IN THE COURT OF APPEAL OF TANZANIA
AT MTWARA

CRIMINAL APPEAL NO. 193 OF 2011

(CORAM: OTHMAN, C.J., MBAROUK, J.A., And BWANA, J.A.)

JIRANI MAARUFU .....APPELLANT
VERSUS

THE REPUBLIC ..... RESPONDENT

(Appeal from the decision of the High Court of Tanzania at Mtwara)

(Lila, J.)

dated the 18th day of April, 2011

in
Criminal Appeal No. 9 of 2010

JUDGMENT OF THE COURT

15th & 25th June, 2012

BWANA, J.A:

This appeal arises from the decision of the District Court of Nachingwea at Nachingwea wherein the present appellant was charged with and convicted of the offence of rape contrary to sections 130 (e) and 131 of the Penal Code. He was sentenced to the mandatory minimum sentence of thirty (30) years imprisonment. His

first appeal before the High Court was not successful. He has now preferred this second appeal.

Before us, the appellant appeared in person while the respondent Republic was represented by Miss Mwahija Ahmed, the learned State Attorney.

The facts of the case leading to this appeal are as follows. Asha Hamisi, aged 15 years then, was a standard VII student at Chiumbati Primary School, in 2008. She stopped attending classes without leave of the school authorities. The school head teacher, PW1, reported the matter to the relevant school leadership, including the Village Executive Officer. Asha Hamisi, PW2, was arrested and found having a baby. When asked, she mentioned the appellant as the father of the child. He was arrested.

When interrogated by the police, PW2 admitted to have had several sexual intercourse with the appellant and that the latter never used condom. As a result of those sexual contacts, she became pregnant and stopped attending school.

Initially, the appellant was charged with two counts namely Rape as stated above and Impregnating School Girl Contrary to Rule 5 of the Education Imposition of Penatlies to persons who marry or impregnate school girl, 2003 (GN 265 of 2003). In his judgment, the trial magistrate found that pregnancy was a result of the rape. He proceeded to convict and sentence the appellant on that single count of rape. **Neither** did the prosecution appeal against that misdirection on the part of the trial court **nor** did the first appellate court invoke its revisional powers to correct the error.

Before us the appellant raised nine grounds of appeal in his memorandum of appeal in which he avers that he was convicted under a wrong provision of the law namely sections 130 (e) and 131 of the Penal Code; that the evidence of Halima Issa (PW3), the victim's mother, was not corroborated; that the offence of rape was not proved and if so, the victim consented to the sexual contacts.

Our first consideration is, what are the consequences of charging the appellant under a wrong provision of the law. It is shown hereinabove that the appellant was charged with the offence of rape contrary to section 130 (e) of the Penal Code. **First,** such a

provision does not exist under the Penal Code. **Second,** what was intended and as per evidence on record, was to invoke the provisions of section 130 (2) (e) which cater for sexual intercourse with girl/woman under the age of eighteen (18) years. Under that provision, it is immaterial whether the said girl/woman did consent to the sexual act. Engaging in a sexual act with a woman under that age is considered to be rape. It is commonly known as statutory rape. That is what transpired in the instant case, other facts remaining supportive of the ingredients of the offence of rape, factors such as penetration of the female organ by the male organ, a fact which is uncontroverted in this case.

What then, are the consequences of such error? The provisions of section 388 of the Criminal Procedure Act, Cap 20, (the Act) do provide a remedy. It is stated thereat thus:-

> *" ... no finding, sentence or order made or passed by a court of competent jurisdiction shall be reversed or altered on appeal or revision on account of any error, omission or irregularity in the complaint, ... charge ...*

order, judgment or in any inquiry or other proceedings ... save that on appeal or revision, the court is satisfied that such error, omission or irregularity has in fact occasioned a failure of justice ..."

Where, as provided under the same section 388 of the Act, the court is satisfied that indeed a failure of justice has been occasioned by that error, then it may order a retrial or make such other order as it considers just and equitable. In the instant case, it is on record that PW2 was 15 years old when this offence was committed. Therefore statutory rape was committed in terms of section 130 (2) (e) of the Penal Code. The other elements of the offence remaining constant, it is our considered view that there was no failure of justice occasioned by charging the appellant under that provision. However, we do invoke our revisional powers under section 4(2) of the Appellate Jurisdiction Act, Cap 141,R.E. 2002 by deleting from the charge sheet the said section 130 (e) and substituting the same with section 130 (2) (e) so as to read that the appellant was charged

with and convicted of the offence of rape contrary to sections 130 (2) (e) and 131 of the Penal Code.

The other issue raised by the appellant is that the evidence of PW3 was not corroborated. In our considered view, that evidence by PW3, the mother of the victim, needed no corroboration. Our reading of the record suggest that what she stated in her evidence before the trial court was similar to what had been narrated before by both PW1 and PW2.

The other issue was whether the offence of rape had been proved to the required standard. We are in agreement with the findings of the two courts below that the prosecution evidence sufficiently established the offence of statutory rape to have been committed by the appellant. The first appellate court went further to the extent of considering the provisions of section 130 (4) (a) of the Penal Code and the evidence on record that PW2 had stated that she had sexual intercourse with the appellant several times in the house of one Lucas Boniface. This important averment was uncontroverted by the appellant either in cross examination of PW2 or in his defence evidence.

Lastly, we would like to restate here that since both courts below did find that the prosecution witnesses were credible, being a second appellate court, we see no reason to fault those findings of fact.

We may mention in passing that, the thirty (30) years prison term meted on the appellant is the mandatory minimum as provided under section 131 of the Penal Code. Therefore the trial court was correct in imposing such a sentence.

All the above considered, we dismiss this appeal in its entirety.

DATED at **MTWARA** this day of 22nd June, 2012.

M. C. OTHMAN
CHIEF JUSTICE

M. S. MBAROUK
JUSTICE OF APPEAL

S. J. BWANA
JUSTICE OF APPEAL

I certify that this is a true copy of the original.

MBUYA R. M.
DEPUTY REGISTRAR

called her to his bedroom, he was naked. However, when the second assessor examined her, she stated that the appellant was dressed, in other words, he was not naked. As a court we must examine her evidence in its totality. It is the duty of the court to separate grain from chaff. The fact of the matter is that the appellant called PW1 to his bedroom, ordered her to undress and lie on his bed and he proceeded on to undress himself in order to satisfy his passion. This is the offence, the appellant is charged with. The so called discrepancy was not material to the conviction of the appellant.

In the result, we allow the appeal to the extent explained above. The conviction for incest by males is set aside and we substitute therefore a conviction for attempted incest by males c/s 158(3) of the Penal Code. Section 35 of the Penal Code Cap. 16 R.E. 2002 provides as follows –

> *"35. When in this Code no punishment is expressly provided for any offence, it shall be punishable with imprisonment for a term not exceeding two years or with a fine or with both".*

The appellant was convicted on the 8.3.1999 and by now he has served close to thirteen years. We therefore sentence the appellant to such term as will result to his immediate release unless otherwise held for some other lawful cause.

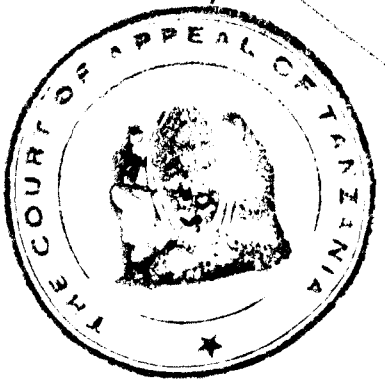
DATED at **ARUSHA** this 8th day of May, 2012.

H. R. NSEKELA
JUSTICE OF APPEAL

B. M. LUANDA
JUSTICE OF APPEAL

S. A. MASSATI
JUSTICE OF APPEAL

I certify that this is a true copy of the original.



(M. A. Malewo)
DEPUTY REGISTRAR
COURT OF APPEAL