IN THE COURT OF APPEAL OF TANZANIA

AT MTWARA

(CORAM: MKUYE, J.A., MWANDAMBO, J.A., And RUMANYIKA, J.A.)

CRIMINAL APPEAL NO. 298 OF 2021

OMARY RASHID @ MILANZI ..... APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

(Appeal from the decision of the High Court of Tanzania at Mtwara

(Ngwembe, J.)

Dated the 12th day of March, 2021

In

Criminal Appeal No. 98 of 2020

.....

JUDGMENT OF THE COURT

20th & 31st March, 2023

MKUYE, J.A.:

The appellant, Omary Rashid @ Milanzi, was charged before the District Court of Kilwa at Kilwa with two counts, namely; rape contrary to section 130 (1) (2) (e) and 131 (1) of the Penal Code and impregnating a school girl contrary to section 60 (1) K of the Education (Imposition of Penalties to a Person who Marry or Impregnate a School Girl) as published in Government Notice No. 265 of 2004 made under the Education Act, No.

25/1978. The particulars of the offence in the 1st count were that, the appellant on unknown date, time and day of August 2018 at Mkungu Village within Masasi District in Mtwara Region did unlawfully have carnal knowledge of R d/o M (name withheld to hide her identity), a school girl aged 15 years old.

In the 2nd count it was alleged that, the appellant on unknown date and time, day of August 2018 at Mkungu Village within Masasi District in Mtwara Region did unlawfully and wilfully impregnate one R d/o M, a school girl aged 15 years.

Upon a full trial, the appellant was found guilty on both counts, convicted and sentenced to thirty (30) years imprisonment on each count which were ordered to run concurrently. Aggrieved, the appellant appealed to the High Court but his appeal was unsuccessful, hence, this second appeal to this Court.

Before embarking on the merit of the appeal, we find it appropriate to narrate albeit briefly, the facts leading to this appeal. They go thus: R d/o M, (who shall be referred to as the "victim" or "PW1") was a pupil at Mkungu Primary School by then staying with her paternal grandmother. Sometimes in August 2018, a certain companion by the name of Rehema

lured her into a love affair with the appellant who appears to have sent the latter to the victim for that purpose. The victim obliged.

Thereafter, PW1 met with the appellant on several occasions and had sex while she was still a pupil attending school. Upon completion of her primary education, PW1 went to stay with her father Magnus Charles (PW5) where it was observed that she was drowsy and sleeping most of the time which made him to be suspicious. PW5 decided to seek assistance from his sister Dominic Liberatus (PW6) whereby it was resolved that she should take her to a dispensary for examination. After medical examination, it was revealed that, PW1 was pregnant and upon probing by both PW5 and PW6 as to who was responsible for the pregnancy, she disclosed to them that it was the appellant.

The matter was reported to the police and the appellant was arrested. Another medical examination was conducted at Ndanda Hospital where it was found that the victim's pregnancy was four months and two weeks old. Under the circumstances the police advised that they should wait for the birth of the unborn child so as to conduct deoxyribonucleic acid (DNA) test to ascertain the paternity of the child.

According to the evidence on record as testified by PW7, through Parentage Test report (Exh. P3), it positively identified the appellant as paternal father of the born child.

The appellant had, on 4th January, 2022 lodged a memorandum of appeal on three grounds of appeal to the effect that:

(1) The age of the victim was not proved.
(2) The 1st appellate Court erred in upholding the conviction based on trial court's decision which contained irregularities which rendered it a nullity.
(3) The case was not proved beyond reasonable doubt.

Yet, on 19th December, 2022 the appellant lodged an additional set of grounds of appeal (Supplementary memorandum of appeal) consisting five (5) grounds which can be extracted as follows:

(1) The appellant was convicted on the basis of unprocedurally tendered and admitted exhibit (PF3) for failure to indicate the case file number.
(2) The PF3 was tendered by PW2 after being given by PW1.
(3) The conviction of appellant was based on DNA which made reference to only one laboratory number 1903/2019 while samples were taken twice.
(4) DNA is questionable as evidence of PW1, PW3 and PW7 was not corroborated.
(5) The PF3 was not cleared before admission.

When the appeal was called on for hearing, the appellant appeared in person, unrepresented whereas the respondent Republic had the services of Ms. Jacqueline Werema, learned State Attorney.

Upon been invited to amplify his ground of appeal, the appellant adopted his grounds of appeal and opted to let the leaned State Attorney respond to them first, while reserving his right to re-join later, if need would arise.

We propose to begin with ground no. 2 in the substantive memorandum of appeal in which the appellant's complaint is that the trial court's decision contains irregularities rendering it a nullity. We note that the appellant did not amplify the said ground of appeal. However, it seems to be plain that it relates to the law under which the 2nd count was preferred. We prompted the learned State Attorney to address us on whether the 2nd count could stand, particularly so, considering that the victim had completed her primary school programme. She was quick to state that the charge was defective as it was premised on a non-existent provision of the law. She elaborated that, section 60 (1) K of the Education (Imposition of Penalties to Persons who Marry or Impregnate a School Girl) preferred in the 2nd count does not exist in the statute book. She, therefore, argued that, since the appellant was charged under a non-

existing law, it contravened section 135 (1) of the Criminal Procedure Act (the CPA) and that such ailment is not curable under 388 of the CPA. She, therefore, beseeched the Court to allow the appeal on the basis of that irregularity.

The 2nd count in the charge sheet reads as follows:

"... CHARGE SHEET
1ST COUNT
STATEMENT OF OFFENCE
Impregnating a school girl c/s 60 (1) K of the Education Imposition of Penalties to person who marry or impregnate a school girl as a published in the Government Notice on 265 of 2004 made from (sic). Education Act, No. 25/1978 [R.E. 2002]
PARTICULARS OF OFFENCE
That OMARY S/O RASHID @ MILANZI charged at unknown date and time day of August 2018 at Mkungu Village within Masasi District in Mtwara Region unlawfully and wilfully did impregnate one R d/o M, a school girl aged 15 years old.
Dated at Masasi this 6th day of August, 2020.

(Sgd)

.....

PUBLIC PROSECUTOR"

It is clear from the above that the appellant was charged under section 60 (1) K of the Education Imposition of Penalties to Person who Marry or Impregnate a School Girl to which he was convicted though it would appear that the trial magistrate, as shown at page 59 of the record of appeal, found the appellant guilty of the said offence under section 60 A (3) of the Education Act as amended by section 22 of the Written Laws (Miscellaneous Amendments), 2016 Act (No. 2 of 2016). However, the amendment of the provision used to charge the appellant came much later at the stage of pronouncing a verdict which, we are satisfied that it was not proper.

The manner in which offences are to be charged is provided under section 135 of the CPA which states as here under:

> *"135. The following provisions of this section shall apply to all charges and information and, notwithstanding any rule of law or practice a charge or an information shall, subject to the provisions of this Act, not be open to objection in respect of its form in accordance with the provisions of this section:*
>
> *(a) (i) a count of a charge or information shall commence with a statement of the offence;*

(ii) the statement of offence shall describe the offence shortly in ordinary language avoiding as far as possible the use of technical terms and without necessarily stating all the essential elements of the offence. And, if the offence charged is one created by enactment, shall contain a reference to the section of the enactment creating the offence."

The thrust of the above cited provision of the law is that the charge or information is mandatorily required to describe the offence and also to cite the specific section and subsection, if any, of the law which creates the offence - see **Felix Patrice v. Republic**, Criminal Appeal No. 18 of 2012 (unreported). The reason why a charge or information is to be framed in such manner is to enable the accused understand the nature of the offence. This, we stated in the case of **Mussa Mwaikunda v. Republic** [2006] TLR 387 that:

"The principle has always been that an accused person must know the nature of the case facing him. This can be achieved if a charge disclosed the essential elements of an offence ... In the absence of disclosure, it occurs to us that the nature of the case facing the appellant was not adequately disclosed to him."

Upon perusal of the law upon which the charge was predicated, we were unable to discern such provision of the law. It is clear that the appellant was charged with an offence under a non-existent law in contravention of the dictates of section 135 (a) (ii) of the CPA. This was a fatal irregularity to the appellant's trial and the resultant conviction and sentence.

In the case of **Marekano Ramadhani v Republic,** Criminal Appeal No. 202 of 2013 (unreported), the Court was confronted with an akin scenario. It stated as follow:

> *"Framing of charge should not be taken lightly. We think it is imperative for the prosecution to carefully frame up a charge in accordance with the law. It becomes even more vital to do so where as accused is* ***faced with a grave offence attracting a long prison sentence as it was the case in this matter.*** *When you look at the circumstances of the case, it appears that the appellant which is lay person and who had no legal representation believed that the complaint was of the age for marriage. It was important therefore that from word 90 he should have been informed and properly made aware that he was being charged with statutory rape so that he could adequately address the charge laid against him."* [Emphasis added]

In consequence, we allow ground No. 2 of the substantive memorandum of appeal and quash the conviction and set aside the sentence meted out against the appellant on the 2nd count.

We now remain with the 1st count relating to the offence of rape.

The appellant's first complaint in the substantive memorandum of appeal is that the age of the victim was not proved. Ms. Werema argued that PW3, the doctor, who examined the victim proved that the victim was 15 years old. To support her argument, she referred us to the case of **John Nganda v. Republic**, Criminal Appeal No. 455 of 2018 (unreported) in which the Court described the persons competent to prove the age of the victim which include a doctor. In any case, she argued that, the issue of age of the victim was not contested as the appellant never cross examined the victim on age.

Admittedly, the issue of age in statutory rape is crucial. This is so because it has a bearing when it comes to sentencing of the person convicted of such an offence.

In this case, PW5 who was the father of the victim, unfortunately, did not adduce evidence regarding the age of the victim. It is only the doctor (PW3) who made an attempt to prove the victim's age. It is a settled principle of law in this country that the age of the victim can be proved by the victim, relative, parent, medical practitioner or where

available, by the Birth Certificate - See **Issaya Renatus v. Republic,** Criminal Appeal No. 542 of 2015 (unreported), **John Nganda** (supra) and Elia **John v. Republic,** Criminal Appeal No. 306 of 2016 (unreported). In particular, in the latter case, the Court expanded the list of persons who could prove the age of the victim to include a teacher, close friend or any other person who knows the victim.

As the list of those who could prove the age of the victim may not be exhaustive, case law has gone as far as making use of inference based on the existing facts in proving age of the victim. For instance, in the case of **Issaya Renatus** (supra) the Court stated that:

> *"... 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 TEA which goes thus:*
>
> > *The court may infer the existence of any fact which it thinks likely to have happened, regard being had to the common course of natural events, human conduct and public and private business, in their relation to the facts of the particular case."*

In the instant case, as hinted earlier on, PW3 at page 16 of the record of appeal, testified to have examined the victim who, at the time

of examination, was fifteen years old. We may add that, PW2 who was a teacher at the school which the victim was a pupil, testified to the effect that the victim started school since 2012 to 2018 when she sat for her final examinations. In the circumstances of this case and being guided by the above cited authorities, we can infer that the victim who was primary school pupil was still under the age of eighteen years when the offence was committed. In this regard, we are inclined to agree that the age of the victim was proved. Thus, this ground of appeal is unmerited and we hereby dismiss it.

Next is on the appellant's general complaint that the case against him was proved beyond reasonable doubt. In his grounds contained in the additional memorandum of appeal, the appellant complains that the evidence of PW1, PW3 and PW7 was uncorroborated and inconsistent as to the dates when they went to the Chief Government Chemist (CGC) to take samples.

Ms. Werema argued that the offence was proved beyond reasonable doubt. She contended that in the offence of this nature (rape) the prosecution was required to prove, **one,** the age of the victim (which we have already discussed at length). **Two,** penetration and **three,** that it was the appellant who committed the offence. The learned State Attorney pointed out that in proving rape, even a slight penetration proves the

ingredient of rape as per section 130 (4) of the Penal Code. She went on submitting that in this case, penetration was proved as the victim clearly explained how she met the appellant on several occasions and raped her. She was of the view that, PW1's evidence was sufficient to prove rape.

As to who raped the victim, Ms. Werema strongly argued that PW1 mentioned the appellant and explained that they had sexual intercourse four times. She added that PW1 cannot be taken to have consented to sexual intercourse since she was below eighteen years old.

In this case, the appellant was charged with statutory rape of the victim who was 16 years old; an offence under section 130 (1) (2) (e) and 131 (1) of the Penal Code. Subsection (2)(e) of the above provision categorically provides that when rape is committed to a child below the age of eighteen years whether the victim consented or not is immaterial.

It is noteworthy that in the case of this nature, the prosecution is required to prove the age of the victim, penetration and that appellant is the one who committed the offence. As regards the issue of age of the victim, we think, we have sufficiently discussed it when dealing with a complaint on age earlier on. As we have alluded to earlier on, we are satisfied that the age of the victim was sufficiently proved by the doctor (PW3) who examined the victim.

The other aspect is penetration. It is important to note that in sexual offences penetration of a male organ into a female organ however slight, constitutes rape as per section 130 (4) of the Penal Code. (See **Masam Kayeye v. Republic**, Criminal Appeal No. 120 of 2017 (unreported). In this case, the evidence proving penetration was that of PW1 and PW7. As was rightly argued by Ms. Werema, rape is established by proving even a slight penetration.

According to the record of appeal, PW1 explained vividly on how she was initially seduced by a certain Rehema to visit the appellant in his room which she did. For ease of reference, PW1 stated at pages 10 to 11 of the record of appeal as follows:

> *"... I went to Omari's house and Omari told me to go inside his own house, when I entered Omari akanibaka in his room. When I entered his room Omari "alinivua nguo akaanza kunibaka na alipomaliza akanigawia shilingi elfu tano ... I met Omari for four different times and we had sex all the times ..."*

Although, PW1 did not say the exact words constituting penetration, the Court has already pronounced itself on this in several cases such as in **Joseph Leko v. Republic**, Criminal Appeal No. 124 of 2013 [2013 TCA 327).

Admittedly, the victim in her testimony used the word "kubaka." But as we stated in **Joseph Leko** (supra), the term "kubaka" means "rape" which entails inserting a male organ into the female genitalia. There is thus no doubt in our view that PW1's evidence extracted above proved penetration; an essential ingredient in the offence of rape.

Both the trial court and first appellate court were satisfied that there was penetration and, therefore, we do not find any cogent reason to fault them.

Regarding who committed the offence, it was the learned State Attorney's submission that it was proved by PW1 that the appellant was responsible. She pointed out that, PW1 explained how they had sexual intercourse four times. We agree with the learned counsel that the appellant was mentioned by PW1 to be the one who raped her. This was after being examined by PW3 and confirmed that she was pregnant. Upon being probed by PW5 (her father) and PW6 (her aunt), she readily mentioned the appellant to be the one responsible for her pregnancy. It is a very well settled principle of law that the ability of the witness to mention the suspect at the earliest possible opportune is an assurance of the witness reliability and credibility – See **Wangiti Marwa Mwita and Another v. Republic,** [2002] T.L.R. 39. PW1 mentioned the appellant to

PW5 and PW6 who was her father and aunt respectively which lent assurance to reliability and credibility in her evidence.

Apart from that, after PW1 was found to be pregnant, the police advised to let the victim give birth to the unborn child to enable deoxyribonucleic acid (DNA) (Ext P3) test to be taken to ascertain the parenthood of the child and when the same was carried out, it was revealed that the appellant was the father of the born child. PW7 who conducted the test confirmed it. In our considered view, although the DNA Report might have been intended to prove the parenthood of the born child, on the other hand, it proved that the appellant was responsible for the offence of rape committed to the victim. In this regard, when the evidence of PW1 is taken together with PW7's evidence and Exh P3, we find that the prosecution managed to prove that PW1 was raped by none other than the appellant.

We note that the appellant complained that there were two samples taken for DNA testing but we think that such complaint is immaterial since PW7 confirmed that the appellant was a biological father of the born child and, in any case, the appellant did not even cross examine PW7 on that aspect. We have also considered the other complaint by the appellant that the PF3 was not properly admitted since it did not indicate the case file

number. However, it is our view that the complaint is misplaced as there is no law that requires the PF3 to contain the police case number.

With the foregoing, we are satisfied that the offence of rape against the appellant was proved beyond reasonable doubt to mount conviction against him. In the upshot, except for the appeal in relation to the 2nd count which we have allowed, we find the appeal in the 1st count to be devoid of merit. We accordingly dismiss it in its entirety.

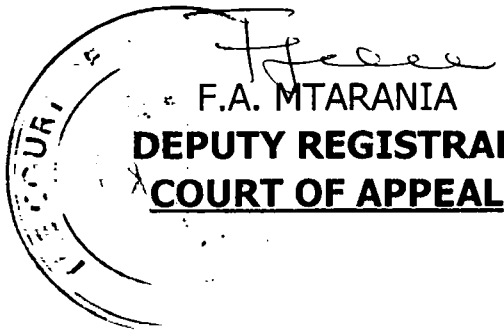
DATED at **MTWARA** this 30th day of March, 2023.

R.K. MKUYE
JUSTICE OF APPEAL

L.J.S. MWANDAMBO
JUSTICE OF APPEAL

S.M. RUMANYIKA
JUSTICE OF APPEAL

The Judgment delivered this 31st day of March, 2023 in the presence of Appellant in person and Mr. Enoshi Gabriel Kigoryo, State Attorney for the Respondent/Republic is hereby certified as a true copy of the original.



F.A. MTARANIA
DEPUTY REGISTRAR
COURT OF APPEAL