in criminal cases that a burden of proof lies upon the prosecution and it is beyond reasonable doubt. And it never shifts to the accused person. See the holding in **Pascal Yoya @Maganga vs Republic**, Criminal Appeal No. 248 of 2017 Court of Appeal of Tanzania (Unreported). I will go through the grounds of appeal in the sequence conversed by the learned State Attorney.

The complaint in the 1st and 2nd grounds of appeal is that the trial court did not consider that the appellant and the victim had married and that the appellant could not know the victim's age considering she was not schooling and she had no birth certificate with her. To Ms. Paul the complaint is a defence of ignorance of law which has no excuse. On my part, as I have introduced hereinabove, the appellant charge was statutory rape in which consent of the victim is immaterial. Section 130 (1), (2) (e) of the Penal Code provides that:

130.-(1) It is an offence for a male person to rape a girl or a woman.

(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. (Emphasis added).

Under the above provision, therefore, when it is proved that, an accused penetrated the victim and the victim was of the age of below 18 years then whether or not that she consented is immaterial. See **Godi Kasengala vs Republic**, Criminal Appeal No. 10 of 2008 Court of Appeal of Tanzania at Iringa (unreported).

In this case at hand, it was the prosecution's evidence through PW1 that the appellant had sexual intercourse with the victim. In that circumstances there was proof of penetration and the proof by PW1 and PW3 that the victim at the incident date was 16 years old. Thus, the defence by the appellant that he could not have known the age of the victim as she did not have a birth certificate with her cannot hold water. The 1st and 2nd grounds of appeal are thus dismissed.

Regarding the 3rd and 4th grounds of appeal, it was Ms. Paul argument that there was no marriage. According to her the victim's parents gave evidence that the appellant and the victim had not married. In the appellant's view he had married the victim. Having

scanned the evidence on the record, in my concerted view, whether the referred marriage was legal or not cannot be ascertained in this appeal since it was not dealt by the trial Court. As I have already enunciated in the previous grounds of appeal, that there was penetration of the appellant to the victim and the victim was below 18 years of age and no proof of marriage according to the victim's mother. Following that fact, it cannot be held that there was marriage between the appellant and the victim. The grounds of appeal therefore, have no merits I dismiss them.

In the 5th ground of appeal that the appellant's defence evidence was not considered. Rightly, argued by Ms. Paul, the appellant's defence was considered by the trial court but found it not casting any doubt to the prosecution evidence it was thus rejected as I also hereby do.

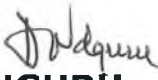
The last issue as introduced by Ms. Paul is whether the sentence meted out to the appellant was proper. I am aware of the current position of the law brought by the Legal Sector Laws (Miscellaneous Amendments) Act, 2023 No. 11 of 2023. Section 74 amended in section 131 of the Penal Code thus making a male person of below the age eighteen years to be excusable for custodial sentence. However, the appellant was convicted and sentenced for custodial on 12/09/2022 before the above law came into existence making the appellant to

benefit in the previous law which provided that a male person of eighteen years of age not to be sentenced for custodial sentence as it was meted to the appellant.

Having the position of the law in mind, under the revisional powers of this Court conferred under section 373 (1) of the Criminal Procedures Act, Cap. 20 R.E 2022, I hereby nullify and set aside the sentence of thirty years imprisonment meted out against the appellant. As result, considering that the appellant was in jail for more than one year, I hereby order for his release from custody unless lawfully withheld.

Ordered accordingly,




D.B. NDUNGURU
JUDGE
14/05/2024