**IN THE HIGH COURT OF TANZANIA**

**(MTWARA DISTRICT REGISTRY)**

**AT MTWARA**

**CRIMINAL APPEAL NO. 86 OF 2020**

**(Originating from Criminal Case No. 59 of 2019 in the District Court of Nanyumbu at Nanyumbu)**

**MSAFIRI MAZOEA YASSIN.....APPELLANT**

**VERSUS**

**THE REPUBLIC.....RESPONDENT**

**JUDGMENT**

**9th August & 8th October, 2021**

**DYANSOBERA, J.:**

Msafiri Mazoea Yassin, the appellant, was charged before Nanyumbu District Court with two counts. The first count related to rape contrary to section 130(2) (e) and 131 (1) of the Penal Code [Cap. R.E. 2002]. In the second count, the appellant was charged with impregnating a Secondary School Girl contrary to section 60 A (3) of the Education Act, [Cap 353 R.E. 2002] as amended by section 22 of the Written Laws (Miscellaneous Amendment) Act, No.2 of 2016.

The particulars in the first count were that the appellant, on diverse dates between January 2019 and June, 2019 at different times in Chipuputa village within Nanyumbu District in Mtwara Region, did have

carnal knowledge of one 'LDW', a girl of 16 years old, hereinafter called, 'the victim'. With respect to the second count, the prosecution alleged that on diverse dates between May, 2019 and June, 2019 at Chipuputa village within Nanyumbu District in Mtwara region, did impregnates one LMW a girl of 16 years old and a Form Two student at Chipuputa Secondary School.

The appellant denied the charge and, in a bid to prove the case against him, the prosecution called six witnesses and produced three exhibits. On part of the defence, three witnesses gave their testimonies. After hearing the evidence on both sides, the trial court was satisfied that the prosecution had proved its case against the appellant. It found him guilty on both counts and meted a sentence of thirty (30) years for the first count and three (3) years for the second count; the sentences being ordered to run concurrently.

Dissatisfied, the appellant has appealed to this court against both conviction and sentences.

Before I determine the appeal, I deem it appropriate to provide a brief background of the matter. The victim (PW 1) is the daughter of PW2 one Mohamed White. The victim was a Form Two student at Chipuputa Secondary School. Due to the big distance between her

parents' home and the school, PW2 decided to rent a room for her at PW4's house.

In the course of studies, PW3 one Hamida Mussa Missanga, a secondary school teacher and in charge of health issues particularly in respect of female students at the School, had the established a practice of calling the health experts to examine female students. In that process, PW 4 called Komeni Njau, a health expert from Chipuputa Dispensary to medically examine female students. Incidentally, the victim was one of those students who underwent that examination. After the health expert touched the victim's stomach, she directed her to undergo U.T.P. examination. The victim was, eventually, found pregnant. PW 3, upon an inquiry, was told by the victim that it was the appellant who was responsible for her pregnancy. The School Headmaster informed PW 2 of the victim's health status. She was taken to Nanyumbu District Hospital for further medical examination whereby PW Daud Daud Amlima (PW 5), a clinical officer at Nanyumbu District Hospital, conducted the medical examination and PW 2 and PW 3 participated fully. According to PW 5, the urine tested gave positive results and the ultra sound test confirmed that the victim was 13 weeks and six days' pregnant. On 20.8.2019, G.4959 DC Said (PW 6) recorded the appellant's cautioned statement (exhibit P 3). In that exhibit, the

appellant admitted to have been having sexual intercourse with the victim.

The victim affirmed that she knew the appellant since August, 2018 though they started love affairs in November, 2018 and that they were always making sexual intercourse at her rented room at PW4's house but only once in the appellant's room and were practising unsafe sexual intercourse. She informed the trial court that after finishing PW1 was being rewarded some money ranging between 3000- 5000/=. The victim asserted the last time they had sexual intercourse was in June, 2019 in her room.

In his affirmed defence, the appellant completely denied to have carnally known the victim and argued that had he done so he would have ran away adding that PW4 could have testified to that effect since they live in the same village. The appellant's evidence was supported by that of Mbaraka Bakari Sudi (DW 2) who denied to have seen any girl invoved in sexual intercourse with the appellant. The third defence witness was Ahman Hassan Ahman who testified how the friendship between him and the appellant was evolved.

In his endeavour to impugn the trial court's decision, the appellant has filed a petition of appeal on the following grounds of appeal: -

1. The learned trial magistrate erred in law and facts by sentencing the appellant while there was no conviction entered.
2. That the learned trial magistrate erred in law and facts by sentencing the appellant while the offence was not proved beyond reasonable doubt.
    - Through the proceedings especially the evidence of PW1(the alleged victim).It is obvious that PW1 was not a credible witness and that the trial magistrate failed to disclose the discrepancies on PW1 testimony which could made the trial magistrate not to consider or give weight to her evidence(PW1) PW1 in her evidence claimed that she had sex with the appellant on November 2018 but when cross examined by the appellant PW1 claimed differently that she (PW1) had sexual intercourse with the appellant in June 2019.
    - Failure by PW 1 to name the appellant at an earliest moment leaves shadows of doubt if it was the appellant who did the alleged offence to PW 1, the appellant was named after three months.
3. That the trial magistrate erred in law and facts by sentencing the appellant on statutory rape while the age of the alleged victim was not established beyond reasonable doubts as to enable sentence under statutory rape. Age is an established since it is mandatory that the victim should be under 18 years.
4. That there was corroboration and inconsistence of prosecution evidence which could not enable sentence.

During the hearing of this appeal, the appellant opted the respondent to reply first the grounds of appeal and then he would, if need arose, re-join.

Mr. Wilbroad Ndunguru, learned Senior State Attorney opposing the appeal, supported the decision of the trial court. He submitted that the rape resulted into pregnancy since the victim was sixteen years old. He was of the view that the issue of age was proved by the victim and her father and this evidence was not shaken by the appellant during cross examination. Further that the evidence was abundant that it is the appellant who was the sole person having sexual intercourse with the victim and both knew each other from 2018 up to June 2019 when PW1 was discovered pregnant. On the inconsistency of testimonies of PW 1, PW 3 and PW 5 on the age of the pregnancy, Mr. Ndunguru invited this court to find it a minor and inconsequential one as PW 3 and PW 5 were testifying from their skill and that the inconsistency did not eliminate the proved fact that the appellant had love relationship with the victim which resulted into pregnancy.

With respect to the appellant's cautioned statement, learned Senior State Attorney admitted that it was admitted against the procedure and invited this court to expunge it from the record. He was,

however, quick to point out that there was other cogent evidence which implicated the appellant.

On the sentence, Mr. Ndunguru stated that it was legal and justified in law.

In his rejoinder, the appellant challenged the inconsistent statements on her age and argued that she was not telling the truth. He argued that his age was not considered by the trial court as at present he is nineteen years but is in jail.

I have carefully gone through the proceedings and judgment of the trial court, as well as the grounds of appeal and the rival submissions of the learned Senior State Attorney.

I propose to start with the second ground of appeal which challenges the prosecution case not to have been proved beyond reasonable doubt on two reasons, namely, the discrepancies on PW1 testimony that the victim testified in chief that she had sexual intercourse with him on November 2018 but when he cross examined her, she testified differently that she had sexual intercourse with him in June 2019 and failure to name him at the earliest moment.

On my part, I think the appellant misconceived the evidence of the victim. According to the record, page 8 of the typed proceedings in particular, the victim is recorded to have stated,

'We started to have an affair in November, 2018'.

This means that the love affair between the appellant and PW 1 started in November 2018. When she was cross examined by the appellant, she said they had sexual intercourse in June 2019 and was emphatic that this was her last time she had sexual intercourse with the appellant further that in August, 2019 they had sexual intercourse in the appellant's room at Chipuputa. This means that there was no any discrepancy and if any, it was minor which did not affect the victim's veracity and was normal. I am fortified in this by what the Court stated in the case of **Marmo Slaa Hofu & 3 Others v. Republic**, Criminal Appeal No.246 of 2011(unreported) that:-

> 'normal discrepancies are bound to occur in the testimonies of witnesses, due to normal errors of observations such as errors in memory due to lapse of time or due to mental disposition such as shock and horror at the time of occurrence. Minor contradictions or inconsistencies, embellishments or improvements on trivial matters which do not affect the case for the prosecution should not be made a ground on which the evidence can be rejected in its entirety."

On the complaint that the victim failed to name the appellant at the earliest possible time, the charge sheet clearly stated that the alleged offences were committed on diverse dates between May and June 2019. Strictly speaking, the date the victim was put under medical

examination by PW3 and PW5 is when the discovery of the existence of love affairs was known to the public, before hand, it was a secret between the appellant and the victim. The time the victim mentioned the appellant is when she was discovered pregnant. To me, that was, in the circumstances of the case, the earliest possible time as before the medical examination no one knew the existence of love relationship between them except the two only. Likewise, none knew that the victim was pregnant. The complaints by the appellant have no substance.

As to the third ground, there is no doubt the Court of Appeal has extensively covered this area of proof of the age of the victim especially in rape cases. For instance, in the case of **Andrea Francis v. Republic**, Criminal Appeal No.173 of 2014(unreported) the Court of Appeal stated that: -

> '...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 the present case the victim testified that she was sixteen years and was born in 2005.Likewise, PW2 the biological father of the victim, testified the same that the victim was sixteen years old. As far as the

above referred case is concerned, in the case at hand, the victim and PW2 were the appropriate persons and witnesses who proved the age of the victim to be sixteen years old and not the opposite.

Although there was inconsistency between the victim and PW 2 on the year the former was born, I find that the inconsistency was inconsequential as, whichever the case, the victim at the time she was carnally known was under 18 years of age and when she was found pregnant she was still schooling.

In the light of the forgoing finding, I see this ground lacking in merit as well. .

The forth ground, I think, should not detain me. The appellant did not clearly point out what was the uncorroborated and inconsistent prosecution evidence which could not enable the trial court to pass the sentences against the appellant.

As far as the first ground of appeal is concerned that is failure by the trial court to enter conviction, I think the appellant is right. The learned trial Resident Magistrate, after finding the appellant guilty of two counts, he proceeded to sentence him without convicting him. This approach was wrong and contravened the law as enjoined by Sections 235(1) and 312(2) of the Criminal Procedure Act, [Cap 20 R.E. 2019]. These provisions impose a duty to the trial court after finding an

accused person guilty of the offence charged to enter conviction and then pass a sentence. Section 235(1) thereof provides:-

> "235. - (1) the court, having heard both the complainant and the accused person and their witnesses and the evidence, shall convict the accused and pass sentence upon or make an order against him according to law or shall acquit or discharge him under section 38 of the Penal Code."

Besides, Section 312(2) of the Act enacts that:-

> "312 (2) In the case of conviction the judgment shall specify the offence of which, and the section of the Penal Code or other law under which, the accused person is convicted and the punishment to which he is sentenced."

The consequences of non-compliance with the above provisions were well elucidated in the case of **Oroondi Juma v. Republic**, Criminal Appeal No.236 of 2012 CAT (unreported), that: -

> "Non-compliance with the requirement to convict the accused as directed under section 235(1) and 312 (2) of the CPA rendered the judgment of the trial court incompetent."

In the present case the learned trial Magistrate wrote as follows: -

> "For these reasons advanced this court find the accused guilty of both charges that of rape c/s.130 [2] [e] and 131 [1] of the Penal

Code Cap16 R. E 2002.Accused is also found guilty of the offence of impregnate a School girl c/s 60 A [3] of the Education Act [Cap 353 R.E 2002] as amended by section 22 of Written Law [Miscellaneous Amendment] No. 2 Act of 2016."

In the light of the above excerpt, it is clear that the learned trial Magistrate did not comply with the requirements of section 235(1) and 312(2) of the CPA by not entering conviction before he sentenced the appellant.

In view of the above legal provisions and binding case law, it cannot be gainsaid that the trial court's failure to enter a conviction and failure to specify the section under which the appellant was convicted and the punishment to which he was sentenced rendered the judgment and sentence a nullity as such there is nothing this court can uphold or dismiss.

Invoking revisionary powers conferred upon me by section 373 (1) of the Criminal Procedure Act, [Cap.20 R.E.2019], I quash and set aside the alleged judgment and sentence of the trial District Court in Criminal Case No. 16 of 2019.

I order the record to be remitted to the trial court so that it composes a proper judgment by entering a conviction and sentence on the appellant according to law.

In the interest of justice, I direct that the prison sentence begin to run from the day of the initial/first incarceration.

Pending the compliance of this order by the trial court, it is ordered that the appellants remain in custody so as to be produced before the trial court on the day the judgment will be delivered and sentence passed.

Order accordingly.

**W.P. Dyansobera**

**Judge**

**8.10.2021**

This judgment is delivered under my hand and the seal of this Court this 8th day of October, 2021 in the presence of the appellant in person and Mr. Paul Kimweri, learned Senior State Attorney for respondent/ Republic.

Rights of appeal to the Court of Appeal explained.

**W.P. Dyansobera**

**Judge**