THE UNITED REPUBLIC OF TANZANIA
JUDICIARY
IN THE HIGH COURT OF TANZANIA
MBEYA DISTRICT REGISTRY
AT MBEYA
CRIMINAL APPEAL NO. 77 of 2022
(Originated from District Court of Kyela at Kyela in Criminal Case No. 68 of 2017)

KONEL MWAKAPALALA .....APPELLANT

VERSUS

THE REPUBLIC.....RESPONDENT

JUDGMENT

Dated: 15th August & 12th September, 2022

KARAYEMAHA, J

The appellant, Konel Mwakapalala, is currently behind the bars serving a sentence of life imprisoned. Essentially, he was arraigned before the District Court of Kyela at Kyela (the trial Court) facing a charge of unnatural offence c/s 154 (1) of the Penal Code, Cap 16 R.E 2002 (now R.E 2022). The allegation was that on 6/8/2017 at or about 8:30 hrs at Majoka area within Kyela District in Mbeya Region the appellant had canal knowledge of a girl aged 8 years against the order of nature. For the sake of modesty and privacy, I shall refer to her as "XZ" or simply as PW1, the codename by which she testified at the trial.

PW1, the victim, testified that she was on her way to school when she met the appellant known to her as Baba Konel. The appellant took her to his house located at Majoka street, sodomised her. She was categorical that the appellant inserted his penis in her anus after warning her not to raise an alarm. On completing the vile act, he allowed her to go home. On getting home she reported the incident to her mother, Anglina Richard Kasulu (PW2) who took her to Kyela police station on 12/8/2017. PW2's narration supported with that of PW1, triggered the police to issue a PF3. Thereafter, PW1 and PW2 went to Kyela District hospital. At the hospital PW1 was examined by Peter Senom Mgezi (PW3) who found out that the anus muscles were loose which made him confirm that it was penetrated by a blunt object. The incident was reported to the police station and the appellant was arrested on 13/8/2017 on allegations of committing an unnatural offence. While at police station, his cautioned statement (exhibit P2) was recorded by PW4, E. 8029 D/CPL Danford.

The appellant's defence evidence at the trial was very brief. The appellant denied any involvement and said that he was neither seen nor arrested at the scene of the crime. Apart from the denial, he complained

that his confession was procured out of torture. He also said while responding to cross-questions that he did not know the reason why PW1 mentioned him.

The trial Magistrate found credence in the prosecution witnesses' evidence and proceeded to convict the appellant and sentenced him to life imprisonment. The conviction and the sentence imposed by the trial Court have utterly aggrieved the appellant, hence his decision to institute the instant appeal. His petition of appeal has nine (9) grounds against the decision of the trial court. However, for the purpose of this judgment two complaints will suffice to dispose of this appeal. **Firstly,** the trial court erred in law by convicting the appellant relying on the evidence of PW1 without conducting the *voire dire* tests and PW1 promising to speak only the truth not lies. **Secondly,** the prosecution failed totally to proof the case as required by the law.

The appeal was argued by way of written submissions at the stance of parties. The appellant prosecuted the appeal on his own unrepresented while Mr. Davis Msanga, learned state Attorney represented his usual client, the republic/respondent.

Starting with the *voire dire* test, the appellant submitted that it was necessary to be conducted for PW1 to promise to speak the truth

not lies. In his view the trial Magistrate recorded her view the act which contravened section 127 (2) of the Evidence Act, Cap 6 R.E 2022 (the "EA"). Mr. Msanga encountered this complaint and argued that section 127 of the EA requires the child of tender years to promise to tell the truth and not lies. He was convinced that that was done citing page 8 of the proceedings.

I have carefully examined the proceedings particularly page 8. I agree with the appellant that the trial Magistrate simply recorded his views not the PW1's. The proceedings thus do not indicate if XZ in her words, promised to tell the truth not lies. The Court of Appeal of Tanzania, contemplated on this issue in the unreported Criminal Appeal No. 301 of 2018-**Wambura Kiginga v R,** and after giving a wide interpretation of section 127 especially sub-section (2) held that:

> *"... we agree with Mr. Erasto that because the evidence of PW1 was taken in disobedience of section 127 (2) of the Evidence Act, it did not necessarily mean that the evidence did not constitute the truth or authenticity."*

In light of the foregoing the court is inclined to critically consider the substance of the evidence of the child with tender age if by itself constitutes the truth. After ascertaining that the victim is telling the

truth, she/he is entitled to benefit from section 127(6) of the EA which provides as follows:

> *(6)* ***Notwithstanding the preceding provisions of this section,*** *where in criminal proceedings involving sexual offence the only independent evidence is that of a child of tender years or of a victim of the sexual offence, the court shall receive the evidence, and may, after assessing the credibility of the evidence of the child of tender years of as the case may be the victim of sexual offence on its own merits, notwithstanding that such The Evidence Act [CAP. 6 R.E. 2019] 54 evidence is not corroborated, proceed to convict, if for reasons to be recorded in the proceedings, the court is satisfied that the child of tender years or the victim of the sexual offence is telling nothing but the truth.*

Interpreting sub-section (6) of the EA, the CAT guided that:

> *"We must confess at the outset that we construed the opening phrase,* ***"Notwithstanding the preceding provisions of this section,"*** *to mean that, a conviction can be based on only subsection (6) of section 127 without complying with any other subsection of 127 including sub section (2)."*

It goes without saying, therefore, that the appellant in this case can be convicted after assessing the victim's credibility on record and the court must record reasons that notwithstanding non-compliance wit section 127 (2) of the EA, a person of tender age still told the truth.

In this case, having the relaxed conditions, I don't see good and cogent reasons not to believe the trial Magistrate's findings that PW1 promised to tell the truth. But assuming that what the trial Magistrate did was procedural irregularity, still I would agree that her narration of the incident was true, original and authentic. Testifying as PW1, the victim stated:

> *"I was raped by the accused who is sitting there. I know him we call him Baba Konel I was going to school I met her (sic) on the way he took me to his house at Moajoka Street then he raped me. He took his (dudu) penis and put into my anus. At his house there was no any person. After having finished he told me to go home. I went home and told my mother that I was raped by Baba Konel (accused) person."*

Responding to cross-examination, PW1 reaffirmed that:

> *"You were out of your house. You took me to your house. You told me not to make (sic) an alarm."*

The appellant made casual and non-rebuttal account defending a serious case of the above magnitude. He simply made a general denial and hid himself on the contention that he was not arrested at the scene. He also said while responding to cross-questions that he did not know the reason why PW1 mentioned him.

I maintain the view that even if PW1 did not promise to tell the truth, a thorough consideration of her testimony demonstrates that she told the truth anyway. I am saying so because of the following circumstances: **first,** the appellant did not dispute any part of PW1's evidence; **second**, PW1 was consistent in her defence that during the rape time, the appellant prohibited her to raise an alarm; and **third,** the appellant's denial is a general denial that he did not commit the offence and that no body saw him committing the offence.

On the strength of the above discussion, I cannot expunge the evidence XZ from the record. Therefore, I proceed to determine the 2nd ground of appeal.

The second issue is on failure by the prosecution to prove the case beyond reasonable doubt which goes in fours with failure to prove XZ's age. This complaint is discerned from grounds 2, 3 and 9 of the petition of appeal. Mr. Msanga opposed the contention. The learned State

Attorney submitted citing page 8 of the proceedings that PW1 testified that she was 8 years and a standard I pupil at Ndandalo Primary School.

It is a cardinal principle in criminal law, that proof of the accused's guilt in a criminal case is a burden that has to be borne by the prosecution and, save for a few exceptions, the standard of proof in such a case is beyond reasonable doubt. This postulation has been underscored in a litany of court decisions across jurisdictions. In **George Mwanyingili v. Republic**, CAT-Criminal Appeal No. 335 of 2016 (Mbeya-unreported), the Court of Appeal of Tanzania guided as follows:

> *"We wish to re-state the obvious that the burden of proof in criminal cases always lies squarely on the shoulders of the prosecution, unless any particular statute directs otherwise. Even then however, that burden is on the balance of probability and shift back to prosecution."*

See also: **Jonas Nkize v. Republic** [1992] TLR 213; and **The D.P.P v. Maria Joseph Somba**, CAT-Criminal Appeal No. 404 of 2007 (unreported).

The question that arises at this point is whether this burden was discharged by the prosecution in the course of the trial proceedings. Whereas the appellant contends that the prosecution case was not proved beyond reasonable doubt, Mr. Msanga vehemently submitted that it was proved and age was also proved by PW1. I agree with the

appellant that the prosecution case was not proved beyond reasonable doubt. My finding is mainly premised on the fact that one key ingredient constituting the offence was not proved. This is the aspect of age of XZ who was the victim of the rape incident. XZ who testified as PW1, had her age stated when she took the witness box and before she was sworn. She is recorded as having stated that she was 8 years of age.

None else, including PW1, the victim's parent, testified on the age of the victim. A trite position is that age of the rape victim is especially important in proving statutory rape. Therefore, it is mandatory that before a conviction is grounded evidence must be positively laid out to disclose the age of the victim. This is consistent with the requirement of the section 130 (2) (e) the substance of which states as follows:

> *"A male person commits the offence of rape if he has sexual intercourse with a girl or a woman under the 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."*

While no suggestion has been given that PW1 was the wife of the appellant, no evidence has been adduced, either, to suggest that PW1 is a girl of the age of below eighteen years of age. This means that had

the trial Court considered this factor, it would have reached to a different decision.

It is now a settled law that in cases involving statutory rape, it is crucially that age of the victim is proved. In the case of **Wambura Kiginga** (supra) the apex Court insisted recalling its decision in the case of **Alex Ndendya vs R,** Criminal Appeal No. 340 of 2017 (unreported that:

> *"... age is of utmost importance and in a situation where the appellant was charged with statutory rape then age of the victim must specifically be proved before convicting the appellant."*

The issue of proving strictly the age of the victim of statutory rape was further emphasized also in **Winston Obeid v. R,** Criminal Appeal No. 23 of 2016 and **Aloyce Maridadi vs. R,** Criminal Appeal No. 208 of 2018 (both unreported).

In this case, therefore, no evidence has been adduced, either, to suggest that PW1 is a girl of the age of below eighteen years of age. This means that Mr. Msanga placed reliance on the statement made by the victim before she testified. She stated that she was 8 years of age on the date she testified. Can this statement be taken as a proof of the

victim's age? In my considered view, the answer to this question is in the negative. My contention is predicated on the position accentuated in **Andrea Francis v. Republic**, Criminal Appeal No. 173 of 2014 (unreported). In the said case, the Court of Appeal was confronted with the position akin to what is at stake in the instant appeal. The superior Bench held as follows:

> *"With respect, 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. Under normal circumstances evidence relating to the victim's age would be expected to come from any or either of the following:- the victim, both of her parents or at least one of them, a guardian, a birth certificate, etc. in this case, no evidence was forthcoming from PW1, her mother PW2, or anybody else for that matter, relating to the age of PW1. In the absence of evidence to the above effect it will be evident that the offence under section 130 (2) (e) (supra) was not proved beyond reasonable doubt."*

In this case I maintain the view that evidence which would ascertain age of the victim - the condition precedent in the proof of statutory rape – is glaringly missing in this case. Such a miss denied the

trial court of a very important evidence that would establish the existence of a key ingredient of the offence with which the appellant was charged. It is fair to conclude that absence of this key evidence has left this case unsupported, and the trial court did not have any shred of justification to hold the appellant guilty, and convict him of the offence of rape.

The impact of failure to prove the age is as was stated in **Nalongwa John v. Republic**, Criminal Appeal No. 588 of 2015 CAT (unreported) it was held that:

> *"... in a case 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...in the absence of evidence to the above effect it will be evident that the offence... was not proved beyond reasonable doubt."*

This was also the position in the case of **Andrea Francis v. Republic**, Criminal Appeal No. 173 of 2014 and **Nalongwa John v. Republic**, Criminal Appeal No. 588 of 2015.

These authorities have a pertinent bearing on the facts of this case and I wish to follow them. I have no doubt that they set out the law correctly apart from being unaware of any decision to the contrary. Consequently, in view of this Court's findings, I hold that this appeal

has merit and allow it. I quash the proceedings, set aside the conviction and sentence, and order that the appellant be immediately set free, unless is held in custody for some other lawful cause.

It is so ordered.

Dated at **MBEYA** this 12th day of September, 2022

J. M. Karayemaha

JUDGE