IN THE COURT OF APPEAL OF TANZANIA

AT BUKOBA

(CORAM: MUSSA, J.A., LILA, J.A. And MWAMBEGELE)

CRIMINAL APPEAL NO. 23 OF 2016

WISTON OBEID.....APPELLANT

VERSUS

THE REPUBLIC.....RESPONDENT

(Appeal from the Decision of the High Court of Tanzania at Bukoba)

(Khaday, J.)

dated the 23rd day of December, 2015

in

Criminal Appeal No. 28 of 2015

JUDGMENT OF THE COURT

29th November & 7th December, 2017

LILA, J.A.:

This is a second appeal. The appellant is still protesting his innocence following his being charged and convicted of the offence of rape contrary to section 130(1), (2) (e) and 131(1) of the Penal Code, Cap 16 R.E. 2002 (the Penal Code). The district court of Karagwe sentenced the appellant to a statutory minimum sentence of thirty years imprisonment after being satisfied that the appellant raped Alinda Kanyambo (PW1), a

standard VII girl at Ngara Primary School aged 14 years old. His first appeal to the High Court (Khaday, J.) was unsuccessful, hence the present appeal.

The trial court record shows that on 22/6/2014 at 07:00 p.m. Alinda Kanyambo (PW1), while in the company of another girl namely Kibanga went to buy kerosene and while on the way back, she met the appellant who was with other boys. The appellant captured her and pulled her into his sleeping room wherein he let her down by force, undressed her and pressed his fingers into her vagina before he later on inserted his penis. The following day the appellant was arrested at his house while with PW1 by Jackson Mbusi, a kitongoji chairman of Igombe who acted on information he received from Clemence Francis (PW2), PW1's nephew. PW1 was taken to hospital where she was treated and a PF3 filled which was tendered as exhibit P2 by herself during trial. She also tendered the torn and blood stained skirt as exhibit P1. The appellant's cautioned statement was recorded by F 3035 D/Cpl Kangela and was later on sent to Nicholaus Emmanuel Rubambula (PW5), a the Ward Executive Officer and a justice of peace where the appellant's statement (exh. P3) was taken in which he admitted committing the offence.

During trial, on 4/9/2014, a *voire dire* examination was conducted to PW1 by the trial magistrate (M. Paul, RM) before she gave her testimony. That was done following the information by the public prosecutor that she was 14 years old.

In his defence, the appellant admitted being arrested at his home while with PW1 with who he stayed for two days. He said, PW1 was his girlfriend and they had agreed to marry.

The trial court was satisfied that the charge was proved against the appellant and proceeded to convict and sentence the appellant to serve a thirty years jail term.

The first appellate court sustained both conviction and sentence meted out by the trial court. It, however, expunged from the record Exh. P2 on the ground that it was admitted in contravention of section 240(3) of the Criminal Procedure Act, Cap 20 R.E. 2002 (the CPA). Similarly, exh. P3 was expunged from the record for having been recorded outside four (4) hours prescribed under section 50 of the CPA.

On the issue of PW1's age, the first appellate court was of the view that the charge sheet as well as PW1's testimony indicated that she was

aged 14 and that was not controverted by the appellant by way of cross-examination. The presiding judge was firm that such issue which was raised at the appellate stage was an afterthought.

In protesting his innocence, the appellant has raised four grounds of appeal in his memorandum of appeal. They are couched thus:-

"**1.** **THAT**, the age of the victim (PW1) as a pivotal issue in the circumstances of the case under appeal was not proved for wanting of birth certificate.

2. **THAT**, lacking of evidence from the victim's parents in support of the PW1's age renders the prosecution's case to be shaky.

3. **THAT**, the Honourable Judge had failed to evaluate and appreciate the nature and quality of the evidence on record consequent upon which fact he failed to squarely exescise the role of first appeal courts.

4. **THAT**, the prosecution case was not proved beyond the shadow of doubts."

At the hearing of the appeal, the appellant appeared in person and unrepresented while Mr. Nestory Paschal Nchiman, learned State Attorney, represented the respondent Republic.

The appellant urged the Court to adopt his grounds of appeal and elected the learned State Attorney to first argue on his grounds of appeal before presenting his reply.

Arguing on the grounds of appeal, the learned State Attorney supported the appellant's appeal on a sole ground that the age of the victim of rape was not established by the prosecution during the trial. He stated that as the appellant was charged with the offence of rape contrary to section 130(2)(e) of the Penal Code which is sometimes termed as "statutory" rape in which consent is irrelevant, the age of the victim ought to have been sufficiently established by evidence. He pointed out that neither PW1 herself nor PW2 who lived with her gave evidence establishing PW1's age. He pointed out that PW1's age indicated in the charge or that given in the particulars before PW1 gave evidence did not form part of the evidence. He went further to state that even the age stated by the public prosecutor before *voire dire* examination was conducted did not form part of the evidence. To bolster his argument he referred us to the Court's

decision in **Andrea Francis Vs The Republic**, Criminal Appeal No. 173 of 2014 (unreported).

In respect of PF3 (exh. P1) and cautioned statement, the learned State Attorney submitted that they were properly expunged from the record because they were improperly admitted on account of been improperly tendered and improperly taken, respectively. For these reasons, he was ready the appeal to be allowed.

The appellant had nothing in reply. He agreed with the learned State Attorney and left the matter for the Court to decide.

After our full examination of the record, we are in all fours with the learned State Attorney.

As demonstrated above, the appellant was charged with the offence of rape contrary to section 130 (2) (e) of the Penal Code. That section provides:-

> *"(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.*

(a)..... (not relevant)

(b)..... (not relevant)

(c)..... (not relevant)

(d)..... (not relevant)

(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 and is not separated from the man."***
(Emphasis added)

Given the fact that in a criminal trial a charge sheet is the foundation of any prosecution against an accused person, it is apparent that in the instant appeal the appellant was charged with a distinct type of the offence of rape. The accusation was that he raped a girl of under the age of eighteen years in which consent is immaterial.

Elaborating on the essence of the provisions of section 130 (2) (e) of the Penal Code, the Court, in the case of **Solomon Mazala Vs The Republic**, Criminal Appeal No. 136 of 2012, CA- Dodoma (unreported), stated:-

" The cited provision of the law makes it mandatory that before a conviction is grounded in terms of section 130 (2) (e), above, there must be tangible proof that the age of the victim was under eighteen years at the time of commission of the alleged offence.

Once the age of the victim is established to be below 18 years, it negates consent of the victim, if any."

In the above decision the court cited the decision of the court in **Andrea Francis Vs The Republic**, (supra) cited to us by the learned State Attorney wherein the court stated that:-

" From the above provision it is discerned that for a male person to be convicted of the above offence which is sometimes referred to as "statutory" rape, it must be established, first and foremost, that the victim was under eighteen years of age. Once that is established consent would be immaterial for purpose of the provisions."

Given the above position of the law, in the present case, it was important that the age of the victim (PW1) must have been established by

evidence to be under the age of eighteen years to justify the appellant's conviction.

Our careful examination of the record have revealed that the age of PW1 was simply indicated in the particulars of the offence in the charge sheet, at the time when the trial court conducted *voire dire* examination before PW1 gave her testimony and at the time PW1 gave her particulars before she was examined in-chief by the public prosecutor.

The issue to be considered and determined here is whether indication of PW1's age in those instances was sufficient to establish her age.

The learned State Attorney was of the view that it was not sufficient. We fully agree with him. This is because what is stated in the charge sheet is not evidence. Likewise, the details of the *voire dire* at page 6 and particulars contained at pages 6 and 7 before the victims (PW1) was sworn do not amount to evidence. We are fortified in that position by the courts' holding in the case of **Andrea Francis Vs The Republic,** (supra) where the court categorically stated that:

"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."

Regarding indication of the victim's age when *voire dire* examination is conducted, the Court, in the case of **Solomom Mazala Vs The Republic,** (supra) stated that:-

"Even if we go further and take the liberty to assume that the fact that the trial court conducted a ***voire dire*** *examination, after being satisfied that PW1 was under eighteen years of age, that*

assumption, in our view, would be contrary to the dictates of the law."

Given the above position of the law and the similarities in facts obtaining in the present appeal, we are in agreement with the learned State Attorney that evidence proving age of the victim (PW1) is lacking. In the absence of such evidence, the appellant's conviction could not stand.

For the foregoing reasons, we hereby allow the appeal, quash the appellant's conviction and set aside the sentence. Unless lawfully held for any other offence, we order his immediate release from prison.

DATED at **BUKOBA** this 6th day of December, 2017

K.M. MUSSA
JUSTICE OF APPEAL

S.A. LILA
JUSTICE OF APPEAL

J.C.M. MWAMBEGELE
JUSTICE OF APPEAL

I certify that this is a true copy of the original.

P.W. BAMPIKYA
SENIOR DEPUTY REGISTRAR
COURT OF APPEAL