

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

**(CORAM: LUANDA, J.A., MASSATI, J.A. And MUGASHA, J.A.)**

**CRIMINAL APPEAL NO 12 OF 2014**

**FUKU LUSAMLA .....APPELLANT**

**VERSUS**

**THE REPUBLIC.....RESPONDENT**

**(Appeal from the Judgment of the High Court of Tanzania  
at Tabora)**

**(Lukelelwa, J)**

**Dated the 20<sup>th</sup> day of August, 2013**

in

**Criminal Appeal No. 107 of 2012**

.....

**JUDGMENT OF THE COURT**

3<sup>rd</sup> & 7<sup>th</sup> December, 2015

**LUANDA, J.A:**

The appellant was convicted with an offence of rape of a girl of one year and six months old. The trial District Court sentenced him to 30 years imprisonment and 12 strokes of the cane. Aggrieved by the finding of the trial District Court, the appellant unsuccessfully appealed for the High Court. But since the victim of the crime was below the age of ten years, the High Court enhanced the sentence to life imprisonment. The appellant has come to this Court on appeal.

The basis of conviction of the appellant was circumstantial evidence. It is the evidence of Pendo Mihayo (PW1) the mother of the victim of rape Helen Mihayo that on the fateful day during day time, the appellant whom she knew him very well, a friend of her husband, arrived at her homestead. The

appellant had consumed liquor. The appellant first asked a place to rest. PW1 provided him with her room. Then the appellant made amorous advances of which PW1 turned him down. So, the appellant was left in the room and PW1 went to her nearby shamba leaving behind the appellant inside the house and her child outside. While in her shamba she heard her child crying. She rushed back home to check what the fuss was all about. She found her child inside the room where the appellant was. She was naked and her pants were under the bed. She was bleeding from her vagina and seriously injured and she had sperms. She also saw the appellant picking his trouser. When PW1 went to call her mother and father, the appellant disappeared.

Helena Yangiro (PW2) confirmed to have seen sperms and blood on the private parts of Helen Mihayo. The child was sent to hospital and PF3 was issued and tendered in Court. But because the PF3 was tendered in contravention of S. 240 (3) of the Criminal Procedure Act, Cap. 20 RE 2002 the High Court expunged it.

On the other hand, the appellant denied to have committed the offence. He said the case was a cooked one. He gave a story of paddy where he said he was given by a certain undisclosed woman for sale. But he could not get customers. To his surprise he was beaten by Mashaka later he was arrested for no apparent reason.

In this appeal, the appellant raised three grounds. The real question in this appeal is whether the evidence on record supports the charge of rape.

At first Mr. Rwegira Deusdedit, learned State Attorney who represented the Republic was inclined to support the appeal. But on reflection, he told the Court that the conviction was properly entered and the sentence of life imprisonment is the correct one.

In this case the victim of rape did not testify because she was an infant of 1 year and 6 months old. Does it mean a charge under the aforesaid circumstances cannot be proved? In **Haji Omary VR**, Criminal Appeal No. 307 of 2009 (CAT- unreported) the appellant was convicted of an unnatural offence by the District Court and sentenced to life imprisonment. The victim of rape was a boy of 4 years of age. The appellant unsuccessfully appealed to the High Court. Dissatisfied, he appealed to this Court. Despite the fact that the victim did not testify, the conviction and sentence were upheld by this Court. The Court said:-

*"The law recognizes that there are instances where charges may be proved without victims of crimes testifying in Court. Take murder for example where the victims are deceased. Senility, tender age or disease of the mind may prevent a victim from testifying in Court (See S. 127 of the Evidence Act) but this does not mean that a charge cannot be proved in the absence of the victim's testimony."*

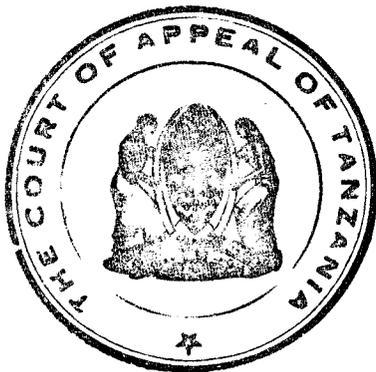
In this case the victim of rape did not testify. But there are unbroken chain of events which irresistibly point out that it was the appellant who committed the offence. The appellant was left in the room resting; while PW1

was in the shamba she heard her child crying; when she went to the house to check, she saw her child inside the room where the appellant was; the child was naked and her pants were under the bed; she was bleeding from her vagina and PW1 saw sperms; she also saw the appellant picking his trouser. And when PW1 went to report to her mother and father, the appellant disappeared. PW2 and Mashaka Mashamba (PW3), the father of the child, confirmed to have seen sperms on the private parts of Helen. With such evidence, there is one conclusion to be drawn; it is the appellant who raped the child.

The appeal is devoid of merits. The same is dismissed. The sentence imposed by the High Court is proper.

Order accordingly.

DATED at TABORA this 4<sup>th</sup> day of December, 2015.



B.M. LUANDA  
**JUSTICE OF APPEAL**

S.A. MASSATI  
**JUSTICE OF APPEAL**

S. MUGASHA  
**JUSTICE OF APPEAL**

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

  
P.W. Bampikya  
**SENIOR DEPUTY REGISTRAR**  
**COURT OF APPEAL**