IN THE HIGH COURT OF TANZANIA
AT SONGEA

DC CRIMINAL APPEAL NO. 12 OF 2016

(Originating from the decision of the Songea District Court in Criminal Case No. 109 of 2015)

ABDUL ADAM @ MSEPULA.....APPELLANT

Versus

THE REPUBLIC.....RESPONDENT

JUDGMENT

Last Order: 27th April, 2016

Date of Judgment: 4th May, 2016

CHIKOYO, J.

On 25/01/2016 the appellant at the Songea District Court (the trial court) was convicted for raping one PRISCA NJOVU (PW1) contrary to **section 130 (1) (2) (e) and 131 (1) of the Penal Code [Cap. 16 R.E 2002]** and as a result, he was sentenced to serve 30 years in jail, and the appellant was ordered to pay PW1 Tshs. 150,000/= as a compensation.

Following the said conviction and sentence, the appellant was aggrieved hence this is his appeal against that judgment, where he has raised six (6)

grounds of appeal, basically the appellant is challenging his conviction and sentence since the prosecution side at the trial court failed to prove the alleged offence beyond reasonable doubts. The facts leading to his appeal are as follows; on 31/08/2015 around 20:00 hrs at Lugagala Village within Songea Rural District in Ruvuma Region after PW1 had prepared *ugali* with her young brother and sister MUSA and ZAKIA, they went to sleep into the room, while PW1's grandmother one HOSANA KILAPILO (PW4) went to a near local pub to see on whether her pombe had already been finished or not. When PW1 was in the room, she heard someone pushing the door, later PW1 discovered that was not her grandmother then PW1 took a torch but when she lighted on, that is when the appellant came directly to PW1 and took that torch, then the appellant took a knife and ordered PW1 to remain quiet, then the appellant removed PW1's underwear and raped her, and after the said incident, the appellant disappeared. PW1 went to report the incident to her neighbor one GERESIANA GAMA (PW3), then PW3 and PW1 went to where PW4 was, and the matter was reported to the police in which Dr. ELIZABETH MUSHI (PW5) from Peramiho Mission Hospital in her findings as per PF3 which was admitted as Exhibit D1 found that the PW1's vagina had been intervened, and PW1 insisted to have identified the appellant at the scene of crime via the light from the torch. However, the

appellant in his defense strongly opposed the said allegation, but at the end of trial, the appellant was convicted and sentenced as stated earlier in the above.

When this appeal was called for hearing, the appellant appeared in person while Ms. Tumaini assisted by Mr. Baligila the learned State Attorneys appeared for the respondent. The appellant in his submissions added more grounds of appeal that, firstly the prosecution side failed to bring a witness to prove on where he was arrested. Secondly the prosecution side failed to call the security chairman who was present when the appellant was arrested and thirdly PW5 testified to have found bruises in PW1's vagina, but PW5 did not state what type of bruises he had discovered.

In reply, Ms. Tumaini strongly opposed this appeal that the prosecution side proved the alleged offence beyond reasonable doubt since PW1 managed to identify the appellant at the scene of crime through a hurricane lamp that is why soon after being raped, PW1 went to PW3 and narrated what the appellant had done to her since PW1 mentioned the appellant's name therein, as a result PW4 was also informed and the appellant was traced and arrested. To support this issue of visual

identification, Ms. Tumaini referred this court the case of **Waziri Amani Versus Republic [1980] T.L.R 250.**

Regarding to the issue of *voire dire* examination Ms. Tumaini submitted that, the trial court was supposed to conduct it before PW1 had testified but according to the case of **Kimbute Otiniel Versus Republic, Criminal Appeal No. 300 of 2011 (CAT-DSM) (Unreported)**, the trial court was correct to consider PW1's testimony even upon conducting a partial *voire dire* examination since the said court was satisfied that, PW1 was only speaking the truth, considering the fact that the best evidence in sexual offences comes from the victim, and to support this position Ms. Tumaini referred this court the case of **Seleman Mkumba Versus Republic [2006] T.L.R 384**. In its totality, Ms. Tumaini insisted that the prosecution side at the trial court proved the alleged offence beyond reasonable doubts as far as the testimonies of PW1, PW2, PW3, PW4 and PW5, thus the appellant's allegation that there were other witnesses were supposed to be called has no merit since by virtue of **section 143 of the Evidence Act [Cap. 6 R.E 2002]** states that, no particular number of witnesses is required to prove any fact. Thus, Ms. Tumaini prayed this appeal to be dismissed. Mr. Baligila pointed out one irregularity in respect

to the appellant's memorandum of appeal which has bared the title of the Court of Appeal instead of the High Court, hence he prayed this memorandum of appeal to be rejected.

Basically, the appellant in his rejoinder insisted that he was not identified at the scene of crime, and he went further by submitting that, he was a strange at that area.

At this juncture, I had to go through the entire court records as well as what has been submitted by both sides, the issue here is whether the prosecution had proved the alleged offence beyond reasonable doubts. However before I determine that issue in merit, there is one major aspect which has drawn my attention where I must first start to resolve it.

The allegation made by Mr. Baligila that, the appellant's memorandum of appeal bares the title 'IN THE COURT OF APPEAL OF (T) AT SONGEA', hence it has to be rejected. The appellant did not respond on that, however, as to me I find it inappropriate to take Mr. Baligila's position because *firstly;* Mr. Baligila did not support his position with any case law or any provision of the law. *Secondly;* normally the grounds of appeals in criminal cases are prepared by the convicted person who is in prison and are submitted to the prison authority for typing and soon the intended

documents must be forwarded to the High Court as per **section 363 of the Criminal Procedure Act [Cap. 20 R.E 2002]**. In the instant appeal, it would appear that the said wrong title was caused by the mistake of the prison authority; hence I find it inappropriate to punish the appellant on this mistake done by the other party considering the fact that, the appellant has been defending himself from the trial court to this appeal, and more so he has been in custody as a result his liberty to make follow up his appeal is restricted. In line to the stated reasons, under the circumstances of the instant appeal I find this error of wrong citation of the Court title is curable under **section 388 of the Criminal Procedure Act (supra),** in the event the title now has to read 'IN THE HIGH COURT OF TANZANIA AT SONGEA' instead of 'IN THE COURT OF APPEAL OF (T) AT SONGEA'.

Turning to the merit of this appeal, starting with the issue of *voire dire* examination where the court records reveal that, at the time PW1 was testifying, she was aged 10 years old. Ms. Tumaini was satisfied that, the trial court had of the view that, PW1 was only telling the truth and not otherwise, despite the fact that, the trial court conducted a partial *voire dire* examination and her position was based in accordance with the case

of **Kimbute Otiniel Versus Republic (supra).** As to me, the question here is whether the trial court conducted a partial *voire dire* examination as suggested by Ms. Tumaini or not. According to **section 127 (5) of the Evidence Act [Cap.6 R.E 2002]**, a *voire dire* examination must be conducted to a witness who is of a tender age of below 14 years old as far as **section 127 (1) and (2) of the same Act** is concerned to ascertain on whether the particular witness understands the nature of an oath or if not, to ascertain on whether such a witness posses a sufficient intelligence to justify the reception of his testimony as well as on whether such a witness understands the duty of speaking the truth. In the instant appeal, PW1 was aged 10 years old, thus the *voire dire* examination on her was unavoidable.

Having in mind with the above legal position, according to the court records (see page 8 of the trial court's proceedings) on 16/10/2015 when the matter at the trial court was called for hearing, this is what has transpired therein;

> *'COURT:* ***Since the first P/witness is a young girl of 10 years.*** *The case should proceed in camera. That's what we do now.*

Sgd: C.M. MWALUMUNGU

RESIDENT MAGISTRATE

16/10/2015

HEARING IN CAMERA.

PW1 Prisca d/o Njovu, 10 years old pupil Rugagara Primary School Christian, ***asked if she known's (sic) concerning taking oath, and she states 'A person if says I want to take oath means that she wants not to tell any lie'*** *Under oath states as here under;-*

X-by S.A' [Emphasis is mine]

The question here is whether the above extracted paragraphs amounted to a partial *voire dire* examination? On my view, the above proceedings do not amount to a partial *voire dire* examination that is the trial magistrate completely omitted to conduct the *voire dire* examination. I say so because the above extracted records, does not reveal on whether the *voire dire* examination had been conducted before PW1 had testified, instead the trial magistrate was merely concerned on whether PW1 should testify upon taking an oath or not. Basically, the above extracted record do not reveal as to whether the trial magistrate had intended to conduct a *voire dire*

examination to ascertain on whether PW1 was a competent witness to testify therein.

In the event, as I am alive with the legal effect on this scenario as it has been well stated in the case of **Kimbute Otiniel Versus Republic (supra)** at page 75, the Court of Appeal of Tanzania had this to say, and I quote;

> *'Where there is* ***a complete omission*** *by the trial court to correctly and properly address itself on section 127 (1) and 127 (2) governing the competency of a child of tender years,* ***the resulting testimony is to be discounted.'*** [Emphasis supplied]

From the above legal position, I hereby discount the testimony of PW1, by disregarding as well as expunging it from the court records, as I hereby do. Having expunged the testimony of PW1 from the court records, the question is whether the testimonies evidence from PW2, PW3, PW4 and PW5 suffice to sustain the appellant's conviction and sentence? Basically, Ms. Tumaini in her submissions answered that question positively. As to me, I disagree with her because since the testimony of PW1 has been discounted, obviously the testimonies from PW2, PW3 and PW4 who were told about the incident by PW1 become hearsay evidence; the conditions

for visual identification at the scene of crime are unfavorable considering the fact that the intensity of hurricane lamp and torch was uncertain considering the fact that, the testimony of PW1 is not available as I am alive with the legal position that, the prosecution side was supposed to give out a detailed statement on the intensity of those sources of lights. **See; Isdory Cornery @ Rweyemamu Versus Republic, Criminal Appeal No. 230 of 2014 (CAT-BUKOBA) (Unreported);** since the testimony of PW1 has been discounted, for that reason I find the testimony of PW5 as well as PF3 alone is not sufficient to prove the alleged offence of rape, since as the law states, in sexual offences cases the best and true evidence has to come from the victim **(See; Godi Kasenegala Versus Republic, Criminal Appeal No. 10 of 2008 (CAT-IR) (Unreported)**, thus in the instant appeal, there is no such testimony from the victim. More so, in line to the above, PF3 only remains as a merely expert opinion which in my view, I find it inappropriate to be bound with it (**See; C.D. de Souza Versus B.R Sharma [1953] EACA 41)** as well as the rationale of PF3 in sexual offences as in the instant appeal only assists to ascertain on whether the alleged offence was committed but it does not indicate who committed that offence. **See; Parasidi Michael Makuka Versus**

Republic, Criminal Appeal No. 29 of 2009 (CAT-TANGA) (Unreported).

As if it is not enough; the testimonies of PW3 and PW4 have also drawn my attention which I find it appropriate to scrutinize as I hereunder do in regards to the issue of visual identification. According to the court records specifically at page 16 of the typed proceedings in examination in chief had this to say, and I quote;

> *'The child told us that she have been raped by a person whom she did not know him by name* ***but she know (sic) him by face only...'*** [Emphasis is mine]

Again PW4 at page 18 and 19 of the typed proceedings of the trial court in elaborating further on how the appellant was identified, he had this to say in examination in chief;

> ***'She said that I know him because I saw him (accused) was wearing a pair of short with singled (T-shirt) i.e. (a T- shirt with no hands). But I know him by face and was wearing a yellow singled T-shirt with a two pair of short not a trouser****...this is after when Prisca found that I*

*(sic) was not me...**that is when she (Prisca) lightened the torch towards the accused and managed to identify him (accused)...**'*[Emphasis is mine]

The above extracted piece of evidence cannot be sufficient to rule out the appellant was properly identified considering the fact that, the intensity of the light from the torch was uncertain as well as the testimonies of PW3 and PW4 merely being the hearsay evidence due to the absence of the testimony of PW1 (the victim) as I have elaborated in the above. Be as it may, if the appellant was alleged to have been identified at the scene of crime from the aid of the torch light as alleged by PW4, in my view as the law stands that, torch lights are not effective in identifying the accused persons at the scene of crime, thus at this juncture I am of the view that, it is uncertain as to whether the appellant was the one who committed the alleged offence since he was not properly identified therein. **See; Mohamed Musero Versus Republic [1993] T.L.R 290.**

Regarding to the allegation of the appellant that there were some witnesses who were not called as prosecution witnesses to prove the alleged offence of rape, but Ms. Tumaini opposed that allegation basing on the fact that under **section 143 of the Evidence Act (supra)**, the

absence of those witnesses was not fatal in proving the alleged offence. In my view, despite the fact that, the above stated provision states that, no particular number of witnesses is required to prove any fact as correctly suggested by Ms. Tumaini, however in the instant appeal, as correctly argued by the appellant that, according to the testimony of PW4 (see page 19 of the typed proceedings of the trial Court), the appellant was arrested in the local pub drinking alcohol upon being identified by PW1 but the prosecution side failed to call one GASI NGAIRO who was the security chairman of that Village and some Villagers who arrested the appellant therein. Since PW1's testimony has been discounted, and since on the material date and time on 31/08/2015 around 20:00 after PW1 had prepared '*ugali*' with her young brother and sister MUSA and ZAKIA, they went to sleep into the room, then it was alleged that the appellant came in and committed the alleged offence, thus this court is now entitled to draw an adverse inference against the prosecution side for failure to call MUSA, ZAKIA and GASI NGAIRO as well as some Villagers who participated in arresting or witnessed the arrest of the appellant as their witnesses. Had it been that, those people were called, and if they witnessed the said incident at the scene of crime as they were with PW1 in their house, obviously in the absence of PW1's testimony, I could have come into a different

conclusion, since the testimonies of GASI NGAIRO and other Villagers could corroborated on the account that, the appellant committed the said offence.

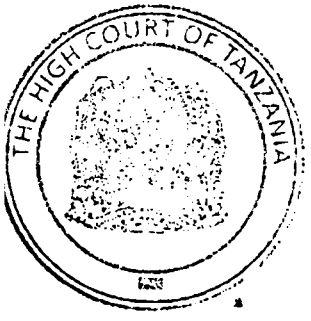
I say so because, the legal position regarding to non-calling of the neighbours witnessed the arrest of the accused as the scenario in the instant appeal is well settled, where in the case of **Chacha Pesa Mwikwabe Versus Republic, Criminal Appeal No. 254 'B' of 2010 (CAT-MWZ) (Unreported)** at page 8 the Court of Appeal cited with approval of the case of **Gallus Faustine Stanslaus @ Wasiwas and Another Versus Republic, Criminal Appeal No. 231 of 2007 (Unreported)**, the Court had this to say;

> ***'Non-calling, as a witness of neighbours who came to the scene of the crime gives rise to doubts as to whether or not the appellants were culprits. No explanation was given by the prosecution as to why even a single neighbour was not called as a witness.*** *In the absence of such explanation, it is fair and reasonable to infer that, if any such neighbor was called would not have given evidence similar to that of PW1 and PW2.'* [Emphasis is mine]

For the foregoing analysis and reasons, I find this appeal has merit that is the trial court was wrong to convict the appellant for the offence of rape as charged since the prosecution side failed to prove the alleged offence beyond reasonable doubts.

In the event, I hereby quash and set aside the above stated conviction and sentence of 30 years in jail and payment as compensation of Tshs. 150,000/= to PW1 imposed by Songea District Court in Criminal Case No. 109 of 2015 to ABDUL ADAM @ MSEPULA, the appellant, and order the appellant be released from the custody unless held with another lawful cause. This appeal is allowed consequently.

It is so ordered.

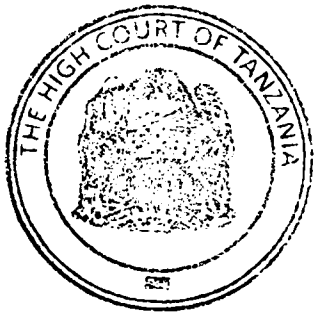


S.M. CHIKOYO

JUDGE

04/05/2016

Judgment delivered in chambers in the presence of the appellant in person, Mr. Baligila Learned State attorney for the respondent and Mr. Komba Court Clerk, this 4th day of May, 2016.

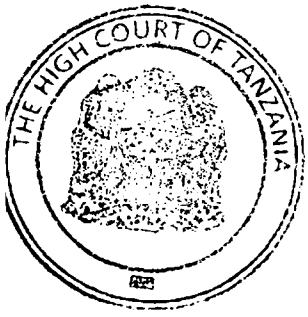


S.M. CHIKOYO

JUDGE

04/05/2016

COURT: Right of appeal explained.



S.M. CHIKOYO

JUDGE

04/05/2016