

IN THE HIGH COURT OF TANZANIA
DAR ES SALAAM DISTRICT REGISTRY
AT DAR ES SALAAM

CRIMINAL APPEAL NO. 199 OF 2015

[Originating from Morogoro District Court Criminal Case No. 102 of 2013]

HAMISI ANTON APPELLANT

VERSUS

THE REPUBLIC RESPONDENT

Date of last order - 24/3/2016
Date of Judgment - 3/5/2016

J U D G M E N T

Kitusi, J.:

HAMISI ANTONY, the appellant was charged with Rape Contrary to Section 130 (1) (2) (e) and 131 of the Penal Code [Cap 16 R.E. 2002]. He was found guilty and convicted by the District Court of Morogoro sitting at Morogoro. The court sentenced the appellant to thirty 30 years imprisonment.

He has appealed hereto expressing his dissatisfaction with the conviction in a four ground Memorandum of Appeal which are paraphrased as follows;

- 1) That the learned Resident Magistrate erred in admitting and acting upon Exhibits P1 and p 2 which were unprocedurally tendered.
- 2) The learned Resident Magistrate erred in admitting and acting upon the statement of the victim who did not turn up to testify on oath.
- 3) The learned trial magistrate erred in not drawing an adverse inference on the prosecution's failure to call the appellant's wife and the Village Executive Officer as witnesses.
- 4) That the learned Resident Magistrate erred in convicting him with the offence which had not been proved beyond all reasonable doubts.

The facts that led to the appellant's prosecution and his ultimate conviction may be briefly stated as thus;

The appellant is married to the aunt of Onesta Omari and the said appellant and his wife were staying with Onesta Omari at their residence at Lubazi Village, Kolelo area within Morogoro District. It was alleged that on 23/2/2013 at their said residence the appellant had carnal

knowledge of Onesta Omari who was thirteen (13) years old. The appellant denied committing the offence but three witnesses for the prosecution testified to the satisfaction of the Court that the guilt of the appellant had been provided beyond reasonable doubts.

The testimony of Gido Patrick Mkude (PW3) was that he attended to the victim Onesta Omari in his capacity as a medical doctor. The girl was crying and the people who had brought her told PW3 that she had been raped. PW3's examination of the girl's private parts established presence of bruises, blood and white substance in her vagina and he was settled that the white substance was sperms. He offered treatment and completed the PF3 which had been issued by the police to the victim. The PF 3 which was tendered by PW3 in exhibit shows that the injury in the victim's private parts was caused by a blunt object.

The remaining testimony consists of confessions that the appellant allegedly made following his arrest. The first was before WP 4620 D/CPL Rehema (PW1) a police officer who recorded the appellant's cautioned statement. The cautioned statement was admitted in evidence after an

inquiry had been conducted by the trial court to satisfy itself that it was voluntarily made. The second was before Hon. Iran Msacky (PW2) a Primary Court Magistrate who was stationed at Matombo Primary Court. PW2 testified that he took the appellant's extra judicial statement. The statement was admitted as Exhibit PE2.

In both the cautioned statement (Exhibit PE1) and the extra judicial statement (Exhibit PE2) the appellant narrated how he had been playing cards with Onesta Omari in the morning of 23/2/2013 and that at some point in time the appellant entered into his room. Onesta Omari followed him into the room and took off her clothes inviting the appellant to sexual intercourse with her because she said she was grown up. The appellant considered this to be a test of his potency, so he thought he should prove it by having sex with the girl, and he did. Just then the wife of the appellant entered the room unannounced and found the girl holding her underparts. She raised alarms and the appellant was arrested and subsequently charged.

The learned trial magistrate entered conviction against the appellant on the ground that the victim was under the

age of eighteen years and that under the law consent of a girl victim who is below that age is immaterial. The law is indeed clear that consent of a female victim of rape is immaterial if she is below eighteen years. The provisions state;

“130 (2)

A male person commits the offence of rape if he has sexual intercourse with a girl or a woman under circumstances falling under any of the following descriptions:

- a) Not relevant*
- b) Not relevant*
- c) Not relevant*
- d) Not relevant*
- e) With or without her consent when she is under eighteen years of age, unless the woman is his wife who is fifteen or more years of age and is not separated from the man”.*

At the hearing of this appeal, the appellant stood for himself while the Republic was represented by Ms Paulina Fungameza learned State Attorney. The learned State

Attorney addressed the Court first, an arrangement that suited the appellant well, him being unrepresented as aforesaid.

When she addressed the Court the learned State Attorney announced her support for the appeal on the ground that there was no proof of the age of the victim. She cited a decision of the Court of Appeal in the case of **Andrea Francis V. Republic**, Criminal Appeal No. 173 of 2014, Court of Appeal at Dodoma (unreported) to support her view that proof of age is important in a charge of rape under Section 130 (2) (e) of the Penal Code.

It is true that in rape under Section 130 (2) (e) of the Penal Code which, in the course of time has been called “*statutory rape*,” proof of age of the victim is mandatory.

In the case of **Andrea Francis** cited to me by Ms Fungameza it was held in relation to proof of the age of the victim of statutory rape;

“With respect, it is trite law that citation in a charge sheet relating to the age of an accused person is not evidence.”

Likewise, the citation by a magistrate regarding the age of a witness before giving evidence is not evidence of the person's age ... In other words, in a case such as this one where the victim's age is the determining factor in establishing the offence, evidence must be positively laid out to disclose the age of the victim."

That is the position even when the victim of the rape turns up to testify in court. The present case is worse because not only is evidence of the victim's age from other witnesses lacking but even the victim herself did not turn up to testify.

As correctly submitted by Ms Fungameza learned State Attorney, this point is sufficient to dispose of this appeal. When she had finished addressing the court, the appellant simply endorsed her able submissions.

For the reason that there was no proof of the age of the victim of statutory rape which proof is mandatory, this appeal is therefore allowed. Consequently the judgment of

Morogoro District Court is quashed and the sentence of thirty (30) years imprisonment imposed on the appellant is set aside. The appellant should immediately be released unless otherwise lawfully held.

I.P. Kitusi

JUDGE

3/5/2016

Coram: Hon. Kitusi, J.
For the Appellant: Present
For the Respondent: Paulina Fungameza, SA
C.C.: Banza

Ms Fungameza:

The appeal is for judgment. We are ready.

Court:

Judgment delivered in court in the presence of the appellant, unrepresented, and Ms Fungameza, SA for the Respondent Republic this 3rd day of May, 2016.

I.P. Kitusi

JUDGE

3/5/2016