IN THE HIGH COURT OF TANZANIA
AT SONGEA

DC CRIMINAL APPEAL NO. 10 OF 2016

(Originating from the decision of the Songea District Court in Criminal Case No. 25 of 2015)

CHARLES HAULE.....APPELLANT

Versus

THE REPUBLIC.....RESPONDENT

JUDGMENT

Last Order: 13TH April, 2016

Date of Judgment: 25TH April, 2016

CHIKOYO, J.

In the instant appeal, the appellant was charged and convicted for the offences of rape contrary to sections 130 (1) (2) (e) and 131 (3), also unnatural offence contrary to section 154 (1) (a) of the Penal Code [Cap. 16 R.E 2002]. The victim was one BERNADETA MHENGA (PW1), and the incidents were alleged to have occurred on 24th February, 2015 at Mtepa Digidigi in Madaba area within Songea Rural District in Ruvuma Region. Following the said conviction, the appellant was sentenced to life

imprisonment for both offences, and six strokes for the offence of rape. The sentence was ordered to run concurrently.

Aggrieved by the said conviction and sentence, the appellant has appealed herein hence this is his appeal, in which the appellant has raised ten (10) grounds of appeal. However after going through all those grounds of appeal, I find them to fall in one fold that is that trial court erred in law and fact by convicting the appellant to the stated offences while the prosecution side failed to prove the alleged offences beyond reasonable doubts.

A brief facts leading to this appeal are as follows; on the material date and time, PW1 aged 4 and ROZALIA KIHINDO (PW2) aged 9 were playing at home, suddenly the appellant was alleged to have come up and took PW1 using a bicycle and sent PW1 into the farm, and when they reached there, it was alleged that the appellant undressed PW1's clothes and inserted his penis into PW1's vagina and anus. PW1 alleged to have been seriously injured hence she started to cry that is when the appellant threatened PW1 that if she continues to cry, the appellant would slaughter her, after PW1 was raped, the appellant left PW1 and he went away, and when PW1 came back home, she met PW2 and one PRISCA where she narrated to PRISCA

what had happened to her, then they went to report the matter to the Police Station where PF3 (Exhibit P.1) was issued and later PW1 was sent to the hospital for medical examination. According to the testimony of DK. KAYOMBO (PW3) a Clinical Officer stationed at Madaba conducted the said medical examination where he discovered bruises into PW1's vagina and anus, and there was also bleedings. PW3's opinion from the said examination is that, the bruises might be caused by a blunt object forced to penetrate into PW1's vagina and anus.

On the other side of the story, the appellant strongly denied commission of the alleged offence instead the appellant insisted that on the material date, around 16:00 Hrs he was at Mboko bar then came PRISCA (PW1's aunt) who according to the appellant was his girlfriend, but later misunderstandings occurred between them and later around 22:00 hrs some people followed the appellant and the appellant was informed that he was supposed to report to the Street Chairperson. When the appellant went there, he met the Street Chairperson and other people including PRISCA where he was asked if he knew the raped PRISCA's relative (PW1), but he was then as to come back next day and later the appellant was sent to the Police Station and later he was arraigned in the trial court for the

above stated offences. Howeyer, at the end of the trial, the appellant was convicted and sentenced as stated in the above.

At the hearing of this appeal, the appellant appeared in person while Mr. Medalakini, the learned State Attorney appeared for the respondent who strongly opposed this appeal. The appellant had nothing more to submit in his submission in chief apart from insisting that, he did not commit the alleged offences, hence he prayed this appeal to be allowed.

Mr. Medalakini in his submission in reply insisted that at the trial court the prosecution side proved the alleged offences beyond reasonable doubts as far as the evidence from PW1 the victim, PW2, PW3 and PF3 (Exhibit P.1) are concerned reveal that the appellant committed the alleged offences, considering the fact that the incident took place in a day time. Thus at the end, Mr. Medalakini prayed this appeal to be dismissed and the imposed appellant's conviction and sentence by the trial court to be sustained.

In the rejoinder the appellant added that the victims as per the charge sheet are two with different names first Bernadeta Mhenga while the second Bernadeta Haule which is contracting. He hence pravs to this court to allow his appeal.

At this moment the issue is whether this appeal has merit or not and in determining this issue I will be confined on whether the prosecution side at the trial court proved the alleged offences beyond reasonable doubts or not. However before I determine that issue, I have to point out few aspects for the sake of clarity and for the easy determination of this appeal. *Firstly;* it is not in dispute that PW1 and PW2 at the time of testifying were of the tender age, and the court records reveal that, the trial court properly conducted a *voire dire* examination to them, in which the trial court had of the view that, PW1 and PW2 had sufficient intelligence of speaking the truth, thus I find the raised appellant's complaint over the conducted *voire dire* examinationin ground one of appeal is not maintainable, thus I hereby dismiss it.

Secondly; since PW1 and PW2 testified upon being tested on their competency to testify via a *voire dire* examination, obviously it should be noted that, their evidences must be treated as any other witnesses and more so, this court can believe their testimonies unless there are available good reasons for not believing those witnesses. **See; Richard Mgaya @ Sikubali Mgaya versus Republic, Criminal Appeal No. 335 of 2008 (CAT-IR) (Unreported).**

Thirdly; the court records reveal that, the prosecution side alleged that, when PW1 came back from being raped by the appellant, she met PW2 who she was with her before her departure with the appellant and also there was one PRISCA, where after PW1 had narrated what had happened, then PW1 was sent to the Police and later to the hospital, however the said PRISCA was not called as witness. The issue here is whether non calling of PRISCA as a prosecution witness can render this court to draw an adverse inference against the prosecution side.

Having in mind with the above observations, as to me after going through what has transpired in the court records, submissions from both parties in this appeal, I find this appeal has no merit, I say so because, since it is trite law that the best and true evidence in sexual offences has to come from the victim, and if an adult, that there was penetration and no consent, and in case of any other women where consent is irrelevant that there was penetration. **See; Godi Kasenegala Versus Republic, Criminal Appeal No. 10 of 2008 (CAT-IR) (Unreported).** In the instant appeal, upon scrutinizing the testimony of PW1 as a victim, I find her testimony is credible to sustain the appellant's conviction since PW1 knew the appellant before the incident as she was her neighbor that is why she managed to mention the appellant's name to PRISCA at the time when

she was narrating what the appellant has done to her, that the appellant had raped and sodomized her. (See page 13 of the typed proceedings from the trial court). More so, PF3 and the testimony of PW3 corroborated that PW1's vagina and anus had bruises which was caused by a blunt object.

Again, the fact that the appellant is known to the victim is well certain as stated above, and PW1's ability to mention the appellant's name to PW2 and PRISCA at the earliest opportunity is an all important assurance of PW1's reliability. **See; Thomas Mgira Versus Republic, Criminal Appeal No. 87 of 2005 (CAT-MWZ) (Unreported).** More so PW2 who was with PW1 at home playing before the appellant came and took PW1 also reveals that the appellant is her neighbor, thus the appellant was also known by PW2 even before the incident had occurred. (See page 16 of the trial court proceedings). The appellant's complaint in ground 5 that the testimony of PW2 is hearsay evidence which was not supposed to be considered, I find this allegation lacks merit since PW2 also heard what the appellant had done to PW1 and her testimony is clear that she did not witness the incident. (See page 15 and 16 of the typed proceedings).

For that reason, PW2's testimony has acted as corroborative evidence by backing up the fact stated by PW1 that, the appellant came to take PW1

when they (PW1 and PW2) were playing at home; the appellant is not a stranger person to PW1 and PW2, thus in my view this piece of evidence implicates the appellant by confirming the stated scenario. **See; R Versus Baskerville [1916] 2 K.B 658** and **Salim Petro and Another Versus DPP, Criminal Appeal No. 234 of 2010 (CAT-AR)(Unreported),** however, in the instant appeal since I found the testimony of PW1 being credible, obviously I am alive with the legal position by virtue of **section 127 (7) of the Evidence Act [Cap. 6 R.E 2002]**, her testimony is sufficient to sustain the appellant's conviction be it whether there is corroborative evidence or not, where in the instant appeal there was corroborative evidence as stated above.

For the sake of clarity, I must state on other two important aspects. *Firstly;* regarding to the position of the prosecution side at the trial for not calling PRISCA as one of their witnesses, this issue need not to detain me so long because **one;** as I have explained in the above that, the evidence from the prosecution side against the appellant is strong, cogent and sufficient to sustain the appellant's conviction, and even the testimony of PW1 alone could be sufficient to convict the appellant as far as **section 127 (7) of the Evidence Act (supra)** is concerned. **Two;** again in my view the prosecution side used their discretionary power of calling the witnesses

they wished to prove the alleged offences, which in the circumstances of the instant appeal I find there is no need for this court to draw an adverse inference against the prosecution for not calling PRISCA as a witness, considering the fact that, by virtue of **section 143 of the Evidence Act (supra)** no particular number of witnesses is required to prove any fact. **See; Omary Majid Versus Republic, Criminal Appeal No. 288 of 2007 (CAT-AR) (Unreported).**

Secondly; the appellant's complaint that the trial court did not consider his defence at the trial court, where as to me I find this complaint lacks merit since as stated earlier that the appellant's defense suggested that he was not at the scene of crime at the material time, instead he insisted that he was at the bar with PRISCA his girlfriend but the misunderstanding occurred between them, later around 22:00 hrs he was followed by some people at his home who informed him that he was called by the Street Chairperson and in the next day he was arrested upon being involved in the said allegations.

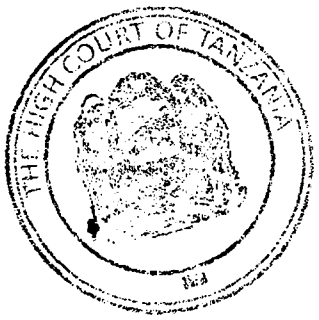
I have gone through the trial court judgment where I have found that, his defense was considered, and the trial magistrate properly directed in disregarding the appellant's defense after observing to have no merit,

where I also agree with that position but I find it appropriate to go further by stating that, in its totality, the appellant's defense that he was not at the scene of crime as alleged has not raised even the slightest doubt on the prosecution case that he was not at the scene of crime, as the law requires him to do so. **See; Abas s/o Matatala Versus Republic, Criminal Appeal No. 331 of 2008 (CAT-IR) (Unreported).** Thus I find this complaint raised by the appellant lacks merit and I hereby dismiss it.

Lastly, the allegation by the appellant that there were two distinct victims with two different names, since it was raised at the rejoinder stage the respondent representative had no chance of replying to this issue. I had a time of going through the record I agree with the appellant submission that the names of the victims in two counts as per substituted charge sheet filed on 09/06/2015 are; first Bernadeta Mhenga and second Bernadeta Haule, however this defect in my opinion has not occasioned a failure of justice to the appellant as it could be a typing error hence it is curable under **section 388 of the Criminal Procedure Act Cap. 20 R.E. 2002.** More so the evidence from the record is clear that the victim is going by the name of Bernadeta Mhenga PW1 who has been also proved by the Exhibit P1 the PF3. In that sense this allegation also is baseless.

From the foregoing reasons, I find this appeal has no merit, in the event, the earlier above stated conviction and sentence imposed to CHALRES HAULE, the appellant by Songea District Court in Criminal Case No. 25 of 2015 regarding to rape and unnatural offences is hereby sustained.

This appeal is dismissed. It is so ordered.

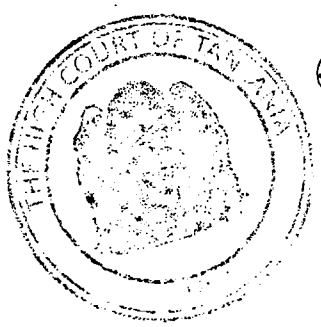


S.M. CHIKOYO

JUDGE

25/04/2016

Judgment delivered in chambers in the presence of the appellant in person, Ms. Hellen Learned State Attorney for the respondent and Mr. Komba Court Clerk, this 25th day of April, 2016.

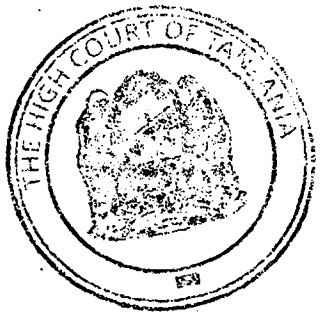


S.M. CHIKOYO

JUDGE

25/04/2016

COURT: Right of appeal explained.



S.M. CHIKOYO

JUDGE

25/04/2016