IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(MWANZA DISTRICT REGISTRY)

AT MWANZA

CRIMINAL APPEAL NO. 175 OF 2020

BUJIKU PETER ..... APPELLANT

VERSUS

THE REPUBLIC..... RESPONDENT

RULING

29th March, & 6th April, 2021

ISMAIL, J.

The appellant was charged with two counts of rape, contrary to sections 130 (1) (2) (e) and 131 (1) of the Penal Code, Cap. 16 R.E. 2019; and abduction, contrary to section 133 of the Penal Code (supra). The allegation as levelled in the charge sheet, is that between March and July, 2020, at Matale village within Misungwi District in Mwanza Region, the appellant abducted ABC (in acronym) with intent to marry or have sexual intercourse with her. It was further alleged that after the said abduction, the appellant raped the said ABC, a girl aged 16 years.

The facts gathered from the proceedings in the trial court have it that ABC, who featured in the trial proceedings as PW2, was a student at Sumbgu Secondary school and lived at Chande locality with her aunt. PW2

alleged that in March, 2020, the appellant abducted her from her aunt's custody and went to cohabit with him until July, 2020. News of the alleged abduction filtered and reached PW1, the victim's father. A search succeeded in locating PW2 who was found at the appellant's residence at Nyamahinza. PW1 reported the matter. The latter PW2' academic master who advised that the matter be reported to Ward Executive Officer or Village Executive Officer. Subsequent thereto, the appellant was arrested and interrogated by the police before he was arraigned in court.

The District Court of Misungwi in which the appellant was arraigned, found the appellant guilty and convicted him of both counts. Accordingly, it sentenced the appellant to a custodial sentence of 30 years in respect of the count of rape, while abduction handed him a one-year prison term.

The conviction and sentence were met with an outrage. Feeling hard done, the appellant has instituted the instant appeal that has 11 grounds of appeal. Because of its wide importance, the counsel for the parties unanimously that agreed that disposal of ground one of the appeal is sufficient to dispose of the appeal. For that reason, I will only reproduce ground one of the appeal. This is to the effect that:

> *"That, the trial court erred in law and fact to convict the Appellant while the prosecution didn't prove the case*

beyond reasonable doubt as requirement (sic) of law (sic)."

Hearing of the appeal pitted Ms. Gladness Lema, learned advocate, against Ms. Ghati Mathayo, learned state attorney, for appellant and respondent, respectively. In exceptional circumstances, Ms. Mathayo requested that she be accorded the first the opportunity to address the Court. This request was acceded by the Court.

Submitting on the said ground of appeal, the learned attorney expressed her support to the appellant's contention in the said ground that the prosecution did not prove its case on both of the counts. With respect to the offence of rape, Ms. Mathayo's argument is that section 130 (2) (e) of the Penal Code (supra), under which the appellant was charged, requires that the victim of statutory rape should be below the age of 18 years. She argued that, in this case, the age of the victim is indicated in the charge as 16 years. This is also reflected at page 17 of the trial court's proceedings when the victim testified. She submitted that, in law, the age stated before the witness testifies is not part of the evidence. Ms. Mathayo buttressed her contention by citing the decision of the Court of Appeal in ***Andrea Francis v. Republic***, CAT-Criminal Appeal No. 173 of 2014 (Dom-unreported). She further contended that the law provides that age may be confirmed by the victim, parent or guardian, or through a birth

certificate. None of that was done. The counsel maintained that age of the accused in statutory rape is a key ingredient which was not proved in this case. There is also a case of penetration which was contended. The respondent's attorney takes the view that none of the witnesses proved that penetration was apparent. She argued that the offence of rape was not proved.

Regarding abduction, Ms. Mathayo's contention is that proof of abduction was not submitted in the trial court. She was of the view that where rape is not proved, the offence of abduction would fall. The attorney went on to submit that, the charge itself is defective as ingredients of abduction have not been included. In so doing, the trial court submitted, the provisions of section 133 of the Penal Code were flouted. She prayed that the appeal be allowed.

Ms. Lema was extremely laconic in her submission. She only prayed that the conviction and sentence should be set aside and set the accused free.

From these concurring submissions, the question that follows is whether the respondent proved its case beyond reasonable doubt.

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 multitude 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. Both counsel are unanimous that this burden was not discharged. This unanimous contention is mainly premised on the fact that one key ingredient constituting the offence was not proved. This is the aspect of age of the victim of the rape incident. The said victim, who testified as PW2, had her age stated when she took the witness box and before she was sworn. She is recorded as having stated that she was 16 years of age.

None else, including PW1, the victim's parent, testified on the age of the victim. As appreciably submitted by Ms. Mathayo, age of the rape victim is especially important in proving statutory rape. 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 PW2 was the wife of the appellant, no evidence has been adduced, either, to suggest that PW2 is a girl of the age of below eighteen years of age. This means that the trial court placed reliance on the statement made by the victim before she testified. She stated that she was 16 years of age on the date she testified. Can this statement be taken as a proof of the victim's age? In my unflustered view, the answer to this question is in the negative. My contention is predicated on the position accentuated in ***Andrea Francis v. Republic***, CAT-Criminal Appeal No. 173 of 2014 (Dom-unreported), cited

by Ms. Mathayo. In the said case, the Court of Appeal was confronted with the position akin to what 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."*

Ms. Mathayo has submitted, rightly so in my 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 has

'robbed' 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.

I take the view that conviction of the appellant in the utter ignorance of this important aspect was nothing short of a flagrant infraction of the principles of fair justice, and it cannot be said that guilt of the appellant was proved.

Turning on to the second limb of the respondent's submission, the uncontested view is that the charge that founded the trial proceedings was untenable. The argument in support of this view is that, since there was no proof of rape, abduction would not be justified and, in any case, PW1 has not proved this allegation. While I join hands with the counsel on this contention, I feel compelled to add that, even the charge that introduced this count was defective as it failed to conform to the requirements of the charging provision i.e. section 133 of the Penal Code (supra). The aspect of ***"lack or absence of will of a parent"*** which is a key ingredient on which the charge of abduction is premised was not factored in the charge.

Inclusion of these words was indispensable, given the allegation that the victim of the alleged abduction is a girl of the age of below 16 years of age. Failure, by the prosecution, to include these words in the particulars of the offence, constituted a wanton failure to conform to the imperative requirement enshrined in section 132 of the Criminal Procedure Act, Cap. 20 R.E. 2019, which has sets minimum requirements that a charge should embody. For ease of reference, the said provision states as hereunder:

> *"Every charge or information shall contain, and shall be sufficient if it contains,* ***a statement of the specific offence or offences with which the accused person is charged, together with such particulars as may be necessary for giving reasonable information as to the nature of the offence charged."*** [Emphasis supplied].

Such failure has the consequence of rendering the charge imperfect and incompetent, and the proceedings predicated on the deficient charge are nothing but a mere charade which cannot stand the test of time. They are a manifestation of an unfair trial and a blatant miscarriage of justice. This is the position which was set by the Court of Appeal in ***Mnazi Philimon v. Republic***, CAT-Criminal Appeal No. 401 of 2015 (unreported), in which it was observed:

(1) *"It is now beyond controversy that one of the principles of fair trial in our system of criminal justice is that an accused person must know the nature of the case facing him, and this can only be achieved if the charge discloses the essential elements of the offence, and for that reason, it has been sounded that no charge should be put to an accused unless the court is satisfied that it discloses an offence known to law. A clear charge drawn in terms of s. 135 of the CPA, would give an accused person an opportunity to fully appreciate the nature of the allegations against him so as to have a proper opportunity to present his or her own case.*

(2) *"Being found guilty on a detective charge, based on wrong and/or non-existent provisions of the law, it cannot be said that the appellant was fairly tried."*

(3) *"We wish to remind the magistrate that it is a salutary rule that no charge be put to an accused before the magistrate is satisfied, inter alia, that it discloses an offence known to law. It intolerable that a person should be subjected to the rigours of a trial based on a charge which in law is no charge."*

See also: ***Mussa Mwaikunda v. Republic*** [2006] T.L.R. 387; ***Oswald Mangila v. Republic,*** CAT-Criminal Appeal No. 153 of 1994; ***Abdallah Ally v. Republic***, CAT-Criminal Appeal No. 253 of 2013; and

Kobelo Mwahu v. Republic, CAT-Criminal Appeal No. 173 of 2008 (all unreported).

In view of the foregoing, it is my humble conviction that the deficiency highlighted above renders the charge of abduction incompetent and unable to ground a conviction.

Ms. Mathayo has cast further aspersions on the conviction by arguing that penetrated was not proved in this case. Without any sense of disrespect to her splendid submission on this point, I take the view that this point is, on the basis of what I have opined above, of less significance. I choose not to strain my muscles on this point.

In consequence of the foregoing, I find the appeal meritorious 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 **MWANZA** this 6th day of April, 2021.

M.K. ISMAIL

JUDGE

Date: 12/4/2021

Coram: G. K. Sumaye, Ag DR

Parties: Absent

B/C: P. Alphonce

COURT

Judgment delivered under my hand and seal of this Court in absence of both, the accused/Appellant and the Republic (Respondent) today 12th day of April, 2021

G. K. SUMAYE
Ag DEPUTY REGISTRAR
12/4/2021