

**IN THE HIGH COURT OF TANZANIA
(MTWARA DISTRICT REGISTRY)**

AT MTWARA

CRIMINAL APPEAL NO. 1 OF 2020

**(Arising from Criminal Case No. 82 of 2018 of the District Court of
Mtwara at Mtwara)**

THE DIRECTOR OF PUBLIC PROSECUTIONS.....APPELLANT

VERSUS

HAMIS MOHAMED @ NAUDENDE.....RESPONDENT

JUDGMENT

3rd & 10th Nov. 2021

DYANSOBERA, J:

This appeal takes exception to the decision of the District Court of Mtwara in Criminal Case No. 82 of 2018 whereby the respondent herein was acquitted of the offence of rape contrary to Sections 130 (1), (2) (e) and 131 (1) of the Penal Code [CAP 16 R.E.2019]. The said acquittal aggrieved the appellant hence this appeal. In the petition of appeal the appellant is complaining that:-

1. That the Honourable trial Magistrate erred in law and fact for failure to appreciate the prosecution evidence which proved the case beyond reasonable doubt.

Briefly, the facts of the case were the following. The victim who testified at the trial as PW 1 was, in 2018, sixteen years old. She was schooling in Form One at Sino Secondary School. Her mother is Asha d/o Salum (PW 2), a resident of Magomeni kwa Mtawike. After PW 2 discovered that the victim was absenting herself at home but was at Naliendele at the respondent, she reported to the Police Station. The hounds of justice managed to apprehend the respondent after the victim led them there. According to the victim, she was staying at the respondent and was having sexual intercourse for almost a week. She asserted that she knew the respondent and had known him since March, 2018 and that he is a bodaboda motorist. She recalled that between 9.3 and 15.3.2018 she was at the respondent's home after the latter had called her for sexual intercourse, having been thereat she had sexual intercourse with him. She was emphatic that during the period she was at respondent's home they had sexual intercourse thrice. In returning her back to her home they used a motor cycle, they did this after they had received information that the victim was being looked for and her absence had been reported to the police station. PW 3 medically examined her and established that she was experienced in sexual intercourse. She produced as exhibit the PF 3 (exhibit P 1).

PW 4, WP 5840 tendered in court the respondent's cautioned statement exhibit P 2.

After the trial court ruled that the accused had a case to answer, the respondent stated at page 26 of the typed proceedings:-

'I choose not to defend my case'

The public prosecutor then prayed for judgment and the respondent remarked that he had nothing to say.

In his judgment delivered on 2nd day of January, 2019, the learned trial Resident Magistrate acquitted the respondent mainly on two grounds. One, that credible evidence which was given by the victim needed corroboration and two, the caution statement could not corroborate such evidence as it was inconsistent with the law, the Criminal Procedure Act, in particular.

At the hearing of this appeal, the appellant was represented by Mr. Wilbroad Ndunguru, learned Senior State Attorney, while the respondent did not make any appearance despite being served by substituted service by way of publications. The appeal was, therefore, heard ex parte.

Supporting the appeal, the learned Senior State Attorney submitted that the appellant's complaint is that the evidence was sufficient to prove the charge beyond reasonable doubt. According to him, the offence was rape –statutory rape and there were three elements to be proved. Age, penetration and the respondent's involvement. In his view, the age of the victim was proved as she was under 18 years (p. 8 of the typed proceedings) where the victim was testifying that she was 16 years of age born in 2002, a fact which was confirmed by PW 2 Asha Salum.

As to penetration, Mr. Ndunguru submitted that the victim was clear that on the material date she was at the respondent and had been living together. He thought the trial court erred in finding that since the victim was familiar with sexing and that is why there were no signs of rape, that was misdirection, learned Senior State Attorney remarked.

It was further contended for the appellant that it was also a misdirection on part of the trial court which required corroborative evidence; the requirement being violative of Section 127 (7) of Evidence Act which states that there is no need of seeking corroborative evidence. He said that the trial to court was aware of the credible evidence of the witness and for that reason, it was wrong to require corroborative evidence, Mr. Ndunguru stressed. On the proof of penetration, Mr. Ndunguru argued that the victim detailed how she became

involved in sexual relationship with the respondent emphasising that the evidence was strong against the respondent to found conviction.

With regard to the evidence of PW3 who tendered the PF3, the learned Senior State Attorney informed the court that such exhibit was improperly admitted in court as its contents were not read out in court. He prayed the court to expunge it from the record maintaining, though, that the available evidence sufficiently proved the case against the respondent. He prayed this appeal to be allowed and the respondent be convicted and sentenced accordingly.

Having considered the trial court's record, I am satisfied that the PF 3 whose contents were not read out was improperly admitted in evidence. Accordingly, I expunge it from the record.

Now on the merits of the appeal. As indicated above, one of the reasons that led the learned Resident Magistrate to acquit the respondent was that that credible evidence which was given by the victim needed corroboration. With respect, I accept the position taken by the learned Senior State Attorney that that was a misdirection on part of the learned trial Resident Magistrate. In the first place, the law that is Section 127 (7) of Evidence Act [CAP 6 R.E.2019] is clear that:-

(7) Notwithstanding the preceding provisions of this section, where in criminal proceedings involving sexual offence the only independent

evidence is that of a child of tender years or of a victim of the sexual offence, the court shall receive the evidence, and may, after assessing the credibility of the evidence of the child of tender years or as the case may be the victim of sexual offence on its own merits, notwithstanding that such evidence is not corroborated, proceed to convict, if for reasons to be recorded in the proceedings, the court is satisfied that the child of tender years or the victim of the sexual offence is telling nothing but the truth'.

Second, that position was settled by the Court of Appeal in the case of **Habibu Mtila v. R**, Criminal Appeal No. 416 of 2018 (CAT-Dar-Unreported) in the following terms:-

'It is now trite position that in a sexual offence case, the only independent evidence of the victim of the offence, including a child of tender age, may be sufficient to prove penetration notwithstanding that such evidence is not corroborated'

In the case under consideration, the learned trial court was satisfied that the evidence of the victim was credible. He is recorded to have said:

'it is only an experienced girl, in sexual intercourse, who can have sexual intercourse, with a man for a week consecutively as it occurred to the

victim girl in this case. Of course, I am aware on the credible evidence which is given by the victim...'.
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The fact that the learned trial Magistrate was satisfied that the respondent had sexual intercourse with the victim is also clear at p. 8 when he is recorded to have said:

'This means that the rape said to have been committed by the accused was just a continuation'.

Likewise, the fact that the appellant had sexual intercourse with the victim was clear from the victim's own version when giving her testimony that:-

'I know Hamis Mohamed Naudende since March, 2018..he is a bodaboda motorist.

As between 9.3 and 15.3.2018 I was at Hamis Mohamed Naudende's home. I went there after he had called me for sexual intercourse, having been thereat I had sexual intercourse with him.

So, during the period I was at Naudende's home we had sexual intercourse thrice. In returning me back to my home they used a motor cycle, they did this after we had received information that I was being found and my absence was reported at the police station'.

All this evidence proved penetration. With regard to the victim's age, she was clear that she was sixteen years old and was schooling in Form One at Sino Secondary School. PW 2, the victim's mother told the trial court that the victim was born in 2002 which means that in 2018 when the offence was committed and when she was testifying she as sixteen years of age.

As rightly submitted by learned State Attorney, the ingredients of statutory rape that is penetration and the age of the victim were proved beyond reasonable doubt. Likewise, the evidence tendered, particularly that of the victim implicated the respondent.

I find that the prosecution had proved the case against the respondent beyond reasonable doubt. The acquittal was against both the evidence and the law.

The appeal is allowed, the acquittal of the respondent is quashed and set aside. The respondent is, accordingly, convicted of the offence charged.

W. P. Dyansobera

Judge

10.11.2021

Antecedents: Mr. Wilbroad Ndunguru, learned Senior State Attorney:

The respondent is a first offender. We pray that he be punished according to law. Since he is absent, a warrant of arrest to be issued.

SENTENCE

The respondent is sentenced to thirty (30) years term of imprisonment. The respondent to start serving the sentence after his being apprehended. A warrant of arrest to be issued for that purpose.

Order accordingly.



[Signature]
W.P.Dyansobera

Judge

10.11.2021

Judgment has been delivered this 10th day of November, 2020 in the presence of Mr. Wilbroad Ndunguru, learned Senior State Attorney for the appellant but in the absence of the respondent.



[Signature]
W.P.Dyansobera

Judge