IN THE COURT OF APPEAL OF TANZANIA
AT TABORA

CRIMINAL APPEAL NO. 658 OF 2020

(CORAM: MKUYE, J.A., LEVIRA, J.A., And MASOUD, J.A.)

ELIUS MGASHI.....APPELLANT

VERSUS

THE REPUBLIC .....RESPONDENT

(Appeal from the decision of the High Court of Tanzania at Tabora)

(Bahati, J.)

Dated the 20th day of November, 2020
in

Criminal Appeal No. 23 of 2020

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JUDGMENT OF THE COURT

25th September & 6th October, 2023

MASOUD, JA.:

This is a second appeal by the appellant, Elius Mgashi. It arises from the judgment of the High Court of Tanzania at Tabora (Bahati, J.), in Criminal Appeal No. 23 of 2020. Initially, the appellant appeared before the District Court of Igunga where he was charged with and subsequently convicted of the offence of rape contrary to sections 130 (1)(2) (e) and 131 (1) and (2) of the Penal Code, [Cap. 16, R. E. 2002 now R.E. 2022] (the Penal Code). He was convicted and sentenced to serve thirty years in

prison. Dissatisfied, he appealed in vain to the High Court where the appeal was dismissed in its entirety. Still aggrieved by the conviction and sentence imposed on him, the appellant has appealed to this Court.

Briefly, the factual background of this case are as follows: The particulars of the offence reveal that, on diverse dates between 14th and 19th September, 2018, during night hours, at Store Street within Igunga District in Tabora Region, the appellant herein had carnal knowledge of a girl of 14 years of age (the victim who testified as PW1) whose name is herein withheld. It was stated by Peter Mboje PW2, the victim's father, that the victim was a student but she stopped schooling after becoming pregnant.

PW2 was living with his daughter, the victim, and the appellant. The appellant and PW2 are cousin brothers. Thus, the appellant is the victim's uncle. The appellant started to live with PW2 and his daughter, sometimes in September 2018. He came to live with the said family because PW2 had intention of doing business with the appellant. It was, according to PW1, when the appellant was living with the PW2's family that, PW1 and the appellant fell in love. As a result, on 14/9/2018 around noon, they agreed to sleep together at night. Thus, the appellant told the victim not to lock

the door of her room when she go to bed as he would join her after midnight. He actually joined PW1 in her room as arranged. They had sexual intercourse of which it was, according to PW1, her first time.

From that night, as testified by PW1, it became a norm as they regularly continued to have sexual intercourse on various dates so much so that the victim could not remember the specific dates. As far as PW1 is concerned, the appellant was the only person she has ever had sexual intercourse with. Sometimes in December 2018, PW2, the father of the victim, started suspecting PW1 being pregnant. Upon being asked by PW2 as to whether she was pregnant, she declined. Subsequently, she gave in and admitted that she was, indeed, pregnant, and went ahead to mention the appellant to PW2 as responsible for the said pregnancy.

Upon such revelation, PW2 asked some assistance from the victim's teacher, one, Annastazia Lucas (PW3), who after talking to the victim, who again mentioned the appellant as the one responsible for the pregnant, she advised PW2 to take her to the hospital for medical examination. PW3, in a company of PW2's friend, took the victim to the hospital. She was examined by PW4 Shila Makala, an assistant medical officer, stationed at Igunga District Hospital. PW4 testified that she examined PW1's urine and

subjected PW1 to ultra sound examination. The results revealed that PW1 was 21 weeks pregnant. PW4 filled a PF3, but due to some procedural irregularities in its admission in evidence as it was not read over, the first appellate court expunged it from the record.

Consequent to reporting the appellant to the police and after being arrested and later arraigned to court, full trial was conducted and, as earlier stated, the trial court found the appellant guilty. He was thus convicted as charged and sentenced to serve thirty (30) years imprisonment. Aggrieved, the appellant preferred an appeal to the High Court where, the trial court's decision was upheld. Dissatisfied by the decision of the High Court, the appellant has preferred this second appeal. In his memorandum of appeal, the appellant has raised four grounds of appeal which are as hereunder:

1. *That, the case for the prosecution was not proved against the appellant beyond reasonable doubt.*
2. *That, the medical examination report (PF3) having been expunged from the record, the remaining evidence on record is shaky and cannot sustain the conviction of the appellant.*

3. *That the age of the victim of the offence was not cogently established as PW2 and the victim (PW1) did not even tell when the victim was born and that the citation of the age in the charge sheet is not evidence, neither the citation of the age before the magistrate put her on oath.*
4. *That the two courts bellow capitalized on the defense of the appellant.*

At the hearing of the appeal, whereas the appellant appeared in person unrepresented, Mr. Enoshi Gabriel Kigoryo and Ms. Wampumbulya Shani, both learned State Attorneys, resisted the appeal on behalf of the respondent Republic.

When the appellant was given time to submit, he prayed to adopt his grounds of appeal as part of his submission. The respondent submitted on each ground and prayed the Court to dismiss the appeal.

Having gone through the record of appeal, the grounds of appeal as adopted by the appellant and Mr. Kigoryo's submission in reply, the main issues for determination of the appeal, in our considered opinion, are as follows: **One**, whether upon the first appellate court expunging the PF3

from record, the remaining evidence can sustain conviction; **two**, whether the age of the victim was properly established; and **third**, whether the prosecution has proved the case against the appellant beyond reasonable doubt.

Starting with the first issue, it was Mr. Kigoryo's submission that after expunging the PF3, the remaining evidence including oral testimony of PW1 could suffice to ground conviction of the appellant. He referred us to Section 127 (6) of the Evidence Act, [Cap 6 R.E. 2019 now R.E. 2022] (the Evidence Act). He argued that PW4's oral evidence sufficiently corroborated the evidence of PW1. Having conducted the examination, PW4 confirmed that PW1 was pregnant. Based on this argument, we are satisfied that the expungement of the PF3 did not, as rightly submitted by Mr. Kigoryo, affect the oral evidence of PW4.

If we may add, apart from PW4's oral evidence having sufficiently corroborated PW1's evidence, it is worthwhile to underline that the oral evidence of PW4 was not in any way controverted during cross examination. See the case of **Koronel Juma Abdallah vs The Republic**, Criminal Appeal No. 316 of 2021 [2023] TZCA 166. PW4's oral testimony,

therefore, remained intact and credible. Thus, the first issue is answered in the affirmative.

Moving to the second issue on proof of the age of the victim, it is trite law that age of a child can be proved by, amongst others, the victim, a parent or guardian or a medical practitioner. In the case of **Issaya Renatus v. Republic** (Criminal Appeal No. 542 of 2015) [2016] TZCA 218 the Court said:

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

See also, **Shani Chamwela Suleiman v. Republic** (Criminal Appeal No. 481 of 2021) [2022] TZCA 592.

As correctly submitted by Mr. Kigoryo, since PW1 (the victim) and PW2, the father of PW1, testified to the same effect, that PW1 was 15 years old and that at the time of the commission of the offence she was 14 years old, automatically, the issue of age was resolved in favour of the prosecution case. And further, the fact that the appellant did not cross examine the witnesses about the age of the victim and did not lead any evidence to the contrary, the prosecution evidence on the age of PW1 remains intact. Henceforth, this issue too is answered in the affirmative.

As regard to the last issue on proof of the case beyond reasonable doubt, it will be recalled that, the charge laid against the appellant was on the allegation of raping the victim contrary to sections 130 (1) (2) (e) and 131 (1) and (2) of the Penal Code. As correctly submitted by Mr. Kigoryo, in terms of the above-cited provisions of the law, the offence of rape is committed where it is established that the accused person had unlawful sexual intercourse with a woman with or without her consent. Moreover, in any charge of rape, there must be evidence from the prosecution establishing beyond reasonable doubt that there was sexual penetration of the accused person's manhood into the complainant's private parts.

The appellant denied to have committed the offence of which he was convicted. He contended that, the allegations levelled against him were a result of a land dispute he had with his brother (PW2), the father of the victim. He, thus, claimed to have been framed. We outrightly disregarded the claim of being framed because of the alleged land dispute as it is purely based on facts and not shown to have been raised at the first appellate court. He also said that he never raped PW1 and for that matter, he prayed us to quash his conviction and set him free. We understood the appellant as submitting that the charge laid against him was not proved beyond reasonable doubt.

Mr. Kigoryo on his part, maintained that there was sufficient evidence to connect the appellant with the offence with which he was charged and subsequently convicted of. Mr. Kigoryo argued that it is proved by PW1, that she had sexual relationship with the appellant and on several occasions, they did have sexual intercourse which resulted into her being pregnant. As soon as PW1 was suspected to be pregnant, she mentioned the appellant to PW2 and PW3 as the person responsible for the pregnancy. PW4's oral testimony, as a medical practitioner who examined the victim, corroborated PW1's evidence that, she was pregnant. All these

pieces of evidence proved penetration, and that it was the appellant who penetrated PW1. Even the appellant himself, impliedly, testified at page 36 of the record of appeal to have had sexual intercourse with PW1 with her consent. The relevant part of his testimony to that effect reads:

> *"...Even PW1 in her evidence told the court that she was not raped, rather she consented."*

We should point out that the claim by the appellant that the victim consented to sexual intercourse is irrelevant under section 130 (2) (e) of the Penal Code since the victim was then a girl of 14 years of age. The victim could not, on account of her age, consent to sexual intercourse.

In view of the above analysis of the evidence, we are satisfied that the prosecution proved the case against the appellant beyond reasonable doubt. We therefore, answer the last issue in the affirmative.

All considered, we are satisfied that the grounds of appeal raised by the appellant which relate to the issues we have answered herein above are not meritorious. We find no basis, upon such grounds, to fault the decision of the first appellate court which sustained the conviction and

sentence against the appellant by the trial court. They are all, accordingly, dismissed.

In the event, we dismiss the appeal in its entirety.

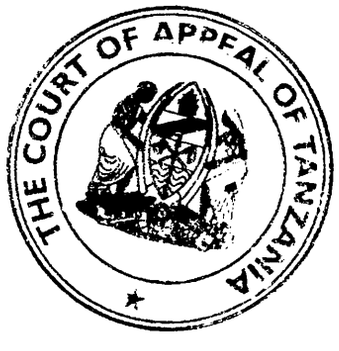
DATED at **TABORA** this 5th day of October, 2023.

R. K. MKUYE
JUSTICE OF APPEAL

M. C. LEVIRA
JUSTICE OF APPEAL

B. S. MASOUD
JUSTICE OF APPEAL

The Judgment delivered this 6th day of October, 2023 in the presence of the appellant in person and Mr. Magonza Charles, learned State Attorney for the respondent/Republic, is hereby certified as a true copy of the original.



S. P. MWAISEJE
DEPUTY REGISTRAR
COURT OF APPEAL