

IN THE HIGH COURT OF TANZANIA
IN THE DISTRICT REGISTRY OF SHINYANGA
AT SHINYANGA

CRIMINAL APPEAL NO. 60 OF 2021

MUYANGA GEMBE.....APPLICANT

VERSUS

REPUBLIC.....RESPONDENT

[Appeal from the Decision of District Court of Maswa at Maswa.]

(Hon. E.S. MISSANA RM)

dated the 27th day of August, 2020
in
Criminal Case No. 77 of 2020

JUDGMENT

27th April & 8th July, 2022.

S.M KULITA, J.:

Muyanga Gembe, referred to as the Appellant in this appeal, was charged in the District Court of Maswa for Rape, contrary to the provisions of section 130(1)(2)(e) and 131(1) of the Penal Code [Cap. 16 RE 2019]. It is in the particulars of offence that, on the 20th day of May, 2020 at Mwamanenge village within Maswa District in Simiyu Region the accused

person, Muyanga Gembe (Appellant herein) did rape the victim who is aged 15 years old.

In a nutshell the prosecution case as it was unfolded by its witnesses is that, on the material date, the Appellant seduced the victim to have sex with her. After her denial to fulfil the Appellant's need, there happened a chance when the victim was alone coming from their farm. On that day, the Appellant forcefully undressed her and had sex with her. Thereafter, the victim ran to their home and informed her father who reported the ordeal and took the victim to hospital where in the medical examination sperms were found in the victim's vagina. From there, the Appellant was hunted down, arrested and thereby the case was instituted.

On his part, the Appellant denied to have raped the victim. He insisted that, the parents of the victim have land dispute with his family. To him this was the cause of this case.

At the conclusion of the trial, the Appellant was accordingly found guilty, and upon conviction, he was sentenced to serve the imprisonment of 30 (thirty) years. This was 27th day of August, 2020.

Aggrieved with that decision, the Appellant preferred the instant appeal relying on eight grounds which can be summarized as follows:

One, that the case was not established at the required standard; **two**, the prosecution evidence was weak and involved hearsay; **three**, the prosecution evidence was with contradiction on point of the time for the commission of the offence; **four**, the trial court disregarded the fact that the Appellant was a minor by the time of commission of the offence; **five**, the victim's age was not established; **six**, the PW3 (Doctor) never stated the time he examined the victim and never linked the Appellant with the one who had raped the victim; **seven**, the trial court disregarded the fact that there are grudges between his parents and those of the victim on the land matter.

The appeal was heard on 27th of April, 2022. The Appellant appeared in person whereas the Respondent, Republic had the service of Ms. Gloria Ndondi, learned State Attorney who resisted the appeal.

It is not in dispute that the Appellant was charged with statutory Rape, that is under section 130(1)(2)(e) of the Penal Code [Cap 16 of RE 2019]. The said section provides; -

"130.-(1) It is an offence for a male person to rape a girl or a woman.

(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) N/A

(b) N/A

(c) N/A

(d) N/A

(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”.

In **Solomon Mazala v. Republic, Criminal Appeal No. 136 of 2012, CAT at Dodoma** it was held to the effect that, for a statutory rape conviction to stand, the age of the victim must be established. The said court stated;

"The cited provision of the law makes it mandatory that before a conviction is grounded in terms of Section 130 (2)(e), above, there must be tangible proof that the

age of the victim was under eighteen years at the time of the commission of the alleged offence”.

In the case of **Andrea Francis vs. Republic, Criminal Appeal No. 173 of 2014** (unreported) it was stated;

“... it is trite law that the citation in a charge sheet relating to the age of an accused person is not evidence. Likewise, the citation by Magistrate regarding the age of a witness before giving evidence is not evidence of that person’s age.”

With this above quote, it goes without saying that, what proves the age of the victim is only the witness’ testimonies and the exhibits tendered to court on that issue, not the age mentioned in a charge sheet or particulars of the witness before he/she had started to give evidence.

In this appeal, the Appellant in ground number five of the appeal complained that, the victim’s age was not proved. During submissions, Ms. Ndoni stated in rebuttal that, at the trial court the victim testified that her age is 15 years and that she was born on 1/12/2015. Her father too testified that the victim was of 15 years of age and that she was born on 14/12/2015. According to Ms. Ndoni the said discrepancy appearing

on the birth date of the victim is a mere slip of the pen, and it is minor one that does not go to the root of the matter.

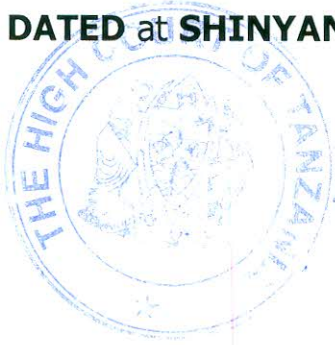
However, in the charge sheet, the offence is said to have been committed on 20th May, 2020. For the victim who has been termed to have been born in the year 2015, it is expected that, the testimonies on the age would title the victim with only five years. For that matter it cannot be said that the victim was of 15 years of age.

With all these above discrepancies, one cannot term them as minor. As age of the victim is a very crucial issue in the statutory rape, with the prevailing evidence available in records, the age of the victim is uncertain. On that account, I am settled in my mind that the age of the victim was not proved at all.

In view of the foregoing reason, I hereby allow the appeal, quash the conviction and set aside the sentence. I further order that the Appellant be released from prison, unless otherwise lawfully held.


S.M. KULITA
JUDGE
08/07/2022

DATED at **SHINYANGA** this 8th day of July, 2022.



A handwritten signature in blue ink, consisting of stylized initials and a surname.

S.M. KULITA

JUDGE

08/07/2022