IN THE COURT OF APPEAL OF TANZANIA
AT TABORA

(CORAM: MBAROUK, J.A., LUANDA, J.A. And MZIRAY, J.A.)

CRIMINAL APPEAL NO. 108 OF 2016

MASANJA SESAGULI............................ .... APPELLANT

VERSUS

THE REPUBLIC...RESPONDENT

(Appeal from the decision of the Resident Magistrate Court of Tabora, at Tabora)

(Shaidi, PRM-Ext. J.)

Dated 22nd day of March, 2016
in
DC Criminal Appeal No. 19 of 2014

JUDGMENT OF THE COURT

24th & 26th October, 2016

MBAROUK, J.A.:

In the District Court of Urambo at Urambo the appellant was convicted of the offence of rape contrary to section 130(2)(e) and 131(1) of the Penal Code [Cap. 16 R.E. 2002]. He was then sentenced to thirty (30) years imprisonment. Dissatisfied his appeal before the Principal

Resident Magistrate with Extended Jurisdiction, Tabora (Shaidi-PRM Ext. J.) was rejected. Aggrieved, hence this second appeal.

Briefly stated the facts of the prosecution's case at the trial court were as follows:

PW1 Rehema d/o Haruna testified that on 16th April, 2010 when her daughter Amina d/o Saidi (PW.2) aged 14 years left home going to school, she never came back on that day. That led PW.1 to report the absence of her daughter to the Village Executive Officer of Motomoto village. A search was conducted and then on the 3rd day she heard rumours that her daughter was at the appellant's house. PW.3 Ndegea d/o Haruna was one among those who went at the appellant's house and saw him outside and PW2 inside the house of the appellant. The appellant was then arrested and sent to the Village Executive Officer with PW.2.

In his defence, the appellant testified that he did not force PW.2 to do sexual intercourse because she consented.

At the hearing of the appeal, the appellant appeared in person, unrepresented and opted for the respondent to start. Earlier on the appellant filed a memorandum of appeal containing a length four grounds of complaint.

On her part, Ms. Upendo Malulu, learned State Attorney for the respondent/Republic initially supported the appeal for the reason that *voire dire* conducted to PW2 violated the requirements under section 127(2) of the Evidence Act [Cap. 6 R.E. 2002]. In support of her argument, she cited the decision of this Court in the case of **Mohamed Sainyenye v. Republic,** Criminal Appeal No. 57 of 2012(unreported). She then urged us to expunge the evidence of PW2. She said, if PW2's evidence is to be expunged, there is no other evidence to support the prosecution's case.

However, the Court then asked her to comment on the appellant's words found at page 15 of the record at the time when he gave his defence, where he said:-

> ***"I did not force her to do sexual intercourse, she consented.*** *"* [Emphasis added].

The learned State Attorney submitted that as far as those words were made by the appellant on oath, they amount to an admission or confession that he had sexual intercourse with PW2, but with her consent. She therefore changed her mind and urged the Court to uphold the decisions of the two courts below and dismiss the appeal.

On his part, the appellant left to the Court to arrive at a just decision.

As the record shows, there is no doubt that the appellant uttered those words in his defence. We fully agree with Ms. Upendo that those words amount to confession. We are of the opinion that, those words have carried the prosecution's case further. This Court in the case of **Edward v. Republic**, Criminal Appeal No. 272 of 2009 (unreported) cited with approval the decision in the case of **Mohamed Haruna @ Mtupeni and Another v. Republic,** Criminal Appeal No. 259 of 2007 (unreported), where it was observed that:-

> " ***If the accused person in the course of his defence got evidence which carries the prosecution case further, the Court will be entitled to take into account such evidence of the accused in deciding on the question of his guilt.*** "[Emphasis added].

As shown earlier, when the appellant gave his defence he implicated himself that he did not force PW.2 to have sexual intercourse as she consented. That means he did sexual intercourse with PW2 a girl aged 14 years with her consent.

The only question for us to decide is whether PW2 was in law, capable of consenting to the sexual intercourse with the appellant. According to section 130(2) of the Penal Code:-

> *"130(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)* ....
>
> *(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." [Emphasis added].

In the instant case, PW2 was only 14 year of age, hence under 18 years of age, therefore under section 130(2) of the Penal Code whether she consented or not, that is statutory rape the appellant had committed.

In the event, we are of the considered opinion that this appeal is devoit of merit, we therefore dismiss it in its entirety.

DATED at **TABORA** this 24th day of October, 2016.

M. S. MBAROUK
JUSTICE OF APPEAL

B.M. LUANDA
JUSTICE OF APPEAL

R.E.S. MZIRAY
JUSITCE OF APPEAL

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

E.F. FUSSI
DEPUTY REGISTRAR
COURT OF APPEAL