IN THE COURT OF APPEAL OF TANZANIA
AT ARUSHA

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

CRIMINAL APPEAL NO. 57 OF 2010

MOHAMED SAINYEYE ..... APPELLANT
VERSUS
THE REPUBLIC ..... RESPONDENT

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

(Mmilla, J.)

dated the 30th day of October, 2009
in
Criminal Appeal No. 94 of 2008

JUDGMENT OF THE COURT

3 & 17 May 2012

LUANDA, J.A.:

In the District Court of Arusha at Arusha, the above named appellant was charged with rape and unnatural offence contrary to sections 130(1) (2), 131(1) and 154 of the Penal Code, Cap. 16 R.E. 2002. He was convicted as charged and sentenced as follows, we reproduce:

> *"This court orders that an accused has to serve the imprisonment of 30 years in jail and pay the fine at the tune of 100,000/= to an accused upon the completion of the*

sentence, the punishment of which will run concurrently for both courts."

Whatever the meaning of it, the appellant was aggrieved by the finding of the trial District Court (Mkama, RM), he appealed to the High Court of Tanzania, Arusha Registry. The High Court dismissed his appeal and to our surprise it confirmed the "sentence" imposed by the trial district court. Dissatisfied by that decision, hence this second appeal.

The appellant has raised four grounds in his memorandum of appeal. And when the appeal was called on for hearing, the appellant added one ground. So, the appellant in total raised five grounds. The first is that the evidence of PW2 Angela Benard, the complainant was not credible; secondly the evidence of PW2 contradicts that of PW4 WP 2612 DC Winfrida; thirdly the evidence of PW1 Benard Aloyce, the father of the complainant, PW3 Dr Hassan Kivuyo who attended the complainant and PW4 were not analyzed and scrutinized properly; fourthly his evidence that he was not in good terms with the father of the complainant was not considered, and

lastly, the one added, is to the effect that the voire dire examination taken before PW2 gave her evidence was not properly conducted.

In this appeal, the appellant appeared in person, unrepresented and so he fended himself. The respondent/Republic had the services of Ms. Immaculata Banzi learned Senior State Attorney. At first Ms. Banzi supported the finding of the lower courts. However; on reflection, she declined to do so in particular the non compliance of section 127(2) of the Evidence Act, Cap. 6 RE 2002. She submitted that once the evidence of PW2 is discarded, the prosecution case has no leg to stand. The appeal should be allowed.

Briefly the prosecution case as found credible by lower courts was that one day when PW1 returned home from work his wife complained to him about the late arrival of PW2 from school and her clothes were smeared with human faeces and urine. Upon inquiry, PW2 told him that she had a stomach up set. PW2 was punished.

Three days later, PW1 saw her daughter PW2 unable to control herself-faeces was coming out. She was rushed to hospital where she was attended by PW3. Dr. Hassan (PW3) saw bruises on PW1's

vagina, smell of urine, syphyncter muscles loose and bruises around the anal area. The doctor opined that the above mentioned areas were penetrated by force.

As to what object penetrated on those areas, it is the version of PW2 the key witness who said it was the appellant who did it. It is the evidence of PW2 that one day when she was returning from school, she met the appellant at a place called Soweto. She was taken to unfinished house where she said the appellant "Penetrated her" at the "back and front." By what means, the record is silent. And this is the evidence which the appellant complained that her evidence was not taken in compliance with section 127(2) of the Evidence Act, Cap. 6. By necessary implication, the appellant is saying the evidence of PW2 has no evidential value.

The Courts below were satisfied that the complainant was raped; and the one who did it is the appellant.

We will first discuss the question of non compliance of S. 127(2) of the Evidence Act and if need be proceed with other grounds. We are much alive to a well settled principle of law that

this being a second appeal generally we are precluded from interfering with the concurrent findings of fact unless it is shown there is misdirection or non direction.

(See **DPP v Jaffari Mfaume Kawawa** [1981] TLR 149; **Salum Mhando v R** [1993] TLR 170)

In this case, the evidence of PW2 is crucial to show who inserted an object on her vagina and anus. But the record shows that PW2 was 10 years of age.

Generally all witnesses in criminal matters are competent to testify on oath or affirmation unless the court considers that they are incapable of understanding the question put to them or of giving rational answer to those questions by reason of tender age, extreme old age, disease whether of body or mind or any other similar cause. However, in case of a child of tender age (fourteen years and below under section 127(5) of the Evidence Act) he can testify either on oath or affirmation or not on oath or affirmation. In other words he is also permitted to give unsworn evidence. In case of unsworn evidence the procedure laid down under section 127(2) of the

Evidence Act, Cap. 6 RE 2002 must be complied with. So, before the evidence of a child of tender age is taken, the procedure laid down under S. 127(2) of the Evidence Act must be followed to ascertain whether such witness is competent to testify on oath or affirmation or not on oath or affirmation. In legal parlance the procedure to ascertain whether a child of tender age is competent to testify is known as voire dire. So, the object of conducting a voire dire test is to establish competency of a child whether he is capable of testifying. In case it is found he is not capable of giving evidence either on oath/affirmation or not on oath/affirmation, then his evidence should not be taken. The findings on these points must be recorded on the case record.

Section 127(2) of the Evidence Act, Cap. 6 RE. 2002 provides:-

> 127 (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 upon 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.

In **Nyasani s/o Bichana v R** [1958] EA 90 the then Court of Appeal for Eastern African stressed the need to comply with the above cited Section. It stated:-

> *"It is clearly the duty of the court under that section to ascertain, first whether a child tendered as a witness understands the nature of oath, and, if the finding on this question is in the negative, to satisfy itself that the child is possessed of sufficient intelligence to justify the reception of the evidence and understands the duty of speaking the truth. This is a condition precedent to the proper reception of unsworn evidence from a child, and it should appear upon the face of the record that there has been a due compliance with the Section."*

In **Hassan Hatibu v R** Criminal Appeal No. 71 of 2002 the Court observed:

> *"From these provisions, it is important for the trial judge or magistrate when the witness involved is a child of tender age to conduct a* voire dire *examination. This is to be done in order for the trial judge or magistrate to satisfy himself or herself that the child understands the nature of oath. If in the opinion of the trial judge or magistrate, to be recorded in the proceedings, the child does not understand the nature of an oath but is possessed of sufficient intelligence and the witness understands the duty of speaking the truth, such evidence may be received though not upon oath or affirmation." (See* ***Dhahiri Ally v R*** *[1989] TLR 27;* ***Sakila v R*** *(1967) EA 403;* ***Khamis Samuel v R*** *Criminal Appeal No. 320 of 2010 CAT (unreported);* ***Kisiri Mwita s/o Kisiri v R*** *[1981] TLR 218 and* ***Kibangeny v R*** *[1959] EA 94)*

In a summary form the procedure to ascertain whether a child of tender age is competent to testify is as follows:

PROCEDURE TO FIND OUT WHETHER A CHILD OF TENDER AGE IS COMPETENT TO TESTIFY

A. ON OATH

1. The magistrate Judge questions the child to ascertain.

(a) The age of the child.

(b) The religious belief of the child.

(c) Whether the child understands the nature of oath and its obligations, based upon his religious beliefs.

2. Magistrate makes a definite finding on these points on the case record, including an indication of the question asked and answers received.

3. If the court is satisfied from the investigation that the child understands the nature and obligations of an oath, the child may then be sworn or affirmed and allowed to give evidence on oath.

4. If the court is not satisfied that the child of tender age understands the nature and obligations of an oath he will not allow the

child to be sworn or affirmed and will note this on the case record:

B. <u>UNSWORN</u>

1. If the court finds that the child does not understand the nature of an oath, it must before allowing the child to give evidence determine through questioning the child **two things**:-

(a) That the child is possessed of sufficient intelligence to justify the reception of the evidence, **AND**

(b) That the child understands the duty of speaking the truth. Again the findings of each point must be recorded on the record.

C. IN CASE THE CHILD IS INCAPABLE TO MEET THE ABOVE TWO POINTS (A & B)

Court should indicate on the record and the child should not give evidence.

In the instant case, before PW2 gave evidence, the trial court according to the record shows thus:

PW2 Angela Benard, 10, I am a pupil at Kaloleni, Std III Christian:

VOIRE DIRE TEST

Court: Do you know God

PW2: He is on top (Mbinguni)

Court: Do you know the truth

PW2: I don't remember, but it is saying the truth not a false statement.

Court: Who is the head teacher.

PW2: Kaaya

Order: I am satisfied that an accused (Sic) is intelligent enough to testify before this court:

Then PW2 gave her evidence. The above extract falls short of a voire dire. It is crystal clear that the trial court did not comply with the procedure of conducting voire dire test. In the absence of an inquiry and a finding that the child understands the nature of an oath or he is possessed of sufficient intelligence and understands the duty of speaking the truth, it cannot be said that the child was a competent witness. The evidence of PW2 is of no evidential value. Since the trial court did not comply with the mandatory provision of Section 127(2) of the Evidence Act, the evidence of PW2 was wrongly admitted and acted upon. The

same is expunged from the record. And since the evidence of PW2 is crucial in this case, the conviction cannot stand. We entirely agree with Ms. Banzi. This ground alone is enough to dispose of the appeal, we see no need of discussing the other grounds.

Before we make concluding remarks, we wish to make one observation. The trial court recorded the evidence by way of question and answer form. That was not proper. The manner of recording evidence before a magistrate is provided under section 210(1) (b) of the Criminal Procedure Act, Cap. 20. The section reads:

> 210 (1) In trials, other than trials under section 213, by or before a magistrate, the evidence of the witnesses shall be recorded in the following manner.
>
> (c) the evidence shall not ordinarily be taken down in the form of question and answer but, subject to subsection (2), in the form of a narrative.

We urge magistrates to follow the law governing the conduct of criminal trials so as to prevent or at least to minimize the chances of a miscarriage of justice.

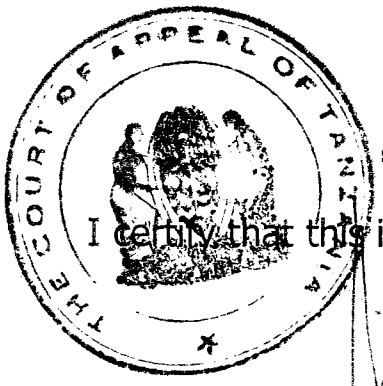
In the event and for the reasons stated above, we allow the appeal, quash the conviction and set aside the "sentence". The appellant is to be released from prison forthwith unless otherwise lawfully detained.

Order accordingly.

DATED at **ARUSHA** this 8th day of May, 2012.

H. R. NSEKELA
JUSTICE OF APPEAL

B. M. LUANDA
JUSTICE OF APPEAL



S. A. MASSATI
JUSTICE OF APPEAL

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

(M.A. MALEWO)
DEPUTY REGISTRAR
COURT OF APPEAL