

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

AT MTWARA

CRIMINAL APPEAL NO. 39 OF 2022

(Originating from Criminal Case No. 55 of 2020 Lindi District Court at Lindi)

HAMISI MOHAMED BAKARI.....APPELLANT

VERSUS

THE REPUBLIC..... RESPONDENT

JUDGMENT

Muruke, J.

Hamisi Mohamed Bakari, the appellant was arraigned and charged before Lindi District Court with an offence of rape contrary to section 130 (1) (2) (e) and 131 (3) of the Penal Code Cap 16 R.E 2019. He was found guilty, convicted and sentenced to 30 years' imprisonment. Being dissatisfied, he has filed present appeal, raising two grounds articulated in the petition of appeal.

At the hearing stage, appellant who was unrepresented requested for his ground of appeal to be received as his submission in Chief reserving right to make rejoinder. Respondent was represented by Wilbroad Ndunguru Senior State Attorney supported conviction and sentenced meted by trial court. He further submitted that, appellant was charged for raping a child below 18 years, in which four elements must exist to prove statutory rape.



One age of victim, two, penetration, three, identification of the rapist, four, credibility of the victim evidence. Learned State Attorney insisted that age of victim was proved by PW4 Doctor Fidelis Clarence Junguru who testified at page 12 of typed proceeds that victim was 11 years. More so, issue of penetration was proved by the victim herself at page six (6) of trial typed proceedings, and medical doctor PW4.

Appellant was identified by the victim not only by face but by name when she mentioned his name to PW3, PW2, and PW5. Victim was credible witness as she testified coherently insisting that she was raped by appellant as seen at page seven (7) of proceedings. State Attorney argued this court to dismiss ground one. On ground two complaint was failure by trial court to take on bond defense case. At page 6, 7, 8 and 9 of typed judgment defense has been taken on board seriously, thus ground lacks merits. In totality Respondent counsel argued court to dismiss the appeal.

From the charge sheet, and evidence paraded, this is statutory rape because the victim PW1 was aged 11 years as correctly proved by PW4 medical Doctor, thus first essential element of statutory rape has been proved. Penetration, was proved by victim herself PW1, PW3 her Aunt, and PW4 medical Doctor. Victim identified the appellant at the dock. More so, she mentioned appellant immediately to PW3 and PW2 after the incident. Appellant also admitted that they live nearby in the same village and victim plays with his daughter who is a primly school pupil. Victim evidence was credible after trial court conducted *voire- dire* test and victim promised to tell the truth. Thus trial court remarked to have complied with section 127 (2) of the TEA Cap 6 R.E 2002.



Having observed as above, it necessary to reproduce what appellant said in his rejoinder submission: -

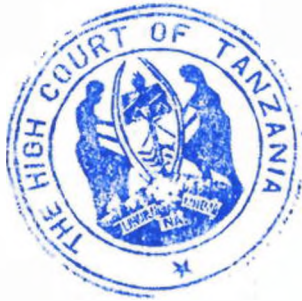
"I am now 62 years old. It is true I raped the victim the girl. I pray that court release me. I have suffered a lot. I pray for leniency. My wife is at Ng'apa she has not visited me even once, with my children. What Respondent counsel said is true. I regret a lot. I pray for lenience".

While accused, was saying the above words, was very confused, unstable shaking, sweating, breathing with difficulties. When court inquired, as to what was happening he kept quiet for some time, then replied that, he suffered metal illness longtime ago, but now his health has deteriorated to the extent of losing memory. Even in prison, he has problem of losing memory, and there is a lot of harassment due to ill health. His hands are now shaking he cannot hold things properly.

I have considered trial court records, and appellant health status. I have noted also issue of failure of charge to disclose the offence as being anomaly that cannot be curable under section 388 of the Criminal Procedure Act (CPA). Appellant was not able to defend himself for lack of particulars in the charge sheet. He was denied his right to defend himself properly contrary to principal of right to be heard, one of the principles of natural justice. He is sick and old.



In totality conviction is quashed. Sentenced is set aside, appellant be released unless lawfully held with other offences.




Z. G. Muruke

Judge

25/11/2022

Judgment delivered, in the presence of appellant and Enosh Kigoryo State Attorney for the respondent.




Z. G. Muruke

Judge

25/11/2022