

TANZANIA / JUDGMENT

greyson getini mwariego vs republic

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IN THE COURT OF APPEAL OF TANZANIA AT MBEYA (CORAM: LILA, 3.A.. KITUSI. J.A.. And MASHAKA. J J U CRIMINAL APPEAL NO. 404 OF 2020 GREYSON GETENI @ MWARIEGOAPPELLANT VERSUS THE REPUBLIC RESPONDENT (Appeal from the decision of the High Court of Tanzania at Mbeya) (Ndunquru, J.) dated the 28th day of May, 2020 in Criminal Appeal No. 165 of 2019 JUDGMENT OF THE COURT 10th & 17th February, 2023. KITUSI, J.A.: The appellant Greyson Geteni @ Mwariego is serving life imprisonment for an alleged rape of a girl allegedly aged below 10 years. He answered the charge under section 130(1) (2) (e) and 131 (3) of the Penal Code, before Mbeya District Court which convicted him with the offence and imposed the sentence of life imprisonment which as we have shown, he is now serving. As the first appeal was dismissed by the High Court for want of merit, the appellant has lodged this second appeal. There are three grounds of appeal which pose no difficulty in reproducing

1. The Honourable appellate Judge erred both in points of law and facts to hold that PW1 was a credible and trustworthy witness without considering the demeanour of the victim in the dock.
2. The Honourable appellate court erred both in points of law and facts for failure to give the appellant the benefit of doubt with regard to the age of PW1 while there was material contradiction with the age of the victim in the charge sheet and birth certificate.
3. The Honourable appellate court erred both in points of law and facts to dismiss the appeal while the prosecution side failed to prove the case of rape beyond reasonable doubt and relied on hearsay evidence. The first two grounds relate to PW1, the victim, whether she is credible and whether her age was proved. The background story is narrated by PW1 so we shall refer to it, and in the course of doing so we shall address the two concerns raised in the first and second grounds of appeal. PW1 stated that she was 8 years in June 2018 when she was giving evidence in court and that she was a scholar at Mageuzi Primary School. She disclosed that the appellant who was one of their neighbours had ever raped her in 2017 but she specifically referred to the second rape incident of January 2018. On that particular date, she stated, she returned home from school at noon. The appellant appeared outside PW1's

residence, held her hand and led her to an unfinished building where he had carnal knowledge of her. She gave the graphic details of the sexual intercourse which are unnecessary for our determination of this appeal, but we note that she said she experienced pains and her clothes were soiled with blood in the process. PW1 painted her mother (PW2) as a no nonsense woman, who used to chastise her, so for fear of her she did not divulge to her the fact that she had been raped. Instead PW1 reported her ordeal to other women who lived nearby, including Yustina Mahenge (PW3). PW3 testified that she saw PW1 approach her while crying and the girl told her that the appellant whom she referred to by his name, had raped her. PW3 and Tabia Mbilinyi the other woman, traced the whereabouts of the appellant and confronted him with the allegation of the rape of PW1. They found him doing masonry work w>tJw> the v'Maqe and he aWegedJy pleaded for forgiveness and offered the women money for them to ignore the allegations, but the women declined. Somehow the appellant escaped but was later arrested by the youth of the neighbourhood, and the hamlet Chairman (PW4) was informed. PW4 stated that he went to the place where the appellant was being held. Upon PW4 interrogating him he confessed raping PW1, and for fear of mob justice against the appellant, PW4 whisked him away to the police. PW5 the investigator of the case interrogated the appellant and recorded his cautioned statement (Exhibit PE 3) but we shall not consider that piece of evidence because it was expunged and disregarded by the High Court on appeal, for not observing the legal requirement to read it out after admission. Lucia Mwakalobo, (PW2) being the mother of PW1, testified on PW1's age and tendered Exhibit PE1, her birth certificate, to prove that she was born in 2008. In defence, the appellant referred to the confrontation he experienced from the two women on allegations of rape, which he denied and still denies. He said he was arrested at his workplace and subjected to assaults, and that when PW4 arrived at the place of the arrest, he found him bleeding as a result of the physical assault he had suffered in the hands of the mob. He confirmed recording a confession before PW5 and that he did that because of fear of his threats as PW5 had threatened to beat him. He prayed for the trial court to disregard the cautioned statement for the reason that it was not voluntarily made. We have already observed that the cautioned statement is no longer a subject of our decision. We begin with the first ground of appeal, on PW1's credibility. Ms. Xaveria Makombe, learned State Attorney who represented the respondent Republic argued that the first appellate court considered the issue of credibility of PW1 even if it had no opportunity to observe her demeanour. She referred us to the case of Raphael Ideje @Mwanahapa v. The DPP, Criminal Appeal No. 230 of 2019 (unreported) among the cases that offer guidelines for assessing credibility. We wish to state first, that since the best evidence in sexual offences comes from the victim [Selemani Makumba v. Republic [2006] TLR 379], and as we know that such victim's testimony must stand the test of credibility [Mohamed Said v. Republic, Criminal Appeal No. 145 of 2017 (unreported)], the attack on the credibility of PW1, the victim, is quite understandable. This is because in terms of section 127 (6) of the Evidence Act and case law, the victim's evidence is the best if she or he is credible. In order to determine this point, we shall take a look at the findings of the High Court Judge on the issue of the credibility of PW1 and whether it can be assailed. After demonstrating his awareness of the

settled law that credibility can be assessed by an appeal court even if it has not had an opportunity to see the witness and assess her demeanour, the learned Judge went on to test PW1's testimony against other parameters such as consistency and coherency and concluded that she was credible. Upon our consideration of the complaint in the first ground of appeal and when weighed with the arguments made by Ms. Makombe, it occurs to us that we have no material that may justify our taking a different view from that of the learned High Court Judge on PW1's credibility. First, the conclusion of the learned Judge came after his proper application of the settled law on assessment of credibility by the first appeal court. Secondly, the two courts below made a concurrent finding as to PW1's credibility. For us to interfere with that finding, it would require the appellant to successfully argue, that the two courts acted on a misdirection, non-direction or misapprehension of facts or wrong application of a principle. [See *Salum Mhando v. Republic* [1993] T.L.R 170]. Having considered all those factors, we agree with the finding of the learned Judge on the credibility of PW1 and we dismiss the first ground of appeal for want of merit. Next for our consideration is a complaint that PW1's age was not proved, or that the appellant should have been given the benefit of doubt. In her submissions Ms. Makombe conceded that there is a variance between the age cited in the charge sheet and that which was testified on by PW1 on the one hand and that appearing in the birth certificate (Exhibit PE 1) on the other. The learned State Attorney submitted however, that the discrepancy is trivial and cited the case of *Jafari Musa v. DPP*, Criminal Appeal No. 234 of 2019 (unreported) to support her position. She maintained that in any event, age is only relevant in sentencing, and urged us to find that the appellant received an appropriate sentence. Settled law is that apart from a victim's birth certificate, her or his age may be proved by the victim, parent, relative, medical practitioner or teacher. See *Issaya Renatus v. Republic*, Criminal Appeal No. 52 of 2015 (unreported) cited in *Jafari Musa* (supra). Therefore, the citation of the victim's age in the charge sheet, though an allegation which the prosecution should ordinarily undertake to prove, cannot stand in view of the victim's birth certificate that was tendered by a witness testifying on oath. In this case there is Exhibit PE 1, the victim's birth certificate showing she was born on 12th September, 2008, and on the basis of that evidence she would turn 10 years by 12th September, 2018. This means that on 27th January, 2018 when the offence was allegedly committed, PW1 was below ten years by about 7 months. Thus, our determination of the issue of PW1's age is that it was proved by her birth certificate that she was below the age of 10 years. Considering that evidence, we agree with Ms. Makombe that the discrepancies in the testimonies of witnesses on that point, if any, are trifling and would not tip the scales in favour of the appellant. We dismiss the second ground of appeal. We shall resolve the third ground of appeal last. Having dismissed the first two grounds of appeal, this last ground is bound to crumble too. As we have taken PW1's word to be true that she was raped by the appellant, a conviction would be inevitable. It is also important to note that PW1's testimony was supported by the fact that the appellant made an oral confession before reliable people, including PW4 the hamlet Chairman and PW3, the woman to whom PW1 complained. Caselaw is settled that such confession may be relied upon to find a conviction [*Alex Ndendya v. Republic*, Criminal Appeal No. 207 of 2018 (unreported) and *Akili Chaniva*

- v. Republic Criminal Appeal No 156 of 2017 (unreported)]. Before we conclude, there is one aspect to bring to light. This is that, before the High Court the appellant had raised the following complaint under the third ground of appeal: "T H A T -M y Lord the tria l m agistrate grossly erred in law point and fact when he convicted the appellant by believing the Evidence o f PW2 (Victim 's m other) and exhibit PE 1 (Birth Certificate) that the victim was aged 8 years old a t the tim e o f the alleged com m ission o f the offence as per PW2, w ithout taking into consideration that the victim was born in 2008 and the said incident allegedly occurred between January and A p ril2008. This m eans that the victim was 10 years old and not 8 years o ld as alleged by the prosecution side. Hence, we wonder why the record shows that the victim was 8 years old. U p to th is ju n c tu re I w a n t to p o in t o u t th a t th e le a r n e d tria l m a g istra te e rre d in la w p o in t to c o n v ic t th e a p p e lla n t to g o to j a il fo r life , even if h e fo u n d th e a p p e lla n t g u ilty a s h e w a s ch a rg e d , th e fa ir se n te n ce w a s to se rv e th irty y e a rs im p riso n m e n t, n o t o th e r w ise ", (em phasis supplied). Certainly, the tone in the above ground of appeal suggests that even the appellant did not firmly believe in his own innocence. This confirms our finding that the appeal against the conviction has no merit. Similarly, for the reasons shown earlier, we have found no merit in the complaint about age and the consequent sentence. This appeal is, consequently, dismissed entirely. DATED at MBEYA th is 16th day of February, 2023. S. A. LILA JUSTICE OF APPEAL I. P. KITUSI JUSTICE OF APPEAL L. L. MASHAKA JUSTICE OF APPEAL The Judgment delivered this 17thday of February, 2023 in the presence of the Appellant in person and Ms. Rosemary Mgenyi, learned State Attorney SjtyRepublic is hereby certified as a true copy of the original. DEPUTY REGISTRAR COURT OF APPEAL 10

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