

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

CRIMINAL APPEAL NO.59 OF 2007
(Originating from Muheza D/C Cr. Case No.32 OF 2007)

FRANK CHEMA APPELLANT
VERSUS
THE REPUBLIC RESPONDENT

JUDGMENT

Date of last order: 9/10/2009

Date of judgment: 10/10/2009

MUSSA, J;

In the District Court of Muheza, the appellant was arraigned for rape contrary to sections 130 (1) and 131 (1) (3) of the Penal Code, Chapter 16 of the laws. The particulars were that on the 5th day of July, 2005 at Ubena area, Muheza District, the appellant had carnal knowledge of a certain Rehema Salimu, aged 16. The appellant denied the charge and; so the matter was gone into upon full enquiry. At the close of a contested trial, the appellant was found guilty, convicted and sentenced to thirty years imprisonment. He now appeals upon a petition, of which, at the hearing, he adopted without more. Miss Massawe, learned State Attorney, on the opposite corner, fully supported the conviction and sentence. Nonetheless, ahead of a consideration of the rival positions, I should reflect on the factual background.

The case for the prosecution was comprised of three witnesses, of whom, Rehema, the alleged victim; was featured as PW.1. She was, at the material times, domiciled at Majani Mapana Muheza and; enrolled as a class VI pupil at Muheza Estate Primary School. At the outset of her testimony, Rehema made no secret of an intimate relationship with the appellant that was begun sometime August, 2005. Someday, that same August, the two lovers were at white house bar, presumably, situate at Muheza; where there was a disco event. Whilst there, the appellant requested for a spell of sexual intercourse; to which Rehema was obligatory. They, thus, let go of the disco event and, instead, had a sexual encounter at Ukena guest house. The way it was told, the two slept over night there but; it was only the beginning of their affair.

Early morning on the morrow of the encounter, Rehema, fleetingly, visited home, if anything, to put on her school uniform. She then took off to attend school but; upon her own testimony, off school, there continued several other sexual encounters with the appellant at that same guest house. There then came a moment in time, although untold as to exactly when but; it was someday on a February, when Rehema had a feeling about being pregnant and; upon medical examination, true; she was, six months pregnant. And; yet, between her and the appellant, game was not over; much as, thereafter, the two of them were to put under the same roof as husband and wife. According to Rehema, theirs was not an entirely secretive affair so long as it was known to a sister of hers called Zaina Ayubu who; by the way, was not featured, as a witness. Much

later, news of Rehema's pregnancy were broken to her father who is domiciled in Tanga City and; it was, rather, him who, in turn, reported the matter to the Police. Rehema concluded her testimony with the production of a PF.3 of which was, nonetheless, improperly adduced without regard to the mandatory requirements of section 240 (3) of the CPA.

There was some further prosecution evidence from Zawadi Madunda (PW.2), incidentally, the alleged victim's mother. To express at the very outset, whatever the prosecution desired of this witness; for sure, her testimony had a negative turn on its version, virtually rendering it into an unintelligible whole. This, I shall have time to elaborate later in my judgment and; in the meantime, let me get into her details. Her account was that October 10th 2006, around 10.00a.m, she was confronted by a certain Mama Amina who was in need of a house girl. Although not quite clarified but, it seems, Rehema was the girl desired by this lady. Be what as it may have been, Zawadi, pointedly, told the lady that her daughter was still schooling. Then, despite her telling, Zawadi was to learn that her daughter had left, anyway destined for Dar es salaam in the company of mama Amina. Much later, according to Zawadi, when Rehema arrived back from Dar es salaam; she was put under arrest and; such was when she was positive to a pregnancy test of which she implicated the appellant. The remainder prosecution evidence was comprised in the testimony of a police constable, namely, Margret (PW.3). She testified upon common investigative stuff; not quite of particular relevance; suffice it to say that, according to her, the

matter was reported at the police station 18th January, 2006 and; that the appellant was apprehended by some other policemen at Ubena area, Muheza. And; that was about all, in so far as the case for the prosecution was concerned.

The appellant was very brief, albeit, pertinent in his disassociation from the storm laid at his door. To begin with and; quite significantly, he is a petty businessman domiciled at Ubena area, Muheza. To him, life had been without incident up until January 19th 2006, around 9.00a.m, when there was a knock at his door. Upon opening, he had policemen for visitors and; soon after, the accusation giving rise to this appeal was formally initiated. Going deeper into the appellants' version, he did not actually, dispute knowing Rehema; only, he said, he did not rape her, much as, if such were so, the alleged victim would have raised an alarm. The appellant further urged that the prosecution fell short of proving that Rehema was a school girl. But, upon the presiding officer seeking further clarification; there was this response from the appellant:-

"It is true that I committed the offence to the complainant but that she is not a school girl. I twice met with her sexually that is why I say that she is not a school girl"

As was, indeed, expected; the learned trial Magistrate capitalized on the appellants' own statement to find that the prosecution had established its case to the hilt. And so, as hinted upon, a conviction was had and the appellant was sentenced as already indicated

The petition is comprised of seven grounds upon a variety of points of grievance that may conveniently be crystallized into two. First, it is complained, the evidence did not sufficiently prove the ingredients of rape, of which, according to the appellants' perception, were, force, penetration and corroboration. Thus, the appellant would echo his telling, as did at the hearing, that, if at all, his having sex with Rehema was not by force, rather, upon a mutual agreement between them. Then, second, the appellant would urge, that the prosecution miserably failed to establish the age of the alleged victim, that is, beyond all reasonable doubt. To the foregoing, Miss Massawe countered that there was ample telling from Rehema to the effect that the appellant shared sex with her which version the appellant, after all, fortified.

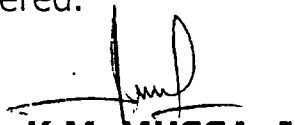
If I may, first, sneak a remark ahead of a consideration of the points of contention; that for some obscure reason, the allegation as comprised on the indictment is slightly at variance with what was adduced into evidence. I have in mind the bold claim there is to it to the effect that the incident occurred of the 5th day of July, 2005. In truth and; upon Rehema's own testimony, the alleged sexual relationship was, actually, begun August, 2005. Thus, it is not known, then, as to where the date comprised on the charge sheet was gotten from but; much as the appellant had the benefit of full trial, I should adjudge, no miscarriage of justice was occasioned by the variance.

Passing on, then, into the nature of the offence with which the appellant was, arraigned; it was to express the least, one of those

categories of rape, recently invented. Modern time rape has been immensely broadened and is constituted in a variety of categories as enumerated under section 130 of the penal Code; suffice it to say the category laid at the appellants' door entails a male person getting into the sexual act with an under-eighteen with or without her consent. As one would, immediately, apprise, it is, so the speak, statutory rape constituted irrespective of the question whether or not the female partner connived unto the act. To this end, the traditional constitution of rape through force or against the will of the victim; does not quite fit into this category of the offence. Erroneous, then, is the appellant's perception that use of force was a necessary ingredient and; much worse, his predication that rape is, of necessity, not constituted where the occurrence is given to mutual consent. A male person is, rather, strictly forbidden to a sexual meddle with an under-eighteen and; it matters not whether or not the latter had consented the arrangement.

But, this being an offence primarily predicated upon the age of the female partner; it is of critical importance that the prosecution conclusively proves that the alleged victim is, indeed, under eighteen. That is to say, in every case, there ought to be evidence as to the date or year of birth from a person versed upon so as, to found a factual basis as to proof of age. Coming closer home and; going through the record of the evidence, there is nothing really such as tending towards proof of the age of the alleged victim. Zawadi, the mother, whom was best placed to testify on the details, did not utter the slightest of a word in that regard. The one and only indication is

upon ones' viewing Rehema's particulars, that is as at prescribed ahead of her affirmation at the commencement of her testimony. Such does not suffice as proof of age and; in this, I am fortified by the Court of Appeal decision comprised in **Abdallah Iddi Mshangama V.R. – unreported – Criminal Appeal No.54 of 2007**. Where proof of age falls short; the case for the prosecution is devastatingly dealt with notwithstanding the fact that that the person accused, as here, was privy to some incriminating verbiage. All factors considered, this appeal succeeds; results of which both the conviction and sentence are set aside. The appellant is to be released from custody forthwith unless held there for some other lawful cause. It is so ordered.


K.M. MUSSA, J
10/10/2009

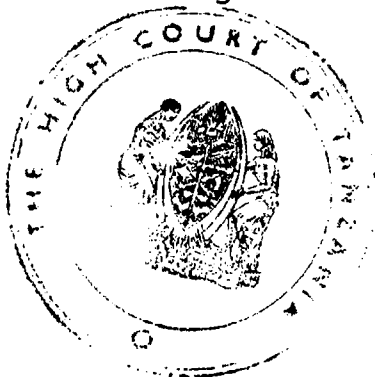
12/10/2009


Coram: Mussa, J

Appellant: Present

Republic: Mr. Iboru assisted by Miss Massawe, State Attorney
Trainee

Judgment delivered in the presence of the parties.




K.M. MUSSA, J
10/10/2009