THE UNITED REPUBLIC OF TANZANIA

JUDICIARY

IN THE HIGH COURT OF TANZANIA

(DISTRICT REGISTRY OF MOROGORO)

AT MOROGORO

CRIMINAL APPEAL NO. 63 OF 2022

(Originating from Criminal Case No. 97 of 2021 before the District Court of Morogoro)

OMARY HASHIMU .....APPELLANT

VERSUS

THE REPUBLIC.....RESPONDENT

JUDGEMENT

Hearing date on: 26/10/2022

Judgement date on: 07/11/2022

NGWEMBE, J:

This appeal is purely related to the offence of rape, whereby the appellant Omary Hashimu was alleged to have been caught *In flagrante delicto* with a school girl aged between 16 years to 17 years. The offence was alleged to occur in the Government reserve forest at Mkundi area within the district and region of Morogoro. The particulars of the charge sheet indicates that the girl was 17 years old while the rapist was 29 years old.

Much as I appreciate the well-developed elements of establishing and proving rape, yet I understand some elements are fundamental, they must be established and proved while the absence of other

elements are not fatal to the case. For instance, it is an elementary principle of criminal law that the founding criminal justice to an accused person is the charge sheet; the prosecution is duty bound to prove what is alleged in the charge sheet; if the charge comprises certain allegations but the evidence proves another thing, obvious a serious court of law will not convict the accused. Above all, the offence of rape in our country is placed in among the most serious offences whereby its sentence is placed under the minimum sentence of 30 years up to life imprisonment. The most important element to establish and prove rape is penetration however slight; equally important element is absence of consent to any woman above 18 years but same is not a legal requirement to a girl below the age of 18 years.

In contrast, the same act may not amount into rape if and only if the same act is done to a woman with consent. In any event consent is a fundamental element to be established and proved beyond reasonable doubt. Moreover, 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. If she is below the age of ten years, the sentence is only one that is life imprisonment, but if she is above ten years but below the age of majority is termed statutory rape where consent is not among the fundamental element of rape to be proved.

The above elements are statutory as provided for in section 130 (4) (a) of **the Penal Code [Cap 16 RE 2019]** quoted hereunder: -

> *"Penetration however slight is sufficient to constitute the sexual intercourse necessary to the offence"*

The Court of Appeal in the case of **Godi Kasenegala Vs. R, Criminal Appeal No. 271 of 2006** raised a valid question on what constitutes an offence of rape? They proceeded to answer as follows: -

> *"Under our Penal Code rape can be committed by a male person to a female in one of these ways. One, having sexual intercourse with a woman above the age of 18 years without her consent. Two, having sexual intercourse with a girl of the age of 18 and below with or without her consent (Statutory rape). In either case,* ***one essential ingredient of the offence must be proved beyond reasonable doubt.*** *This is the* ***element of penetration*** *i.e.* ***the penetration, even to the slightest degree, of the penis into the vagina"***

In similar vein the Court in the case of **Mbwana Hassan Vs. R, Criminal Appeal No. 98 of 2009 (CAT – Arusha)**, held: -

> *"It is trite law also that, for the offence of rape .... There must be unshakeable evidence of penetration"*

In the absence of unshakable evidence on penetration even to the slightest degree, rape cannot be constituted. Penetration being a core element of rape, undoubtedly, must be unshakably established and proved beyond reasonable doubt.

For a statutory rape, proof of age is fundamental like penetration. This was insisted by the Court of Appeal in the case of **George Claud Kasanda v. R, Criminal Appeal No. 376 of 2017 (unreported)**, as follows: -

"In essence that provision (section 130(2)(e) of the Penal Code) creates an offence now famously referred to as statutory rape. It is termed so for a simple reason that it is an offence to have carnal knowledge of a girl who is below 18 years whether or not there is consent. In that sense age is of great essence in proving such an offence."

From the above understanding, the question is how do they apply in this appeal. To answer this question, I need to peruse the genesis of the offence itself. It is undoubtedly as per the evidences of PW3, being a teacher of the respective primary school where the victim was schooling, he firmly testified that he was informed that the victim had a boy and together with other female teachers, went to the crime scene and found the two in an act of sexual intercourse. Likewise, the evidence of the victim (PW2) left no doubt she had love affairs with the appellant.

The defence evidence was of different dimension which is not related at all with the story given by the eye witnesses like PW3. Notwithstanding, the law is clear that the defence evidence even if is weak, yet he cannot be found liable because of weak defence but the offence is proved by strong evidences of the prosecution.

The trial court having heard both parties and upon analysing both facts and law, found the appellant liable to the offence of rape, consequently convicted him and sentenced him to suffer thirty years imprisonment. Having been so punished, he appealed to this house of justice clothed with six grounds of appeal which for convenient purposes same may be summarized into two namely: -

1. The prosecution witnesses testified contradictory evidences including proof of age of the victim; and
2. The prosecution failed to prove the offence beyond reasonable doubt by failure to call key witnesses who alleged to be eye witnesses.

On the hearing of this appeal, the learned State Attorney Jamilah Mziray stood firm to support the decision of the trial court and prayed this appeal be dismissed forthwith. Insisted that the testimonies of PW3 corroborated the evidences of PW2 that the two (accused and victim) were found by matured persons, in the act of sexual intercourse. Without wasting time, the two were taken to police station and then the victim was taken to hospital as per PF3.

On the age of the victim, the State Attorney referred to the evidences of PW1 that being a mother of the victim, she proved that the victim on the eventful date, she was 17 years old, as she was born on 6/6/2004. Referred this court to the case of **Issaya Renatus Vs. R, Criminal Appeal No. 542 of 2015**.

Argued further that the victim was a primary school girl as was proved by attendance register tendered in court by PW3. Otherwise, she distinguished all grounds of appeal and asked this court to uphold the decision of the trial court.

Unfortunate during trial and on this court, the appellant appeared in person, hence lacked viable contributions to his grounds of appeal. In fact, in this appeal, the appellant became tongue tied, trembling and not knowing what to say. The court asks one question, but he responds quite different from the question. Even sometimes the court tries to

mention all grounds of appeal, and invites the appellant to address the court on those grounds, yet he fails to say anything viable therein. In such imbalanced representations on serious offences like rape cases, it is difficult to see justice being done and seen to be done. This situation has reminded me on the oldest books of law in England where the House of Lordship in England, issued a long living warning to the society, in the case of **Pett Vs. Greyhound Racing Association Ltd [1969] 1 B. 125** when they held: -

> *"It is not every man who has ability to defend himself on his own... he may be tongue – tied, nervous, confused or wanting in intelligence, we see it every day. A magistrate says to a man, you may ask a question you like, whereupon the man immediately starts to make a speech.* ***If justice is to be done, he ought to have the help of someone to speak for him"***

In the absence of another person who is legally trained to speak for the appellant/accused, in serious offences like homicide, sexual offences, armed robbery and economic related cases, the likelihood of imprisoning an innocent person cannot be undermined.

In this appeal, the appellant failed even to say a word on his appeal, rather relied solely on his grounds of appeal which he seemed not to understand them. In such a situation, the appeal is like between the prosecution and the court. As such it is not healthy for the ends of justice in our society.

In respect to the above summarized grounds of appeal, prosecution witnesses, testified some contradictions like the class of the

victim. While PW1 and PW2 testified that she was in standard six, at Mawasiliano Primary School, PW3 at page 9 proved that the student was of standard seven. Accordingly, the event occurred on 12th July, 2021, where the change of class from one class to another is done in every January of every year as opposed to July. This may be a slip of either recording by the trial court or by the witness. Thus, may be covered under section 388 of Criminal Procedure Act.

Equally important is the contradictions of the age of the victim. The victim as per page 6 testified that she was 16 years old. Likewise, PW1 mentioned even date and month that she was 17 years old. The same testimony of age was repeated by PW4 at page 13 that the girl was about 17 years. Therefore, the age of the victim was not proved to the standard required as I will discuss in details later on.

The most important element in rape cases is penetration, which may be proved both by evidence and medical report. PW4 as a medical doctor who examined the victim on the very day or hour of the event, observed as she testified in page 13 of the proceedings:-

> *"I started to examine her clothes, and underwear, I did not see blood or water. I did not see any bruises to the victim's vagina"*

She proceeded to testify that: -

> *"She has no hymen and my two fingers entered without any problems. The victim is sexually active that she was already done the sexual intercourse"*

Also proceeded to examine her anus and observed *"her anus also there was no any bruises or blood I entered two fingers to her anus without any force. So, this showed the victim does sexual intercourse through her anus"* The laboratory tests proved that there was no sperms and pregnancy and no venereal diseases. The same testimony was recorded in exhibit PE 2 (PF3), which proved that the victim was sexually active, meaning experienced in sexual intercourse.

Two important issues are seriously exercising my mind, one is the age of the victim which is accompanied with confusion of her classes, second is the testimonies of PW4 that the girl was experienced like any active woman in sexual relationship. Under normal circumstances, a child of 16 or 17 or 18 years, must be studying secondary school of either form four or entering form five. In any event she cannot be in primary school unless she is attending special program best known as MEMKWA.

I fully subscribe to the learned State Attorney's assertion that due to the evidence of PW1, who is the mother of the victim, the girl was 17 years. Equally important is to note that the victim herself disclosed her age as 16 years old. Rightly so, I accept the age of the victim may be proved by the testimony of parents. Just along what the learned State Attorney submitted; I believe that the victim's mother in our case was in a better position to establish the victim's age. However, there must be a standard against which, parent's testimonies on the age of the victim may be adduced and proved.

I interpret that the Court of Appeal in developing this good principle on the need to establish the age of the victim as per the case of

Isaya Renatus (Supra) and other good precedents followed thereafter, did not intend to require the court to believe on general statements. The proof of age must be concrete, viable and reliable. General statement cannot be accepted at this era of statutory rape. For instance, production of birth certificate, clinic card (if any), affidavit, medical report, school registration which indicates year of birth (if any) and any other reliable and acceptable documentary proof.

The Court of Appeal in respect to this point, had strict requirement of proof as was discussed and held in the case of **Leonard s/o Sakata Vs. DPP, Criminal Appeal No. 235 of 2019**, where two schools of thought regarding proof of victim's age in rape cases were discussed *extenso*. In the same vein, the case of **Winston Obeid Vs. R, Criminal Appeal No. 23 of 2016**; **Edson Simon Mwombeki Vs. R, Criminal Appeal No. 94 of 2016;** and **Aloyce Maridadi Vs. R, Criminal Appeal No. 208 of 2016 (all unreported)** discussed in details on the need of proof of age of the victim.

Accordingly, one school of thought, held that the victim's age must be strictly proved. The other school of thought held that, the age of the victim can be inferred from other facts, even when not directly proved. In my reasoning, the first school fits more in the circumstance of this case at hand. Failure to establish and prove the age of the victim in a statutory rape cannot establish and prove the offence beyond reasonable doubt. In this case strict proof was required to establish that the victim was not an adult matured woman, sexually and physically.

Much as I agree that the age of the victim can be proved by the parent, among others, it follows therefore that, where there is neither

birth certificate, nor School registration, nor clinic card, nor medical report, nor affidavit on the age of the victim; and is only a parent being a witness of the age of the victim. In the current society where, speaking truth is a becoming a foreign vocabulary, courts must demand more than mere assertion.

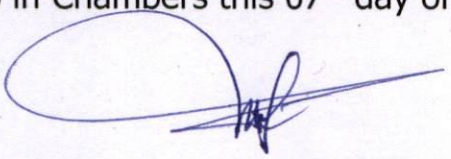
More doubts on her age are born out of her behaviours that she behaved so maturely as was proved by a medical doctor that she had wide experience sexually in both of her parts, that is vagina and anus. Moreover, is her reaction when she was invited in that forest with the victim. Instead of raising alarm for help she accepted and together went to the appropriate place for their love affairs. I am troubled, seriously, that her behaviour demonstrated maturity in sexual intercourse and the appellant was not the first one or the first day.

In statutory rape, the prosecution must be very careful to establish and proof the main elements of rape, such as penetration, age of the victim and relevant evidences linking the accused with the alleged offence. Otherwise, this court will not accept mere facts on serious offences like rape.

In totality and for the reasons so stated, I am certain the age of the victim was crucial to be established and proved beyond reasonable doubt when considered together with other ancillary contradictions, the conclusion is obvious. I therefore, proceed to allow this appeal, quash the conviction and set aside the sentence meted by the trial court, consequently order an immediate release of the appellant from prison, unless otherwise lawfully held.

I, accordingly order.

Dated at Morogoro in Chambers this 07th day of November, 2022.



P. J. NGWEMBE

JUDGE

07/11/2022

Court: Judgement delivered at Morogoro in chambers this 7th day of November, 2022 in the presence of the Appellant in person and Ms. Jamila Mziray State Attorney for the Republic/respondent.

Right to appeal to the Court of Appeal explained.

P. J. NGWEMBE

JUDGE

07/11/2022