

**IN THE COURT OF APPEAL OF TANZANIA
AT DODOMA**

(CORAM: MBAROUK, J.A, MZIRAY, J. A. And MWAMBEGELE, J.A.)

CRIMINAL APPEAL NO. 152 OF 2016

TANO MBIKA APPELLANT

VERSUS

THE REPUBLIC RESPONDENT

(Appeal from the decision of the High Court of Tanzania at Dodoma)

(Makuru, J.)

**dated 17th day of July , 2013
in**

Criminal Appeal No. 7 of 2010

JUDGMENT OF THE COURT

27th February, & 7th March 2018

MZIRAY, J.A.:

The appellant, Tano Mbika, was charged with and convicted in Mpwapwa District Court of the offence of rape contrary to sections 130(2)(e) and 131 (1) of the Penal Code, Cap. 16 R.E. 2002. He was alleged to have carnal knowledge of one Zipora Mazengo, a girl of 16 years, on 2/10/2008. He was sentenced to 30 years imprisonment and in addition to be inflicted eight strokes of the cane. His appeal to the High

Court was dismissed in its entirety. Undaunted, the appellant has filed this second appeal.

Briefly stated, the facts as found at the trial court were that, on 2/10/2008 at around 19.00 hrs, the victim, Zipora Mazengo (PW1) was on her way home from selling cakes of ground lentils (bajia). All of a sudden, the appellant appeared. He held her hand and pulled her into the bush where he undressed her. He then forced her to the ground and had sexual intercourse with her. In the exercise, PW2 (Judith Mazengo), the victim's mother who was by the time searching for her daughter found the appellant raping her somewhere under a baobab tree. It was testified further that in the effort to stop the act, PW2 pulled the appellant's trouser. The appellant stood up and punched her using his fist. PW2 fell down and the appellant fled. The matter was reported to Mpwapwa Police Station where a PF3 was issued to PW1 to be medically examined. Subsequently, the appellant was arrested and charged in connection with the offence.

In his defence, the appellant denied to have committed the offence and maintained that the case is just a frame up against him.

In this appeal, the appellant has lodged a memorandum of appeal advancing eight grounds of appeal namely;

- 1. THAT, the trial court and first appellate court erred in law and fact for convicting and dismissing the appellant's appeal while the offence of statutory rape is not proved beyond reasonable doubt since the age of the alleged victim was not proved before the court.*
- 2. THAT, the trial court and first appellate court erred in law and fact for convicting and dismissing appellant's appeal relying doubtfully on identification since the alleged offence was committed at night.*
- 3. THAT, the trial court and first appellate court erred in law and fact for convicting and dismissing appellant's appeal considering sketch map of the scene is not listed in the list of exhibits in PH.*
- 4. THAT, the trial court and first appellate court erred in law and fact for convicting and dismissing appellant's appeal*

basing on alleged pardon (confession) of accused without taking him to the justice of peace.

- 5. THAT, the trial court and first appellate court erred in law and fact for convicting and dismissing appellant's appeal relying on PF3 which is not properly filed and without calling the doctor or informing the appellant the right to call the doctor.*
- 6. THAT, the trial court and first appellate Court erred in law and fact for convicting and dismissing appellant's appeal without considering that some independent witness such as VEO or Village Chairman were not called.*
- 7. THAT, the trial court and first appellate court erred in law and fact for convicting and dismissing the appeal without considering that the trial magistrate analysed evidence in isolation from and memorandum of disputed facts were not read after conclusion on PH*
- 8. THAT, according to my grounds of appeal above, I pray your Honorable Court to declare null and void all the decisions of*

the lower court and allow my appeal in its entirety. And I pray to be present during the hearing date of my appeal.

At the hearing of the appeal the appellant appeared in person, unrepresented, while the respondent Republic was represented by Ms. Beatrice Nsana, learned State Attorney. The learned State Attorney did not support the conviction and sentence meted out by the trial court and confirmed by the first appellate court. In arguing the first ground of appeal Ms. Nsana submitted that the only evidence which the court relied upon to ground the conviction was the evidence of PW1 and PW2. However, she pointed out that throughout the evidence, the age of the victim was not established and proved. She stated that the victim's age features only in the charge sheet where it is averred that the victim was 16 years old. The learned State Attorney, citing the case of **Solomon Mazala V. Republic**, Criminal Appeal No.136 of 2012 (unreported) as an authority which stated that it is mandatory that before a conviction is grounded in terms of section 130(2) of the Penal Code, there must be tangible proof that the age of the victim was under 18 years at the time of the commission of the

alleged offence. She submitted that as the age of the victim was not established and proved in the case at hand, then, the conviction of the appellant was not proper and cannot be sustained. So, it was for this reason alone that the learned State Attorney supported the appeal. She said that this ground alone was sufficient to dispose of the appeal. She asked us to allow the appeal, quash the conviction and set aside the sentence.

When called upon to respond, the appellant entirely agreed with the submission of the learned State Attorney and asked the Court for him to be set at liberty.

At the outset, we entirely agree with Ms. Nsana, learned State Attorney that the first ground of appeal is dispositive of the present appeal. It is not in dispute that the appellant was charged with and convicted of statutory rape but the age of the victim was not established and proved in the case at hand. According to the record of appeal, the victim's age features in the particulars of the offence where it is mentioned that at the

material time she was 16 years old. She testified before the trial court after elapse of about six months where her age was recorded to be 17 years old. In the case of **Andrea Francis V. Republic**, Criminal Appeal No. 173 of 2014 (unreported), we stated that,

"....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 a magistrate regarding the age of a witness before giving evidence is not evidence of that person's age"

Applying the above principle in this case and reasoning by analogy, the citations of the age of the victim in the charge sheet and before giving evidence are not part of the evidence and cannot be used to prove the age of the victim. As rightly held in the case of **Solomon Mazala V. Republic**, (*supra*), in which this Court stated;

".... before a conviction is grounded in terms of Section 130(2), above, there must be tangible proof that the age of the victim was under 18 years at the time of the commission of the alleged offence".

Since in the instant case the age of the victim was not established and proved in evidence, the conviction of rape grounded under Section 130(2) (e) of the Penal Code cannot be allowed to stand.

In the event, and for reasons stated herein above, we allow the appeal, quash the conviction and set aside the sentence. We order that the appellant be released from prison forthwith unless otherwise lawfully detained.


DATED at DODOMA this 3rd day of March, 2018.

M.S. MBAROUK
JUSTICE OF APPEAL

R.E.S MZIRAY
JUSTICE OF APPEAL

J.C.M. MWAMBEGELE
JUSTICE OF APPEAL

I certify that this is a true copy of the Original.


E. F. FUSSI
DEPUTY REGISTRAR
COURT OF APPEAL