

TANZANIA / JUDGMENT

MORA DOTO

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31 July 2024

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IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA SHINYANGA SUB REGISTRY AT
SHINYANGA CRIMINAL APPEAL NO. 13238 /2024 (Arising from Criminal Case No. 59 of 2023,
Busega District Court) MORA S/O DOTO APPELLANT VERSUS
REPUBLIC RESPONDENT

JUDGMENT

10th & 31st July 2024 F.H. MAHIMBALI, J The appellant herein was arraigned before the trial Court for the offence of rape Contrary to sections 130 (1) (2) and 131 (1) of the Penal Code, Cap 16 RE 2022. It was alleged that on diverse dates of July 2023 the appellant had carnal knowledge with a girl aged 16 years without her consent. The appellant pleaded not guilty to the charge, thus compelled the prosecution to summon their witnesses in proof of the charge. 1 The trial court after a thorough finding, convicted the appellant and sentenced him to suffer thirty years' imprisonment for the offence charged with. The appellant is not amused with both conviction and sentence, he has therefore approached this court armed with seven grounds of appeal which in digest all fall under the question of evidence and that the prosecution case was not proved to the required standard. During the hearing of this appeal the appellant appeared in person and unrepresented while the respondent/republic had legal representation of Ms. Caroline Mushi learned State Attorney. Amplifying his grounds of appeal, the appellant had no much to say, instead, he just prayed for his grounds of appeal be adopted by this Court and form part of his submission. He also added that there was no DNA test by prosecution to prove the alleged pregnancy if it really belonged to him. There was no evidence from school that the victim was a school lady/student. And that the evidence of the case (proceedings) was not signed by the trial Magistrate. He finally prayed for the appeal to be allowed that and that be set free. 2 On the side of the respondent, Ms. Mushi resisted the appeal and thus supported conviction and sentence, meted out against the appellant. With the first ground of appeal, Ms. Mushi submitted that the main concern is on identification. But reading the facts of this case, the issue of identification has no legal space as there was no that issue as the issue before the trial court by PW1 was on recognition. She testified well how they were lovers and that they know each other since 2022 when they started their relationship. The victim explained well that they did the said sex twice at the home of the appellant. Thus, it's clear that they know each other. She banked her argument by making reference to the case of Charles Nanati v Rep, Criminal Appeal No. 286 of 2017, CAT at Dsm at page 13, in which the CAT quoted the case of Nicholas James and Kenga Chea Tenya that

the evidence of a person recognizing the accused prior to the commission of the offence is more reliable than that of identification of a stranger. She therefore was of the view that the appellant's ground of appeal is meritless as per circumstances of this case. With the second ground of appeal, Ms. Mushi alluded that the appellant's concern is, Exhibit P1 does not show/state time when the appellant was arrested and that the same was not recognized, known 3 and read over after its admission. Ms. Mushi fortified that Exhibit P1 is the appellant's own admission statement. It was tendered by PW2. Reading the testimony of PW2, it is clear that his duty was only to record the cautioned statement of the appellant. But reading the testimony of PW3, it is him together with the hamlet chair and other mgambos who arrested him at the home of the PW3. He did all this, after also being aware that PW1 was impregnated by the appellant. It is PW1's testimony that just after his arrest, they took him to Police. Also reading the testimony of PW2 when being cross examined by the appellant, he replied that he had arrested him at 15.00hrs and sent him to police station. That s. 50(1) of CPA has been contravened, it is not true as time starts to run after the accused has been put into restraint. Thus, there was nothing of the alleged contravention. Furthermore, on the allegation that it was not read over to court, the records are not with that assertion as he also read it. This exhibit P1 corroborates the evidence of PW1 thus, this ground of appeal is as well of no any value. On the third ground of appeal, Ms. Mushi submitted that the argument that the victim was not arraigned before the court of law for her evidence, is merit less as per available record. Since the said PW1 made her oral testimony, she prayed that this ground of appeal be dismissed as well. 4 The 4th to 7th grounds of appeal which were jointly argued, Ms. Mushi stated that, the main concern here is the age of the victim, discrepancy and that there was no proof beyond reasonable doubt as per law. This being a statutory rape, she submitted that two things were important to be established: age of the victim and penetration. With the issue of age, the victim herself and PW3 said all. PW1 said she was 16 yrs. PW3 testified that she was born in 2007. Thus, though PW1 said that she was born in 2006, there was nothing of prejudice as both dates still make the child under age. On the ingredient of sexual penetration, she contended that PW1 said it all. How it was her first time but repeated twice until when caught. This is corroborated by the evidence of PW4 who established that she had sexual intercourse with the appellant. Therefore, PW1's testimony is strong on this. In consideration of the fact that in sexual offences best evidence comes from the victim, there has been no good doubt on that. On the sixth ground of appeal, the appellant's complaint is this, his alibi defence was not considered. Reading the second page from last paragraph of the trial court's judgment, it is clear how the defence testimony of the appellant was considered by the trial Magistrate. 5 With the additional ground that there was no DNA test, Ms. Mushi submitted that in the circumstances of this case, the offence being rape, the DNA test was irrelevant as it was not establishing parentage issue but sexual penetration. That school teacher didn't give his testimony, the same is value loss as the issue before it was rape and not making the school girl not attend school or of impregnating a school girl. On the third additional ground of appeal, Ms. Mushi submitted that upon perusal to the court's records, it is clear that each witness' evidence was signed. Ms. Mushi further submitted that in her perusal to the trial courts record, the appellant's name as per charge reads: Mora Doto, but in the particulars, he is named Mora Maduhu. She argued that this Court to consider the defectiveness as minor as per consideration of the gravity of the offence charged

with. It being a minor defect, she prayed that it be cured by section 388 of the CPA. She further boosted her argument with reference to the case of Festo Dominican vs. Rep, Criminal appeal No. 147 of 2016 – page 11-15. As he knew all this, the appellant was not prejudiced by that irregularity. Thus, she prayed for the appeal to be dismissed in its entirety. 6 By way of rejoinder, the appellant had nothing to add, he kept on pressing of being acquitted as he is not responsible. Having heard the submissions from the both parties; and upon scanning the trial court's records, my deliberation of this appeal to the best, I find the major contention between the parties is on the burden of proof and standard of proof. In this point, it is a trite law that, prosecution bears the burden to establish and prove the offence beyond reasonable doubt (see section 3 (2)(a), section 110(1) & (2) of The Evidence Act, These sections received a considerable legal breath by the Court of Appeal in the case of Anthony Kinanila Enock Anthony Vs. Republic, Criminal Appeal No. 83 Of 2021. The appellant has complained on the issue of identification, that he was not properly identified. The proposition which was objected by Ms. Mushi as the fact of recognition is the strongest evidence compared to identification. Since the appellant was recognized by the victim elaborating that she used to have sex with the appellant more than twice then identification was nonsense. Ms. Mushi however submitted since rape offence is proved by establishing two important elements: penetration and age of the victim (for statutory rape). I first absolutely, 7 agree with Ms. Mushi that recognition was sufficient to prove the culprits of the offence than identification. As correctly submitted by Ms. Mushi when making reference to cases of Charles Nanati v Rep, (supra) the CAT quoted the case of Nicholas James and Kenga Chea Tenya Tabu Sita vs. Republic, (supra). On impropriety admission of exhibit P1 - a cautioned statement of the appellant, that it was not in compliance to section 50 of CPA and that no time of arrest is indicated, I have endeavoured my mind to go through the complained Exhibit P1 which is a cautioned statement. Definitely, the appellant's complaint is misplaced. Section 50 of the Criminal Procedure Act provides for a duration of recording interview from when the person under restraint to be done within four hours after being put in restraint. In the instant appeal, the appellant was arrested on 15.9.2023 at 15:00hrs and taken to police. On the similar date at 16:00 hours, the appellant was his statement recorded. By way of appearance, Exhibit P1 was in compliance with the law and nothing contravened. Luckily, the same was admitted without any objection. Thus, this ground is meritless. As correctly submitted by Mushi that the victim had made her statement before police and later, gave her oral testimony before the 8 trial Court, the contention that the victim didn't give her testimony is baseless, she having testified as PW1. Moreover, there was a serious complaint of age of the victim to be not legally established by the prosecution. Clearly, the offence of statutory rape is established when two essential ingredients are proved beyond reasonable doubt: One - there was male penis penetration to a girl's reproductive organ (vagina); two – proof of the girl's age being below of 18 years. In the current case, since the victim girl is said to be a minor of 16 years, then two things were important to be established: age of the victim girl and the fact of her being known carnally i.e sexual penetration. The appellant had complained about the age of the victim that was uncertain and that the witnesses' evidence on age was contradictory in nature. I have gone through the testimony of PW1 - the victim who testified that she was 16 years old, born in 2006. PW3 a father of the victim testified that the victim was aged of 16 years. I agree with Ms. Mushi that the age of a child can be

established either by a parent, child herself, guardian, medical doctor etc and it is not necessarily established by birth certificate (See Isaya Renatus v. Republic, Criminal Appeal No. 542 of 2015, CAT at Tabora). Apparently, in the instant case, PW1 just mentioned to be aged 16 years as born in 2006. PW3 (the victim's parent) just stated that the victim is of age of 16 years. He did not go further to detail as to when she was born as the law requires for certainty of the age of the victim. On this evidence, I am sorry to say that the age of the victim was uncertain. The evidence on the victim's age in sexual offences must be complete and satisfactory. That takes us back to the evidence of the victim herself as contended by the learned State Attorney that the best evidence in rape cases comes from the victim herself. In her evidence she was clear that she consented to the sexual intercourse with the appellant. Under the circumstances the evidence that she was under age to constitute a statutory rape ought to have been fully established. That was stated in a number of cases including that of Andrea Francis versus The Republic, Criminal Appeal No. 173 of 2014 (CAT). It has further been held that the victim's age in statutory rape cases must be strictly proved and not a mere mention. See; Edward s/o Yohana versus The Republic, Criminal Appeal No. 48 of 2022 10 (HC) at Shinyanga. In the absence of a sufficient proof of the victim's age and the fact that the sexual intercourse was consented to, the offence of rape can not stand against the appellant. Even if it is trite law that the best evidence in sexual offences must come from the victim, the evidence must itself be complete, truthful and court's convincing. A mere saying that she was born in 2006, does not sufficiently establish the age of the victim. Birth date is established by date, month and year. A mere mention of year can be reserved to other social uses but not for establishing the legal age of a victim of sexual offences, of statutory rape. In sexual offences, proof of age of the victim girl is a matter of greatest importance, thus must be strictly established. That she was born in 2006, does not make the requirement of age being strictly established as to my considered view. There ought to be clear evidence on that, which is lacking in this case. That alone is sufficient to make this appeal allowed. I therefore, need not labour much on other grounds as it will merely be an academic exercise in which I am not its tutor. All this having been said, I allow this appeal and quash both the conviction and sentence of 30 years meted against the appellant. 11 In its place, I order his immediate release from custody unless he is lawfully held by another cause. It is so ordered. Right to further appeal is hereby explained. DATED at SHINYANGA this 31st day of July, 2024. F. H. Mahimbali Judge. 12

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