

IN THE HIGH COURT OF TANZANIA

AT DAR ES SALAAM

CRIMINAL APPEAL NO. 42 OF 2018

RAJABU HASSAN..... APPELLANT

VERSUS

THE REPUBLIC..... RESPONDENT

30/5/2018 & 4/6/2018

JUDGMENT

I.P.KITUSI,J

Rajabu Hassan is serving a Custodial sentence of 30 years having been charged and convicted for Rape contrary to section 130(1), (2) (e) and 131 (1) of the Penal code, before the District Court of Bagamoyo at Msoga.

It was alleged before the trial court that on 25th March 2016 at about that 18.00 hours at Mdaula Village within Bagamoyo District in Coastal Region Rajabu Hassan, hereafter the appellant, had carnal knowledge of one Amina Hamisi who was 13 years old. The prosecution led evidence of Amina Hamisi(PW3) who stated that on the material day her aunt Rehema Yusuph (Pw2) sent her to buy buns from the shop. While proceeding to the shop the appellant called her into his room where he undressed her and had sexual intercourse with her.

Pw3 who is a school girl disclosed her experience to a female teacher (headmistress) on the next day when she went to school. It

was after Godfrey Kisobo (Pw4) also a teacher overheard pupils talking about a rape incident involving Pw3. Thus Pw4 had Pw3 interrogated by a female teacher during which she disclosed the truth of the matter. Pw2 was summoned to the school where the teachers informed her about Pw3's behavior and the alleged rape.

The matter was reported to the village authorities, Fatuma Ismail (Pw5) a Harmlet Chairperson then to the police. Pw3 underwent medical examination before Victor Bamba (Pw1) 13 days later and his conclusion was that the girl had sexual intercourse before because her hymen had been perforated.

In defence the appellant denied the allegation and narrated how he received a call from the OCS of Mdaula, 11 days since the alleged rape and that he turned up at the police after the call, only to be arrested. He was initially charged in court on 8 April 2016 but he was discharged on 21 March 2017. The appellant alleged that the case has been framed up by the Kisebengo's, a clan that its members hate him for no apparent reason.

The trial court took the view that the appellant's defence was an afterthought and that he had failed to explain why the Kisebengo's only picked on him and not any other person. The learned Resident Magistrate was satisfied that Pw3 had been raped and that it was the appellant, and nobody else, who had perpetrated it. He was therefore convicted and sentenced to 30 years.

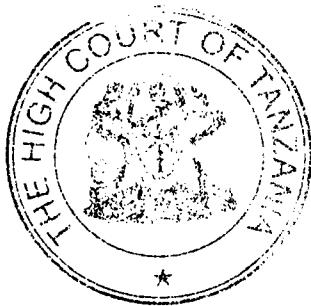
The appellant raised ten grounds to challenge the conviction and sentence mainly criticizing the prosecution witnesses who the trial court wrongly relied on in finding him guilty. He also faulted the trial court for not considering the defence case. On ground 9 he raised the issue of failure on the part of the prosecution to prove the age of the victim, while on ground number 10, the appellant attacked Pw3's testimony for having been taken without there being a voir dire examination.

At the hearing the appellant was unrepresented and made no efforts to expound on the grounds of appeal. The petition of appeal was however accompanied by two unreported decisions of the Court of Appeal that the appellant considered relevant to the case at hand. These are **Christopher Kandidius V. Republic** Criminal Appeal No. 394 of 2015 at Dar es Salaam(unreported) and ; **Charles Mlande V. Republic**, Criminal Appeal No. 270 of 2013 at Dar es Salaam(unreported).

The respondent Republic was represented by Ms Ellen Masululi learned State Attorney who supported the appeal on one ground which is failure to prove the age of the victim, a ground also raised by the appellant. The learned State Attorney cited the case of **Andrea Francis V. Republic**, Criminal Appeal No. 173 of 2014, CAT at Dodoma (unreported) to support her submission that proof of age is mandatory when one is charged with statutory rape under section 130(1) & (2) (e) of the Penal Code.

With respect, I cannot agree with the learned State Attorney more. It is now settled law that in cases of statutory rape as the present, the prosecution has a duty to prove the age of the victim. I had the occasion of making a similar decision in **Hamisi Anton V. Republic**, Criminal Appeal No. 199 of 2015, High Court , Dar es Salaam District Registry (unreported) in which the case of **Andrea Francis V. Republic** (supra) was referred.

In this case the prosecution did not prove the age of the victim and thus failed to prove an important element. Consequently the conviction entered against the appellant cannot stand. It is hereby quashed and the sentence is set aside. The appellant should be immediately set at liberty if not otherwise lawfully held.




I.P. KITUSI

JUDGE

4/6/2018