THE HIGH COURT OF TANZANIA

(MTWARA DISTRICT REGISTRY)

AT MTWARA

CRIMINAL APPEAL NO. 122 OF 2016

[Appeal from the decision of the District Court of Liwale (R.E. Kangwa, DRM) dated 30th September, 2016, in Criminal Case No. 33 of 2016]

ALLY HAMADI NATEULE ..... APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

Twaib, J:

The appellant, Ally Hamadi Nateule was the accused person before the District court of Liwale in Criminal Case No. 33 of 2016 where he was charged of raping one Fatuma Kasimu Mchwembo, a girl of 15 years of age. At the conclusion of the trial, he was convicted as charged and sentenced to thirty (30) years imprisonment. Aggrieved, he has lodged this appeal. His petition of appeal, which contains seven grounds, challenges both the conviction and sentence. However, the seven grounds may be condensed into three grounds, as follows:

1. That in convicting and sentencing the appellant, the trial court did not take into account the fact that the appellant was aged 16 years.

2. That the case against the appellant was fabricated as PW1 had grudges against the appellant.
3. That the appellant did not commit the offence because on the alleged date and time he was sick and was at his home with his family. And that he was denied and opportunity to call witnesses

At the hearing of the appeal before me, the appellant appeared in person and had no legal representation: The Respondent Republic was represented by Mr. Makasi, learned State Attorney.

In his brief submission, the appellant ostensibly added a new ground and submitted, in essence, that though he is, as of now, 18 years old, he was only 17 at the time of the alleged commission of the offence. He further argued that the instant case has been cooked up by the victim's father because he owed him Tshs 500,000/=. The appellant recalled that the father had once caused him to be convicted of raping the same girl. But the father was not happy with the punishment imposed, because he was only sentenced to serve a six months period of community service. That was why, lamented the appellant, the father came up with this case—to ensure that he (the appellant) is this time around sent to prison.

On his part, Mr. Makasi supported the conviction. He contended that the issue of age was not disputed at the trial court. The charge sheet and the facts of the case together with the appellant's defence state his age as 18 years old.

On the appellant's assertion in one of the grounds of appeal that he was denied an opportunity to call witnesses, Mr. Makasi responded that the record shows that the appellant promised to call three witnesses. But he only brought two. The last one was reported sick and the appellant closed his case. Hence, he had ample opportunity to call witnesses.

As for the grievances between the appellant and PW1 (the father of the victim), Mr. Makasi submitted that the appellant did not bring up the issue at the trial court. To him, this is an afterthought and cannot be entertained at this stage. He referred to the evidence of the alleged victim (PW2), who told the trial court that she had a relationship with the appellant since 2015, and that they had sex on the material date. Counsel further submitted that there was evidence from DW2 and DW3 that the appellant was not at home on the day and time of the incident.

Mr. Makasi submitted further that the best evidence of rape is that of the victim, in view of the holding in the case of **Simon Lucas v Republic**, Criminal Appeal No. 286 of 2013 CAT at Arusha (unreported). It is therefore his view that apart from other evidence the evidence of PW2 was sufficient to prove the offence against the appellant.

On the issue of sentence, Mr. Makasi submitted that the sentence imposed was not sufficient because the appellant had a criminal record and therefore the court should have addressed its mind to section 131 (2) (b) of the Penal Code. However, after the court prompted him to read the section, he conceded that the section was not in line with his proposition for a more severe punishment. He therefore withdrew his argument on sentence, and acknowledged that the sentence was proper.

The issues for the court's determination are mainly two: One, whether the offence of rape against the appellant was proved beyond reasonable doubt; two, whether the sentence imposed on the appellant was excessive and illegal.

On the first issue, Mr. Makasi viewed that the evidence of PW2 who is the victim of rape was the best evidence to prove rape. According to him such evidence was sufficient to prove the offence. This being a case of statutory rape, the prosecution had a burden of establishing two sets of facts: One, that the victim

was below the age of 18 years and that there was penetration of the male sexual organ into the victim's sexual organ; two, that it was the appellant who was the culprit.

In this case, the victim's father (PW1) testified that his daughter was aged 15 years and that she was a student of RM Kawawa Secondary School. This testimony, according to law, was sufficient to establish that the victim (PW2) was below 18 years, because in law the evidence of the parents regarding the age of his/her child is considered most reliable. In the absence of any other evidence to the contrary, I accept it as a fact that PW2 was 15 years old at the time.

On the issue of penetration, the evidence of PW3, a doctor who examined the victim and filled a PF3, corroborated the testimony of PW2 herself, who told the trial court that there was penetration of the victim's private parts. Hence, the evidence of PW3 established that PW2 was raped. As for who was responsible for the act, the evidence came from the victim herself. She testified that she and the appellant had had a love sexual relationship and that on the material date they had sexual intercourse. Reading the testimony of PW2, it is apparent that the witness was honest in what she stated against the appellant. Her testimony does not suggest that she cooked the story against him. As rightly argued by Mr. Makasi, the offence of rape was sufficiently proved against the appellant. The trial was therefore correct in convicting him as charged.

What now remains is the issue of sentence. I do not agree with Mr. Makasi's proposition that the sentence was proper. Though the appellant was a second offender, Mr. Makasi ought to have considered the fact the appellant was aged 18 years old at the time of the commission of the offence. In rape cases, a boy who is aged 18 years must be sentenced under section 131 (2) of the Penal Code, which provides (emphasis mine):

(2) Notwithstanding the provisions of any law, where the offence is committed by a ***boy who is of the age of eighteen years or less****, he shall–*

(a) if a first offender, be sentenced to corporal punishment only;

(b) ***if a second time offender, be sentenced to imprisonment for a term of twelve months with corporal punishment;***

(c) if a third time and recidivist offender, he shall be sentenced to life imprisonment pursuant to subsection (1).

Mr. Makasi appears to hold the view that the appellant does not fall under the provisions of the above section because he is stated to be 18 years of age. With due respect, I do not think that is a proper interpretation of the law. Nowhere in the record is it stated that the appellant was above 18 years when he committed the offence. The charge sheet says he was 18, the facts of the case say the same, and when the appellant himself gave evidence in his defence, the trial Magistrate recorded him as saying the same thing. He is not once referred to as a person above 18 years of age.

The point of reference when determining sentence is the date the offender committed the offence. I think that to remove a convict from the benefits of the provisions of section 131 (1) and (2) of the Penal Code, **it must be shown that the offender was at that point in time at least a day older than 18 years**. What this means is that on the offender's eighteenth birthday, he is still entitled to the benefits of section 131 (1) and (2) of the Penal Code.

It is not disputed that the appellant is a repeat offender. He has already been convicted once of raping the same girl (PW2). Therefore, he falls within the provisions of 131 (2) of the Penal Code. The proper sentence for him would have been twelve months imprisonment with corporal punishment.

In the final result, while the appellant's conviction is confirmed, the sentence of thirty years imprisonment is set aside. In its stead, I substitute a sentence of twelve months imprisonment.

The appellant has been in prison for slightly over eight months since his conviction and sentencing on 30th September 2016. Considering the one-third statutory remission, eight months covers the period he is supposed to spend as a prisoner. He has also spent 18 days over and above that period. That, in my view, plus the agony of having a 30-year sentence hanging over his head for all this time is sufficient punishment. I therefore discharge him forthwith, unless he is being held in custody for some other lawful cause.

Dated and delivered at Kwale this 17th day of May, 2017.

F. A. Twaib

Judge