IN THE HIGH COURT OF TANZANIA

AT DAR ES SALAAM

CRIMINAL APPEAL NO. 40 OF 2018

(Original Criminal Case No. 352 Of 2015)

ATHUMANI MUSSA .....APPELLANT

VERSUS

THE REPUBLIC .....RESPONDENT

14/5/2018 &19/7/2018

JUDGMENT

I.P.KITUSI,J

Athuman Mussa the appellant, appeals hereto against the conviction and sentence for statutory rape with which he was charged before the District Court, contrary to section 130(1) (2) (e) and 131(1) of the Penal Code [cap 16 R.E. 2002]

It was alleged at the trial that on diverse dates between April and September 2013 at Mbezi Makabe area within Kinondoni District Dar es Salaam Region the appellant had carnal knowledge of a girl aged 10 years known as Sarah Christopher.

The appellant had also been charged under the second count, with Unnatural Offence Contrary to section 154(1) (a) of the Penal Code, it being alleged that on the same diverse dates at the same

place as in the first count the appellant had carnal knowledge Sarah Christopher aged 10 years against the order of nature.

The appellant was found not guilty and acquitted of the second count.

The case for the prosecution was that the appellant was working at a Bar known as Jack Pub as a security guard and in discharge of these duties he had a room with a mattress to sleep in. On the fateful day in around September 2013 Sarah Christopher (Pw3) was at the said Pub watching Television at night. When the Pub was closed and as (Pw3) was setting off to go home the appellant motioned for her to his room where he undressed her and had sex with her.

Pw3's version is that she had sex with the appellant from 8.00 P.m up until 4.00 a.m when he escorted her to her home where upon being probed by her mother she lied to her regarding where she had spent the right.

Rosemary Paul (Pw2) the mother of Pw1 testified that on 29 August 2013 her daughter (Pw3) went missing from 16.00 hours and she was not seen until 10.00 hours when she was seen in the house of Pw2's neighbor. However Pw3 lied to Pw2 by telling her that she had spent the night in a nearby unfinished house. The truth only came when Pw2 decided to beat up the girl, for fear of which she disclosed that she had been ravished by the night security guard in whose room she had spent the night.

Pw2 verified Pw3's story by checking her private parts where she saw traces of blood and mucus. She reported the matter to police and obtained a PF3. She took Pw3 for Medical examination which was conducted by Asia Ngoma Ally (Pw4). The Pf3 was tendered by Pw4 and admitted as Exhibit P3 despite the appellant's objection that he did not know its contents.

Pw4's findings were that Pw3 had sexual intercourse although it was not possible to tell the dates when that took place. On receipt of the PF3 with those findings D/Sgt Rukia (Pw1) who had been assigned to investigate the case prepared the charge against the appellant who was already in custody.

When cross- examined by the appellant as to the age of the victim, Pw2 stated that she was 12 years as of the date of giving the evidence, on 9 October 2014.

In defence the appellant denied having sex with Pw3 and accused Pw2 for concocting the case on the basis of a grudge she held against him. He stated that he was a night security guard for the Bar or Pub as well as a tape from where people drew water on payment of money. The essence of the grudge, he said, was a previous demand by Pw2 that she be given water by the appellant, at night when the person responsible had already left. When the appellant refused to give water to Pw2 she became mad about it and promised to do something that would make him regret. He never took Pw2's threat seriously until he was arrested and charged.

The appellant said he did not even know Pw3.

The trial court accepted Pw3's story that it was the appellant who raped her, and found the defence too improbable to raise a reasonable doubt. The learned Resident Magistrate considered it a 'miracle' that the appellant would admit knowing Pw2 but deny knowing the latter's daughter who lived in the same house with the mother. The appellant was convicted as earlier shown, and was sentenced to 30 years imprisonment. He was further ordered to compensate the victim by paying her shs 1,000,000/=.

This appeal raises six(6) grounds which may be summarized as thus;

1) Faults the conviction based on the evidence of Pw3 whose testimony was recorded after an invalid Voir dire test.
2) Complains against the conviction entered in a case in which there was a variance between the charge and evidence.
3) Raises the issue of failure to call material witnesses.
4) Questions the veracity of Pw2 and Pw3.
5) Questions the fact that there was no blood in the victim's vagina.
6) Faults the trial court for entering conviction in a case where the age of the victim was not proved.

At the hearing of this appeal Ms Rachael Magambo learned state Attorney who stood for the respondent supported the conviction and addressed the grounds of appeal. She was the first to address the

court after the appellant intimated that he had nothing to say in addition to the grounds.

The learned State Attorney submitted that the Voir dire examination was conducted properly and the court was satisfied that the victim witness understood the meaning of telling the truth. She then addressed grounds 3 and 4 together by submitting that in sexual offences the evidence of the victim is the decisive one. She referred to section 127(7) of the Evidence Act to support that argument then cited section 143 of the same Act for the principle that there is never a particular number of witnesses required to prove a case.

On the complaint that the blood stained underpant was not tendered or that no blood was detected in the victim's private parts she submitted that the victim was examined three days after the rape and her hymen was found to have been perforated. She submitted that in law, penetration however slight is sufficient to prove rape. She added that it is true that the victim may have been carnally known by some other men before but in this particular incident it is the appellant who perpetrated it.

As regards the age, Ms Magambo submitted that the age must be taken to be that appearing in the charge sheet.

With respect to the learned State Attorney this appeal arises from a conviction on statutory rape where consent of the victim is immaterial but the age of that victim is central.[See the Case of **Gerald Daudi V. Republic** Criminal Appeal No. 591 of 2018 CAT

(unreported) which I had the occasion to c ite in the case of **Omary Yusuph Mkurungwa V. Republic**, Criminal Appeal No. 290 of 2016, High Court Dar es Salaam District Registry [(unreported)].

Since in this case the age of the victim was not proved it means that the prosecution failed to prove an important ingredient of the offence. I do not take the age mentioned in the charge as being proof of that age as Ms Magambo would have me do.

For that reason I find merit in the appellant's sixth ground of appeal. Consequently I allow the appeal for that ground alone, quash the conviction and set aside the sentence which would have been illegal anyway if the victim was 10 years as it had been alleged.

The appellant should be released forthwith if not otherwise held for another lawful cause.

I.P.KITUSI

JUDGE

19/7/2018

Date : 19/7/2018

Coram: Hon. Tiganga, Dr

Appellant: Present in person .

Respondent : Ms Theresia Mkaki State Attorney

Cc: Banza

Order – Judgment delivered in open chambers is the presence of the parties as so per coram.

J.C. TIGANGA

DR

19/7/2018

Right of Appeal Explained and guaranteed.

J.C. TIGANGA

DR

19/7/2018