

IN THE COURT OF APPEAL OF TANZANIA

AT DODOMA

(CORAM: MBAROUK, J.A, MKUYE, J.A AND MWAMBEGELE, J.A.)

CRIMINAL APPEAL NO. 540 OF 2016

ALLY RASHIDI **APPELLANT**
VERSUS

THE REPUBLIC **RESPONDENT**

**(Appeal from the decision of the High Court of Tanzania at Dodoma)
(Kalombola, J.)**

**dated the 2nd day of November, 2016
in
Criminal Appeal No 42 of 2016**

RULING OF THE COURT

5th & 8th March, 2018

MKUYE, J. A.:

Before the District Court of Iramba at Kiomboi the appellant stood charged with an offence of rape contrary to sections 130(1) and (2) (e) and 131 (1) of the Penal Code, Cap. 16 R.E. 2002 (the Penal Code). It was alleged that on the 27th day of August, 2014 at about 10.00 hrs at Kyengege village within Iramba District in Singida Region the appellant did have carnal knowledge of one Wantongela d/o Joseph who was aged six years.

The appellant denied the charge leveled against him but the trial District Court convicted and sentenced him to life imprisonment. His appeal to the High Court at Dodoma was unsuccessful. Still aggrieved, he has lodged this second appeal containing four grounds of appeal which are basically new as they were not raised in the High Court. It is noteworthy that it is now settled that the Court will only look into matters which were canvassed during trial and were decided and not on matters which were not raised or determined by the trial court or the High Court. (See **Jafari Mohamed Vs. Republic**, Criminal Appeal No. 112 of 2006 (unreported)). Be it as it may, the said grounds of appeal can conveniently be summarized as follows:-

- (1) The two courts below acted on the statement tendered by PW3 while it was not taken in accordance with the provisions of section 50 and 51 of the Criminal Procedure Act.
- (2) That the alleged statement was not corroborated as the grandfather who was said to be present at the time of recording did not testify in court.

- (3) The appellant was not given an opportunity to comment on the statement when tendered as per section 172 of the Evidence Act Cap. 6 R.E. 2002.
- (4) The requirements of section 131 (2) of the Penal Code Cap 16. Vol. 1 basing on the age of the offender who is under the age of 18 years or less, was not considered.

When the appeal came before us, the appellant appeared in person as he was not represented; whereas Ms. Judith Mwakyusa, learned State Attorney represented the respondent Republic.

When the appellant was given the floor to elaborate his grounds of appeal he adopted them and opted for the learned State Attorney to submit first, and respond later if need arises.

On her part, Ms. Mwakyusa outrightly supported the appeal on the main ground that the case against the appellant was not proved beyond reasonable doubt. She contended that while the charge sheet showed that the victim was six years old at the time the offence was committed, the prosecution witnesses did not testify in regard to the age of the victim. She submitted further that even Dr. Kuila Katunzi (PW4) who said the victim was aged six years, did not explain if he examined her in order to

ascertaining her age. Nor did he mention the year when the victim was born. For that reason, Ms. Mwakyusa was of the view that as there was no tangible proof of the victim's age, the Court should invoke section 4(2) of the Appellate Jurisdiction Act, Cap 141. R.E 2002 (the AJA) and allow the appeal, quash the conviction, set aside the sentence and release the appellant from prison. She referred to us the case of **Solomon Mazala Vs. Republic**, Criminal Appeal No. 136 of 2012 (unreported) at page 4.

When the appellant was asked to respond, he did not have any substantial contribution except to concede to what the State Attorney submitted and urged the Court to set him free.

As alluded earlier on, the offence under which the appellant was charged with was premised under sections 130 (1) and (2) (e) and 131 (3) of the Penal Code. The provisions of section 130(1) and (2)(e) provide as follows:-

"130(1) It is an offence for a male person to rape a girl or a woman.

(2) A male person commits the offence of rape if he has sexual intercourse with a girl or a woman under the circumstances falling under any of the following description:-

(a)

(b)

(c)

(d)

(e) *with or without her consent when she is under eighteen years of age, unless the woman is his wife who is fifteen or more years of age and is not separated from the man."*

It is a requirement of the law in charging a person under section 130(2) of the Penal Code to specify the nature of the offence under paragraph (a) to (e) with which the accused is charged. This was emphasized in the case of **Simba Nyangura Vs. Republic**, Criminal Appeal No. 144 of 2007 (CAT) (unreported) where it was stated:-

"... in a charge of rape an accused person must know under which description (a) to (e) the offence he faces falls so that he can be prepared for his defence ..."

Where the accused is charged with a specific offence under paragraph (e) of section 130 (2) of the Penal Code, the age of the victim of rape must be proved in order to clear the doubts on the age due to the

statutory consequential effect if the offence is proved. It means that there cannot be a conviction for an offence under section 130(2) (e) of the Penal Code unless there is sufficient evidence or proof that at the commission of the offence of rape, the victim's age was below eighteen years.

This stance was articulated in the case of **Solomon Mazala** (Supra) where this Court stated that:-

"The cited provision of the law makes it mandatory that before a conviction is grounded in terms of section 130(2)(e), above, there must be tangible proof that the age of the victim was under eighteen years at the time of the commission of the alleged offence."

The Court went further to state that once the age of the victim is proved to be below the age of 18 years, it negates the consent of the victim.

In this case, it was stated in the particulars of the offence that the appellant did have carnal knowledge of Wantongela Joseph (the victim) who was a girl aged 6 years old. It showed the age of the victim when the offence was committed. When Wantongela who testified as PW2 was called to testify in the trial court as shown at page 9 of the record, she was

recorded as "a child of a tender age" without recording her specific age. In her testimony taken after a *viore dire* test had been conducted PW2 did not say anything regarding her age. Of course, we are aware that even if the victim's age was shown in her particulars before she testified in court it would not have proved her age because that is not part of evidence. Even the *viore dire* test cannot be taken as a proof of the victim's age. Apart from that, it was expected that Anna Enock, PW1 who was a victim's mother could have proved the age of the victim but she completely said nothing in that regard.

It was PC Jacob (PW3) who recorded the appellant's statement and Kuila Katunzi (PW4) a medical physician who attempted to testify on the victim's age. PW3 said the victim was aged 6 years. However, he did not explain how he came to know that the victim was aged 6 years old. As to PW4 who also said the victim was six years, he did not as well explain why he said so. According to his evidence, he examined the victim on the issue of rape and he found her bruised on her private parts and thus, he confirmed that she was raped. He did not explain if examination of the victim for determination of her age was among his tasks and that he did it. As it is, it seems to us that regarding the victim's age was not a scientific

opinion but rather he just recalled that age as was indicated by the police in the PF3. In our view, failure to adduce evidence on the victim's age was an incurable defect.

In the case of **Charles Makapi Vs. Republic**, Criminal Appeal No. 85 of 2012 (unreported) where the prosecution failed to prove the age of the victim, the Court observed as hereunder:-

"... We have also noted that there is no proof of the age of the victim Monica d/o Charles (PW1) mentioned as a girl aged (10) years in the particulars of the alleged offence. Taking into account that this is a statutory rape, it is important for the prosecution to give a clear evidence of the age of the victim. Failure of that, will create doubt as to the real age of the victim in this alleged statutory rape. The record in this case is completely silent on the issue of the age of the victim. Neither the victim herself nor her mother Ashura Rajabu (PW2) has specified on the issue of age of the victim."

Even in this case, as the prosecution failed to prove the age of the victim of the alleged statutory rape at the time when it was committed, we

think, it creates doubt to the prosecution's case. Hence, the conviction of rape under section 130(2) (e) lacks legs to stand on.

All said and done, by virtue of powers conferred on us under section 4(2) of the AJA, we allow the appeal, quash the conviction and set aside the sentence imposed on the appellant. We further order that the appellant be released forthwith from custody unless he is otherwise held for some other lawful reasons.

DATED at **DODOMA** this 7th day of March, 2018.

M.S. MBAROUK
JUSTICE OF APPEAL

R.K. MKUYE
JUSTICE OF APPEAL

J.C.M. MWAMBEGELE
JUSTICE OF APPEAL

I certify that this is true copy of the original.


E.F. FUSSI
DEPUTY REGISTRAR
COURT OF APPEAL