IN THE COURT OF APPEAL OF TANZANIA
AT ARUSHA

(CORAM: MBAROUK, J.A., MJASIRI, J.A., And MASSATI, J.A.)

CRIMINAL APPEAL NO. 300 OF 2008

MEMBI STEYANI.....APPELLANT
VERSUS
THE REPUBLIC .....RESPONDENT

(Appeal from the decision of the High Court of Tanzania at Arusha)

(Sheikh, J .)

Dated the 6th day of May, 2004
i n
Criminal Appeal No. 78 of 2002

JUDGMENT OF THE COURT

12th & 17th October, 2011

MJASIRI, J.A.:

The appellant Membi Steyani was charged with and convicted by the Arusha District Court of unnatural offence contrary to **Section 154** of the Penal Code Cap. 16, R.E 2002 as amended by the Sexual Offence Special Provisions Act (Act No. 4 of 1998) and he was sentenced to 30 years imprisonment and 12 strokes. His first appeal to the High Court (Sheikh, J.) at Arusha was unsuccessful, hence this second appeal.

The background leading to the conviction of the appellant is as follows:-

The appellant and PW1, Gilman Jackson, were both residents of Kiranyi Village in Arusha District. On June 16, 2001 at around 17:00 hrs while PW1, a 10 year old boy was in the farm picking avocadoes, the appellant grabbed him, dragged him to the coffee plantation, removed his shorts and had sexual intercourse with him against the order of nature. PW1 reported the incident to his uncle. This led to the arrest and subsequent charge and conviction of the appellant.

The appellant presented five grounds of appeal which can be summarized as follows:-

1. *No **voire dire** examination was conducted by the trial magistrate.*
2. *The cautioned statement of the appellant was illegally obtained contrary to the requirements under **Sections 50 and 51** of the Criminal Procedure Act.*

3. *PW4 was improperly called to testify as he was not listed as a witness at the preliminary hearing.*
4. *The sentence imposed on the appellant was illegal as he was only sixteen (16) years old when he committed the offence.*
5. ***Section 240(3)** of the Criminal Procedure Act was not complied with. Appellant was not informed of his right to have a doctor called as a witness.*

At the hearing of the appeal, the appellant sought leave to file additional grounds of appeal. However the additional grounds were more or less similar to those presented before.

In this appeal, the appellant appeared in person and was unrepresented. The respondent Republic was represented by Ms. Javelin Rugaihuruza, learned State Attorney.

Ms. Rugaihuruza did not support the conviction. In relation to the complaint that no ***voire dire*** examination was conducted, which was raised in ground No.1 of the memorandum of appeal, the learned State Attorney conceded that this was not done and therefore the requirement under section 127(2) of the Evidence Act, Cap 6, R.E. 2002 was not met. According to her this reduced the testimony of PW1 to the level of an unsworn statement.

With regards to the complaint that **Sections 50 and 51** of the Criminal Procedure Act were not complied with, she conceded that the requirements under sections 50 and 51 of the said Act were not complied with. She submitted that the cautioned statement of the appellant should be expunged from the record.

On the complaint relating to the age of the appellant, she stated that it was not disputed in the courts below that the appellant was 16 years old at the time he committed the alleged offence.

Lastly on the non compliance with **Section 240(3)** of the Criminal Procedure Act, Ms. Rugaihuruza submitted that as the appellant was not informed of his right to have a doctor called in court in order to give him an opportunity to cross examine him, the medical report cannot be acted upon.

We on our part, are inclined to agree with the learned State Attorney. In relation to ground No. 1, it is evident from the record that no ***voire dire*** examination was conducted by the trial court. PW1 who was 10 years old was simply sworn by the trial magistrate without complying with the requirements under **Section 127(2)** and **(5)** of the Evidence Act Cap 6 R.E. 2002. **Section 127(2)** and **(5)** provides as follows:-

> *"(2). Where in any criminal case or matter a child of tender age called as a witness does not in the opinion of the court, understand the nature of an oath, his evidence may be received though not given an oath or affirmation, if in the opinion of the court, which opinion shall be recorded in the*

proceedings, he is possessed of sufficient intelligence to justify the reception of his evidence and understands the duty of speaking the truth"

(5) For the purpose of subsection ***(2), (3)*** *and* ***(4),*** *the expression* ***"child of tender age"*** *means* ***a child whose apparent age is not more than fourteen (14) years***

(Emphasis supplied).

We will examine the first ground of appeal on the non compliance with **Section 127(2)** of the Evidence Act (Cap 6, R.E. 2002).

It is settled law that in any criminal cause or matter, every witness shall be examined on oath or affirmation unless it is otherwise provided by any other written law. Section 198(1) of the Criminal Procedure Act, Cap 20 R.E. 2002 provides as under:-

"Every witness in a criminal cause or matter, shall subject to the provisions of any other written law to the contrary, be examined upon oath or affirmation in accordance with the provisions of the Oaths and Statutory Declarations Act".

The only exception to section 198 (1) of the Criminal Procedure Act is when the evidence of a child of tender age is involved. The evidence will then be taken in accordance with section 127(2) of the Evidence Act.

In conducting a ***voire dire*** examination section 127(2) requires the court to establish two issues. **First,** whether or not the child understands the nature of an oath. If the Court comes to that conclusion then it proceeds straight away to swear or affirm the child and to record the evidence. **Second,** if the court is not satisfied on the first test, it should express its opinion, not only that the child is possessed of sufficient intelligence to justify reception of the evidence, but also understands the duty of speaking the truth before proceeding to record the child's evidence.

We are satisfied that the trial magistrate was not conscious about her duty under **Section 127(2)** of the Evidence Act as she failed to conduct a ***voire dire*** examination as required under the law to establish and make a finding whether the child understood the nature of an oath before taking his sworn evidence. Therefore in law, PW1 had not testified at all, and his evidence has no evidential value. His evidence cannot therefore be corroborated by any other evidence as there is nothing to corroborate. In **Kibangeny Arap Kolil v. R** (1959) EA 92 it was held as under:-

> *"...Since the evidence of the two boys was of so vital a nature we cannot say that the learned trial judge's failure to comply with the requirements of* ***Section 19(1)*** *was one which can have occasioned no miscarriage of justice, and upon this ground alone the appeal must be allowed."*

(See **Justine Sawaki v. Republic,** Criminal Appeal No. 103 of 2004 (unreported).

The only evidence linking the appellant with the offence against the order of nature is the testimony of PW1. As his evidence cannot be acted upon, the prosecution case falls apart. Section **127(7)** of the Evidence Act is not applicable to the circumstances of this case.

In the result, we allow the appeal, quash the conviction and set aside the sentence meted out to the appellant. The appellant is to be released from prison forthwith unless he is otherwise lawfully held. It is so ordered.

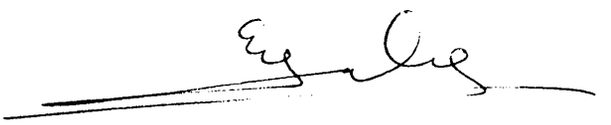
DATED at Arusha this 13th day of October, 2011

S.M. MBAROUK
JUSTICE OF APPEAL

S. MJASIRI
JUSTICE OF APPEAL

S.A MASSATI
JUSTICE OF APPEAL

I certify that this is a true copy of the original.



E.Y. MKWIZU
DEPUTY REGISTRAR
COURT OF APPEAL