

IN THE HIGH COURT OF TANZANIA

**AT TABORA**

APPELLATE JURISDICTION

(Tabora Registry)

(DC) CRIMINAL APPEAL NO. 26 OF 2013

CRIMINAL CASE NO. 126 OF 2011

OF THE DISTRICT COURT OF KIGOMA

BEFORE: - HON. E. Y. BAHA Esq. RESIDENT MAGISTRATE

YABE S/O ATHUMANI .....APPELLANT  
(Original Accused)

VERSUS

THE REPUBLIC .....RESPONDENT

**JUDGMENT**

11<sup>th</sup> & 20<sup>th</sup> August, 2014

**S.M.RUMANYIKA, J**

Yabe s/o Athuman (the Appellant), was on 15.02.2012, convicted and sentenced to 30 years imprisonment by the District Court – Kigoma (the trial court), for offence of rape contrary to

sections 130 (2) (e) and 131 (1) of the Penal Code Cap. 16 RE 2002. He now appeals against it.

The ten (10) grounds of appeal revolve around only seven (7) points. Rephrased as hereunder:-

1. No Voire Dire examination proper was conducted by the trial court on Pw1 (victim).
2. The Learned Trial Magistrate having not discounted evidence of the three women public witnesses, who were obviously only to serve, at all costs, their fellow's interests (victim).
3. The age of victim not having been proved by evidence.
4. The victim (Pw1) not proved as being a school girl.
5. The doctor having not appeared in court to defend on the PF3.
6. Reliance by the trial magistrate on the victim's untrue evidence.
7. Failure by the trial magistrate to hold that the prosecution case was proved not beyond reasonable doubts.

He appears in person, while supporting the appeal, Mr. Miraji Kajiru Learned State Attorney represents the Respondent Republic.

The Appellant during the hearing did submit nothing material.

As said, in his concession to the appeal, Mr. Kajiru submitted that the appeal was meritorious for three main points; one; the evidence of Pw4 (PF3) in particular, contradicts with the doctor's testimonies. On the issue of whether or not the victim's private parts beared some

bruises. Two; The prosecution never proved the victim being really of tender age. (a crucial ingredient of statutory rape). The state Attorney cited the case of Charles Makapi V R Criminal Appeal No. 55 of 2012 (CA) (Unreported). That the reasonable doubts be resolved in favour of the Appellant. Three; that as the Appellant committed the offence, if at all in February, and was, without any explanations for the delay, arrested and charged in April, 2011, the appeal be allowed. The learned state Attorney insisted.

The prosecution evidence/point rounded up, will witness that the Appellant having raped her several times and repeatedly, almost witnessed by the victim's young sister one Tausi Adamu Pw3 the appellant's ill conduct was eventually revealed by the former to their mother and others. It was no longer at ease. Matter was reported to the police. Victim medically examined (PF3), hence the criminal charges.

The issue is whether the charge of raping an under age girl was proved beyond reasonable doubts against the Appellant. The answer is respectfully "no"!

The most important, and indeed the only ingredient of statutory rape that requires proof beyond any rational controversy is that the girl was without more, below 16 sixteen years old. Neither draftsman of the charge nor the victim (Pw1) for that matter, can prove it only by mere assertions. Cogent and scientific evidence needs be led

irresistibly. With a view to supporting the particulars of the offence on the material charge sheet.

I know no law, leave alone Africa traditions that required partners asking each other how many birthdays one of them had ever celebrated before day one of their love affairs.

This point alone, which infact suffices to dispose of the entire matter, the highest fountain of justice in the country had an occasion to observe, and infact direct in the case of Charles Makapi (supra):

.....it is important for the prosecution to give a clear evidence of the age of the victim. Failure of that, will create doubt.....in this alleged statutory rape ..... the cumulative effect of the defects examined herein above leads us to find that section 388 of the Act (the CPA Cap. 20 RE 2002) cannot apply.....

We are obliged to find that the charge in this case is incurably defective .....the age of the victim.....was not proved, that creates doubts to the Prosecutions case .....For that reason, we allow the appeal .....

Quash the conviction and set aside the sentence .....

Appellant to be set free.....

I trust had the learned trial magistrate done the needful, he would have reached at a different conclusion. Grounds 3 and 7 of the appeal allowed. All said and done, I will, as hereby do allow the appeal, quash conviction and set aside the sentence. Appellant be set free forthwith unless otherwise legally detained.

R/A explained.

**S.M.RUMANYIKA**

**JUDGE**

**16/08/2014**

Delivered under my hand and seal of the court in chambers. This 19<sup>th</sup> August, 2014. In the presence of the Appellant and Mr. Rwegila State Attorney for the Respondent.

**S.M.RUMANYIKA**

**JUDGE**

**19/08/2014**