IN THE HIGH COURT OF TANZANIA
AT MTWARA

CRIMINAL APPEAL NO 106 OF 2005

(Original Kilwa Masoko District Cr. Case no. 61/2005

Before: S.G. Cleophas Esq – DM

DIDAS S/O SIMWANZA .....APPELLANT

VERSUS

THE REPUBLIC .....RESPONDENT

21/7/2008 & 25/7/2008

Judgement

Rweyemamu J..

In Kilwa District Court (DC) Cr. Case 61/2005, the appellant **Didas Simwanza** was charged, tried and convicted of rape c/s 130 of the Penal code as amended by the Sexual Offences Special Provisions Act No. 4 of 1998, popularly known by its acronym - SOSPA. He was sentenced to 30 yrs imprisonment.

The facts at trial were brief. On the night of 12/6/2005, Pw[1] a policeman was on usual police duties following up information that there were bandits in Mavuji village. Accompanied by other officers and the village leader Pw[3] he went to the house of one Mwanahawa and knocked the door of the room where the appellant was. They found 3 people there. The appellant was lying on the

mat together with the victim Pw^2 (herein after the girl), while another man was sleeping on the bed. On being questioned, the girl disclosed that the appellant was her boyfriend and she was a primary school girl aged 15.

According to $Pw^1$and Pw^3, they called the head teacher who confirmed that the girl was a standard VII pupil at his school. That teacher however, was not called to testify. The girl herself admitted to have been found in a room with the appellant who was her boyfriend since 2004, they used to have sex and the appellant had promised to marry her on completion of her education.

In defense, the appellant admitted to have been found as described and deposed that; even the girl's parents knew of their relationship and condoned it but that he did not that Pw^2 was a school girl until after his arrest.

In his memorandum of appeal adopted at the hearing -since the appellant did not wish to be present, he raises a number of grounds key ones among them that; the teacher was not called to testify to corroborate the story that the girl was a pupil at his school; that there was no birth certificate to prove the girl's age; that there was no evidence that he had raped the girl; and therefore that he was convicted on insufficient evidence.

Mr. Hyera state attorney does not support conviction. He submits that there was no evidence adduced at trial to prove that the girl was below 18; that lack of proof of age in a statutory rape case is fatal to the prosecution's case. I agree.

It is true that from the evidence on record which is summarized above, none of the witnesses save the girl testified in respect of age. In the absence of a birth certificate, which may not be easily available given realities of life in the village, the prosecution should have at least called the girl's parents-who were apparently available, to testify on the girl's age. This court Mchome J., has held in **Emmanuel Kibona and Others v. R,** 1995 TLR 241 that "evidence of a parent is better than that of a medical doctor ...as regards the girl's age". I should add that a parent's statement on age should be believed unless there are good reasons to find otherwise.

The value of the parent's testimony on age has been confirmed in a number of cases by the Court of Appeal (CA) including **Mustafa Ramadhan Kihiyo v. R,** Cr. Appeal 25/2005 (dated 6/7/2006, Tanga sub registry-unreported), a case where one of the issues on appeal was age of the complainant. The appellant on second appeal to the CA argued that the complainant was an

adult like himself and not below 14. The CA held that *"we are satisfied that the complainant was eleven years old when she was raped. Her natural father stated that she was born in May 1986. She was therefore, below 14 of age."* To conclude, I am satisfied that from the evidence on record age of the victim an important ingredient, was not proved.

On importance of proof of age in these kind of cases, I find it opportune to repeat my observation in a case decided recently, **Hamisi Ally Tupatupa v. R, HC Cr Appeal 144/ 2005 (Mtwara registry)** where I observed that: "*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 that the victim was a girl or woman below 18, a key ingredient in these offences.*" I concluded therein that: "*I need not emphasize the importance of establishing age of the victim in statutory rape cases, for age 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.*" Although the best proof of age is a birth certificate, authorities above show one other way of obtaining the required proof and I believe there are several others.

There is yet another interesting aspect in this case rightly alluded to by the appellant in the MA where he complains that there was no evidence to prove that the appellant had sex with the girl on the date in question. I agree that there was no such

evidence, if anything, the fact that there were 3 people in the room implying that ordinarily, no sex took place that day. Admittedly they had had sex on prior occasions. Proof of sex on the date alleged in the charge sheet was vital.

In a case with similar facts, **Simon Abonyo v. R,** Cr. Appeal 144/2005 (dated 16/3/2007, MZA sub registry, unreported) the appellant was convicted because there was evidence that the appellant and the girl (victim) had had sexual intercourse on unspecified dates. His conviction was upheld by the HC but on second appeal to the CA, the court allowed the appeal because there had been no proof that the offence took place on a date alleged in the charge sheet. The court concluded by stating that "*the importance of proving the offence as alleged in the charge hardly needs to be over emphasized*".

The same position was taken by that court in **Christopher Rafael Maingu v. R,** Cr. Appeal 222/204 (dated 16/3/ 2007, MZA sub registry-unreported) following its decision in the prior cases of **Ryoba Mariba @ Mungare v. R,** Cr. Appeal 74/2003 where it held that *"it was incumbent upon the republic which had charged Ryoba Mariba with raping Sara on 20/10/2002 to lead evidence showing exactly that Sara was raped on 20/10/2002"*.

Similarly in the instant case, there was no evidence to prove that rape occurred on 12/6/2005, the date stated in the charge sheet. This appeal should for that second reason succeed. I believe I am duty bound to remind the DC that the offence of rape is a criminal case like any other and a serious one for that matter, attracting serious consequences, as such all ingredients of the offence as stated in the charge sheet must be proved beyond reasonable doubt.

In view my conclusions above, I quash the appellant's conviction, set aside the sentence and order his immediate release unless he is otherwise lawfully held. It is so ordered.

R M Rweyemamu
Judge
23/7/2008