IN THE HIGH COURT OF TANZANIA

AT TABORA

APPELLATE JURISDICTION

(Tabora Registry)

(DC) CRIMINAL APPEAL NO.99 OF 2007

ORIGINAL CRIMINAL CASE NO. 149 OF 2007

OF THE DISTRICT COURT OF TABORA

AT TABORA

BEFORE: A.M. FUNGO, Esq; RESIDENT MAGISTRATE

JUMA S/O BAKARI.....APPELLANT

(Original Accused)

VERSUS

THE REPUBLIC.....RESPONDENT

(Original Prosecutor)

JUDGMENT

Date of last order 19th Oct. 2009

Date of Judgment 7th Dec. 2009

WAMBALI, J.

The District Court of Tabora sitting at Tabora convicted the appellant with the offence of rape contrary to section 130 and 131 of the Penal Code Cap. 16 of the laws as amended by section 5 and 6 of the Sexual offences Special Provisions Act. No. 4 of 1998 and

sentenced him to a term of imprisonment for 30 years in jail. The charge against the appellant indicated that on 15th June, 2004 at about 01.00 hrs at Mpenge village within the District of Uyui and Region of Tabora the appellant did have carnal knowledge of Hidaya d/o Salum. without her consent. The appellant denied the charge against him. He has been dissatisfied with both conviction and sentence imposed by the District Court and has come to this court with several complaints in his petition of appeal. His complaints however are premised on the weakness of prosecution case, lack of corroboration, no doctor was called for cross-examination as required by law and that his defence was wrongly rejected by the trial court. During the hearing of the appeal he appeared in person and adopted what he stated in his petition and replied briefly to the response by the learned State Attorney.

The Respondent/Republic supported both conviction and sentence of the trial court and was represented by Miss. Pendo Malulu learned State Attorney.

In her submission Miss. Malulu argued paragraphs 1,2,5,6,7 and 8 of the appellant's petition together as she was of the opinion that they concerned the complaints that the evidence was weak and that there was no corroboration. She argued paragraph 4 separately as it deals with non compliance with section 240 (3) of the Criminal

Procedure Act, Cap. 20 R.E. 2002 as the doctor was not summoned for cross-examination.

Submitting on the credibility of witnesses and sufficiency of evidence, she stated that it is not disputed that the appellant is the brother in law of PW.1 (the victim) and PW.2 and that on the material day he went to the house occupied by the two witnesses and knocked the door and when it was not opened he smashed it and entered inside the house at around 1.00 hrs and started to rape PW.1. She stated that PW.2 was in the same house but in separate room and saw what happened as she was also threatened by the appellant. Miss Malulu stated that according to the evidence on record, PW.1 shouted for help but was silenced by the appellant who had a bush knife (panga). She stated that according to the evidence the appellant raped PW.1 in the room and later in the sitting room until 5.00 hrs when he went out and that all the time he was threatening to kill her (PW.1) and PW.2 who was in different room watching what happened. She therefore submitted that the evidence of PW.1 was sufficiently corroborated by PW.2. She also added that the evidence of PW.1 was also corroborated by DW.2 who was his witness and stated that he heard the alarm and when he wanted to go for help as the house where the incidence occurred was near, she found the door of her house locked outside and it was the appellant who had gone out by then and that she came out later after the appellant had come back and opened it. DW.2 is the mother of the

Procedure Act, Cap. 20 R.E. 2002 as the doctor was not summoned for cross-examination.

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appellant (The appellant is the son of his elder sister) who according to the evidence on record they stayed together in that house but on that day she had gone to Mwanza. She thus submitted that after the door was opened by the appellant she went to her in laws to inquire what had happened and she was told that PW.1 was raped by the appellant. The learned State Attorney explained that according to the record, PW.3 also came to the scene later after he got information of the incidence and was told the same story and was present when the appellant was arrested in the morning while asleep in his room. She thus submitted that the evidence was sufficient as the same was corroborated and the witnesses were truthful. She thus urged the court to dismiss the complaints.

The appellant in his short reply insisted that the evidence was not sufficient and that the case was framed because they had previously quarred with both PW.1 and PW.2 but admitted that the quarrel was settled by his mother although it occurred again. He stated that their evidence should not be accepted. He however conceded that PW.1 and Pw.2 were his sisters in law. He also stated that PW.2 could not see what was happening through the space that was on her door. He also complained that he was not given chance to lead his witness (DW.2) and thus she gave false evidence.

From the record, there is no doubt that PW.1 and PW.2 testified at length concerning what happened on that day and the

fact that the appellant spent longtime in the house. The appellant also had opportunity to cross examine all witnesses sufficiently and from the record the witnesses were consistent during examination in chief and cross-examination PW.2 for example testified that the appellant ordered her to give him water which she did and that she was smoking cannabis (bangi) and stating that he was not going out that day as he would sleep there. The appellant in his petition also stated that the evidence of PW.1 and PW.2 deferred concerning the where about of their husband who is his elder brother. He submitted that while PW.1 said he had gone to Kipalapala, PW.2 stated that he had gone to Itema. It is my considered opinion that the difference is not important as the fact is that the husband of PW.1 and PW.2 was not in the house during the incidence and in any way there is no evidence or it is suggested that he was in the house as the situation could have been different.

It is true that although the trial magistrate mentioned the hatred between the appellant and PW.4 and PW2 in passing no discussion was made. I am of the view that basing on the evidence on record even if they was such hatred it might not have affected the fact that the appellant was responsible for the offence. His witness DW.2 could have stated expressly about the problem and she indeed testified at length of what happened and the appellant was in court. His defence was therefore not wrongly rejected by the trial court. In the circumstances of this case the appellant was well know to the

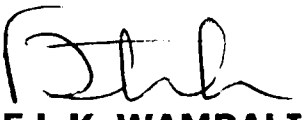
victim and other witnesses who are his relatives. I am not convinced that all of them including his mother could have stood up and framed a case against him. Indeed although it was during the night there is evidence that the incidence took a considerable time. I therefore agree with the learned State Attorney that the witnesses were truthful and they should be believed as the trial court did when it arrived at a finding that the prosecution witnesses were credible. The complaints in the paragraphs referred above are dismissed accordingly.

In paragraph 4 of his petition the appellant complained that the doctor was not summoned to be cross examined and give opinion on what was stated in the PF.3. The response of the learned State Attorney was that, it is true there was that commission but stated that the same was not fatal as the best evidence was that of the victim (PW.1) that was corroborated by the evidence of PW.2. She referred the court to the decision of the Court of Appeal in Selemani Makumba V.R. Criminal Appeal No. 94 of 1999 at Mbeya (unreported) to support other submission. She thus prayed that the complaint has no merit at all and should be dismissed.

There is no dispute that at trial the doctor was not summoned as required by section 240 (3) of CPA stated above. That being the case what is stated therein can not be acted upon as the mandatory provision of the law was not adhered. It means therefore on record

we are only left with the evidence of the three prosecution witnesses. However as stated by the learned State Attorney the evidence of those prosecution witnesses suffice to ground conviction of the appellant in the circumstances of this case.

In the final analysis, I am satisfied that the complaints of the appellant in this Appeal are without foundation. It follows that as the prosecution proved its case beyond reasonable doubt the appeal is dismissed and the finding of the District is confirmed accordingly. The appellant should continue serving his sentence. It is accordingly ordered.

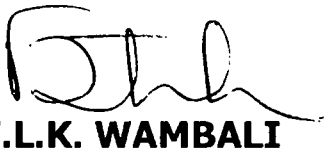


F.L.K. WAMBALI

JUDGE

7/12/2009

Judgment delivered on 7/12/2009 in the presence of the appellant and Miss. Janeth Sekule State Attorney for the Respondent.



F.L.K. WAMBALI

JUDGE

7/12/2009

Right of Appeal explained.

F.L.K. WAMBALI

JUDGE

7/12/2009

Date: 7/12/2009

Coram: Hon. F.L.K. Wambali,J.

Appellant: Juma Bakari, Present under custody.

Republic: Miss. Sekule, State Attorney for the Republic.

CC: Nhelegani, RMA.

Miss. Janeth Sekule-State Attorney:

The appeal is for judgment. The appellant is present in person. We are ready to proceed.

Mr. Juma Bakari – Appellant:

I am ready.

Court: Judgment delivered.

F.L.K. WAMBALI

JUDGE

7/12/2009