IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

BUKOBA SUB-REGISTRY

AT BUKOBA

CRIMINAL APPEAL NO. 79 OF 2023

(Arising from Criminal Case 34 of 2023 District Court of Ngara)

JOEL THOMAS.. APPELLANT

VERSUS

THE REPUBLIC.. RESPONDENT

JUDGMENT

11th and 19th June, 2024

BANZI, J.:

On 16th February, 2023, the appellant was arraigned before the District Court on Ngara charged with two counts, rape contrary to sections 130 (1) (2) (e) and 131 (1) of the Penal Code [Cap. 16 R.E. 2022] and impregnating a school girl contrary to section 60A (3) of the Education Act [Cap. 353 R.E. 2002] as amended by section 22 of the Written Laws (Miscellaneous Amendments) Act, No. 2 of 2016. Both offences were alleged to be committed on 1st January, 2023 at Rulenge village, within Ngara District in Kagera Region.

The brief facts reveal that, on the date of the incident, the victim (PW2), went to Malaika Beach situated at Rulenge and stayed there until

19:00hours when he was approached by the appellant whereby, after conversation, they went to his house located at Murutambikwa area and they had sexual intercourse. Thereafter, the appellant returned her to Malaika Beach. It was the contention of the victim that, after having sexual intercourse with the appellant, she missed her menstrual period. One day, her sister, discovered that she was pregnant and she informed her mother, (PW3) who reported the matter to Rulenge Police Station. The victim was taken to the Police Station whereby she was given PF3 to go to Rulenge hospital for examination. At the hospital, she was examined by PW1 who found her eight weeks pregnancy. Upon inquiry, she mentioned the appellant as the one responsible for the said pregnancy. The appellant was arrested and upon interrogation, he admitted to have love affairs with the victim and confessed to have sexual intercourse with her.

In his defence, the appellant admitted to have love affairs with the victim. He stated that, on the fateful date, he was at Malaika Beach where he was called by the victim and the duo started to have conversation. At about 20:00hours, they agreed and went to his home where they had sexual intercourse. Thereafter, he returned her to Malaika Beach and he went home to sleep. He denied to have raped her, because there was mutual agreement.

After receiving the evidence of both sides, the trial magistrate was satisfied without any doubt that, the offence of rape was proved to the required standards, hence, she convicted and sentenced the appellant to thirty years imprisonment. However, she acquitted him with the offence of impregnating a school girl for want of evidence. Aggrieved with his conviction and sentence, the appellant through Mr. Baraka John Samula, learned Advocate initially lodged seven grounds of appeal. However, at the hearing, he abandoned four grounds and remained with three grounds which are reproduced as hereunder:

1. *That the trial court erred in and fact be reaching its decision without considering that the case was not proved to the required standard of proof that is to say beyond reasonable doubt.*
2. *That, the trial court erred in law and fact by reaching its decision by acquitting the appellant on the offence of impregnating a school girl and convicting the appellant on the offence of rape without considering and proving key ingredients for the offence of statutory rape as required by law.*
3. *That, the trial court erred in law and facts for convicting the appellant without proof of the age of the victim of rape.*

At the hearing, Mr. Baraka John Samula, learned Advocate appeared for the appellant whereas, Mr. Erick Mabagala, learned State Attorney represented the respondent, Republic.

Submitting on the first ground, Mr. Samula argued that, it is the duty of the prosecution to prove the case beyond reasonable doubt as provided for under sections 3(2)(a) and 114(1) of the Evidence Act [Cap. 6 R.E. 2022] and as it has been stated in numerous cases such as **Said Hemed vs Republic** [1987] TLR 117. **Salehe Said vs Republic** [2020] TZCA 2762 TanzLII and **Nchangwa Marwa Wambura vs Republic** [2019] TZCA 459 TanzLII. According to him, there were many doubts on the prosecution case, for example, the doctor found the victim was seven weeks and four days pregnant while the victim stated that she was raped on 1st January, 2023. With such evidence, the victim was pregnant even before the alleged date of rape. In that view, the prosecution failed to prove the alleged rape. To support his submission, he cited the case of **Jeremiah Shemweta vs Republic** [1985] TLR 128 and **Edwin Sausand @ Sikanzwe vs Republic** [2023] TZCH 1151 TanzLII.

Concerning the second ground, he submitted that, as the appellant was charged with rape and impregnating a school girl, the two offences are

connected, therefore, the prosecution was responsible to prove who was responsible for pregnancy before reaching into the conclusion that, the victim was raped. According to him, as the prosecution failed to prove that it was the appellant who impregnated the victim, the first count fell short of proof. Reverting to the third ground, learned counsel argued that, this being a statutory rape, the age of the victim should be proved. However, the prosecution side did not produce birth certificate, medical evidence or any other information from the parent or teacher to prove the age of the victim. According to him, the decision of the victim to go to Malaika Beach and accept to have sexual intercourse with the appellant, in absence of proof of her age, is a clear indication that, she was of majority age. He supported his submission with the case of **Rutoyo Richard vs Republic** [2020] TZCA 298 TanzLII where it was stated that, the offence of statutory rape cannot stand where the age of the victim, which is one of the ingredients of rape, was not proved. He concluded that, the trial court erred to convict the appellant in the absence of proof of age of the victim.

Apart from submitting on the grounds of appeal, Mr. Samula raised a point of law concerning admissibility of the cautioned statement (Exhibit P2) claiming that, the same was wrongly admitted because it was recorded out of statutory time contrary to section 50 of the Criminal Procedure Act [Cap.

20 R.E 2022] (the CPA). He stated that, the appellant was arrested on 11/02/2023 but he was interviewed on 14/02/2023. Thus, he prayed for the same to be expunged from the record regardless being admitted without objection. On this point, he cited the case of **Mohamed Juma @ Mpakama vs Republic** [2019] TZCA 518 TanzLII to support his position. He finalised his submission, by praying for the appeal to be allowed by quashing the conviction and setting aside the sentence.

In response, Mr. Mabagala submitted that, this being statutory rape, the prosecution side was duty bound to prove two ingredients; penetration and age. Concerning proof of penetration, Mr. Mabagala argued that, the victim explained how she was in a relationship with the appellant whereby on 01/01/2023 she went to his house and the duo had sexual intercourse. According to him, the evidence of the victim was credible and coherent and the same was corroborated by the appellant himself who admitted to have sexual intercourse with her. He added that, as the appellant failed to cross examine the victim on the fact concerning the duo to have sexual intercourse, it meant that, he accepted her testimony. Therefore, there is no need to doubt her testimony. The case of **Issa Hassan Uki vs Republic** [2018] TZCA 361 TanzLII was cited to support his argument.

In respect of the third ground, Mr. Mabagala contended that, the victim's age was mentioned by her mother. Although she was not exhaustive, her evidence gave light that, the victim was under age. According to him the first and third grounds lack merit. Reverting to the second ground, it was his submission that, although the appellant was acquitted on the second count for absence of DNA evidence, that was misconception as DNA is not the only evidence to prove the offence of impregnating a school girl. He insisted that, it is misconception of law to conclude that, the appellant should be acquitted for the offence of rape simply because, he was acquitted for the offence of impregnating the victim,. To him, the trial court properly convicted him on the offence of rape.

Submitting on the issue of cautioned statement, Mr. Mabagala readily conceded that, it was recorded three days after the appellant was arrested. Thus, he conceded to the prayer by Mr. Samula that, Exhibit P2 be expunged from the record. However, he prayed for this appeal be dismissed for want of merit. In rejoinder, Mr. Samula requested the court to consider his chief submission.

Having thoroughly considered the evidence on record, the grounds of appeal and the submissions of the learned counsel for both sides, the issue

for determination is whether the offence of rape was proved to the required standards.

Before determining the merit or otherwise of the appeal, I find it prudent to start with the legal issue addressed by learned counsel for both sides concerning the cautioned statement (Exhibit P2). Learned counsel for both sides had the same view that, Exhibit P2 was recorded out of time. Although the same was admitted without objection, I am constrained to agree with learned counsel that, Exhibit P2 was illegally obtained as it was recorded out of time contrary to section 50 (1) of the CPA. This section requires the person under restraint to be interviewed within four hours after the arrest. Nonetheless, according to the record, the appellant was arrested on 11/02/2023 and PW4 interrogated him on 14/02/2023 which was beyond the four hours prescribed by law. The fact that it was admitted without objection from the appellant, it cannot cure the defect that, it was recorded out of time. There are numerous cases that addressed about this issue. In the case of **Mohamed Juma @ Mpakama vs Republic** (supra) it was stated that:

> *"With the position of the Court so settled, we do not agree with the suggestion by the first appellate Judge to the effect that failure to object the admissibility of a cautioned*

statement that is found to have been recorded out of time would save it. Courts in Tanzania have undeniable duty to ensure that cautioned statements which were taken beyond the times prescribed by the law are first cleared before they are exhibited as evidence. This is a legal question which cannot be shifted to the accused person, even if he does not object to the admission of a belated cautioned statement. We as a result expunge exhibit PE2 from the record."

In the light of the position of the law above, it is apparent that, Exhibit P2 was evidence that was illegally obtained and it ought to be rejected from the beginning because it was recorded three days after the arrest of the appellant which is beyond the prescribed time. Thus, the cautioned statement, Exhibit P2 is hereby expunged from the record.

Back to the merit of the appeal, the appellant was charged with the offence of rape. It is settled law that, in rape cases, the prosecution is required to prove that, there was penetration of male organ into the female organ 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

Wambura Kiginga vs Republic [2022] TZCA 283 TanzLII and **Masanyiwa Msolwa v. Republic** [2022] TZCA 456 TanzLII.

In the case at hand, there is no doubt that the appellant had sexual intercourse with the victim, as it was narrated by the victim herself. At page 16 of the proceedings, the victim had this to say:

> *"I can recall on 1/1/2023 when I get out of home for fun at Malaika Beach at Rulenge. I stayed there till 1900hours when I meet Joel Thomas accused person. We have conversation. We then went together with him to where he resides Murutambikwa. We have sex with him (accused person) and then he takes me back to Malaika beach.... I had sex with accused four times. On 1/1/2023 was the second time we have sex"*

Apart from that, the appellant in his defence admitted to have had sexual intercourse with the victim on the date of the incident claiming that, the same was consensual. From the evidence of the victim and the appellant, it is undoubted that, the appellant had sexual intercourse with the victim on the date of the incident. In that regard, this being the statutory rape, the remaining issue for discussion is whether the age of the victim was proved.

It is a cardinal principle that, in statutory rape apart from proving penetration, the prosecution side is duty bound to prove that the victim at

the time of rape was below 18 years of age. In the case of **Wambura Kiginga vs Republic** (*supra*), it was held that:

> *"**When it comes to statutory rape, there is an additional burden of proof of age of the victim** in order to ascertain that at the time the offence was committed, she was below 18 years of age since birth."* (Emphasis is mine).

It is common knowledge that, the age of the victim can be proved by the victim herself, parent, relative, medical practitioner, teacher, close friend birth certificate of any other person who knows the victim. See the case of **Omary Rashid @ Milanzi vs Republic** [2023] TZCA 167. In the instant case, the victim did not adduce any evidence to establish her age. Her age of 16 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 vs 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 the victim 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).

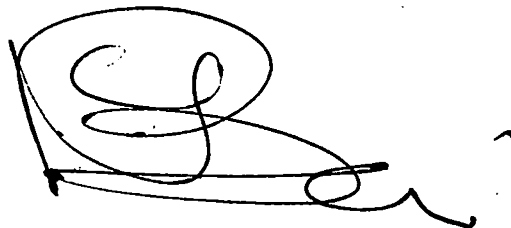
Furthermore, her teacher, PW5 apart from producing a copy of the attendance register (Exhibit P3) which had no proof of the victim's age, her testimony had nothing which can be used to prove that, the victim was below 18 years. Her mother, PW3 in her testimony stated that, the victim was 16 years but she did not state the date when she was born so as to clear doubt that she was exactly 16 as alleged. Although Mr. Mabagala convinced the court that by mentioning that the victim was 16 years, PW3 gave us light that the victim was below 18, I do not agree with him, because when it comes to counting age of a person, a mere mention of a purported age, (say sixteen years of age), is not a sufficient proof of that age. For purposes of proof, rather, it is important to state the exact date when that person was born.

Since the victim's age was the determining factor in establishing the charged offence, evidence must be positively laid out to disclose the age of such victim. In other words, the victim and PW3 were supposed to mention

the exact date disclosing when the victim was born in order to prove that, she was sixteen years old. In the absence of such evidence from the victim and PW3, it is the considered view of this court that, the victim's age was not proved to the required standards.

In the absence of proof of age of the victim which 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. This in itself is sufficient to fault the conviction of the appellant. Thus, I allow the appeal by quashing the conviction and setting aside the sentence meted against the appellant. Consequently, I order his immediate release unless otherwise, he is held for other lawful cause.

It is accordingly ordered.



I. K. BANZI
JUDGE
19/04/2024

Delivered this 19th June, 2024 in the presence of Ms. Elizabeth Twakazi, learned State Attorney for the respondent, the appellant in person, Mr.

Audax V. Kaizilege, Judge's Law Assistant and Ms. Mwashabani Bundala, RMA. Right of appeal duly explained.

I. K. BANZI
JUDGE
19/06/2024