

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
SUMBAWANGA SUB-REGISTRY
AT SUMBAWANGA**

DC. CRIMINAL APPEAL No. 54 OF 2023

*(Originating from the decision of B.M. Ahmed, SMR, Mlele District Court
in Criminal Case No. 37 of 2023)*

BETWEEN

PAULO s/o JOSEPH @ MTITINYA

VERSUS

THE REPUBLIC

Last order: February 13, 2024

Judgement: March 13th, 2024

JUDGMENT

NANGELA, J.:

This appeal arises from the decision of the District Court of Mlele at Mlele, Katavi Region (in Criminal Case No. 37 of 2023) wherein the Appellant herein stood charged with an offence of rape contrary to Sections 130 (1) (2) (e) and 131 (3) of the Penal Code, Cap.16 R.E 2022.

Upon arraignment, the Appellant (by then accused) entered a plea of not guilty, and the trial court proceeded to a full hearing of the case and, based on the evidence laid before it, convicted the Appellant herein (by then accused) and sentenced him to life imprisonment.

Aggrieved by both his conviction and sentence, the Appellant has appealed to this court, raising three grounds of appeal, to wit, that:

1. The trial court erred in law and fact when it convicted the appellant of an offence that the prosecution had failed to prove beyond reasonable doubt.
2. The trial court erred in holding that the appellant had carnal knowledge of the victim without proof of penetration of the appellant's penis into the victim's vagina.
3. The court erred in law when it convicted the appellant without any proof that both the appellant and the victim were under the age of 18 years.

On February 13, 2024, the appeal was scheduled for hearing. The appellant showed up in court unrepresented and prepared to present his case. On the other hand, Ms. Godliva Shio and Mr. Komba, learned State Attorneys, appeared for the Respondent.

The appellant pleaded with this court to consider and sustain his grounds of appeal in order to set him free. When

he was first charged in court with the alleged rape, the accused (appellant) had stated to the trial magistrate that he was not yet eighteen years old. He claimed that since he did not commit the crime, the court ought to have released him.

During Ms. Shio's court appearance, she argued in favour of the appeal on the third ground rather than the first and second. In her submission, Ms. Shio told this court that, during trial, the issue regarding the age of the appellant was not given the requisite attention by the trial court, even though the appellant has disputed the age that was stated in the charge sheet.

Ms. Shio argued that that fact is evident from the list of disputed facts (found on page 2 of the trial court's proceedings) and from page 20 of the same proceedings, where the appellant claimed, during cross-examination, that he was 17 years old because he was born in 2006.

On that account, it was Ms. Shio's submission that, although the appellant had contested his age as being 17 years and not otherwise, the trial court did not embark on an inquiry as to whether the appellant was of the age of

majority or not. She referred this court to Section 113 of the Law of the Child Act, Cap. 13 R.E. 2019, arguing that the trial court must have determined the age of the accused (the appellant) to find out if he indeed was a minor. Ms. Shio used Court Regulation 12 of the Law of the Child (Juvenile Court Procedure) Rules, 2016 in support of her submissions.

She submitted, however, that, although she supports the appeal, her support is only to that extent, and she does not support the release of the appellant but rather prays that, since there has been a miscarriage of justice, this court should allow the appeal, quash the conviction, and set aside the sentence, but make an order that the matter be returned to the lower court to be re-tried. She cited the case of **Athony Mbilinyi vs. The Republic**, Criminal Appeal No. 275 of 2020 (unreported), to support her submission.

In his brief rejoinder submission, the appellant told this court that he does admit that he was 17 years of age when the alleged offence took place, but he does not support the view that he should be re-tried again because he has

spent time in prison since the 6th day of March 2023 to date. He urged this court to set him free.

I have carefully considered the submissions made by the appellant and looked at his grounds of appeal as well. I have also considered Ms. Shio's submissions and looked at the record of the trial court. I am of the firm view that Ms. Shio's submissions are valid. The third ground is sufficiently potent to dispose of this appeal, although the outcome should not be what the appellant desires.

As the learned State Attorney correctly pointed out, the appellant's age was a contentious issue, and before the trial court heard the case, an inquiry should have been conducted to ascertain his age. Under the Law of the Child Act, Cap. 13 R.E. 2019, Section 4 (1) of the law defines a child as a person who is below the age of 18 years. Accordingly, where a person, whether charged with an offence or not, is brought before any court otherwise than for the purpose of giving evidence and it appears to the court that he is a child, the court is required to inquire and ascertain the correct age of that person. That is a mandatory

requirement set out under Section 113(1) of the Law of the Child Act, Cap. 13 R.E. 2019.

In the matter at hand, it was the appellant who claimed, before the trial court, to be a child at the time when the alleged offence was committed. Following the guidelines of Rule 12 of the Law of the Child (Juvenile Court Procedure) Rules, 2016 and Section 113 of the Law of the Child Act, it was procedurally improper to proceed with the appellant's trial before ascertaining the veracity of his age claims.

In the case of **Athony Mbilinyi vs. The Republic** (supra), the Court of Appeal authoritatively articulated the aforementioned position. The Court did this by citing extensively from Rule 12 of the Law of the Child (Juvenile Court Procedure) Rules, 2016. The Law of the Child (Juvenile Court Procedure) Rules, 2016 stipulate, for example, in Rule 12(1) that:

"Where a person appearing before the court claims to be a child, and that claim is in dispute, the court shall cause an inquiry to be made into the child's age under section 113 of the Act."

Having found that the trial court had erred in law, and since the first appellate court did not pick on that fact with a view to correct the anomaly, the Court of Appeal upheld the respective ground of appeal, nullified the proceedings of the trial and first appellate courts, quash the conviction, and set aside the life imprisonment sentence meted out to the appellant in that case.

However, the Court did not set free the appellant but ordered a retrial of the appellant with immediate effect before another magistrate, subject to there being conducted an inquiry as to the age of the appellant in line with the requirements of the law. Ms. Shio has urged this court to make a similar finding, which, in my view, is the only appropriate approach to take.

In the upshot of what has been stated herein above, this court settles for the following orders:

1. The appellant's third ground of appeal is hereby upheld.
2. The proceedings of the trial court are hereby nullified, and the appellant's conviction and the

life imprisonment sentence meted out to him
are set aside.

3. That the appellant is, with immediate effect, to
be re-tried before another magistrate and
subject to there being made an inquiry as to
his age in line with the dictates of both Section
113 of the Law of the Child Act, Cap. 13 R.E.
2019, and Rule 12 of the Law of the Child
(Juvenile Court Procedure) Rules, 2016.
4. In the meantime, the appellant shall remain in
custody pending retrial in accordance with the
law upon the establishment of his age at the
time of the commission of the offence.

It is so ordered.

**DATED AT SUMBAWANGA ON THIS 13TH DAY OF
MARCH 2024**




DEO JOHN NANGELA

JUDGE

**HIGH COURT OF TANZANIA,
SUMBAWANGA**