

**“ORIGINAL”**

**IN THE HIGH COURT OF TANZANIA  
DODOMA DISTRICT REGISTRY  
AT DODOMA**

**CRIMINAL APPELLATE JURISDICTION**

**DC CRIMINAL APPEAL NO. 99 OF 2016**

*(Originating from the District Court of SINGIDA  
Criminal Case No. 294 of 2005,  
Hon. R.B. MASSAM, RM)*

**MWANGU S/O MWAHANJA @ MAHAYU.....APPELLANT**

**VERSUS**

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

**JUDGEMENT**

**09<sup>TH</sup> JUNE 2017**

**Mansoor, J:**

This appeal arise out of the judgment dated 01 March 2006, passed by the District Court of Singida in Criminal Case No. 294 of 2005, by which, the Appellant was convicted of the offence charged of rape contrary to Section 130 (1) and (2) and Section 131(1) of the Penal Code, Cap 16 R: E 2002.



**“ORIGINAL”**

It was alleged by the prosecution that on 3<sup>rd</sup> day of October 2005 at about 16.00 hrs at Ntonge Village within the District and Region of Singida, the Appellant willfully and unlawfully did have sexual intercourse with one Nasra d/o Salehe a girl of 5 years of age.

The Appellant was found guilty of the offense charged; he was convicted and sentenced to Thirty Years Jail Sentence.

The Appellant obtained leave of the Court to appeal outside the prescribed time through Misc. Criminal Application No. 31 of 2014.

The Appellants grounds of appeal is that the Trial Magistrate did not observe the mandatory provisions of Section 235 (1) of the Criminal Procedure Act, Cap 20 R: E 2002, which reads as follows:

235.-(1) The court, having heard both the complainant and the accused person and their witnesses and the evidence, shall convict the accused and pass sentence upon or make an order against him

*H*

**“ORIGINAL”**

according to law or shall acquit him or shall dismiss the charge under section 38 of the Cap.16 Penal Code.”

In the Criminal Appeal Case No.253 of 2013 between Abdallah Ally vs. R (unreported), the justices of Appeal had this to say regarding section 235 (1) of the Criminal Procedure Act:

“Section 235 (1) is couched in a mandatory language in that if at the end of trial, the Court is of the opinion that on evidence available, the accused person is guilty, it must proceed further, in terms of this subsection, by entering a conviction before proceeding to sentence such accused person.

The paragraph in page 2 of the judgment reads:

*“so according to the strong evidence which testified by the prosecution witnesses, plus the exhibit PW.1, which is the PF.3 which wrote by Medical Expert this Court has no doubt that accused person was the one who raped, or this court has no doubt that the victim was raped, so this court found out that prosecution side succeeded to prove its case*



**“ORIGINAL”**

*against the accused person so this court is convicting  
accused forthwith in his present”*

Thus, the court below complied with Section 235(1) of the Criminal Procedure Act; it entered a conviction after finding the accused guilty of the offence.

Mr. Sarara, the State Attorney who appeared for the Respondent supported the appeal on the ground that the Victim, the girl child who was raped was not brought in court to give evidence. It was the victim’s mother who testified that her daughter was raped, and she also tendered a PF3. The Doctor who carried out the medical examination of the girl child was not called to give his evidence.

It is the rules of Evidence that it is mandatory that the adversary must have the right and opportunity to cross-examine the witnesses, especially the victim and the doctor because at the time of recording statement of the victim or the medical report, there vests no right or opportunity with the adversary to cross-examine the witnesses.



**“ORIGINAL”**

The victim in the instant case is a minor child aged about 5 years at the time of incident, who was subjected to rape by the accused.

In order to substantiate its case, prosecution in all examined 2 witnesses. All the incriminating evidence appearing against the accused was put to him while recording his statement wherein he denied the case of prosecution and alleged his false implication in this case. It was alleged that he used to work with pW2, the victims' mother and he was never paid his salary despite repeated requests and got this false case registered against him. Since this was a false case, therefore, even the victim did not turn up for evidence.

After meticulously examining the evidence led by the parties, the learned Trial Court convicted the appellant and sentenced him as mentioned hereinbefore. Aggrieved, present appeal has been preferred.

I agree as submitted by State Attorney Sarara that the impugned judgment suffers from several infirmities. The



**“ORIGINAL”**

material witnesses, the victim and the doctor were not examined by the prosecution. The victim and the doctor were material witnesses. The doctor was the one who medically examined the victim but he was not examined. As such, adverse inference has to be drawn. The reason for non-appearance of victim or the doctor to substantiate the case of prosecution is unknown. . The testimony of the victim herself would have been sufficient to sustain the conviction. And the testimonies of PW1, PW2, and PW3 would have been used as corroborative evidence of the victim’s testimony. Besides that medical and scientific evidence was not presented by the Doctor himself too prove the case of prosecution.

I have given my considerable thoughts to the respective submissions of learned state attorney and have perused the record.

Admittedly, the prosecution case is based on the testimony of victim child who was approximately five years of age at the time of incident, which would have been proved from the

*FX*

**“ORIGINAL”**

testimony of PW2 the mother of the victim and the people who saw the accused person raping the child.

The question for consideration, therefore, is as to whether a conviction can be recorded on the sole testimony of a child's mother in the absence of the testimony of the child witness who was the victim.

The conviction on the sole evidence of a child witness is permissible if such witness is found competent to testify and the court after careful scrutiny of evidence is convinced about the quality and reliability of the same. It should be accepted albeit with circumspection. In this case the child did not give the evidence, and this made the prosecution case very weak. The conviction cannot be recorded in the absence of the victim, and in the absence of the doctor who examined the victim.

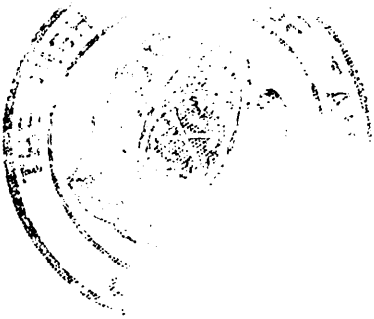
Consequently, and based on the above, this appeal has merit and is allowed; the conviction is quashed and the sentence is



**“ORIGINAL”**

set aside. The Appellant is ordered to be released from prison unless he is otherwise lawfully held.

It is ordered accordingly

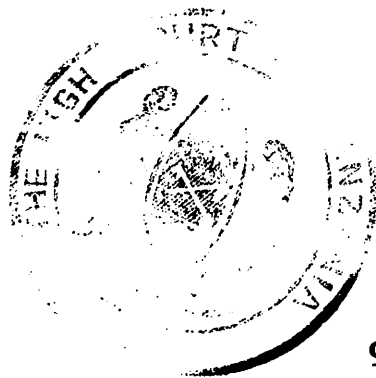


  
**L. MANSOOR**

**JUDGE**

**09<sup>th</sup> JUNE 2017**

Judgement delivered in Court today in the presence of the Appellant, Ms. Luwongo, State Attorney for the Respondent Republic and Mr C.A. Chali the Court Clerk.



  
**L. MANSOOR**

**JUDGE**

**9<sup>TH</sup> JUNE 2017**