

IN THE HIGH COURT OF TANZANIA
AT MTWARA

CRIMINAL APPEAL NO 144 OF 2005

(Original Nachingwea District Court Cr. Case No. 130 of 2004)

HAMISI ALLY TUPATUPAAPPELLANT

VERSUS

THE REPUBLIC.....RESPONDENT

22/7/2008 & 23/7/2008

Judgment

Rweyemamu J.,

This is yet another of the many criminal appeal cases I have handled at this station involving the offence of *statutory rape* – where conviction was entered without a specific finding by the trial court as to whether the victim was a *girl or woman below 18*, a key ingredient in these offences.

In this case the appellant **Hamisi Ally Tupatupa** was charged of rape c/s 130 & 131 (e) of the Penal Code. The charge particulars indicated that at unknown time on 25/9/2004, at Namikonga village the appellant had carnal knowledge of the victim – a girl aged 14 years.

The appellant's conviction was based on the evidence of Pw¹ the father of the victim Pw², the victim's mother Pw³, and Pw⁴. In brief, that evidence was as follows; the girl's father learnt from her mother that on 25/9/2004 Pw² had not come home. According to the mother she had left home to attend circumcision ceremonies with her friends and did not return home that day. On being questioned she told the mother that she had been with the appellant. On 28/9/2004, the father took her to school and the matter was reported to Village Executive Officer (VEO), the victim taken to police and ultimately the hospital. The PF3 indicated that *"patient came 2 days after the rape incidence. She was supposed to come immediately"*

Pw³ testified that the victim was a pupil at a primary school. That she left for the festival, she did not return until two days later. The victim herself testified that while at the festival she met the appellant who requested and she obliged to go and have sex with him. She stayed with him from 18 hrs and they had sex, she returned 24 hrs and went to her grandmother's place. Pw⁴ deposed that on 25/9/2004 she saw the victim and the appellant talking together.

In defense, the appellant denied to have met or to have been with the victim, pleaded alibi, and summoned his fiancé Dw² to testify that he was away on the material day in Nachingwea.

The DC concluded that the evidence clearly established the fact that the appellant did have sex with the victim Pw² because her story was credible and corroborated by Pw⁴, and further because the defense's alibi could only be believed; and I paraphrase 'if there was proof that the appellant was in Nachingwea the who day of 25/9/2004, but as there was none, the prosecution case remains unchallenged'. I should remind the concerned DC magistrate to always remember that the defense bears no burden to prove the alibi.

The appellant vide his 8 grounds of appeal (he did not wish to attend hearing), repeated his stand denying to have had sex with the victim; faulted the DC for failing to believe his alibi and repeated his assertion that that the case was a fabrication.

Mr. Mkude state attorney declined to support conviction. In support of his position he submitted in part that there was no evidence adduced at trial to prove that the victim was below 18 and citing **Emmanuel Kibona VR 1995 TLR 241**, he argued that since

age of the victim is uncertain, the appellant must be given benefit of doubt .

I have gone through the evidence of the victim's father and mother on record, none of them testified as to their daughter's age. I need not emphasize the importance of establishing age of the victim in *statutory rape* cases for it is the very basis upon which the offence is created out of facts which would otherwise prove consensual sex. The evidence of age in such cases must be deliberately sought by investigators, properly presented by the prosecutor and specifically evaluated by the court.

To conclude, I agree with the state attorney that the case against the appellant was not adequately proved, quash the subsequent conviction and sentence, and order immediate release of the appellant unless he is otherwise lawfully held. It is so ordered.



R M Rweyemamu
Judge
23/7/2008