IN THE COURT OF APPEAL OF TANZANIA

AT TABORA

(CORAM: MBAROUK, J.A., MANDIA, J.A. And MMILLA, J.A.)

CRIMINAL APPEAL NO. 40 OF 2012

JOSHUA S/O MALENDEJA.....APPELLANT

VERSUS

THE REPUBLIC .....RESPONDENT

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

(Songoro, J.)

dated the 26th day of October, 2011
in
DC. Criminal Appeal No. 196 of 2006

.....

JUDGMENT OF THE COURT

13th & 17th September, 2013

MANDIA, J.A.:

The appellant appeared before the District Court of Maswa at Maswa on a charge of Rape c/s 130 (2) (e) and 131 of the Penal Code where he was convicted and sentenced to thirty years imprisonment. He preferred an appeal to the High Court of Tanzania at Tabora against both the conviction and sentence. His appeal was dismissed in its entirety, hence this second appeal.

At the trial District Court, evidence was led showing that the appellant started seducing a Standard VII pupil at Buyubi Primary a School

in May, 2005. After a first refusal on the part of the pupil and persistence on the part of the appellant, the pupil, PW1 Mary Jackson, gave in. Since the pupil was living with her sister the two lovebirds chose Shanwa hill on the outskirts of Maswa town for their trysts. PW1 Mary Jackson testified that for the two first penetrations the appellant put on a condom. She went on to say that she had three more sexual encounters with the appellant when they did not use a condom. The result of the unprotected sex on three different occasions led to PW1 becoming pregnant. She informed her brother of her pregnancy, after the brother PW2 Ernest Charles took his sister to Maswa Police Station where the matter was reported. The appellant was handed over to PW3 F.3690 detective Corporal Adam of Maswa Police Station who testified that the appellant owned up to the pregnancy and recorded a cautioned statement which he tendered in court as Exhibit P2. It appears the love relationship between PW1 Mary Jackson and the appellant went on for some time from 2005 to 2007 because PW4 James Lukanda, the Headmaster of Nyalikungua Secondary School in Maswa testified that PW1 Mary Jackson was her student who he expelled on 12/6/2007 while she was in Form 11, and that the reason for the expulsion was that the girl Mary Jackson was discovered to be pregnant.

In his defence the appellant disclaimed any love relationship with PW1 Mary Jackson and said he was surprised to be arrested on 17/12/2006 at an auction and charged with the rape of the complainant, which he denied. Despite these protestations of innocence, the trial court convicted the appellant and sentenced him accordingly. As we remarked earlier, his first appeal was dismissed in its entirety.

The appellant's memorandum filed in this court raises three grounds of complaint, namely:-

a) that the age of the complainant was not proved

b) that the trial court erred in relying on the cautioned statement he made because it was made user torture

c) the prosecution did not tender in evidence a report on D.N.A. analysis to prove that he was responsible for the pregnancy.

At the hearing of the appeal, the appellant appeared in person, unrepresented, while respondent Republic was represented by Mr. Jackson Bulashi, learned Principal State Attorney who supported the conviction and sentence.

On the question of age, the learned Principal State Attorney submitted that the charge to which the appellant pleaded in the trial court showed that the victim of the alleged rape was aged sixteen when the offence was alleged to have been committed. The appellant did not contest the aged of the complainant as shown in the charge sheet when the plea was taken. The complainant gave evidence in court on 31/10/2007, one year after the charge was read out to the appellant, and she gave her age as seventeen. Again the appellant did not contest the age of the complainant. The evidence of PW4 James Lukanda, the headmaster of Nyalikungu Secondary School, shows that by the time she was expelled from school for pregnancy, the complainant was a Form two student at Nyalikungu Secondary School. Mr. Jackson Bulashi agreed that the charge of rape leveled against the appellant is a statutory rape which depends upon proof that the victim is under eighteen years of age, but urged us to hold that the age of the victim as given in the charge sheet, and the evidence of the victim giving her age, if not contested, is enough proof of age. We agree. The particular circumstances of this case show that the victim was in Secondary School when she testified in court and gave her age as

seventeen, an assertion which the appellant did not contest. We are satisfied that there was enough proof of the age of the victim despite the absence of a birth certificate which was demanded by the appellant. We therefore dismiss the ground of complaint relating to age.

The appellant also raised issue with the cautioned statement tendered in evidence during the trial as Exhibit P2. The statement was recorded by PW3 F3690 Detective Corporal Adam and when the witness put in the cautioned statement the appellant informed the trial court that he had no objection to the statement being put in evidence. Mr. Jackson Bulashi urged us to dismiss the issue as raised in ground two. This issue on the admissibility of the cautioned statement was raise as ground eight and nine in the petition of appeal which the appellant filed in the High Court. In our view the appellate High Court dealt very adequately with the issue and came to the conclusion that it was an afterthought. Arguing the issue in this Court Mr. Jackson Bulashi stressed the points that the cautioned statement was tendered in evidence after the complainant had testified, that the contents of the cautioned statement was similar to the evidence which the complainant gave in court, and that the appellant did not object

to the production of the cautioned statement during the trial. We are satisfied that the querry about the cautioned statement is an afterthought. We therefore dismiss this ground.

Lastly, the appellant raised issue with the failure of the prosecution to prove that he was responsible for PW1's pregnancy and that this proof should have been done though a D.N.A. test. We think we should not be detained by this issue. The charge facing the appellant is rape. In **Selemani Makumba vs. Republic**, Criminal Appeal No. 94 of 1999 (unreported) this Court made the following observation:-

> *"True evidence of rape has to come from the victim, if an adult, that these were penetration and no consent and in the case of any other woman where consent is irrelevant, that there was penetration."*

In the case at hand, the victim was aged sixteen at the time of the commission of the offence. The victim was not a wife to the appellant so consent was irrelevant under the provisions of Section 130 (2) (e) of the Penal Code. This was not a case of paternity so the issue of proof of parentage through a D.N.A. test is irrelevant. We find this ground lacking

in merit and we dismiss it. In the upshot, we find the appeal devoid of merit and dismiss it in its entirety.

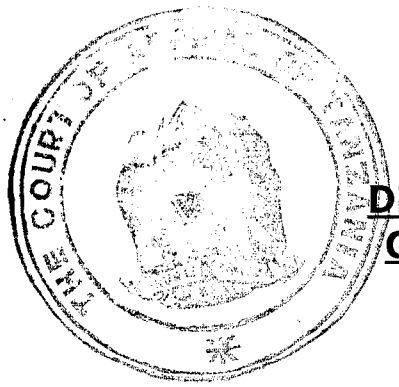
DATED at TABORA this 16th day of September, 2013.

M. S. MBAROUK
JUSTICE OF APPEAL

W. S. MANDIA
JUSTICE OF APPEAL

B. M. K. MMILLA
JUSTICE OF APPEAL

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



Z. A. Maruma
DEPUTY REGISTRAR
COURT OF APPEAL