

AT DODOMA

(CORAM: KILEO, J.A., KIMARO, J. A. AND MASSATI J. A.)

CRIMINAL APPEAL NO. 137 OF 2012

AMOS PALANZI..... APPELLANT

AND

THE REPUBLIC.....RESPONDENT

**(Appeal from the decision of the Resident Magistrate's
Court of Dodoma [Ext. Juris.]**

at Dodoma

(Rutatinisibwa, PRM Extended Jurisdiction]

dated 28th February 2012

in

PRM Criminal Appeal No 37 of 2010

JUDGMENT OF THE COURT

17 & 18 September, 2013

KILEO, J. A.:

In the District Court of Kongwa a charge of rape contrary to section 130 (1) and (3) of the Penal Code was preferred against the appellant Amos Palanzi. He was convicted and sentenced to 30 years imprisonment. In addition, he was ordered to pay the sum of shs. 500,000/- as compensation to the victim. He appealed to the High Court which transferred his appeal to Hon. Rutatisinibwa, Principal Resident Magistrate with Extended Jurisdiction. He lost the appeal and he has come before this Court on a second appeal.

The appellant's conviction was founded on the evidence of PW1 who was a girl aged 14 years of age and who, according to the record, was in Class IV at the time the offence was committed against her. According to her testimony, which was taken without oath, the appellant had approached her with a promise that he would secure a job for her if she agreed to go with him to Arusha. They left together and they stopped at Msagali village where the appellant's young brother is said to have been residing. The appellant's young brother is alleged to have yielded up his room to the appellant and PW1. It was in this room that the appellant is claimed to have had sexual intercourse with PW1.

The appellant's main complaint in his memorandum of appeal centres on sufficiency of proof of the charge against him, particularly considering that the evidence of the victim of the crime was not corroborated.

The appellant appeared before us in person while the Respondent Republic was represented by Mr. Angaza Mwipopo, learned Senior State Attorney. The appellant, (understandably being a layman), did not have much to say before us other than asking us to allow his appeal on the basis of his grounds of appeal.

... that the trial had a number of shortfalls which should have been resolved in favor of the appellant. In the first place he pointed out that having found that the victim was 14 years of age the trial magistrate ought not to have conducted the *voire dire* test and should have taken her evidence on oath as she was not a child of tender age. We agree with the learned Senior State Attorney on this point. Section 127 (5) of the Evidence Act, Cap 6 R,E. 2002 defines 'a child of tender age' upon whom it is compulsory to conduct the *voire dire* test to mean a child whose apparent age is not more than fourteen years. Further still, as urged by Mr. Mwipopo, even assuming that the witness was a child of tender age she being the only witness in so far as the commission of the crime was concerned, there was need for caution on the part of the trial magistrate before her testimony was used as the basis of conviction.

Section 127 (7) provides:

"(7) Notwithstanding the preceding provisions of this section, where in criminal proceedings involving sexual offence the only independent evidence is that of a child of tender years or of a victim of the sexual offence, the court shall receive the evidence, and may, after assessing the

credibility of the evidence of the child of tender years of as **the case may be the victim of sexual offence on its own merits, notwithstanding that such evidence is not corroborated, proceed to convict, if for reasons to be recorded in the proceedings, the court is satisfied that the child of tender years or the victim of the sexual offence is telling nothing but the truth."**

There was no such warning on record as was required by law and in the circumstances the testimony is rendered value less.

We also note, as observed by Mr. Mwipopo, that the charge was not specific as it was only section 130 (1) and 131 of the Penal Code which were cited. The offence of rape consists of two scenarios. One is statutory rape where the victim is below 18 years of age in which case consent becomes immaterial. This scenario falls under section 130 (2) (e) which provides:

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

(a).....

(b).....

(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."

The second scenario is where the victim is 18 years of age or above where the lack of consent must be proved before a conviction of rape is entered.

In this case there was no evidence of age from the victim's parent. However her age could be gathered from PW3 who was her teacher. According to this witness, the victim started school at Ndaribo Primary School in 1996 at the age of 8 years. Now, if in 1996 she was 8 years old it means that she was born in 1988 which would make her to be 22 years when the crime was committed. Proof of lack of consent would be crucial in the circumstances. There was no such proof of lack of consent in this case.

The appellant was entitled to know from the beginning under which scenario he was charged so as to enable him to put up an informed defence. Failure to specify the exact provision of the law under which the

conviction entered against appellant. In the circumstances of this case prejudiced the appellant's trial.

Having deliberated on the matter as above we conclude that the appeal was filed with sufficient cause for complaint. We accordingly allow it. Conviction entered against the appellant is quashed and sentence imposed is set aside. The appellant is to be released from custody forthwith unless he is held for other lawful cause.

It is ordered accordingly.

DATED at DODOMA this 17th day of September 2013

E. A. KILEO
JUSTICE OF APPEAL

N. P. KIMARO
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