

TANZANIA / JUDGMENT

JUDGMENT LOSHIRU SAILEPU VS

COURT
TANZLII

DECIDED
22 August 2024

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IN THE COURT OF APPEAL OF TANZANIA AT ARUSHA fCORAM: NDIKA. J.A.. RUMANYIKA. J.A.. And MGEYEKWA. J.A.^ CRIMINAL APPEAL NO. 573 OF 2021 LOSHIRU SAILEPU..... APPELLANT VERSUS THE REPUBLIC..... RESPONDENT (Appeal from the Judgment of the High Court of Tanzania at Arusha fMzuna. J.^ dated the 28th day of June ,2021 in Criminal Appeal No. 44 of 2019 JUDGMENT OF THE COURT 13th & 22nd August, 2024. RUMANYIKA. J.A.: The appellant, Loshiru Sailepu, was convicted by the District Court of Longido at Longido ("the trial court") of rape and impregnating a schoolgirl. While the first count earned him a thirty years' jail term, he was ordered to serve five years' imprisonment on the second count. Both sentences were to run concurrently. His appeal to the High Court against the convictions and consequential terms of imprisonment was unsuccessful, hence this second appeal. The appellant is alleged to have committed the two offences on 24th May, 2018 at 19:00 hours at Kamwanga Village, Longido District in Arusha Region. That he had carnal knowledge of the complainant (PW3), a sixteen-year-old girl of Irkaswa Primary School. That the appellant raped her at Kamwaga Village when she went for milling grains, where the appellant worked as the operator of the machine, and he gave her TZS. 1,000.00. PW3 did not reveal the ordeal to anybody until on 27th July, 2018 when she was examined and found to be pregnant on a routine check-up, at the instance of the school authority. She associated the appellant with her pregnancy, and she dropped out of the school while in Standard VII, before she could sit for her national examinations. Namsifu Saimon Mana (PW1) was the complainant's schoolteacher, who led her and her fellows to Irkasawa Dispensary for the pregnancy test on 27th July, 2018. She was in class seven with Admission No. 1257, as per school attendance register (exhibit PI). And she named the appellant to be the expecting father. Ngumile Julius (PW2) was a Clinical Officer, who examined PW3 on 30th July, 2018 and found her to be two months pregnant. He tendered PF3 as exhibit P2. Police Officer E.6576 D/CPL Lucas (PW4) interrogated the appellant and recorded his cautioned statement (exhibit P3) by which he allegedly confessed to the crimes. On his part, the appellant denied the charge. He asserted that, on the alleged 24th May, 2018 he was at home. That he was arrested and charged on 27th July, 2018 allegedly for stealing beans. He averred that he appended his thumbprint to the cautioned statement without knowing its contents before. Ultimately, he was convicted and sentenced to serve a jail term of thirty (30) years and five (5) years for the first and second counts, respectively. The appellant lodged ten grounds of appeal in his two memoranda of appeal. In essence, the memoranda raise the following main complaints: one; that, PW3's testimony was received

without bath contrary to section 198 of the Criminal Procedure Act Cap 20 ISf the Revised Laws ("the CPA"); two; that, the cautioned statement attributed to him (exhibit P3) was irregularly recorded, hence liable to be expunged; three, that, the complainant's age was not proven; and four, that the charge? were not proven beyond reasonable doubt mainly because the prosecution case was inconsistent and unreliable. At the hearing of the appeal, the appellant was self-represented whereas Ms. Lilian Kowero, Neema Mbwana and Eunice Makala, learned Senior State Attorneys represented the respondent Republic. 3 Relying on his written statement of arguments, the appellant urged us to allow his appeal. Beginning with the first ground of appeal, the appellant contended that, the complainant had testified without oath which contravened section 198 (1) of the CPA. He argued that the trial court wrongly received the complainant's testimony on her promise to tell the truth, a procedure only applicable for witnesses of tender age in terms of section 127 (2) of the Evidence Act, Cap. 6. He thus prayed for the evidence to be discounted, citing Ashumu Mailooya @ Lesage v. R (Criminal Appeal No. 156 of 2021) [2024] TZCA 70 (20 February 2024; TanzLII) and Manjo Saruwatt v. R (Criminal Appeal No. 424 of 2020)

[2024] TZCA 519 (5 July 2024). He added that, once the complainant's evidence is discarded, the remaining testimonies of PW1, PW2, PW4 and PW5 would not sufficiently establish the charged offence for being plainly hearsay. About the second complaint, he contended that, the alleged cautioned statement (exhibit P2) had two shortfalls, which rendered it liable to be expunged from the record; one, it was recorded beyond the four hours stipulated under section 50 of the CPA, since the time of his arrest was not established. To support his stance, he cited Anold Loishie @ Leshai v. R (Criminal Appeal No. 249 of 2017)

[2021] TZCA 528 (27 September 2021: TanzLII). Two; that, the cautioned statement lacked certification by the recording officer to show that it was read over to the appellant before the latter countersigned it. The omission, he added, contravened section 58 (1)

(b) (2) (3) of the CPA. He cited Tumaini Frank Abraham v. R (Criminal Appeal No. 40 of 2020) [2023] TZCA 17467 (1 August 2023: TanzLII) to bolster his point. The third complaint concerns the complainant's age; that it was not proved. On this, the appellant asserted that, there was no direct evidence on the complainant's age and that the said omission rendered the age cited in the charge sheet unproven. Relying on the decisions in Genes Arisen Tarimo @ Kaputi v. R Criminal Appeal No. 337 of 2019 [2023] TZCA 17423 (18 July 2023: TanzLII) and Samuel Nyerere v. R, Criminal Appeal No. 65 of 2020 [2023] TZCA 27 (20 February 2023: TanzLII). The appellant's contention on the 4th point is on complainant's belated disclosure of the ordeal until when she was two months pregnant. That it showed high degree of unreliability and incredibility which can be accepted with great caution. He cited Pascali Yoya @ Maganga v. R, Criminal Appeal No. 284 of 2017 (unreported) and Abiola Mohamed @ Simba v. R (Criminal Appeal No. 291 of 2017)

[2021] TZCA 632 (2 November 2021: TanzLII) to support his argument. The appellant wound up his arguments by contending that, the prosecution evidence was too insufficient to found a conviction thus, failed to prove the case to the hilt. He implored us to allow the appeal and restore his liberty. Replying, Ms. Mbwana supported the conviction and sentence. Starting

with the first ground of appeal, she conceded to the complaint that, the complainant not being a witness of tender age, her evidence was received without oath contrary to section 198 of the CPA. She thus implored us to discount the evidence, as proposed by the appellant. On the second ground regarding the legality and reliability of the cautioned statement, Ms. Mbwana argued that the impugned cautioned statement (exhibit P3) was received in evidence without any objection from the appellant. It is also in evidence that the statement was recorded within the prescribed period of four basic hours following the arrest of the appellant at 16:00 hours on 27th July,

2018. The statement was finalized by 18:50 hours on that day. As regards the statement's certification, she referred us to page 34 of the record of appeal where the appellant is recorded to have stated that, "maelezo yangu nimesomewa na kuona kuwa ni sahihi kama nilivyoeleza," meaning that the statement was read over to him and he confirmed that it was correct. To bolster her submission, Ms. Mbwana cited the Court's decision in *Manjo Saruwatt* (supra). On the complainant's age featuring as the third ground, Ms. Mbwana conceded that, once the complainant's testimony is discounted due to the procedural infraction alluded to earlier, there is no other direct evidence from her parent, teacher or medical witness to establish her age. However, she urged us to infer that on the material date she was aged below eighteen years given that she was a schoolgirl. Ms. Mbwana particularly referenced the evidence of the complainants' schoolteacher (PW1) who averred that she was a standard VII pupil with Registration No. 1257 at the material time. Prefacing her submission on ground 4, Ms. Mbwana stated that to prove the offence of statutory rape against the appellant, the prosecution had to establish three ingredients: one, that, the complainant was aged below eighteen years; two, that, the complainant was penetrated in her vagina; and three, that, the appellant was the perpetrator of that act. She, then, resolute that, based on the inference drawn from the facts of the case, the complainant was below the age of eighteen years at the material time. Moreover, based on the appellant's confessional statement, it was plainly established that he had sexual intercourse with the underage complainant, at least once. However, while Ms. Mbwana was firm that the offence on the first count was established to the hilt, she moved us to allow the appeal on the second count on the reason that there was no evidence that the appellant made the complainant in the family way once the complainant's testimony is discarded. In his rejoinder, the appellant reiterated his earlier submission that the appeal be allowed, and his liberty restored. Having heard the contending arguments, we start with contention in the first ground of appeal that the complainant's evidence was wrongly received without oath or affirmation. Section 198 (1) of the CPA stipulates a mandatory requirement that every witness in a criminal case or matter must be examined upon oath or affirmation: "198.-(1) Every witness in a criminal cause or matter shall\ subject to the provisions of any other witness law to the contrary be examined upon oath or affirmation in accordance with the provisions of the Oaths and Statutory Declarations Act." It is undisputed that, although the complainant was not a child of tender age, she was allowed to testify by promising to tell the truth in terms of section 127 (1) of the Evidence Act. That approach was wrong. At

her professed age of sixteen years, she was supposed to testify upon oath or affirmation in consonance with the provisions reproduced above. The omission to have her give oath or affirmation was an incurable irregularity rendering her testimony worthless - see, for example, *Nestory Simchimba v. R* Criminal Appeal No. 454 of 2017 [2020] TZCA 155 (1 April 2020: TanzLII). We, thus, find merit in the first ground of appeal and proceed to expunge the complainant's evidence. Concerning the cautioned statement, we uphold Ms. Mbwana's argument that the complaint is unfounded. In the first place, it is in evidence that, the said statement was admitted without any objection from the appellant as to its voluntariness or legality. Besides, we find it too plain for argument that while the appellant was arrested at 16:00 hours on 27th July, 2018, the statement was recorded within the prescribed period of four basic hours between 18:05 hours and 18:50 hours. The claim that the statement bore no certification is equally unfounded as it is evident from page 34 of the record of appeal that it was certified that the statement was read over to the appellant and its contents confirmed to be correct. The ground of appeal at hand is without merit. We dismiss it. On the complainant's age, we readily agree with the concurrent submission by the parties that, following the expurgation of the complainant's testimony, there is no other direct evidence from her parent, teacher or the medical witness to establish her age. We would, however, hasten to agree with Ms. Mbwana's assertion that her age could be inferred from PW1's testimony that she was a Standard VII pupil at the material in accordance with section 122 of the Evidence Act, which provides that: "122. A 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." [Emphasis added] It is true that in *Issaya Renatus v. Republic*, Criminal Appeal No. 542 of 2015 [2016] TZCA 218 [26th April, 2016; TanzLII], this Court stated that, it would be preferable for the victim, relative, parent, medical practitioner, or the production of a birth certificate to provide evidence of age. Nevertheless, the Court confirmed that the complainant's age could be inferred based on the above provision in certain circumstances - see also *Elia s/o Richard Shoo v. Republic*, (Criminal Appeal No. 196 of 2021) [2024] TZCA 422 (10 June 2024: TanzLII). In *Issaya Renatus* (supra), the Court ruled as follows, relying on that provision: "In the case under our consideration there was evidence to the effect that, at the time of testimony, the victim was a class five pupil at Twabagondozi Primary School. Furthermore, PW1 was introduced into the witness box as a child of tender age, following which the trial court conducted a voir dire test. Thus, given the circumstances of this case, it is in the least, deducible that the victim was within the ambit of a person under the age of eighteen." ii Guided by the above holding, we find it inferable that the complainant was a person under the age of eighteen years from the evidence that she was a Standard VII pupil at the material time. For considering the common course of natural events and human experience in our country, persons attending primary school education in regular schools are invariably below the age of majority- see also *Elia s/o Richard Shoo* (supra). The third complaint fails. Rounding off with the inquiry into whether the two charges were sufficiently established, we, initially agree with Ms. Mbwana that the appellant could only have been convicted on the first count if the three ingredients she

cited were proved. Besides, we uphold her submission that, given our inference that the complainant was a girl below the age of majority, the appellant's confessional statement that he had sexual intercourse with her incriminates him beyond doubt. To illustrate the point, we extract from the substantive part of the cautioned statement in Kiswahili thus: "... namfahamu [complainat] nilimjua hapo hapo mashineni alikuja kusaga mahindi nikamtongoza na kufanya naye mapenzi mara moja tu sikumbuki tarehe ... nilimuomba abaki hadi mwisho alivua chupi yake Nilipanda 12 juu yake na kumuingilia kimwHi riilifanya naye mapenzi kwa njia ya kawaida, niliingiza uumevwangu kwenye uke wake pekupeku ... sikuva condom ... sikurudia tena lakini sikudhanikama angepata mimba..." The above text means that, having enticed the complainant, the appellant had the carnal knowledge of her at his workplace once, but he did not expect her to conceive. On this confession, there is no doubt that the appellant ravished the complainant, an underage girl. It did not matter whether she consented to the sexual activity or not given that she was underage. He was therefore rightly convicted of rape. Insofar as the second count is concerned, given the absence of the complainant's testimony that the appellant made her in the family way after we discarded it, there is no evidence upon which the conviction on the second count could be founded. For all its worth, the appellant's confession did not include an admission that he impregnated the complainant. Accordingly, we agree with Ms. Mbwana that the impugned conviction and corresponding sentence on the second count are unsustainable. On this basis, we partly find merit in the fourth ground of appeal. 13 In conclusion, while we allow the appeal on the second count and proceed to quash the conviction and set aside the sentence on it, we dismiss the appeal as regards the first count. For avoidance of doubt, the appellant shall continue to serve his thirty years imprisonment on the first count. DATED at ARUSHA this 21st day of August, 2024. G. A. M. NDIKA JUSTICE OF APPEAL S. M. RUMANYIKA JUSTICE OF APPEAL A. G. MGEYEKWA JUSTICE OF APPEAL The Judgment delivered this 22nd day of August, 2024 in the presence of the Appellant in person and Mr. Godfrey C. Nugu, learned State Attorney for the Respondent/ Republic is hereby certified as a true copy of the original. 14

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