IN THE HIGH COURT OF TANZANIA

IN THE DISTRICT REGISTRY

AT MWANZA

HC. CRIMINAL APPEAL NO. 202 OF 2020

(Arising from Criminal Case No. 18 of 2020 of the District Court of Sengerema)

IBRAHIM MAKUBI.....APPELLANT

VERSUS

THE REPUBLIC .....RESPONDENT

JUDGMENT

Date of last order: 19.07.2021

Date of Judgment 30.08.2021

F. K. MANYANDA, J.

The appellant, Ibrahim Makubi, was arraigned in the District Court of Sengerema at Sengerema charged with two counts of offences. Count one, Rape; contrary to sections 130(1) and (2)(e), and 131(1) of the Penal Code, [Cap. 16. R. E. 2019]. The prosecution alleged that the appellant on 20/06/2019 at about 20:00 Hours, at Bulolo Village within Sengerema District in Mwanza Region, raped a girl whose name for purposed of protecting her dignity will be referred to as "the victim" or simply "PW1", a girl of 17 years old, a student of Form I at Iligamba Secondary School.

In the second count, the appellant was charged for impregnating a school girl, contrary to section 60A(3) of the Education Act, [Cap. 353 R. E. 2002] as amended by Act No. 2 of 2016. The prosecution alleged that the appellant on 20/06/2019 at about 20:00 Hours, at Bulolo Village within Sengerema District in Mwanza Region, did impregnate a school girl, whose name for purposed of protecting her dignity will be referred to as "the victim" or simply "PW1", a girl of 17 years old, a student of Form I at Iligamba Secondary School.

Before I go into the determination of the appeal in earnest, I find it apt to briefly narrate the relevant factual background of the instant appeal. The Appellant is a paternal uncle of the victim. At the time of incident both lived in one house belonging to the victim's father. On the said incident day, 20/06/2019, at about 20:00 Hours, the Appellant took the victim into his room and stripped off her clothes and his, then he had sexual intercourse with her. Subsequently, the Appellant continued having sexual intercourse with her in other several occasions. In August, 2019 she was discovered to be pregnant, however, the incident was not reported to police until on 24/01/2020 when her father, who was on safari, returned and reported it. The Appellant was arrested and admitted complicity in the crimes. The prosecution summoned five

prosecution witnesses and the Appellant fended on his own. After full trial the Appellant was convicted with the first count of rape and acquitted in the second count of impregnating a school girl. He was sentenced to imprisonment for 30 years. As explained above, been aggrieved, he has appealed to this Court with five grounds of appeal as follows: -

1. *That, the honourable trial magistrate erred both in law and facts to base conviction on an offence of rape whose essential ingredients (sic) to warrant conviction and sentence were not proved beyond reasonable doubt by the prosecution witnesses and evidence.*

2. *That, the honourable trial court erred both in law and facts to convict and sentence the appellant in absence of certificate or any proof of the age of the alleged victim to be minority.*

3. *That, the honourable trial magistrate misapplied the provisions of section 127(7) of the Evidence Act, [Cap. 6 R. E. 2019] while knowing that PW1 was not a child of tender age when she was testifying for the prosecution which fact necessitated her evidence to be corroborated before being relied upon by the trial court;*

4. *That, the honourable trial magistrate erred both in law and facts by failing to properly analyze and evaluate the evidence brought before him; and*

5. *That, the honourable trial court erred both in law and facts by convicting the Appellant on proceedings where the complainant's statement was neither availed to the Appellant nor tendered in court, which occasioned miscarriage of justice.*

Hearing of the appeal with leave of this Court, was conducted by audio teleconference. The Appellant was introduced by B.2169 Ssgt William, a Prison Officer from Butimba Prison, the Respondent, the Republic, was represented by Maryasintha Lazaro, learned Senior State Attorney via Telephone Number 0787821625.

The Appellant being a lay man simply submitted by adopting his grounds of appeal and left it to the court request for restitution of his freedom. The Senior State Attorney opposed the appeal, supported conviction and sentence. She submitted against the grounds of appeal seriatim.

In ground one, the Senior State Attorney argued that the prosecution through the testimony of PW1 which was corroborated by the evidence of PW5 a police officer who interrogated the Appellant and tendered a cautioned statement in which he confessed committing the offence of rape sufficed to prove the first count of rape. It was her submission that, PW1 explained in detail on how the Appellant approached her at night and took her to his room in the same house they were living. That while at his room the appellant undressed her and himself then had sexual intercourse with her on the fateful night 20/06/2019.

PW1 did not report the rape anywhere until she noticed to be pregnant that she told her step mother in August, 2019 However, the said step mother never reported the incident anywhere until when her father who was on safari returned and noticed the pregnancy that he reported to police. The testimony of the father PW2 is that upon noticing the pregnancy and reporting to police, Dr. Deonatus Luganyizya, PW3, was examined by a medical doctor who confirmed the pregnancy. PW4, Martin Michael Mandawa, was a Village Executive Officer who had nothing tangible in evidence other than advising the victim's father to report the incident to police. PW5, H. 8904 PC Silvester, a police officer, interrogated the Appellant and recorded the cautioned statement in

which the Appellant confessed to rape the victim. The cautioned statement was tendered and admitted in evidence as Exhibit P2 without objection from the Appellant.

The Senior State Attorney argued further that rape was proved from the evidence of PW1, the victim. She relied on the authority in the famous case of **Seleman Makumba vs. Republic** [2006] TLR 372 where the Court of Appeal of Tanzania stated as follows: -

> *"True evidence of rape has to come from the victim, if an adult, that there was penetration and no consent, and in case of any other woman where consent is irrelevant, that there was penetration."*

The Senior State Attorney was of views that evidence proved that the victim was a standard VII pupil and 17 years old at the time of incident, therefore the offence of rape of a girl was proved.

In respect of ground two, the Senior State Attorney submitted that the age of the victim was proved by the Appellant herself who testified that she was 17 years old at the time of commission of the offence, therefore she was under 18 years old. She was of the views that since

the Appellant did not cross examine on it, then the fact of age of the victim was uncontested.

In ground three, the Senior State Attorney argued that by vitue of the provisions of Section 127(7) of the Evidence Act, the evidence of a child or adult woman, victim of sexual offence, if believed to be credible and reliable it suffices to found a conviction. In this case, the victim was a girl under 18 years, she was a victim and her testimony was believed as credible and reliable. The trial court was justified to convict the Appellant.

With regard to ground four where the complaint is on non-evaluation of the evidence by the trial court, the Senior State Attorney argued that the trial court adequately evaluated the evidence presented before it, both prosecution and defence evidence.

In the last ground where the complaint is that the Appellant was not supplied with a copy of the complainant's statement made before police, the Senior State Attorney argued that it is not a requirement of the law. She was of the views that since PW1 testified in court, then he had ample of time to cross examine her. Moreover, there is evidence showing that the Appellant was prejudiced anyhow.

The Senior State Attorney prayed the appeal to be dismissed in its entirety.

In rejoinder, the Appellant reiterated his submissions in chief and prayed to be released.

From the submissions by the parties, the main issue is whether the offence of rape was proved beyond reasonable doubts by the prosecution. I will start with the complaint in the first round of appeal because it carries the whole of the issue. The ground reads: -

> *"That, the honourable trial magistrate erred both in law and facts to base conviction on an offence of rape whose essential ingredients to warrant conviction and sentence were not proved beyond reasonable doubt by the prosecution witnesses and evidence."*

The offence of rape is created by section 130(1) which provides that it is an offence for a male person to rape a girl or a woman. There are two scenarios of rape as provided under section 130(2) namely statutory rape where the victim is under 18 years of age and rape of a woman where she is 18 years and above. Consent is immaterial in the former scenario but absence of consent must be established in the later scenario. This was the holding of the Court of Appeal of Tanzania in the

case of **Amos Palanzi vs. Republic,** Criminal Appeal No. 137 of 2012 (unreported) cited in **Moses Sanjito vs. Republic,** Criminal Appeal No. 64 of 2016 CAT at Dodoma (unreported), where it was stated as follows:-

> *"The offence of rape consists of two scenarios. One is statutory rape where the victim is below 18 years of age in which case consent becomes immaterial. The scenario falls under section 130(2)(e) .... The Second scenario is where the victim is 18 years of age or above where lack of consent must be proved before a conviction of rape is entered."*

From the particulars of offence the rape in the instant appeal falls under the first scenario. It was stated in the particulars that:-

> *"did have carnal knowledge with a girl ..... of 17 years old, a student of Form I at Iligamba Secondary School."*

It follows therefore that; the prosecution was required to prove two important elements, that is, the victim was carnally known by the Appellant and that she was under 18 years old.

The Senior State Attorney argued that the prosecution proved both elements that the victim was carnally known by the Appellant and that she was 17 years of age which is under the statutory age of 18 years.

I have taken pain to go through the impugned judgement and the proceedings, I agree with the Senior State Attorney that the prosecution proved that the victim was carnally known by the Appellant. The evidence is water tight against the Appellant that he had had sexual intercourse with the victim on the fateful day 20/06/2019 and the subsequent days.

The testimony of the victim who testified as PW1 is very clear that the Appellant with whom she lived together in one house but separate rooms on the fateful night on 20/06/2019 knocked at her. When she opened, the Appellant took her into his room. While in his room the Appellant undressed her and undressed himself then they had sexual intercourse. PW1 explained in detail on how the Appellant raped her on the first time and the subsequent days. PW1 did not report the rape anywhere until she noticed that she was pregnant that she told her step mother in August, 2019 and later on it was reported to police on

24/01/2020 by her father PW2. Dr. Deonatus Luganyizya, PW3, examined her and confirmed the pregnancy.

Moreover, the victim categorically mentioned the Appellant as the only man who had sexual intercourse of her. This fact was not cross examined by the Appellant. It is trite law that failure of a party to cross examine on vital incriminating facts is taken to admit that fact.

I am fortified by the holding of the Court of Appeal of Tanzania in the case of **Hatari Masharubu @ Babu Ayubu vs. Republic**, Criminal Appeal No. 590 of 217 (unreported) where it was stated as follows: -

> *"It must be made clear that failure to cross examine a witness on a very crucial matter entitles the court to draw an inference that the opposite party agrees to what is said by that witness in relation to the relevant fact in issue."*

In **Hatari Masharubu's case (supra),** the Court of Appeal followed its earlier decisions in the cases of **Damian Ruhele vs. Republic**, Criminal Appeal No.501 of 2009, and **Cyprian Athanas Kibogo v. The Republic,** Criminal Appeal No.88 of 1992 (both unreported), where plainly stated that it is trite law that failure to cross-

examine a witness on an important matter ordinarily implies the acceptance of the truth of the witness's evidence.

Also, a similar position was elucidated in the case of **Sebatian Michael & Another vs. the Director of Public Prosecutions**, Criminal Appeal No.145 of 2018 (unreported) where the Court of Appeal of Tanzania stated: -

> *"It is trite law that failure to cross examine a witness on a material evidence amounts to acceptance of it."*

Apart from this piece of evidence, there is also the testimony of PW5, H. 8904 PC Silvester, a police officer, who interrogated the Appellant and recorded the cautioned statement in which the Appellant confessed to rape the victim. The cautioned statement was tendered and admitted in evidence as Exhibit P2 without objection from the Appellant. The Appellant in his attempt to exculpate himself from the charge he attempted to retract the confession in his defence. However, this was an afterthought.

As stated above, the prosecution proved the first element of rape, that is the victim was carnally known and she was known by the Appellant.

However, as regard to the second element, a question is whether the age of the victim was proved to be under 18 years old. In my perusal of the judgement I did not find anywhere that the trial magistrate in his judgment referred evidence that established the age of the victim apart from mentioning by the way 7 of the typed judgement where he stated as follows: -

> *"However, as far as the age of the victim are (sic) concerned being 17 years, there is no need to discuss about the consent because the law is clear that the child under the age of 18 years as it happened in this case, has no capacity to consent having sexual intercourse with a man...."*

The trial magistrate was right as far as the law is concerned, but where did he get the evidence of age of the victim. My perusal of the proceedings has not revealed any evidence showing that PW1 was 17 years at the time of commission of the rape.

The figure "17 years" is found in the particulars of the charge and the introduction words by the trial magistrate before PW1 took oath and testify. In the body of her testimony, she did not state anywhere that

her age was 17 years old. Equally the testimony of her father, PW2, is silent on the victim's age.

It is trite law that particulars of offence as well as introductory words before swearing of the witness are not evidence. This was a holding of the Court of Appeal of Tanzania in the case of **Andrea Francis vs. Republic,** Criminal Appeal No. 173 of 2014 (unreported) where it stated as follows:-

> *".....it is trite law that the citation in a charge sheet relating to age of 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."*

This authority was followed in the cases of **Solomon Mazala vs. Republic**, Criminal Appeal No. 136 of 2012 and **Rwekaza Bernado vs. Republic**, Criminal Appeal No. 477 of 2016 (both unreported). Other recent cases on point are the case of **George Claude Kasanda vs. DPP,** Criminal Appeal No. 376 of 2017, which was followed in the recent case of **Rutoyo Richard vs. Republic,** Criminal Appeal No. 114 of 2017 decided on 16/06/2020 where the Court of Appeal of Tanzania stated as follows: -

"Before we proceed, we find it opportune to remind the courts below and the prosecution that preliminary answers and particulars given prior to giving evidence are not part of evidence as the same are not given on oath (See ***Simba Nyangura vs. Republic,*** *Criminal Appeal No. 144 of 2008 (unreported) Instead they serve as general information (see* ***Nalogwa John vs. Republic,*** *Criminal Appeal No. 588 of 2015) (unreported)."*

As it can be gleaned from the string of authorities cited above, the age of the victim which purportedly cited in the charge sheet and the preliminary notice of the magistrate before taking oath are not evidence. Therefore, it follows that the prosecution did not prove the age of the victim. Failure to prove the age of the victim in statutory rape renders proof of the charge unproved. This was the position of the Court of Appeal in the case of **Robert Andondile Komba vs. DPP**, Criminal Appeal No. 465 of 2017 where it stated as follows: -

"Not only that, but in cases of statutory rape, age is an important ingredient of the offence which must be proved. We are not prepared to hold that citing of age of the victim is akin to proving it, and it is not the first time we make such observation."

Other cases on point include the case of **Isaya Renatus vs. Republic,** Criminal Appeal No. where the Court of Appeal stated that: -

"We are keenly conscious of the fact that age is of great essence in establishing the offence of statutory rape in establishing the offence of statutory rape under section 130(1)(2)(e), the more so, under the provision, it is a requirement that the victim must be under the age of eighteen. That being so, it is almost desirable that the evidence as t the proof of age be given by the victim, relative, parent, medical practitioner, or where available, by the production of a birth certificate."

The authority in **Isaya Renatus's case (supra)** was followed in a recent decided case of **Rutoyo Richard (supra)** where the Court of Appeal of Tanzania insisted that where a person is charged under section 130(1)(2)(e) of the Penal Code, now termed as statutory rape, age of the victim is of great essence, it must be proved that the victim is eighteen or below. Then it went of stating as follows: -

"Times without number, this Court has demonstrated that need and casted that duty on the prosecution who, in our criminal jurisprudence is, imperatively obliged to prove the charge beyond all reasonable doubts."

It follows therefore that a charge of statutory rape, is not proved where the age of the victim is not proved to be under 18 years of age.

In the instant appeal, no age of the victim was proved, means also that the charge of rape of the girl under 18 years was not proved.

In the result, for reasons stated above, I find that the first count of the charge of Rape; contrary to sections 130(1) and (2)(e), and 131(1) of the Penal Code, was not proved. With this finding, there is no need of dealing with rest of grounds of appeal.

Consequently, I make the following orders: -

1. The appeal is allowed, the conviction and the sentence of 30 years imprisonment were erroneously entered by the trial court.

2. The conviction of rape contrary to sections 130(1) and (2)(e), and 131(1) of the Penal Code is quashed and the sentence of 30 years imprisonment is set aside; and

3. The Appellant to be set free unless otherwise lawfully withheld.

It is so ordered.

THE HIGH COURT OF TANZANIA
UHURU NA UMOJA
MWANZA

F. K. MANYANDA,
JUDGE
30/08/2021