IN THE COURT OF APPEAL OF TANZANIA
AT TABORA

(CORAM: MSOFFE, J.A., MBAROUK, J.A. And ORIYO, J.A.)

CRIMINAL APPEAL NO. 270 OF 2008

AMANI FUNGABIKASI.....APPELLANT

VERSUS

THE REPUBLIC.....RESPONDENT

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

(Kaduri, J.)

dated the 10th day of September, 2008
in
Criminal Appeal No. 70 of 2007

JUDGMENT OF THE COURT

25 & 29 October, 2012

MSOFFE, J.A.:

This appeal arises from the decision of the High Court of Tanzania at Tabora (Kaduri, J.) upholding the "guilty verdict" of rape by the District Court of Kigoma (Mhina, RM.) in which upon the said "verdict" the appellant was sentenced to life imprisonment. In the appeal the sentence was substituted to one of thirty years imprisonment.

In their concurrent findings of fact the courts below were satisfied that on 6/10/2006 at about 17.00 hours at Luguru Refugees Camp, Kigoma, the appellant raped PW1 Riziki Piere, a girl of 9 years of age at the material time.

We have used the words "guilty verdict" above deliberately. We say so because a look at the record of proceedings of the District Court will show that in the judgment of the said Court dated 19/2/2007 no conviction was entered against the appellant thereby offending the mandatory provisions of Section 235(1) of the Criminal Procedure Act (CAP 20 R.E. 2002) (the Act). So, since there was no conviction at best the appellant was therefore sentenced to imprisonment on the basis of the "guilty verdict" only.

In view of the above shortcoming, at the hearing of this appeal we invited the parties to address us on the point. Ms. Pendo Makondo, learned Senior State Attorney who appeared before us on behalf of the respondent Republic, was of the strong view that the proceedings of the trial court were a nullity for want of a conviction. In a similar vein, the

High Court proceedings were also a nullity because they had no leg to stand on, she urged. In her further view, we could make an order for a retrial. But such an order would not meet the best interests of justice because the evidence on record did, and does, not establish the appellant's guilt beyond reasonable doubt. In the light of this, she impressed upon us to exercise our revisional jurisdiction and thereby vacate the proceedings of the lower courts.

Understandably, the appellant being a layman had nothing material to submit on the above legal point. His submission was merely that he supports Ms. Pendo Makondo in her submission.

With respect, we agree with Ms. Pendo Makondo. It was imperative upon the trial District Court to comply with the provisions of Section 235(1) of the Act by convicting the appellant after the magistrate was satisfied that the evidence on record established the prosecution case against him beyond reasonable doubt. In the absence of a conviction it follows that one of the prerequisites of a true judgment in terms of Section 312(2) of the Act was missing. The sub-section reads: -

> *(2) In the case of **conviction** the judgment shall specify the offence of which, and the section of the Penal Code or other law under which, the accused person is **convicted** and the punishment to which he is sentenced.*
>
> (Emphasis supplied.)

So, since there was no conviction entered in terms of Section 235(1) of the Act there was no valid judgment upon which the High Court could uphold or dismiss - See also this Court's decision in **Shabani Iddi Jololo and Three Others v Republic**, Criminal Appeal No. 200 of 2006 (unreported).

It is true, as contended by Ms. Pendo Makondo that in the light of the above shortcoming we could make an order for a retrial. But it is also true that we could have easily set aside the decision of the High Court and consequently direct that the record be remitted to the District Court so that it enters a conviction.

However, after giving the matter a very careful thought and consideration we are not inclined to make any of the above orders. We go

along with Ms. Pendo Makondo that sending the matter back to the District Court will not serve the best interests of justice. It is true that the evidence on record did not justify the "guilty verdict". Therefore remitting the record to the District Court will not serve any useful purpose. Sending the record back to the District Court will only be a waste of time and thereby subjecting the appellant to unnecessary jeopardy. We say so for reasons that will be apparent hereunder.

As already stated, PW1 was aged 9 years at the material time. In this sense, it was imperative upon the trial District Court to comply with the mandatory provisions of Section 127(2) of the Evidence Act (CAP 6 R.E. 2002) by conducting a *voire dire* examination. Apparently no such *voire dire* examination was conducted. Obviously, this was an error in law. For times without number this Court has always implored upon trial courts to ensure that where a witness is a child of tender age in terms of Section 127(5) of the Evidence Act the provisions of sub-section (2) thereto should be complied with. Indeed, in that spirit through our recent decision in **Mohamed Sainyeye v Republic**, Criminal Appeal No. 57 of 2010 (unreported) we have even gone a step forward to the extent of directing

trial courts on the proper procedure in the conduct of a *voire dire examination* in ascertaining whether or not a child of tender age is competent to testify thus: -

> *PROCEDURE TO FIND OUT WHETHER A CHILD OF TENDER AGE IS COMPETENT TO TESTIFY*
>
> ***A. <u>ON OATH</u>***
>
> *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 questions 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: UNSWORN

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 view of the failure to comply with the dictates of Section 127(2) of the Evidence Act (*supra*) it follows that the evidence of PW1 had no

probative value in the case and it ought to be expunged from the record and we accordingly do so. Once it is expunged there is no other material evidence upon which the appellant could bear criminal responsibility for the offence in question. We say so because at best the evidence of PW2 Anna Asako was hearsay. She did not witness the incident. PW3 Dr. Joelam Mpemba examined PW1. Surprisingly however, at the trial he produced an examination sheet (Exh. P2). The PF3 (Exh. P1), which was presumably filled in by him, was tendered in evidence by PW1. As it is therefore, the spirit of the provisions of Section 240(3) of the Act could not be invoked because in the circumstances there was no room for cross-examining PW3 on the contents of the PF3. In this sense, the PF3 had no evidential value in the case and could not therefore carry the prosecution case a step further in establishing the appellant's guilt.

For the foregoing reasons, under Section 4(2) of the Appellate Jurisdiction Act (CAP 141) in exercise of our revisional jurisdiction we hereby quash and set aside the proceedings and judgments of both the District Court and the High Court. The appellant is to be released from prison unless lawfully held.

DATED at TABORA this 26th day of October, 2012.

J. H. MSOFFE
JUSTICE OF APPEAL

M. S. MBAROUK
JUSTICE OF APPEAL

K. K. ORIYO
JUSTICE OF APPEAL

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

(E. Y. Mkwizu)
DEPUTY REGISTRAR
COURT OF APPEAL