IN THE COURT OF APPEAL OF TANZANIA
AT MTWARA

(CORAM: OTHMAN, C.J., MBAROUK,J.A. And BWANA, J.A.)

CRIMINAL APPEAL NO. 92 OF 2011

BETWEEN

MOHAMED OMARY.....APPELLANT

VERSUS

THE REPUBLIC.....RESPONDENT

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

(Mipawa, J.)

dated 30th June, 2011

in
Criminal Appeal No. 21 of 2010

JUDGMENT OF THE COURT

21ST & 27th JUNE, 2012

OTHMAN, C.J.:

The appellant, Mohamed Omary, was charged with and convicted by the Ruangwa District Court of the offence of rape contrary to section 130 (1)(2)(e) and 131(1) of the Penal Code, Cap 16 R.E. 2002 as amended by the Sexual Offences Special Provisions Act, No 4 of 1998. It sentenced him

to thirty years imprisonment. He unsuccessfully appeal to the High Court (Mipawa, J.). Hence this second appeal.

At the hearing of the appeal, the appellant appeared in person, unrepresented. The respondent Republic, which supported the appeal was represented by Mr. Renatus Mkude, learned State Attorney.

The charge sheet preferred by the prosecution on 22/04/2009 had alleged that on 03/04/2009 at 15:00 hrs at Liuguru Village, Ruangwa District the appellant had carnal knowledge of Shukurani d/o Peter (PW1) , a seven years old girl. The trial court, without conducting a *voire dire* examination as required under section 127(2) of the Evidence Act, Cap 6 R.E. 2002 (hereinafter refresh to as the Act) received her testimony and relied on it to convict the appellant. She told the court that the appellant took her inside a house and raped her. She tendered the PF3 Form (Exhibit P.1), which was signed by the examining medical officer, Gerion Ndambilo (PW4) but not stamped by the Hospital Authorities. PW1's mother (Hadija Athumani) had learnt about the incident on her return from the farm and had examined PW1 in the presence of PW5 (Fatuma Chikwati).

In his defence, the appellant (DW1) denied involvement. There was a fight, he said, between PW2 and his daughter who was married to PW2's

son, in which the former was injured. The matter was reported to the police.

The appellant challenges the following in his memorandum of appeal, namely, that no *voire dire* examination of PW1 had been conducted by the trial court; PW1's age was not proved and the PF3 Form (Exhibit P1) was improperly admitted and acted upon.

Before us, the appellant, a lay person, continued to deny his involvement. He attributed his prosecution to the existence of a prior family conflict, which was admitted by PW2 at the trial.

On his part, Mr. Mkude submitted that the whole prosecution case depend on PW1, the complainant. That while the High Court had appreciated the trial court's mistake in totally failing to conduct a *voire dire* examination of PW1 as required under section 127(2) of the Act, it eroneously acted on it in the best interests of the child and dismissed the appeal.

Relying on **Mohamed Sainyeye V.R.** Criminal Appeal No. 57 of 2010 (CAT, unreported) Mr. Mkude forcefully submitted that PW2's evidence should be entirely disregarded. That if this is done, there is no

other evidence to support the appellant's participation in the commission of the offence. PW2, PW3 and PW5's evidence was hearsay and without PW1's evidence no conviction could be obtained. Prompted by the Court, he submitted that in the instance case, even a retrial was not worth considering as it would not have strengthened the prosecution case in any way.

The record bears out that on 22/10/2009 when PW1 was called to testify the trial court noted:

> *"PROSECUTION CASE OPENS (IN CAMERA)*
> *PW1. SHUKRANI S/O PETER (AGE SHE SEEMS NOT TO KNOW HER AGE- BUT SHE IS IN STANDARD ONE LIUGURU. TO ME SHE IS OF AGE BETWEEN 7-9 YEARS FOR HER PHYSICAL APPEARANCE). ISLAM. FOR HER AGE I INQUIRE, BUT SHE DOES NOT KNOW. BUT SHE UNDERSTAND THE DUTY OF SPEAKING THE TRUTH.*
> *I DID NOT MAKE VOIRE DIRE AS THIS CASE IS NOT SUBJECT TO VOIRE DIRE EXAMINAITON PER S. 127(7) TEA AND ALSO NOT AFFIRM HER AS SHE DOES NOT KNOW THE NATURE OF OATH. BASING ON THE ASSUMPTION THAT SHE WILL SPEAK NOTHING BUT TRUTH I TAKE HER TESTIMONY WITHOUT OATH (SEC.C 127(7) OF THE EVIDENCE ACT, CAP 6 RE 2002)".*

With respect, **first**, the trial court could not validly have established PW'1s age and in the way it did. PW2, who could have done it, did not. (See, **Emmanuel Kibona and Others V.R**., 1995 T.L.R. 241). **Second**, the court misdirected itself on the correct provision of the law applicable. It purported to apply section 127(7) of the Act, not applicable to *voire dire* examination instead of section 127(2), the proper subsection. **Third**, it completely omitted to conduct a *voire dire* examination of PW1.

On its part, the High Court correctly noticed that the trial court had "escaped" to conduct the *voire dire* test as required under section 127(2) of the Act. However, it took into account the best interests of the child under Article 3(1) of the United Nations Convention on the Rights of the Child, ratified by Tanzania and equity, which treats as done that which ought to have been done, to hold that the appellant's conviction by the trial court was proper.

We are most aware that section 4(2) of the Law of the Child Act, No 21 of 2009, which came into effect on 01/04/2010 (G. N. No. 156 of 2010) encapsules the principle that the best interest of a child shall be the primary condition in all activities concerning a child whether undertaken by public or private social welfare institutions, courts or administrative bodies.

For the evidence of doubt section 127(2) of the Evidence Act provides:

> *"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."*

With great respect, much well intended as the High Court may have been, the serious irregularity committed by the trial court could not have been cured in the way the first appellate court attempted to do. Section 127(2) of the Act is couched in mandatory terms and it is an imperative for the reception of the evidence of a child of tender age.

With the total omission by the trial court to conduct a *voire dire* examination as required under section 127(2), the purported testimony of PW2 was of no evidential value (See, **Mohamed Sainyeye's case** (*supra*)). It could not have been acted upon, as did the courts below, to anchor the appellant's conviction.

We would agree with Mr. Mkude that without PW's evidence on the record, the resulting situation is that there was no other sufficient evidence on which to peg the appellant's participation in the commission of the offence and to prove it beyond reasonable doubt.

In the final analysis and for all the foregoing reasons, we allow the appeal, quash the conviction and set aside the sentence. The appellant is to be released forthwith from prison, unless otherwise lawfully held.

DATED at **MTWARA** this day of 26th June, 2012.

M. C. OTHMAN
CHIEF JUSTICE

M. S. MBAROUK
JUSTICE OF APPEAL

S. J. BWANA
JUSTICE OF APPEAL

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

MBUYA R. M.

DEPUTY REGISTRAR