

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)

Criminal Appeal No. 7 of 2010

The appellant was charged with an offence of rape contrary to **sections 130 (2) (e) and 131 (1) of the Penal Code, Cap.16 R.E. 2002**; and sentenced to 30 years imprisonment with eight strokes of the cane by Mpwapwa District Court. His first appeal to the High Court was dismissed in its entirety, therefore, filing this second appeal. The facts of the trial court were that on 2/10/2008 at about 19.00 hours the victim, Zipora Mazengo (16), was on her way home when the appellant appeared, held her hand and pushed her into the bush; where he forcefully had sexual intercourse with her. Meanwhile, the victim's mother was searching for her daughter when she found the appellant raping her under a baobab tree. As she tried to stop the act, the appellant allegedly stood up, punched her using his fist and fled the scene. In his defence, the appellant denied the charge and in this appeal, he lodged a memorandum of eight grounds of appeal.

The said grounds of appeal: -

1. The trial court and first appellate court erred in fact and law when convicting and dismissing the appellant's appeal without proving the alleged victim's age before the court.
2. The trial court and first appellate court erred in law and fact for regarding the evidence of identification while the alleged offence was committed at night.
3. The trial court and first appellant court erred in law and fact for considering a sketch map of the scene that was not listed in the list of exhibits in PH.
4. The trial court and first appellate court erred in law and fact for relying on the confession of the accused without taking him to the justice of peace.
5. The trial court and first appellate court erred in law and fact on relying on a PF3 that was not properly filed and not corroborated by the doctor.
6. The trial court and first appellate court erred in law and fact for not calling some independent witness such as VEO or Village Chairman.
7. The trial court and first appellate court erred in law and fact for not considering that the trial magistrate analysed the evidence in isolation and the memorandum of disputed facts were not read after conclusion on PH.
8. That according to the grounds of appeal above, the Honourable Court declares null and void all the decisions of the lower court and allow the appeal in its entirety.

At the hearing of the appeal, the learned State Attorney, Ms. Beatrice Nsana, did not support the conviction and sentence of the trial court on the basis that the age

of the victim was not established and proved. She cited the authority case of **Solomon Mazala v. Republic** to prove that it was mandatory to have tangible proof that the victim's age was under 18 years at the time the offence was committed.

Decision

This court agreed with Ms. Nana that the first ground of appeal was an important ground in the present appeal. What was in dispute was that the age of the victim was not established and proved in the case at hand. In **Andrea Francis v Republic** the court established 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 magistrate regarding the age of a witness before giving evidence is not evidence of that person's age" By applying this principle, the victim's age in the charge sheet and before giving evidence are both not part of the evidence and cannot be used to prove the age of the victim. Therefore, since the age of the victim was not established and proven in evidence, the conviction of rape pursuant **section 130 (2) (e) of the Penal Code** cannot be allowed to stand. The appeal was allowed, the conviction quashed and sentence was set aside.