IN THE HIGH COURT OF TANZANIA
AT MTWARA

CRIMINAL APPEAL NO 89/2007

(Original Criminal Case No. 32/2006 of the Disitrict Court of Lindi
At Lindi Before: C.P. Semwijah Esq – RM)

FADHILI SELEMANI @ KUMTWANGA .....APPELLANT

VERSUS

THE REPUBLIC .....RESPONDENT

14/7/2008 & 22/7/2008

Rweyemamu J.,

Reasons for Judgment

On 14/7/2008 after hearing submission by the appellant **Fadhili Selemani Kumtwanga** and Ms. Shio state attorney for the republic/respondent, I allowed this appeal, quashed the appellant's conviction, set aside the sentence and set him free but reserved my reasons for that decision until today- 22/7/2007. I proceed to give them.

In Lindi District Court (DC) Cr. Case 32/2006 the appellant was arraigned on a charge with two counts namely Rape c/s 130 & 131 of Penal Code and Impregnating a School girl c/s 5 of GN 265/2003 made under S. 35 (3) of the Education Act 25/1978. The appellant's age on the charge sheet was indicated as 18 yrs. He was tried, convicted and sentenced to serve 30 yrs imprisonment on the first count and discharged conditionally under section 38 of the penal code on the second count. Dissatisfied, he appealed against both conviction and sentence.

The appellant filed 11 grounds in his appeal adopted at the time of hearing but before proceeding, I find it useful to dispose of ground 3 and 4 at the outset so as to send a clear massage to the appellant and similarly situated individuals who, judging from grounds of appeal filed in a number of criminal appeals I have handled particularly at this station, do not appear to be familiar with the law governing *statutory rape.*

Statutory rape, the offence the appellant was charged with has become part of the law - section 130 (2) (e) of the Penal Code after enactment of the Sexual Offences Special Provisions Act4/98 popularly known by its acronym SOSPA. Under that law, a male person who has sexual intercourse with a girl or woman who is below 18 yrs of age, with or without her consent commits the offence of rape.

In view of this position, the appellant's grounds 3,4 5 and 6 where he submitted that the girl in question testifying as **Pw**[1] told the court that he seduced her and she consented; that no PF 3 was tendered to show that **Pw**[1] was found with injuries or signs indicating forceful sex; are without merit.

That done, I continue to explain my reasons for finding the appeal merited. The prosecution's case was brief-based on the evidence of two witnesses one of them the victim- **Pw**[1]. The witness testified that she was a *Mnonela* primary school pupil but she was no longer attending school because of pregnancy; that in October 2005 she 'met the appellant in his room' in his parents home then in November 2005 she discovered she was pregnant and when she told the appellant, he said nothing. Later when her father questioned her, she told him the appellant was responsible for her

pregnancy. Her father and the appellant reported to the police where she was given a PF 3, examined and found to be 4 months pregnant.

The other witness **Pw²** – a village secretary of *Mnonela village* testified that on 6/2/2006 PWI reported that the appellant had impregnated her while she was a school girl, he had him arrested vide village "sungusungu'; questioned him but the appellant denied to have committed the offence.

At trial, the accused denied the charge, raised a defense of alibi - produced tickets to show that he was away in Dar es Salaam at the alleged time of commission of the offence from where he returned later. When cross examined by the DC, the appellant testified that he was aged 16 yrs having been born in 1990. That is the totality of the evidence upon which the DC found this serious case carrying a sentence of 30 yrs proved.

Apart from the dismissed grounds, the appellant also faulted the DC decision on several other grounds but relevant ones were that; there was no evidence to prove that **Pw¹** was a school girl or aged below18. Ms. Shio agreed with the appellant. Declining to support the appellant's conviction, she submitted that on the evidence, age of the victim an important ingredient to establish the first count was missing, as was the evidence to prove that the victim was a school girl as per second count. Conceding the appellant's appeal against sentence, she submitted that the evidence on record showed the appellant to have been 16 yrs of age who if found guilty and is a first offender, should be sentenced to 12 strokes of the cane as per section 131(2) (a) of the Penal Code.

I accepted both parties' submission that there was no sufficient evidence that the girl Pw[1]; had sex with the appellant on the alleged day; and no evidence that Pw[1] was aged below 18; and even if guilty, the sentence was illegal in view of the appellant's age and the fact that he was a first offender.

At the time of hearing, the appellant pointed out that, there was no clear proof that Pw[1] was a school girl below 18 yrs of age -ordinarily a teacher or parent would be expected to come and testify in the case but such was not the position. I agree with both parties that age of the complainant a key ingredient in statutory rape cases was missing.

This court; I and other judges have observed a number of times that rape, a serious offence attracting serious consequences should be investigated and prosecuted with seriousness than was done in this case. One would expect the investigator or initiator of investigation to testify to establish a link between the accused and commission of the offence. I fear to imagine the consequence to justice where the court acts only on the word of a victim of statutory rape without any other direct or circumstantial evidence, particularly when the alleged culprit is a fellow young person.

It was in view of all the above that I accepted the appellant's appeal.

R.M. Rweyemamu
Judge
21/7/2008