

TANZANIA / JUDGMENT

fuku lusamla vs republic 2015

tzca 392 7 december 2015

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IN THE COURT OF APPEAL OF TANZANIA AT TABORA (CORAM: LUANDA, J.A., MASSATI. 3.A.
And MUG ASH A, J.A.^ CRIMINAL APPEAL NO 12 OF 2014 FUKU
LUSAMLA APPELLANT VERSUS THE
REPUBLIC.....RESPONDENT (Appeal from the Judgment of
the High Court of Tanzania at Tabora) (Lukelelwa, 3) Dated the 20th day of August, 2013 in
Criminal Appeal No. 107 of 2012 JUDGMENT OF THE COURT 3rd & 7th December, 2015 LUANDA.
J.A: The appellant was convicted with an offence of rape of a girl of one year and six months old.
The trial District Court sentenced him to 30 years imprisonment and 12 strokes of the cane.
Aggrieved by the finding of the trial District Court, the appellant unsuccessfully appealed for the
High Court. But since the victim of the crime was below the age of ten years, the High Court
enhanced the sentence to life imprisonment. The appellant has come to this Court on appeal.
The basis of conviction of the appellant was circumstantial evidence. It is the evidence of Pendo
Mihayo (PW 1) the mother of the victim of rape Helen Mihayo that on the fateful day during day
time, the appellant whom she knew him very well, a friend of her husband, arrived at her
homestead. The i appellant had consumed liquor. The appellant first asked a place to rest. PW1
provided him with her room. Then the appellant made amorous advances of which PW1 turned
him down. So, the appellant was left in the room and PW1 went to her nearby sharnba leaving
behind the appellant inside the house and her child outside. While in her shamba she heard her
child crying. She rushed back home to check what the fuss was all about. She found her child
inside the room where the appellant was. She was naked and her pants were under the bed. She
was bleeding from her vagina and seriously injured and she had sperms. She also saw the
appellant picking his trouser. When PW1 went to call her mother and father, the appellant
disappeared. Helena Yangiro (PW2) confirmed to have seen sperms and blood on the private
parts of Helen Mihayo. The child was sent to hospital and PF3 was issued and tendered in Court.
But because the PF3 was tendered in contravention of S. 240 (3) of the Criminal Procedure Act,
Cap. 20 RE 2002 the High Court expunged it. On the other hand, the appellant denied to have
committed the offence. He said the case was a cooked one. He gave a story of paddy where he
said he was given by a certain undisclosed woman for sale. But he could not get customers. To his
surprise he was beaten by Mashaka later he was arrested for no apparent reason. In this appeal,
the appellant raised three grounds. The real question in this appeal is whether the evidence on

record supports the charge of rape. 2 At first Mr. Rwegira Deusdedit, learned State Attorney who represented the Republic was inclined to support the appeal. But on reflection, he told the Court that the conviction was properly entered and the sentence of life imprisonment is the correct one. In this case the victim of rape did not testify because she was an infant of 1 year and 6 months old. Does it mean a charge under the aforesaid circumstances cannot be proved? In Haji Omary VR, Criminal Appeal No. 307 of 2009 (CAT- unreported) the appellant was convicted of an unnatural offence by the District Court and sentenced to life imprisonment. The victim of rape was a boy of 4 years of age. The appellant unsuccessfully appealed to the High Court. Dissatisfied, he appealed to this Court. Despite the fact that the victim did not testify, the conviction and sentence were upheld by this Court. The Court said:- "7776? law recognizes that there are instances where charges may be proved without victims o f crimes testifying in Court. Take murder for example where the victims are deceased. Senility, tender age or disease o f the mind may prevent a victim from testifying in Court (See S. 127 o f the Evidence Act) but this does not mean that a charge cannot be proved in the absence o f the victim's testimony." In this case the victim of rape did not testify. But there are unbroken chain of events which irresistibly point out that it was the appellant who committed the offence. The appellant was left in the room resting; while PW1 3 was in the shamba she heard her child crying; when she went to the house to check, she saw her child inside the room where the appellant was; the child was naked and her pants were under the bed; she was bleeding from her vagina and PW1 saw sperms; she also saw the appellant picking his trouser. And when PW1 went to report to her mother and father, the appellant disappeared. PW2 and Mashaka Mashamba (PW3), the father of the child, confirmed to have seen sperms on the private parts of Helen. With such evidence, there is one conclusion to be drawn; it is the appellant who raped the child. The appeal is devoid of merits. The same is dismissed. The sentence imposed by the High Court is proper. Order accordingly. DATED at TABORA this 4th day of December, 2015. B.M. LUANDA JUSTICE OF APPEAL S.A. MASSATT JUSTICE OF APPEAL S. MUGASHA JUSTICE OF APPEAL I certify that this is a true copy of the original. P. . , SENIOR DEPUTY REGISTRAR COURT OF APPEAL 4

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