IN THE COURT OF APPEAL OF TANZANIA

AT MOSHI

(CORAM: KOROSSO, J.A., KIHWELO, J.A. And RUMANYIKA, J.A.)

CRIMINAL APPEAL NO. 337 OF 2019

GENES ARISEN TARIMO @ KAPUTI ..... APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

(Appeal from the Decision of the High Court of Tanzania, at Moshi)

(Mkapa, J.)

dated 12th day of July, 2019

in

Criminal Appeal No. 33 of 2018

.....

JUDGMENT OF THE COURT

10th & 18th July, 2023

RUMANYIKA, J.A:

Before the District Court of Rombo at Rombo (the trial court), the appellant was charged with two counts namely Rape contrary to sections 130(1) (2) (e) and 131(1) of the Penal Code Cap 16 (the Penal Code) and Impregnating a School Girl contrary to section 60A (3) of the Education Act. Cap. 353 (the Education Act). Upon a full trial, he was convicted and sentenced to thirty years and one year imprisonment for each count respectively. Aggrieved by that decision, he appealed but lost the battle

at the High Court. His appeal was dismissed for being unmerited. He is dissatisfied, hence this appeal.

It was alleged that on diverse dates in May, 2017, at Kirwa Mashati village within Rombo District in Kilimanjaro region, the appellant had sexual intercourse with a school girl aged 17 years who will be referred to as "the girl" or "the victim" in order to conceal her identity, by that time a form three pupil of Bustani Secondary School. It happened that, on the material date the girl and her two siblings went to the appellant's home to fetch water as usual. While there, they asked for some sugar cane from him. The appellant invited the girl in the room pretending to give her the said sugar cane but had carnal knowledge of the girl while her little brothers stood by the road waiting for her. It is further alleged that from there, the sexual intercourse between them became repetitive and for every occasion the appellant rewarded her TZS. 2,000/= or sugarcane for the act until the girl conceived and on that account dropped out from the school. Upon being medically examined on 18th August, 2017 she was found to be three months pregnant. On that basis the appellant was reported to the police and charged, upon being named by the girl to be responsible.

Before the trial court, seven witnesses were lined up in a bid to prove the prosecution's case: PW1, the girl who was the alleged victim. PW2 her mother to whom the girl named the appellant to be the perpetrator of the offence charged. PW3 and PW4 are the victim's siblings who accompanied her as they used to fetch water at the scene. They were ten and eleven year's old boys respectively. They narrated on how often they remained outside waiting, on every occasion as the appellant and their sister entered the house and closed the door. PW5, was the local chairman, who, following the incident arrested the appellant with a warrant issued to him by the police. PW6, was the doctor who examined the victim and found her to be pregnant. Last but not least, was PW7, the police investigations officer.

On his side, the appellant was the sole defence witness. He denied knowing the girl and her mother before. He alleged that the charges and the whole evidence adduced was a fabrication intended to fix him. In the end, the trial court's magistrate in her decision found the prosecution case to be proved beyond reasonable doubt. She convicted the appellant as charged and sentenced him to thirty years imprisonment on the first count and one year imprisonment on the second count.

Aggrieved by the said conviction and sentence, the appellant appealed to the High Court where he lost the battle. The High Court dismissed the appeal upholding the conviction and sentence. Still protesting his innocence, the appellant is before the Court appealing the High Court's decision.

At the hearing, the appellant appeared in person unrepresented whereas Messrs. Paul Kimweri and Geofrey Mlagala learned Senior State Attorneys represented the respondent Republic.

The appellant adopted his two memoranda of appeal. The substantive one being one filed on 8th November, 2019 which contains four points of grievance and the supplementary memorandum filed on 28th June, 2023 which has three grounds.

In the substantive memorandum of appeal the grounds could be rephrased to read as follows;

1. *That, the appellant's conviction was grounded on a case which was not proved beyond reasonable doubt, let alone the variance of the name of the village between the particulars of the offence charged and the witnesses' testimonies and that, the victim was not proved to be a pupil of Bustani Secondary School aged 17 years.*

2. *That, evidence of PW3 and PW4 was recorded contrary to section 210 (3) of the Criminal Procedure Act., upon establishing of a prima facie case against the appellant, the provisions of section 231 of the CPA were not complied with.*
3. *That, the two courts below did not consider the appellant's defence which constitutes a denial of right to be heard.*
4. *That, the appellant's conviction was founded on weak, contradictory, unreliable and incredible evidence.*

In the supplementary memorandum of appeal the grounds are:

1. *That, the late naming of the appellant by the girl as the perpetrator of the offence charged lowered the girl's credibility as witness.*
2. *That, the evidence of PW2 and PW3 was received in violation of section 127(2) of the Evidence Act.*
3. *That, the prosecution case was not proved beyond reasonable doubts.*

Upon adopting his written submission presented in the Court for filing on 27th August, 2021 in support of his appeal, with regard to the 1st ground in the substantive memorandum of appeal, he contended that, as to where the alleged offence was committed, PW5, the local and arresting leader stated a different village from what was stated in the particulars of the offences thus, not clear whether it is Kirwa or Mrere village. That

variance, he argued, rendered the charge to be defective and therefore, the prosecution case not proved beyond reasonable doubt as required by the law. Additionally, he asserted that, the girl was not proved to be seventeen years old to establish an offence of statutory rape. He also complained that, the girl's mother who testified as PW2 was duty bound to prove the daughter's age as an essential ingredient which she did not venture into. Moreover, the appellant argued that, a mere citation of the girl's age by the trial magistrate as done constituted no proof of the age. On this aspect, he cited our unreported decision in **Andrea Francis v. R**, Criminal Appeal No. 173 of 2014 to fortify his point.

Further, he argued that the prosecution evidence fell short of proof of another essential ingredient that, at the alleged material time the girl was a school pupil so as to establish and prove the offence of impregnating a school girl as alleged, much as exhibit P1 recognized her to be sixteen years old. He thus faulted the High Court for having upheld the conviction which was based on mere allegations, in that regard.

Elaborating on the substantive 2nd ground of appeal, the appellant contended that, the evidence of PW3 and PW4 was improperly recorded,

without the trial magistrate observing the mandatory provisions of section 210(3) of the Criminal Procedure Act (CPA), which unfortunately escaped the mind of the High Court Judge. He stressed that, upon recording the evidence, the trial magistrate should have read it over to each of the two witnesses with the view to counter checking its correctness or otherwise of evidence in recording it. He thus, implored us to find the omission to be a serious one and consequently expunge it from the record.

Regarding the issue of non-compliance with section 231 of the CPA and its legal effects, the appellant asserted that, upon the closure of the prosecution case, the court ought to have explained the substance of the charge, informing the appellant (accused then) that he is at liberty to bring defence witnesses if any, as required by the law which requirement was omitted and the High Court Judge also skipped it. The appellant claimed it to be a denial of fair hearing and this being the second appellate court, he urged us to do the needful as the first appellate court failed to re-evaluate the evidence.

On another limb of argument which concerns the two courts below which allegedly disbelieved his defence evidence, the appellant expressed

his dissatisfaction on the alleged failure of the High Court Judge on that account to re-evaluate the entire evidence giving its deserving objective scrutiny as the first appellate court ought to do.

Regarding the 4th ground in the substantive memorandum of appeal, he contended that, the prosecution's evidence was too weak, incredible, contradictory and unreliable to found a conviction. He contended that, the girl's story that, she had sexual intercourse with the appellant for the first time seduced by him at the latter's home in May, 2017 while fetching water, contradicted the particulars of the offences charged. He added that, her failure to name the appellant at the earliest possible opportunity also put her evidence in question thus ought to be disregarded. He argued also that, the possibilities of the girl having been impregnated by any other man could not be ruled out thus naming him was an afterthought.

In the alternative, he asserted that, from the conduct of the girl, the Court be pleased to find that she was mature thus, appreciated and consented to the sexual intercourse. He thus implored us to find that, the charge of rape was wrongly preferred against him. Winding up, he urged the Court to find merits in his appeal, allow it and restore his liberty.

Replying, Mr. Kimweri readily supported the appeal generally. With regard to the 1st count of statutory rape, he contended that, unlike in ordinary rape cases where only the victim's consent counts, in the instant case, proof of the girl's age being below eighteen years was paramount. However, he argued that, none of the prosecution witnesses including the girl's mother (PW2) proved that, at the alleged material time she was seventeen years old thus under age. Stressing on the requirement of proof of the victim's age, he contended that, as the law stands, those mandated to discharge that liability could be of the victim, her parents or a medical doctor if age is in question. To cement his stance, he cited our decision in **Rwekaza Bernado v. R**, Criminal Appeal No. 173 of 2014 (unreported).

If anything, Mr. Kimweri added, in the instant case the medical doctor mentioned the girl's age just in passing in the PF3 (exhibit P2) to be 16 and not 17 years old as alleged in the particulars of the offence charged. About the 17 years cited by the Trial Magistrate in the proceedings to be the girl's age, Mr. Kimweri argued that, that too was not a proof of the age. He cited to us our unreported decision in **Andrea Francis v. R**, Criminal Appeal No. 173 of 2014 to fortify his point. He thus

implored us, in favour of the appellant to find that, the girl was not proved to be under age and so the charge of statutory rape was not proved.

Regarding the 2nd count which concerns the offence of impregnating a school girl, Mr. Kimweri contended that, the offence was not proved because it's three essential ingredients are missing. They are: **one,** that, at the alleged material time the girl was a school pupil as recognized by the Education Act, **two**, regarding the girl' pregnancy, the appellant was the responsible father and **three**, Mr. Kimweri also questioned the manner and the timing of the girl in naming the appellant who is alleged to be a neighbor and the perpetrator of the offences charged. Stressing on the 2nd count, he claimed that, with all those highlighted shortfalls, there were possibilities that somebody other than the appellant may have impregnated her.

On the issue of whether or not the girl was impregnated while a school pupil as alleged, Mr. Kimweri argued that, that essential ingredient lacked proof because, he argued, there was no cogent evidence to substantiate the allegations that the girl was a drop out pupil of the said

Bustani Secondary School. Let alone failure of the prosecution's witnesses to present the respective and corresponding attendance register.

Rejoining, the appellant had no further comments. He endorsed Mr. Kimweri's concession to the appeal as being a correct stance reflecting the actual position. He reiterated his prayer urging the Court to allow his appeal and set him free.

On our part, and considering the appellant's written submission, Mr. Kimweri's concession to the appeal and the authorities cited, the central issue for our consideration thus, is whether the prosecution case was proved beyond reasonable doubt. This point is in accordance to the appellant's 1st and 3rd grounds in the substantive and supplementary memoranda of appeal respectively.

To start with the 1st count regarding the offence of statutory rape, we are satisfied that it was not established, let alone proven. We wish thus to re-state the two essential ingredients of the offence, as rightly in our view stated by Mr. Kimweri: **one**, a man having carnal knowledge of a girl, and **two,** that, at the alleged material time that girl was under

eighteen years. Whether or not there was consent of the girl is immaterial unlike in normal rape cases where only absence of consent counts.

In the circumstances, proof of age of the victim of statutory rape as required in the instant case was vital. The Court has reiterated this legal principle in a plethora of its decisions including **Amani Yusuph v. R**, Criminal Appeal No. 124 of 2019 (unreported), where persuasively it quoted the words of the High Court Judge in the case of **Omary Hashimu v. R.** [2022] where it was stated:

> *"In statutory rape, proof of age is fundamental. In fact, the age of a woman is a determining factor which differentiates between normal rape and statutory rape. Even punishment depends on the age of a woman".*

The above cited principle referred, in the instant case it is glaring to us, as rightly conceded by Mr. Kimweri, no evidence was led by the prosecution and tested at the trial to show that, indeed on the alleged material date the girl was seventeen. If anything, the medical doctor, PW6 who examined and established the girl to be pregnant stated her age just in passing as it appears in his oral evidence at page 18 of the record of

appeal and in the PF3 (exhibit P2). We do not find it to be proof of her age, as an essential ingredient of the offence charged requires.

Regarding the evidential value of the witnesses' testimony, in this case given in passing as PW6 did about the girl's age, it needs to be disregarded. The Court has reiterated that observation on a number of occasions including **Andrea Francis** (supra). It needs no body's over emphasis therefore, that, it is until when a formal request has been presented to the medical practitioner and upon scientific inquiries coming out with a concluding report on the age of a person at issue, when it is said to be proved.

Moreover, we are aware of a long list of the Court's decisions where we stressed that parents, guardians or schools authorities as the case may be are mandated to prove the age of the respective children under them. Short of which the prosecution case is bound to crumble. In **Rwekaza Bernado** (supra), the Court reiterated its stance referring to its decisions in **Andrea Francis** (supra) which was also quoted with approval by this Court in **Nalongwa John v. R**, Criminal Appeal No. 588 of 2015 (unreported) holding 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.**"* (Emphasis added).

Still deliberating on the same aspect of evidence regarding the said mandatory requirement of proof of the age of the victim in statutory rape cases, on many occasions the Court has widened the scope as to who has that mandate. For instance in **Victory Mgenzi @ Mlowe v. R**, Criminal Appeal No. 354 of 2019, the Court referred to its decision in **George Claud Kasanda v. DPP**, Criminal Appeal No. 376 of 2017 (both unreported) and stated that:

> *".... Proof of age may come from either the victim or her relative, parent, medical practitioner, or by producing a birth certificate".*

It is very unfortunate, as alluded to above that, in the instant case the girl's mother, PW2 who is one of the above listed qualified persons to prove the girl's age did not even venture into stating her daughter's age just as, in the course the Trial Magistrate cited the girl's age to be 17 years

as reflected at pages 8 and 1 of the record of appeal respectively. No doubt, that was not a proof.

As alluded to above, and given all the obtaining circumstance, it is our finding that, without any proof that at the alleged material time the victim was a school pupil, with respect, we are inclined, as hereby do to find that, too, the offence of impregnating a school girl was not proved. The Court reiterated so times without number including in **Maneno Matibwa Francis @ Babio v. R,** Criminal Appeal No. 35 of 2021 (unreported). The two charges therefore, should have not been preferred against the appellant in the first place.

In the result, now that from the start the prosecution did not prove its case beyond reasonable doubt as conceded by the learned Senior State Attorney, the 1st and 3rd grounds of appeal in the substantive and supplementary memoranda of appeal respectively are merited. They are sufficient to dispose of the entire appeal. For that reason we are hesitant to discuss on the remaining grounds of appeal because doing so is tantamount to embarking on mere academics which we hereby refrain to do.

Consequently, we allow the appeal for being merited and on that account order immediate release of the appellant unless he is held for another lawful cause.

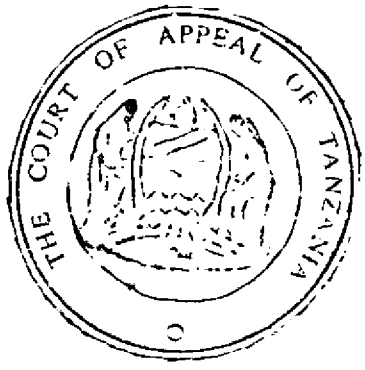
DATED at **MOSHI** this 18th July, 2023.

W.B. KOROSSO
JUSTICE OF APPEAL

P. F. KIHWELO
JUSTICE OF APPEAL

S. M. RUMANYIKA
JUSTICE OF APPEAL

The Judgment delivered this 18th day of July, 2023 in the presence of the Appellant in person, unrepresented and Mr. Innocent Exavery Ng'assi, learned State Attorney for the Respondent/Republic, is hereby certified as a true copy of the original.



A. L. KALEGEYA
DEPUTY REGISTRAR
COURT OF APPEAL