IN THE COURT OF APPEAL OF TANZANIA

AT MBEYA

(CORAM: NDIKA, J.A., RUMANYIKA, J.A., And MURUKE, J.A.)

CRIMINAL APPEAL NO. 631 OF 2020

EDWARD WAISON MZOLOPA ..... APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

(Appeal from the Judgment of the High Court of Tanzania at Mbeya)

(Utamwa, J.)

dated the 15th day of October, 2020

in

Criminal Appeal No. 83 of 2020

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JUDGMENT OF THE COURT

9th & 12th February, 2024

NDIKA, J.A.:

The appellant, Edward Waison Mzolopa, was convicted of raping a thirteen-year-old girl ("the complainant") and sentenced to thirty years' imprisonment by the District Court of Ileje ("the trial court"). His first appeal to the High Court of Tanzania at Mbeya having born no fruit, he now appeals to this Court.

To prove the accusation that the appellant had sexual intercourse with the complainant on 17th October, 2018 at 12:00 hours at Mlale village within Ileje District in Songwe Region, the prosecution, at the forefront, relied upon the testimony of the complainant who testified as PW1. Briefly, she adduced that around 12:00 hours on 17th October, 2018 she went to the appellant's home, at the instruction of her uterine sister (PW2), to collect bananas. While there, the appellant got her inside his bedroom and forcibly had sexual intercourse with her. She returned home a short while later and told PW2 of the incident. In turn, PW2 informed their mother of the incident. The mother then took the complainant to the village office where a report was made to the Village Executive Officer. On the same day, local militiamen arrested the appellant and took him to the village office before he was sent to Itumba Police Station.

Dr. Joshua Mwalongo (PW3) from Ileje District Hospital examined the complainant on 18th October, 2018, observing that her hymen was perforated, but that she had no injuries on the labia majora, labia minora,

cervix and anus. He posted his findings in the medical examination report – PF3 – which was admitted as Exhibit P1.

A Justice of the Peace by the name of Avina Thadeo Mkinga (PW4) recalled having recorded the appellant's extrajudicial statement (Exhibit P2) on 19th October, 2018. Moreover, Police Officer WP.7223 Detective Constable Lucy (PW5) tendered a cautioned statement dated 18th October, 2018, which she imputed to the appellant. Both statements portray the appellant confessing quite honestly and contritely to have had sexual intercourse with the complainant as alleged.

In a rather unexpected turn of events, the appellant admitted in his sworn defence to have had sexual intercourse with the complainant, asserting that she prompted him to do it with her. In addition, he conceded to have made the extrajudicial and cautioned statements (Exhibits P2 and P3).

The trial court convicted the appellant of rape as charged acting on his own confession as captured in the extrajudicial and cautioned statements as well as his admission in the witness box. Accordingly, the

court sentenced him to the minimum custodial term of thirty years and ordered him to pay TZS. 300,000.00 to the complainant as compensation.

On appeal, the High Court initially upheld the appellant's complaint that the complainant's evidence was received on oath in violation of the imperious provisions of section 127 (2) of the Evidence Act, Cap. 6 ("the Evidence Act"). The court reasoned that the complainant, being a child witness of tender age, ought to have given her evidence on oath after a *voire dire* examination had been conducted and established that she understood the nature of oath. As no such examination was done, she could have testified upon a promise to tell the truth, but she made no such promise as she was irregularly allowed to make oath and testify. In the premises, the court held the irregularity incurable and expunged her testimony.

Nonetheless, the High Court held that still without PW1's evidence, the appellant's confession as captured in the extrajudicial and cautioned statements as well as his confession in the witness box that he had sex with the complainant sufficiently established the charged offence. The

court was cognizant that the complainant, being aged thirteen years at the time the offence was committed, could not legally consent to sexual interaction. Thus, whether she instigated the sexual encounter with the appellant or not, it was immaterial. The court, therefore, dismissed the appeal, as hinted earlier.

Mr. Hassan Gyunda, learned counsel for the appellant, has impeached the High Court's judgment on the ground that the charged offence was not proven beyond reasonable doubt. For the respondent, Ms. Prosista Paul and Mr. Josephat Mwakasege, learned State Attorneys, have valiantly opposed the appeal.

Submitting, Mr. Gyunda contends that the extrajudicial and cautioned statements (Exhibits P2 and P3 respectively) were not sufficient on their own to sustain the disputed conviction following the complainant's testimony having been expunged. The cornerstone of his argument is **Omar Rashid @ Kangwiza v. Republic**, Criminal Appeal No. 405 of 2021 [2023] TZCA 17701 [3 October 2023; TanzLII] in which following the complainant's testimony being discounted, this Court found the impugned

conviction unsustainable on the reason that the rest of the evidence did not prove the alleged sexual intercourse.

Mr. Gyunda is also resolute that the prosecution failed to prove the complainant's age, which was a necessary ingredient of statutory rape as provided under section 130 (1) and (2) (e) of the Penal Code, Cap. 16 ("the Penal Code"). Apart from arguing that none of the prosecution witnesses testified to that fact, he submits that the indication on the PF3 (Exhibit P1) that the complainant was thirteen years old at the material time was irrelevant. He anchors this submission on **Robert Andondile Komba v. DPP**, Criminal Appeal No. 465 of 2017 (unreported); **Rutoyo Richard v. Republic**, Criminal Appeal 114 of 2017 [2020] TZCA 298 [16 June 2020; TanzLII]; and **Kambarage Mayala v. Republic**, Criminal Appeal No. 208 of 2020) [2023] TZCA 17944 [13 December 2023; TanzLII].

Mr. Mwakasege disagrees with his learned friend, positing that the exclusion of PW1's testimony was inconsequential given that the appellant confessed to the crime as unveiled by Exhibits P2 and P3 besides the

confession he made in the witness box. Citing **Mawazo Anyandwile Mwaikwaja v. DPP**, Criminal Appeal No. 455 of 2017 [2020] TZCA 268 [3 April 2020; TanzLII], he submits that this Court has consistently maintained that the very best of witnesses is an accused who confesses his guilt provided that the confession is beyond reproach. As regards the application of **Omar Rashid** (*supra*) relied upon by Mr. Gyunda, he claims that it is distinguishable on the ground that, unlike the instant case, the complainant's testimony in that case was the only incriminating evidence on record, resulting in the prosecution case inevitably collapsing once it was discounted.

As regards the complainant's age, it is Mr. Mwakasege's submission that it was proven that she was thirteen years old at the material time as evidenced by Exhibit P1, which was tendered in evidence and read out at the trial by the medic (PW3).

We have dispassionately considered the contending arguments of the learned counsel and examined the record of appeal. Both learned counsel are cognizant that the essence of offence against the appellant,

which was charged as statutory rape under section 130 (1) and (2) (e) of the Penal Code, is a male person having sexual intercourse with a girl, with or without her consent, if she is under eighteen years of age, unless she is his wife aged fifteen years or above and is not separated from him. Hence, in addition to providing proof of penetration, the prosecution must establish that the complainant was aged under eighteen years at the time of the incident – see, for instance, **Issaya Renatus v. Republic,** Criminal Appeal No. 542 of 2015 [2016] TZCA 218 [26 April 2016; TanzLII].

The question whether the prosecution sufficiently proved the charged offence poses no difficulty. In the beginning, we agree with Mr. Mwakasege that the exclusion of the complainant's testimony had no deleterious effect on the prosecution case given that the appellant confessed to the raping as revealed by Exhibits P2 and P3. The statements were received in evidence without any objection from the appellant. In the premises, they were rightly presumed to be voluntarily made. In fact, the appellant neither repudiated nor retracted any of the statements and that he confirmed in his defence testimony to have given them. Most

importantly, the courts below evaluated the statements and made a concurrent finding that they were truthful and reliable. Given these circumstances, the case of **Omar Rashid** (*supra*) relied upon by Mr. Gyunda, does not advance the appellant's cause. For it is cited out of context. Mr. Mwakasege is right that in that case the complainant's testimony was the only incriminating evidence on record, which is not the case in the instant matter.

We are mindful that the appellant himself gave credence to the two confessional statements after he took the witness stand before the trial court. Even though the statements required no corroboration, the appellant provided one by confessing so unreservedly to having sexual intercourse with the complainant. To illustrate the point, we excerpt from his sworn testimony, at pages 24 and 25 of the record of appeal, the following passage:

> *"Your honour, I did not commit the offence of rape I stand charged [with], but* ***the child herself was the one who caused me to sex her.*** *Your honour, I told that child that I was too aged, I got*

an accident, I advised that child to look for [a youthful] person of her age but [she] did not agree instead ***she needed me to have sexual intercourse with her and I did [it].***

"Your honour, PW1 used to come to my home and assist me [with domestic chores and] she used to enter inside my bedroom. ***While in the bedroom, she required me to [have sex with her] and I did [it] on 17/10/2018.***" [Emphasis added]

It is evident from the above excerpt that the appellant admitted having had sexual intercourse with the complainant. However, he put in a rider that, apart from it being consensual he was an unwilling participant in the act. It seems he did not appreciate the position of the law that since the prosecution presented the complainant as a child aged thirteen years, she could not legally consent to any sexual interaction. Consequently, whether she instigated the sexual encounter with him, it was immaterial.

The facts in the instant case resonate with what occurred in **Nyerere Nyague v. Republic**, Criminal Appeal No. 67 of 2010 [2012] TZCA 103 [21 May 2012; TanzLII] where we observed that:

> *"So, if the cautioned statement needed any corroboration, the appellant's own confession in court provided one. And as the maxim goes:* ***'a confession made in court is of greater effect than any other proof'*** *(BLACK'S LAW DICTIONARY, 8th Ed. LEGAL MAXIMS, p. 1709."* [Emphasis added]

Turning to the question of the complainant's age, we wish, at first, to recall what we observed in **Issaya Renatus** (*supra*):

> *"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), the 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, relative, parent,* ***medical practitioner*** *or, where available by the production of a birth certificate.*

We are however, far from suggesting that proof of age, must, of necessity, be derived from such evidence. There may be cases, in our view, where the court may infer the existence of any fact including the age of the victim on the authority of section 122 of [the Evidence Act]...." [Emphasis added]

With the above position in mind, we uphold the learned State Attorney's submission that the complainant was a thirteen-year-old child at the material time on three grounds: first, that the medical examination report (Exhibit P1), which was tendered in evidence and read out at the trial by the medical practitioner (PW3), plainly shows that she was of that age at the time of her examination, which was the day after the fateful event. With respect, we think Mr. Gyunda misread our decision in **Robert Andondile Komba** (*supra*). For we did not hold in that case that medical examination report (PF3) is irrelevant in proving a victim's age. We have stated in many cases including **Issaya Renatus** (*supra*) that proof of age may also be sourced from a medical practitioner. To be sure, in **Robert Andondile Komba** (*supra*) the PF3 on record was discounted because it

was not read out after it was admitted. Its exclusion from the record was compounded further by the fact that the medical witness did not testify to the complainant's age in his testimony.

Secondly, since as per the testimony of the complainant's sister (PW2) that the complainant completed her primary school education in October, 2018, which was a few days before the fateful incident, it is reasonably inferable in terms of section 122 of the Evidence Act, in view of the common course of natural events, that she was on the fateful day a child, hence aged below eighteen years. For it is quite improbable for a schoolgirl to have reached adulthood at the time of completion of her primary school education.

Finally, in his defence testimony a passage of which we have excerpted above, the appellant consistently referred to the complainant as a child. This fact, in our view, sufficiently corroborated the prosecution case that she was a child aged thirteen years at the material time.

In the final analysis, we uphold the concurrent finding the courts below made that the appellant raped the complainant who was a child

aged thirteen years. He was rightly convicted and sentenced as aforesaid. This appeal, therefore, was lodged without any justification. We dismiss it in its entirety.

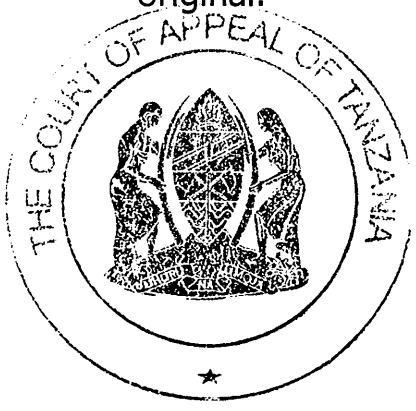
DATED at **MBEYA** this 10th day of February, 2024.

G. A. M. NDIKA
JUSTICE OF APPEAL

S. M. RUMANYIKA
JUSTICE OF APPEAL

Z. G. MURUKE
JUSTICE OF APPEAL

Judgment delivered this 12th day of February, 2024 in the presence of the Mr. Isaya Mwandri holding brief for Mr. Hasssan Gyunda, learned counsel for the Appellant and Ms. Lilian Chagula, learned State Attorney for the Respondent/Republic is hereby certified as a true copy of the original.



E. G. MRANGU
SENIOR DEPUTY REGISTRAR
COURT OF APPEAL