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

**(CORAM: MBAROUK, J.A., LUANDA, J.A., And MUSSA, J.A.)**

**CRIMINAL APPEAL NO. 527 OF 2015**

**VICENT INGI.....APPELLANT**
**VERSUS**
**THE REPUBLIC.....RESPONDENT**

**(Appeal from the decision of the High Court of Tanzania at Arusha)**

**(Maghimbi, J.)**
**Dated 12th day of May, 2015**
**in**
**(HC) Criminal Appeal No. 112 of 2014**

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## JUDGMENT OF THE COURT

11th & 16th February, 2016.

**MBAROUK, J.A.:**

In the Resident Magistrate's Court of Manyara at Babati, the appellant Vicent Ingi was arraigned for the offence of rape, contrary to section 130 (1) (2) (e) and 131 (1) of Penal Code Cap. 16 R.E. 2002 and secondly for an unnatural offence, contrary to section 154 (1) (a) of the Penal Code Cap. 16 R.E. 2002. Sentence of life imprisonment was imposed on him on each offence. Dissatisfied, the appellant unsuccessfully appealed to High Court of Tanzania at Arusha, where

his sentence was enhanced and ordered to pay compensation of T.Shs. 300,000/= to the victim Loveness Bruno and twelve (12) strokes of the cane as corporal punishment. Aggrieved, he has now preferred this second appeal to this Court.

At this juncture, we have find it pertinent to first revisit the evidence upon which the appellant's conviction was founded. At the trial court, PW1, Benadetha Bruno testified that, on 03/04/2012 at 16:00 hrs. her mother called her young sister Loveness to buy milk. Half an hour passed without Loveness return back, PW1 started looking for her. After a while, she heard a scream coming from a bush and when he approached the scene of crime, she found Loveness (the victim) laid down naked while the appellant inserting his penis into her anus. When the appellant saw PW1, he zipped up his trouser and fled, but PW1 identified the appellant as they are staying in the same village and Loveness was studying with his young sister called Celina. PW1 further testified that when she reached the victim, she was bleeding at her mouth, vagina and had faeces at her anus. PW1 then took the victim to her mother who then sent her to Dareda Hospital.

On her part, PW2 Loveness Bruno (girl aged 8 yrs.) testified that on 03/04/2012 at 16:00 hrs. on her way back home with the milk, the appellant followed her and later took her to a farm. PW2 started to scream, but the appellant told her not to scream otherwise he will kill her as he was a soldier in the army. PW2 further testified that she was laid down and the appellant took off all her clothes and unzipped his trouser and inserted his penis into her vagina and anus where faeces came out until when PW1 appeared the appellant ran away. PW2 added that, she knew the appellant since 2011 as she was studying with his young sister whom he once took her from their (PW2's) home.

PW3, Benadina Edward Mutatiina who testified as a doctor who attended PW2 – the victim told the trial court that on 04.04.2012 at 11:00 hrs she examined the victim and found bruises on her lip of her vagina which was bleeding with a swollen labia. PW3 further testified that the victim had bruises and faeces coming out at her anus which suggested that there was blunt object which was inserted therein. She then filled up the PF3 which was later admitted as Exhibit P1 at the trial court.

As pointed earlier, the trial Court found that such evidence from the prosecution side was sufficient enough to prove the two offences against the appellant.

In this appeal, the appellant appeared in person unrepresented, whereas the respondent/Republic was represented by Mr. Khalili Nuda, learned Senior State Attorney who was assisted by Mr. Felix Kwetukia, learned State Attorney.

Six grounds of appeal were preferred by the appellant, namely:-

1. That, the first appellate Judge erred in law and in fact in holding that the appellant was properly identified at the scene of crime.
2. That, the first appellate Judge erred in law and in fact when she upheld the decision of the lower trial court while the prosecution did not prove their case against the appellant beyond reasonable doubt.

3. That, the first appellate Judge erred in law and in fact when she failed to scrutinize the preview statement of the complained.
4. That, the first appellate Judge erred in law and in fact when she held that PW1 and PW2 proved the prosecution case beyond reasonable doubt.
5. That, the *voire-dire* examination was problematic.
6. That, the learned trial magistrate and the first appellate Judge erred in law and in fact when they failed to consider the defence evidence.

At the hearing of the appeal, the appellant prayed to file what he called it as an elaboration of his ground of appeal and we granted his prayer. Thereafter, he opted to allow the learned State Attorney to submit first and he will respond later if the need arises.

On his part, Mr. Felix Kwetukia from the outset indicated that he did not support the appeal. In his response to the 1st ground of appeal on identification, the learned State Attorney submitted that both PW1

and PW2 sufficiently identified the appellant at the scene of crime. He said, as shown at page 11 of the record of appeal, PW1 saw PW2 laid down naked and the appellant inserted his penis into PW2's anus. The learned State Attorney added that, the incident occurred at 16:00 hrs. on a day time when sun light was still there. Also he said the proximity was about 23 steps and as she knew the appellant before as a village mate that enable her to identify the appellant without any difficulty. He further added that, PW1 even mentioned on the clothes worn by the appellant. Hence, the learned State Attorney urged us to find that PW1 sufficiently identified the appellant at the scene of crime.

The learned State Attorney submitted that, apart from PW1, also PW2 who was the victim sufficiently identified the appellant. He said, considering that the offence was committed in a day time, she even mentioned the attire worn by him at the scene of crime and as PW2 knew the appellant before since 2011 there was no doubt that she sufficiently identified him.

The learned State Attorney then urged us to find that the first ground of appeal to have no merit. Our evaluation of the evidence as a whole especially that of PW1 and PW2 on the issue of identification is to the effect that, we are satisfied that the appellant was properly identified at the scene of crime, because:-

1. The appellant was known to PW1 and PW2 as their village mate, hence not a stranger to them.
2. The appellant had not covered his face, hence clearly seen by PW1 and PW2.
3. The incident occurred at day time, hence sufficient light.
4. The attire worn by the appellant was described by both PW1 and PW2.
5. The distance when PW1 saw the appellant was not far.

All in all we fully agree with the learned State Attorney that, the appellant was sufficiently identified, hence we find the first ground of appeal devoid of merit.

As to the 2nd and 4th grounds of appeal, based on the issue that the prosecution failed to prove their case beyond reasonable doubt,

the learned State Attorney submitted that the evidence adduced by PW2 was a direct evidence of a victim as to how the appellant committed the two offences. He added that, also there was evidence of PW1 who saw the appellant inserting his penis into PW2's anus. In addition to that, the evidence of PW3 who was a doctor who examined PW2 established that a blunt object was inserted into PW2's vagina. For that reason, he urged us to find the 2nd and 4th grounds of complaint devoid merit.

On our part, we are of the considered opinion just like the learned State Attorney that the prosecution proved their case beyond reasonable doubt. This is for the following reasons:-

(1) The evidence of PW2 who was a victim was a direct evidence, where it is now settled that the true evidence of rape has to come from the victim. See, **Sulemani Makumba v. Republic** [2006] TLR 379. In the instant case, PW2 sufficiently testified as to how she met the appellant and how he committed rape and unnatural offence upon her at the scene of crime.

(2) Also PW1 as an eye witness testified as to how she witnessed the appellant inserted his penis into PW2's anus.

(3) PW3, the doctor who examined PW2 – the victim confirmed that a blunt object was inserted into PW2's vagina. He also testified that, when she checked PW2 she saw her bleeding and had bruises in her vagina and the labia swollen. PW3 also saw PW2 with faeces coming out uncontrollably and had bruises at her anus.

We are of the considered opinion that from the totality of the evidence on record, the prosecution had proved their case beyond reasonable doubt. For that reason, we find the 2nd and 4th grounds of appeal devoid of merit.

In his reply to the 3rd ground of complaint concerning the claim that the first appellate Judge failed to scrutinize the preview statement of the victim, the learned State Attorney submitted that the contradiction of not mentioning the name of the appellate when PW2 gave her statement at the Police Station is not fatal as it did not go to

the root of the matter. He therefore urged us to find the 3rd ground of appeal devoid of merit.

We on our part agree with the learned State Attorney that the contradiction of not mentioning the name of the appellant by PW2 in her statement at the police station was not fatal taking into account the state she had given immediately after the horrible incident she encountered. For that reason and as PW2 sufficiently identified the appellant as we have established earlier on, we find the 3rd ground of complaint devoid of merit too.

The learned State Attorney's reaction to the 5th ground of appeal concerning the issue that the *voire dire* examination was problematic, was to the effect that, the *voire dire* examination conducted by a trial magistrate had no major problem, and the omission of not recording the questions put to PW2 as a child witness was not fatal. In support of his argument he cited to us the decision of this Court in the case of **Joseph Leko v. The Republic,** Criminal Appeal No. 124 of 2013 and **Yust Lala v. The Republic,** Criminal Appeal No. 337 of 2015 (both unreported).

Having carefully considered the complaint on the *voire dire* examination, we have noted that it is true that no questions were recorded. However, we have noted that, from what PW2 stated before her evidence was taken it is clear that the trial magistrate asked PW2 the relevant questions required to ascertain whether she knew the meaning of oath and the duty of speaking the truth. This Court in the case of **Mohamed Sainyenye v. Republic,** Criminal Appeal No. 57 of 2010 (unreported) set out on what kind of questions to be put to a child witness so as to ascertain whether he/she knows the meaning of oath and the duty to speak the truth. Such questions would include:-

- The age of a child witness.
- His/her religion.
- Whether, he/she understands the nature of oath and its obligation based on his/her religious belief.

We are of the view that, even if questions were not recorded by the trial magistrate, but we find that he correctly reached to a finding that PW2 understood the nature of oath, possessed sufficient intelligence and undertook the duty of speaking the truth. In the case of **Yust Lala** (*supra*) this Court stated that:-

*"As to the **voire dire** although it is advisable that the questions put to the child witness should always be recorded, the omission to do so does not necessarily vitiate the finding that the child is competent to testify."*

In the instant case, we are of the considered opinion that from the answers given by PW2, the learned trial magistrate correctly found that PW2 understood the nature of oath. Hence, we do not find merit in the 5th ground of appeal.

In his response to the last ground of complaint that the defence was not considered, the learned State Attorney submitted that, the trial magistrate considered the appellant's defence of *alibi*, that he rejected it. He therefore urged us to find this grounds devoid of merit.

We on our part fully agree with the learned State Attorney that the contention is devoid of merit. This is because in order for a defence of *alibi* to be considered, normally the accused has to give notice to the court and the prosecution that he intends to rely upon a defence of *alibi* before the hearing of the case in compliance with the

mandatory requirement of section 194 (4) of the Criminal Procedure Act [Cap. 20 R.E. 2002] (the CPA). In the instant case, section 194 (4) of the CPA was not complied with by the appellant, hence we find that the trial magistrate was right for not according weight to the appellant's defence of *alibi*. We find this ground of complaint devoid of merit too.

All said and done, eventually, we find the appeal is lacking merit. We therefore dismiss it in its entirety.

**DATED** at **ARUSHA** this 15th day of February, 2016.

M. S. MBAROUK
**JUSTICE OF APPEAL**

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

K. M. MUSSA
**JUSTICE OF APPEAL**

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


E. Y. MKWIZU
**DEPUTY REGISTRAR**
**COURT OF APPEAL**