IN THE COURT OF APPEAL OF TANZANIA

AT ARUSHA

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

CRIMINAL APPEAL NO. 294 OF 2008

MANASE SAMWEL ..... APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

(Appeal from the conviction of the High Court of Tanzania at Moshi

(Munuo,J.)

dated the 6h day of August, 2008
in
Criminal Appeal No. 113 of 2006

JUDGMENT OF THE COURT

29th & 30th September, 2011

NSEKELA, J.A.:

The appellant, Manase Samwel, was convicted of rape contrary to **Sections 130** and **131** of the Penal code as amended by Act No. 4 of 1998 and was sentenced to thirty (30) years imprisonment. His first appeal to the High Court (Sheikh, J.) was dismissed, hence this second appeal.

The appellant appeared in person and unrepresented. He preferred four grounds of appeal (i) that Police Form No. 3 (PF3) should not have been admitted in evidence since it had been illegally obtained; (ii) that the evidence of PW5, Hamisi Mbaji in PF3 should have been excluded from the evidence, (iii) that the trial magistrate did not conduct a ***Voire dire*** examination in respect of PW1, Sinyati Lamanyaki, the complainant, then aged 11 years and (iv) the case against the appellant was not proved beyond reasonable doubt.

At the hearing of the appeal, the appellant submitted written submissions with leave of the court, amplifying the contents of the memorandum of appeal. He contended that the trial court was enjoined to comply with **Section 127(2)** of the Evidence Act since PW1 was a child of tender age. He added that her identification evidence of the appellant was suspect. She referred to the appellant as *"Mwarusha"*. This was an insufficient description to identify him. On another occasion, she purported to identify by pointing at him at the Division Office. The appellant submitted that the police should have conducted a proper identification parade. In addition, the appellant doubted whether or not PW5 was a qualified medical doctor.

Ms. Javelin Rugaihuruza, learned State Attorney, submitted that there was nothing irregular for PW5 to tender in evidence exhibit P2, the medical examination report in respect of the complainant, issued by the Divisional Secretary. PW5 gave evidence during the trial and was cross-examined by the appellant, and Exhibit P2 was admitted in evidence without objection from the appellant. The learned State Attorney conceded that a **Voire dire** examination was not conducted before PW1 gave her evidence. This procedure was in contravention of **Section 127(2)** of the Evidence Act. She submitted however, that it was unsworn evidence which required corroboration and that the testimony of PW3 and PW5 provided the required corroborative evidence. As regard irregularities in the proceedings, the learned State Attorney contended that the appellant did not state the nature of these irregularities.

We propose to start with non-compliance with the procedure laid down in **Section 127(2)** of the Evidence Act, 1967, but before we do that let us lay down the foundation contained in **Section 198(1)** of the Criminal Procedure Act Cap.20 R.E 2002. which reads :-

"(1) 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 starting point is that in a criminal cause or matter, every witness shall be examined on oath or affirmation unless some other written law provides otherwise. In our context, PW1 was enjoined to give evidence on oath or affirmation as stipulated in the Oaths and Statutory Declarations Act. We now move on to **Section 127(2)** of the Evidence Act which provides as follows:-

"(2) Where in any criminal cause 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 on 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."

With this background, let's examine the third ground of appeal. The complaint here was to the effect that the trial magistrate did not conduct a **voire dire** examination before PW1 gave her evidence on oath. The prosecution case commenced on the 25th October, 2004 before Duma, RM. It is self-evident from the proceedings that no **voire dire** examination was conducted. The defence case opened on the 17/2/2005 when DW1, the appellant testified and closed his case. Inexplicably, on the 15th September, 2005, one U.S. Swallo, RM, took over the conduct of the case and apparently it dawned upon her that when PW1 had testified earlier on, **Section 127(2)** of the Evidence had not been complied with. So she purported to cure this anomaly by recalling PW1 to testify and a **voire-dire** examination was conducted on the 26th October, 2005. The appellant was duly convicted by the trial court and the evidence of PW1 was relied upon in securing the conviction. On appeal to the High Court the conviction was upheld and the learned judge on first appeal relied on

PW1's evidence taken on the 25th October, 2004. In the course of her judgment, the learned judge stated thus:-

> *"Admittedly as stated earlier herein there was non-compliance with* ***Section 127(2)*** *of the law of Evidence Act 1967 in that a* ***voire dire*** *examination of PW1 was not conducted before receiving her evidence rather it was conducted at the end of the trial almost a year later. Indeed as pointed out by the learned State Attorney the trial magistrate had erred in recalling PW1 to rectify the omission to conduct a* ***voire dire*** *test. This was highly unprocedural. However as pointed out by the learned State Attorney this error/irregularity did not prejudice the appellant who was afforded the opportunity to Cross-examine PW1 the first that is before, and also after the conducting of the* ***voire dire*** *test.* ***With respect, I am indired to agree with Ms Banzi that the irregularity though serious did not, in the circumstances of this***

case, miscarriage of justice and is curabie under Section 388(1) of the Criminal Procedure Act, 1985. For the avoidance of doubt, I wiii say the evidence of PW1 can be relied on by the Court is the one taken on 25th October, 2004." (emphasis added)

With respect, on our part, we have this to say. The first requirement under **Section 127(2)** of the Evidence Act is that the trial magistrate must investigate as to whether or not a child of tender age understands the nature of an oath. If the court is satisfied that the child understands the nature of an oath, the child will be sworn or affirmed and this conclusion will be reflected on the record. PW1, being a child of tender age, had to undergo this **voire dire** investigation. None was conducted, but nonetheless she was sworn and testified on oath. This was unprocedural to say the least, admittedly caused by the court's lack of seriousness. In law however, PW1 did not testify: It is not a question of treating PW1's evidence as unsworn evidence and then fishing around the record to find corroborative evidence. Indeed, in what we believe is the

leading case on this point, **Kibangeny Arap Kalil v. R** (1959) EA 92 the then Court of Appeal for Eastern Africa observed as follows at page 95:-

> *" ... 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* ***S. 19(1)*** *was one which can have occasioned no miscarriage of justice, and upon this ground alone the appeal must be allowed."*

Indeed this Court in **Justine Sawaki v. Republic** Criminal Appeal No. 103 of 2004 *(unreported)* had this to say on the need to strictly comply with the dictates of **Section 127(2)** of the Evidence Act:-

> *"The Court of Appeal for Eastern Africa said ... that there was need for strict compliance with the provisions of that section and that non- compliance might result in the quashing of a conviction unless there was other sufficient evidence to sustain the conviction. We share the view.*

In the case before us, the trial judge said she had found that the witness knew the duty of speaking the truth and then proceeded to have her sworn. ***But she had not found that the witness understood the nature of an oath which is a condition precedent for taking her evidence on oath. In the circumstances there was no basis for taking Coietha's evidence. There was also no sufficient justification for even treating her evidence as unsworn because one of the prerequisites had not been met, that is to say there was no specific finding that she was possessed of sufficient intelligence to justify the reception of her evidence..."*** (emphasis added)

Once the evidence of PW1 is expunged from the record for reasons stated above, as we hereby do, the prosecution case crumbles. The foundation of the case has collapsed. In the result, we allow the appeal quash the conviction and set aside the sentence meted out to the

appellant. However, the mistake was caused by the trial court in not conducting a **voire-dire** examination. This was e serious error of law which involved a miscarriage of justice on the prosecution side. We therefore direct a new trial of the appellant before a different magistrate.

It is accordingly ordered.

DATED at ARUSHA this 3rd day of October, 2011.

H.R. NSEKELA
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