IN THE COURT OF APPEAL OF TANZANIA
AT IRINGA

(CORAM: MBAROUK, J.A., MMILLA, J.A., And MWARIJA, J.A.)

CRIMINAL APPEAL NO. 6 OF 2010

COSMAS CHALAMILA ..... APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

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

(Mkuye, J.)

dated the 4th day of November, 2009

in

Criminal Appeal No. 20 of 2009

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JUDGMENT OF THE COURT

10th & 13th August, 2015

MBAROUK, J.A.:

The appellant, Cosmas Chalamila was charged in the District Court of Mufindi at Mafinga with unnatural offence contrary to section 154 (1) and (2) of the Penal Code, Cap. 16 R.E. 2002. He was convicted as charged and sentenced to life imprisonment. Aggrieved, he appealed to the High Court (Mkuye, J.) where his appeal was dismissed in its entirety, hence he has preferred this second appeal.

Briefly stated the facts which led to this appeal are as follows: on 6th day of December, 2005 at about 08:00 hrs. at Mwilavila village, Mufindi District in Iringa, Jenera Mhelela (PW1) a child aged four years was playing with her fellow children outside their home. Thereafter came one man unknown to PW1 and her fellow children namely Michael Mkongwa and Danny Mkongwa aged two and three years respectively. It was alleged that the said man took PW1 so as to go and buy biscuits for her. However, it was later learnt that, the said man had carnal knowledge of PW1 against the order of nature. According to Dotto Chang'a (PW2), the mother of PW1 testified that while she was preparing breakfast, she called PW1 to inform her that the breakfast was ready, but PW1 did not respond. On questioning her fellow children they showed PW2 where PW1 was taken by such man. Promptly, PW2 took an action to call her husband one Simon Mhelela (PW3) and they went towards a bush and found shoes marks as it rained on that day. On approaching a certain shrub, they found a person who took to his heals and left PW1 crying. PW3 testified to

have identified that person as Cosmas s/o Chalamila – the appellant on the spot. He identified that person to have worn a red T-shirt and blue jeans. Thereafter, PW1 was taken by her parents to Malangali Police Station where a report was made. They were issued with a PF.3 form and then took PW1 to Malangali Hospital where Henry Mlelwa (PW5), a clinical officer examined her and confirmed that the victim was defiled. Following the search made by the Police, the appellant was arrested on 13th March, 2007 at Nyololo village then arraigned before the court for the offence.

In his defence, the appellant categorically denied the charge laid against him.

In this appeal, the appellant appeared in person and fended for himself. On the other hand, Mr. Abel Mwandalama, learned Senior State Attorney represented the respondent/ Republic.

The appellant lodged a memorandum of appeal containing nine grounds of appeal, but in essence we are of the

opinion that they boil down to only one ground of complaint, namely, that the appellant was not correctly identified at the scene of crime.

At the hearing, the appellant opted to allow the learned Senior State Attorney to address us first in response to his grounds of appeal and had nothing to elaborate.

On his part, the learned Senior State Attorney from the out set indicated not to support the appeal. He initially directed his submission on four major points, however, he later directed himself on one major issue of identification.

The learned Senior State Attorney submitted that, there is no dispute that PW1 was defiled, but the only question is, who did such and offence? In answering such a question, the learned Senior State Attorney submitted that, the record shows that the incident occurred at 08:00 hrs. which was broad day light as testified by PW2 and PW3. Apart from that, Mr. Mwandalama submitted that, PW3 knew the appellant before as they were living in the same village and a choir member of

Assemblies of God Church. Mr. Mwandalama added that PW3 named the appellant at the earliest possible time to PW2 and at the Police Station where he went to report the matter. Furthermore, the learned Senior State Attorney submitted that, the record shows that the distance from where PW3 was and the place where he identified the appellant was few paces. He said, PW3 also managed to have mentioned the colour of a dress worn by the appellant as a red T-shirt and blue jeans. Thereafter, Mr. Mwandalama urged us to find, if there are any contradictions concerning the colour of a dress worn by the appellant at the scene of crime, they should be considered as minor and had not gone to the root of the matter. In support of his earlier submission, Mr. Mwandalama cited the case of **Waziri Amani V. Republic** [1980] TLR 250 and **Pascal Kitigwa V. Republic** [1994] TLR 65. He then urged us to find that the prosecution proved its case beyond reasonable doubt, hence we should dismiss the appeal.

In his rejoinder submission, the appellant emphatically states that the evidence of identification adduced by the prosecution witnesses was not sufficient enough to prove beyond reasonable doubt that he was correctly identified at the scene of crime. He contended, PW3's testimony was not clear as to the specific distance which managed him to make correct identification as the term used "few paces" is too general. The appellant also contended that it was also too general to say that the appellant worn a red T-shirt and blue jeans as in the society there are various people who are dressed in a red T-shirt and blue jeans. After all, the appellant claimed that there was a contradiction between what was stated by PW2 and PW3 on the actual colours of the dress worn by such a person at the scene of crime. Whereas PW2 said a person was dressed with a red T-shirt and a cream trousers, on the other hand PW3 testified that such a person was dressed in a red T-shirt and blue jeans. He also added that no search was conducted in his house to prove that, he possessed the alleged dresses. All in

all, he urged us to find that there was no evidence to implicate him with the offence charged against him.

In the instant case, as pointed out earlier the matter can safely be disposed of relying mainly on the issue as to whether the appellant was correctly identified at the scene of crime. We are of the view that there is no doubt that the matter took place at day time. But, the question is who did the act to PW1? As the record shows, the trial court and the first appellate court relied on the evidence of PW3 to prove that the appellant was identified at the scene of crime. However, it is now settled that a witness who alleges to have identified a suspect at the scene of crime ought to give a detailed description of such a suspect to a person whom he first report the matter to him/her before such a suspect is arrested. The description should be on the attire worn by a suspect, his appearance, height, colour and/or any special mark on the body of such a suspect.

Various decisions of this Court have emphasized the importance of giving a detailed description of a suspect at the

scene of crime from a person who witnessed him committing the alleged offence. For example See **Jaribu Abdalla v. R.,** Criminal Appeal No. 220 of 1994. In the case of **Mohamed Alhui v. Rex** (1942) 9 EACA 72 the erstwhile East African Court of Appeal stated as follows:-

> *"In every case in which there is a question as to the identify of the accused, the fact of there having been given a description and terms of that description are matters of the highest importance of which evidence ought always to be given first of all, of course by the person who gave the description, or purports to identify the accused and then by person to whom the description was given".*

Considering the circumstances which occurred in the instant case when PW 3 approached the scene of crime, he saw a person running, that means he only saw a back side of such a person not his face. Also the distance from where PW3 was, to the place where the appellant was allegedly identified was not clearly stated, as PW3 simply said it was "few paces". In addition to that, it seems PW2 and PW5 had no sufficient time which allowed them to stay with such a person which they

believed to be the appellant at the scene of crime. They only had a short glance and that it is why they differed as to the colour of the trousers worn by a person alleged to have committed the offence.

Taking into account those short comings, and considering the fact that it is now settled that evidence of visual identification should only be relied upon when all possibilities of mistaken identity are eliminated and the court is satisfied that the evidence before it is absolutely watertight, we are of the opinion that those doubts have to be resolved in favour of the appellant.

All said and done, we are of the opinion that, the ground on identification alone can dispose of this appeal. In the event, and for the reasons stated above we are constrained to allow the appeal quash, the conviction and set aside the sentence. In the result, we order that the appellant be released from custody forthwith, unless otherwise he is lawfully held.

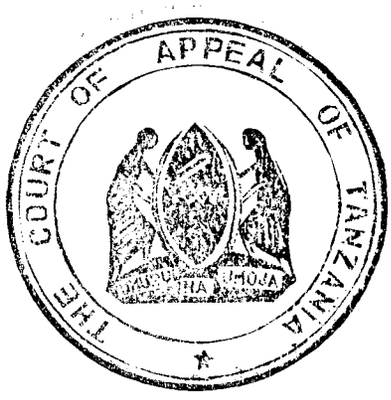
DATED at **IRINGA** this 12th day of August, 2015.

M.S. MBAROUK
JUSTICE OF APPEAL

B.M. MMILLA
JUSTICE OF APPEAL

A.G. MWARIJA
JUSTICE OF APPEAL

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



E.F. FUSSI
DEPUTY REGISTRAR
COURT OF APPEAL