

**IN THE HIGH COURT OF TANZANIA
IN THE DISTRICT REGISTRY
AT MWANZA**

HC. CRIMINAL APPEAL NO. 123 OF 2020

(Original Criminal Case No. 101 of 2020 of the District Court of Bukombe at Bukombe)

MUSA MALENDEJAAPPELLANT

VERSUS

THE REPUBLIC.....RESPONDENT

JUDGMENT

02 & 12/11/2020

RUMANYIKA, J.:

The appeal is against conviction and concurrent custodial sentence of thirty (30) years for each one of the counts of rape and impregnating a school girl Contrary to Section 130 (1) (2) (e) and 131 (1) of the Penal Code Cap 16 RE. 2019 (the code) and Section 60A (3) of the Education Act Cap 353 as amended by Section 22 of the Misc. Amendment Act No. 2 of 2016 respectively.

The 5 grounds of appeal revolve around and they may boil down to 3 points essentially.

- (i) That in fact the appellant's plea was equivocal.
- (ii) That the conviction solely based on hearsay evidence.
- (iii) That the victim was in evidence not proved a school girl.

Whereas the appellant appeared in person, Mr. V. Karumuna learned senior state attorney appeared for the respondent Republic and readily supported the appeal only for the reason that actually the appellant's plea "NI KWELI" was, contrary to Section 228 (1) of the Criminal Procedure Act Cap 20 RE. 2019 equivocal the entire records therefore be remitted to the trial court for the latter to do the needful. That is all.

The appellant, apparently a layman he just prayed for acquittal. That is it.

The central issue is whether with respect to both counts the appellant's plea was unequivocal. The answer is no. Reasons are; **One** the appellant may have responded with the words "it is true" to the charges yes, but that one referred only to one having had love affairs with a secondary school girl not impregnating her much as with respect to the pregnancy there was no evidence adduced to or proof that the appellant was the responsible father. **Two**; the victim may have been a child hence the charges of statutory rape under the code yes, but unlike in charges of ordinary rape where essential ingredient was lack of the victim's consent, for statutory rape the victim's consent was immaterial except that the victim was only proved being under age. In the present case the prosecution case lacked the essential ingredient. However, through his cautioned statement (Exhibit MM-I) the appellant may have confessed the charges of rape yes, but there is nowhere in the Exhibit where he confirmed the victim being under age. It would have been a different scenario had the material facts narrated by the public prosecutor shown the victim's birth certificate, the baptismal certificate, the clinic card or the

school enrollment register as the case may be. It is very unfortunate that the victim's age was only stated. I think where, in a case of statutory rape the victim's age was only stated (not proved), such doubts shall only be cleared in favor of the accused in which case therefore as I shall hereby do, the victim shall be considered to be adult. Now that according to him (Exhibit MM-I) the appellant and the victim had been a boy and girl friend, and this time around he had sexual intercourse invited home by her, the charges of rape should not even have been laid at the appellant's door.

The appeal is entirely allowed. Unless he was retained for some other lawful causes, the appellant be released immediately from the prison. It is so ordered.

Right of appeal explained.



S. M. RUMANYIKA

JUDGE

09/11/2020

The judgment is delivered under my hand and seal of the court in chambers this 12/11/2020 in the absence of both parties with prior notice.



J. M. KARAYEMAHA
DEPUTY REGISTRAR

12/11/2020