

**IN THE COURT OF APPEAL OF TANZANIA  
AT TANGA**

**(CORAM: LUANDA, J.A, MZIRAY, J.A And NDIKA, J.A)**

**CRIMINAL APPEAL NO 132 OF 2016**

**NURU MTANGI .....APPELLANT**

**VERSUS**

**THE REPUBLIC.....RESPONDENT**

**(Appeal from the Judgment of the High Court of Tanzania at Tanga)**

**(Mussa, J.)**

**Dated the 15<sup>th</sup> day of July, 2011**

**In**

**Criminal Appeal No. 30 of 2010**

.....

**JUDGMENT OF THE COURT**

10<sup>th</sup> & 14<sup>th</sup> July, 2017

**MZIRAY, J.A:**

In the District Court of Korogwe at Korogwe, the appellant was charged with rape contrary to Section 130 (2) (e) and 131 (1) of the Penal Code [Cap. 16 RE. 2002]. The appellant was sentenced to imprisonment to a term of 30 years in jail. He was further ordered to pay Tshs. 50,000/= to the victim as compensation for injuries sustained during the alleged rape. Aggrieved, the appellant appealed to the High Court of Tanzania at Tanga which dismissed the appeal in its entirety.

Still dissatisfied, the appellant seeks to challenge the decision of the first appellate Court.

The charge sheet preferred by the Prosecution on 22/07/2009 had alleged that on 19/07/2009 at 18:00 hours at Mashewa Village within Korogwe District in Tanga Region, the appellant did have carnal knowledge with one Asha d/o Ibrahim (PW2), a thirteen (13) years old girl.

In this appeal, the appellant filed a memorandum of appeal consisting of three grounds namely;

- 1. The appellate judge erred in law and in fact by sustaining the conviction on the unrepresented appellant based on the weakness of the defence;*
- 2. The appellate judge erred in law and in fact by failing to analyze that during defence the unrepresented appellant was cross-examined by technical questions; and*
- 3. The prosecution side did not prove their case to the standard required by the law.*

On that basis, he prayed to this Court for conviction be quashed and the sentence of 30 years imprisonment plus compensation be set aside.

The victim of the offence, PW2 Asha Ibrahim was aged 13 years old at the material time. A *voire dire* test was to be conducted by the trial court before her evidence was received. There is no proof that the *voire dire* test was conducted. The trial magistrate only remarked that PW2 did not know the meaning of an oath hence incapable of testifying on oath. Her evidence was therefore received without taking oath.

In her unsworn evidence PW2 informed the trial court that on the fateful day i.e. 19/7/2009 at around 18.00 hours while at home alone, the appellant took her to a nearby cemetery whereupon he undressed her and had sexual intercourse with her until he ejaculated. When her mother (PW1) came back home from shamba she reported the ordeal to her. PW1 examined and found her vagina was smeared with sperms. The matter was reported to Mashewa Police Station where PW2 was given a PF3 (exhibit P1) for medical examination. The appellant was subsequently arrested on 19/7/2009 at around 20.00 hours and upon interrogation he voluntarily gave his cautioned statement (exhibit P2) on 21/7/2009, admitting the offence. In defence, the appellant consistently confessed to have committed the offence.

On the strength of the evidence of the appellant, coupled with his cautioned statement and PW2's evidence, the trial court convicted the appellant as charged.

At the hearing of the appeal, the appellant appeared in person unrepresented, while Mr. Saraji Iboru, learned Senior State Attorney, represented the respondent Republic. When the appellant was given a chance to elaborate his grounds of appeal, he opted to allow the learned State Attorney to submit first.

On his part, the learned Senior State Attorney from the outset did not support the appeal. He submitted that even if *voire dire* examination was not properly conducted against PW2 in terms of section 127(2) of the Evidence Act, Cap. 6 R.E. 2002 and the appellant's cautioned statement being not taken during the prescribed period as required under section 50 and 51 of the Criminal Procedure Act, Cap. 20 R.E. 2002, still, there was ample and strong evidence on record to establish that the appellant raped PW2, Asha Ibrahim. The learned Senior State Attorney submitted further that the appellant on being cross examined confessed to have committed the offence with which he was charged, alleging that the victim consented and was enjoying the act.

The appellant being a layman had nothing to say in reply. He simply left the matter in the hands of the Court.

Going by the record we have no doubts in our minds that the appellant confessed in the trial Court to have had sexual intercourse with the victim as reflected at page 20 of the record. According to **BLACK'S LAW DICTIONARY** 8<sup>th</sup> ed. **LEGAL MAXIMS** p. 1709. "*...a confession made in court is of greater effect than any other proof*". This similar view was reiterated in the case of **Nyerere Nyague v. Republic**, Criminal Appeal No. 67 of 2010 [unreported].

The appellant is on the record to have adduced as follows upon being cross-examined by the trial court:-

*" I made the sexual act with the girl, Asha Ibrahim within the cemetery area.... When I sexed her didn't cry (sic). I made sexual intercourse of 19.00 hours on 19/7/2009 (sic). Before the sexual act I undressed also my trouser. **I then took my penis and penetrated into her vagina.** She did not even cry but she went on enjoying the sexual act. After such act I felt comfortable."*

[Emphasis supplied].

This evidence leaves no doubt in our minds that sexual intercourse occurred between PW2 and the appellant. At that time, based on the evidence of PW1, the victim's mother, the victim was 13 years old and therefore legally incapable of consenting to sexual intercourse.

On that basis we are of the settled view that the offence of rape was proved beyond all reasonable doubt. The conviction of the appellant and the sentence imposed on him cannot be faulted. The appeal is therefore dismissed in its entirety.


DATED at TANGA this 14<sup>th</sup> day of July, 2017.

B. M. LUANDA  
**JUSTICE OF APPEAL**

R.E.S. MZIRAY  
**JUSTICE OF APPEAL**

G. A. M. NDIKA  
**JUSTICE OF APPEAL**

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

  
E. Y. MKWIZU  
**DEPUTY REGISTRAR**  
**COURT OF APPEAL**