

**IN THE HIGH COURT OF TANZANIA  
DAR ES SALAAM DISTRICT REGISTRY  
AT DAR ES SALAAM**

**CRIMINAL APPEAL NO 58 OF 2018**

*(Original Criminal Case No 308 of 2016, of Temeke District Court at Temeke)*

**JULIUS CHEDI MBEGENI.....APPELLANT**

**VERSUS**

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

**JUDGMENT**

Date of last Order: 12/9/2018

Date of Judgment: 26/9/2018

**Munisi,J.**

The appellant, Julius Chedi Mbegeni and another person who was acquitted stood before the District Court of Temeke arraigned for the offence of gang rape contrary to section 130(1)(2)(e) and 131A (1)(2)(3) of the Penal Code, Cap 16 RE 2002. It was alleged that on 12<sup>th</sup> May, 2016 at Mzinga Kongowe area within Temeke District in Dar es Salaam Region, appellant and one Helena Petro Marco had carnal knowledge of Betty Godchans Mariki without her consent. Upon the charges being read over to the accused persons, they both pleaded not guilty, the prosecution thus called three witnesses to prove the allegation while the appellant

defended himself in person without any other witness. The prosecution's central story was that on the evening of the material day, the 2<sup>nd</sup> accused asked PW1 to go together to fetch water and the latter agreed. As they walked towards their destination, the 2<sup>nd</sup> accused walked ahead faster leaving behind her companion who was then invaded by three men who took her to a forest and raped her. She later managed to escape and reported the matter to the police. At the conclusion of the trial, the court found the appellant guilty of the offence charged and sentenced him to the statutory punishment of life imprisonment. The present appeal comprised of 10 grounds of appeal challenges the finding. The main areas of complaint include:

- Basing conviction on un-categorized provisions of the Penal Code.
- Failure to record the appellant's plea
- Lack of sufficient and credible evidence to support the conviction

On 12/9/2018 when the appeal was called on for hearing, the appellant appeared in person unrepresented and prayed to adopt the grounds set out in his petition of appeal. On its part, the respondent/Republic was being represented by Miss Brenda Nicky, learned State Attorney who initially supported the conviction on the ground that there was sufficient evidence. However, on being probed by the court, she changed her position and supported the appeal. She agreed that the charge was wrongly framed as it

lumped together two distinct offences. She thus prayed for the appeal to be allowed.

I have gone through the lower court's record and wondered whether prosecution was serious at all in the investigation and prosecution of this case. There are serious omissions such as the anomalies in the contents of the charge, the inclusion of the 2<sup>nd</sup> accused who was a woman in the charge suggesting that she took part in the gang rape among others. It is glaring from the charge sheet that it was ambiguous, unclear and it lumped together two distinct offences. For ease of reference I reproduce hereunder the same:

**"CHARGE**

**STATEMENT OF OFFENCE**

*GANG RAPE: Contrary to section 130(1)(2)(e) and 131A (1)(2)(3) of the Penal Code [Cap 16 R.E. 2002].*

**PARTICULARS OF OFFENCE**

**JULIUS CHEDI MBEGANI** and **HELENA PETRO MARKO** on 12<sup>th</sup> day of May, 2016 at Mzinga Kongowe area within Temeke District in Dar es Salaam Region and have carnal knowledge of one **BETTY GODCHANS MARIKI** without her consent.

*Dated at Dar es Salaam this 03<sup>rd</sup> day of June 2016*

**Sgd.....**

**STATE ATTORNEY"**

From the contents of the Statement of Offence set out above it is clear that the provisions cited by the prosecuting authority mentioned; i.e. *section 130(1)(2)(e) and 131A (1)(2)(3) of the Penal Code [Cap 16 R.E. 2002]* herein above relate to two distinct offences, statutory rape and gang rape which are distinct offences. Further the statement of offence does not support any category of rape appellant was charged with. I have no doubt to lump the two offences together in one count was improper. In the case of **Kauto Ally V R (1985) TLR 183**, the Court of Appeal observed:

*“Lumping of separate and distinct offences in a single count may render a charge bad for duplicity.”*

The omission above is compounded by the unclear particulars contained in the particulars of offence as shown above where it is unclear whether they intended to show gang rape under section 131A or statutory rape under section 130(1)(2)(e) of the Penal Code. I have no doubt such omission offended the provisions of section 133(2) of the Criminal Procedure Act but it must have prejudiced the appellant defence as it is unclear whether he knew the nature of the offence he pleaded to. In that regard, the appellant was not afforded a fair trial. On a different score, while the cited provisions showed that the category of rape related to a girl of under 18 years, the particulars of the charge did not state the age of the victim.

Turning to the evidence, it is unclear how the appellant got arrested because the incident occurred during the night hence

the evidence of identification left a lot to be desired considering that the victim did not explain how she managed to identify her assailants when they invaded her. With regard to how it happened, PW1 told the court that:

*“On 12/5/2016 at 19.45 hours Helena asked me to go fetch water. I did carry a bucket when I was at the edge of the house three people tied me, they fed my mouth. By then Helena had already passed so I was at behind. (sic) When I was tied she was not seen as she had passed already.*

*The three people covered themselves with masks on face so I could not see them....*

*They took me to the unknown place, when they opened me, I found myself in the room, they covered my eyes too.*

*They opened their masks at the house, there was one brother, short white, short black and tall acute men. Among them was herein the 1<sup>st</sup> accused Julius.*

*They ever threaten me before one day when I met them on my way from school, they said they will do bad thing to me.”*


It is apparent from the above extract that PW1 did not say whether the house she found herself in had electricity to assist her in identifying the appellant. It is also very strange that the magistrate having acquitted the 2<sup>nd</sup> accused still proceeded to find the appellant guilty of gang rape irrespective of the definition of gang rape which contemplate the commission of the said offence to be perpetrated by more than one person. With

respect, the trial was infested with so many anomalies including unclear evidence coupled with the fact that the trial was conducted on a fatally defective charge sheet. These anomalies have to be resolved in favour of the appellant.

From the foregoing discussion, I find the appeal with merit and I allow it. Accordingly, I quash the conviction, set aside the sentence of life imprisonment meted on the appellant and I direct for the immediate release of the appellant from prison unless otherwise lawfully held.

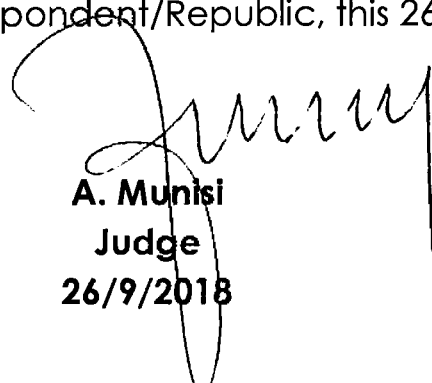
It is so ordered



  
**A. Munisi**  
**Judge**  
**26/9/2018**

Judgment delivered in Chambers in the presence of the appellant in person and in the presence of Mr. Justus Ndibalema, learned State Attorney for the respondent/Republic, this 26/9/2018.



  
**A. Munisi**  
**Judge**  
**26/9/2018**