IN THE COURT OF APPEAL OF TANZANIA
AT DAR ES SALAAM

(CORAM: MSOFFE, J.A., KILEO, J.A., And MASSATI, J.A.)

CRIMINAL APPEAL NO. 199 OF 2011

MTENDAWEMA SAID ..... APPELLANT
VERSUS
THE REPUBLIC ..... RESPONDENT

(Appeal from the Decision of the
High Court of Tanzania at Morogoro)

(Massengi, J.)

dated the 14th day of July, 2010
in
Criminal Sessions Case No. 8 of 2009

JUDGMENT OF THE COURT

29 June & 16 July 2012

MASSATI, J.A.:

The appellant was charged with and convicted of the offence of murder. The High Court sitting at Morogoro (Massengi, J) sentenced him to death by hanging. He is now appealing against conviction and sentence.

It was alleged that on the 20th September, 2007 at Kilama A. village, Kilombero District, Morogoro Region, the appellant kidnapped NORA MUSHI; and murdered her. Evidence was led to the effect that

as the deceased was coming from school in the company of HADIJA ALI, (PW1), SELEMANI KILACHELE (PW2) and other children, she was grabbed by the appellant on the pretext of taking her back to school as she did not do well in her arithmetic lessons. That was the last time she was found alive. After some fruitless initial search for his granddaughter, RASHID SEFU (PW4) alerted the village authorities and the police. The deceased's lifeless body was found the next day in some bush. Investigation led to the arrest of the appellant on 3/10/2007. In his defence, the appellant denied the charge, and suggested that he even participated in the burial of the deceased.

Before us, Mr. Cornelius Kariwa, learned counsel appeared for the appellant, whereas the respondent/Republic was represented by Mr. Vincent Haule, learned Senior State Attorney, assisted by Ms. Rehema Katuga, learned State Attorney.

The appellant had filed his own memorandum of appeal consisting of seven grounds; and Mr. Kariwa filed another memorandum which had two grounds. We think, they all boil down

to two main grounds, namely, **First,** that it was wrong for the trial court to convict the appellant on the basis of the evidence of PW1 and PW2 alone. **Second,** that the prosecution case was not proved beyond reasonable doubt. Arguing on the first ground, Mr. Kariwa submitted that the evidence of PW1 and PW2, was contradictory and inconsistent and that the testimony of PW2 was taken without fully complying with section 127(2) of the Evidence Act, in that the trial court did not make a finding on his competency before taking his evidence. It was also submitted that the two witnesses could not corroborate each other, and the identification parade was useless. Lastly, learned counsel argued that the fact that some other person was arrested before the appellant in connection with the same offence and that the appellant freely attended the deceased's burial introduced some serious doubts in the prosecution case. So, argued the learned counsel in his second ground of appeal, that, the prosecution case was not proved beyond reasonable doubt. He thus prayed that the appeal be allowed.

In a short but focused submission, Mr. Haule argued that the conviction rested on a strong foundation. He said there were no

material contradictions, between the evidence of PW1 and PW2, even if they were children of tender years. Asked on the value of the evidence of PW2 and the identification parade, the learned Senior State Attorney said that the evidence of PW2 was improperly taken without first making and recording a finding on his competency, and that this was not cured by doing it in the judgment; and secondly he conceded that as PW1 had already seen the appellant several times in the village, the identification parade was useless. However, Mr. Haule maintained that the conviction could still rest on the testimony of PW1 alone even without corroboration, more so, after the learned trial judge had warned herself against the danger of acting on such evidence. As such, it was established that the appellant was the last person to be seen with the deceased. He therefore prayed for dismissal of the appeal.

The conviction of the appellant rests on two pieces of evidence. Visual identification by PW1, PW2, and the identification parade. As this is a first appeal we are duty bound to re - evaluate the evidence and if necessary, come to our own conclusions.

Let us first deal with testimony of PW2. It has forcefully been submitted before us, that his evidence should be discarded because, the trial judge did not make a finding as to his competency before taking down his evidence. We agree that, it is prudent for a trial court to take and record notes of any examination taken on any intended child witness and to record a finding as to the witness's competency to testify, as this would assist appellate courts to determine whether or not the evidence was properly admitted (See **NYASANI s/o BICHANA v R** (1958) EA 190; **SEKO SAMWEL v R** (2005) TLR. 371.) However, it has been held that, in such circumstances, if it appears from the trial's court's judgment that the court found the witness competent to testify on oath, or that such finding may be inferred, such evidence would not necessarily be faulted on appeal. An identical situation occurred in **OLOO s/o GAI v R** (1960) EA 86. Like in the present case, there, a child was allowed to testify on oath without first recording a finding on the child's competency, but the trial judge made such finding in his judgment. The defunct Court of Appeal for Eastern Africa said:

> *"Whilst it would have been better for the trial judge to record in terms that he had satisfied himself that the child understood the nature of an oath, this was the effect of his finding."*

In the present case, the learned trial judge conducted an exhaustive *voire dire* examination on PW2. In answer to the question whether he understood the nature of an oath, the witness said:

> *"Yes, I know that oath is related to you (sic) religion whereby you use the name of God to affirm what you (sic) telling a (sic) truth."*

And in the judgment, the learned judge made the following, finding:

> *"PW2.....after a successful VOIRE DIRE that was conducted I was satisfied that he possesses sufficient intelligence to justify reception of his evidence and he know (sic) the meaning of telling the truth and the meaning of an oath therefore be gave evidence on oath."*

So, although, it is not good practice for a trial court to have made such a finding in the judgment, we are satisfied that the effect of the finding was that PW2 was competent to give evidence on oath. With due respect to the learned counsel, we find that PW2 was competent to testify on affirmation and so we retain his evidence on record.

Before we examine the evidence of PW1 and PW2, we wish to make three points quickly, relating to the issue of corroboration of child witnesses. The first is that under section 152(3) of the repealed Criminal Procedure Code of Tanzania, it was a matter of law that unsworn evidence of a child had to be corroborated in criminal cases. The Criminal Procedure Code was repealed and replaced by the Criminal Procedure Act No. 9 of 1985 (Cap 20 RE 2002) which has no similar provision. However, case law has retained that position as a matter of practice. Case law has also maintained that even sworn evidence of a child requires corroboration as a matter of practice (See **MAGANGA MSIGARA v R** (1965) E.A 471 on page 474, where the following passage from the judgment of the Privy Council in

MOHAMED SUGAL v R (1946) AC 62 interpreting the Indian Evidence Act; was quoted:-

> *"In England, where provision has been made for the reception of unsworn evidence from a child, it has always been provided that the evidence must always be corroborated in some material particular implicating the accused. But in the Indian Act there is no such provision, and the evidence is made admissible whether corroborated or not. Once there is admissible evidence a Court can act upon it; corroboration, unless required by statute only goes to the weight and value of the evidence. It is a sound rule in practice not to act on the uncorroborated evidence of a child, whether sworn or unsworn, but this is a rule of prudence not of law."*

This position is crystallized in section 127(3) of the Evidence Act which, in effect, recognizes the existence of the rule of practice to look for corroboration in cases of any evidence received under section 127(2). The full text is set out below:

> *"Notwithstanding any rule of law or practice to the contrary, but subject to the provisions of subsection (7) herein, where evidence received by virtue of subsection (2) is given on behalf of the prosecution and is not corroborated by any other material evidence in support of or implicating the accused, the court may, after warning itself of the danger of doing so, act on that evidence to convict the accused,* ***if it is fully satisfied that the child is telling nothing but the truth.***"
>
> *(emphasis supplied)*

The point is that, as a matter of practice and prudence any evidence taken under section 127(2) of the Evidence Act whether sworn or unsworn requires some corroboration although such evidence may be acted upon, it the court is satisfied that it is nothing but the truth.

The second point is made in answer to the submission of the learned counsel for the appellant that the evidence of PW1 could not be corroborated by that of PW2 because the evidence of the latter

itself (if found legally received) requires corroboration. It is true, and it has been laid down as settled law that, evidence which itself requires corroboration cannot act as corroboration; or; that, a witness who himself requires corroboration cannot corroborate. (See **RAMADHANI BIN MAWINGU v R** (1936) 13 EACA 39. **ALLY MSUTU v R** (1980) TLR I. **SWELU MARAMOJA v R** Criminal Appeal No. 43 of 1991 (unreported). But that is not so in respect of evidence taken under section 127(2) of the Evidence Act. This exception is provided in section 127(4) of the Evidence Act which reads:

> *"Notwithstanding any rule of law or practice to the contrary, the evidence of a child of tender years received under subsection (2) may be acted upon as material evidence corroborating the evidence of another child of tender years previously given or the evidence given be an adult which is required by law or practice to be corroborated."*

It is clear from this provision that the evidence of a child which requires corroboration in practice, may be corroborated by evidence

of another child even if such evidence is not corroborated; and similarly the evidence of a child may corroborate that of an adult witness whose evidence requires corroboration either in practice or in law.

The third point we wish to make is in respect of direction to assessors. Although the point was not taken up at the hearing of the appeal, we nevertheless feel bound to make our comments known. We wish to remind trial courts to bear in mind that in trials with assessors, when the issue of corroboration crops up in the course of the trial, it is not enough for the trial judge to direct himself, but he should also direct the assessors on the need, if any, and the danger of acting on uncorroborated evidence. In **KIBANGENY ARAP KOLIL v R** (1959) EA. 92, it was held that failure to direct the assessors on the practical need for corroboration on the evidence of children, as in the present case could be fatal to a conviction.

Having set out what we consider to be the axle of the present appeal, it is now necessary to consider the evidence of PW1 and PW2 in some detail, because counsel for the appellant has pointed out

some discrepancies in and between the evidence of the two witnesses.

We must first acknowledge the existence of a presumption of fact that if it is proved that a person was the last person to be seen with the deceased, it gives rise to a strong suspicion, and the court may take it into account along with other circumstances, in deciding the guilt of the suspect. But, that in itself, is not conclusive proof that that person is the one who killed the missing person (See **RICHARD MATANGULE v R** (1992) TLR 5. But further in our view, before invoking that doctrine, it must conclusively be established that it was the accused person and no other who was last seen with the deceased.

There is no dispute that, according to PW1 and PW2, it was the first time they were seeing the person who kidnapped the deceased. It is also true that it was in broad daylight, but there is no evidence as to how thick the cassava vegetation (where the witnesses were uprooting cassava) was, and the distance where the witnesses stood to where the victim was grabbed. This would certainly have had

effect on the witnesses' ability to perceive clearly what was unfolding before then. It is also on record that at that time (2007) PW1 and PW2 were 6 and 7 years of age respectively. We are not sure, and it was not brought forth in the evidence, whether given their tender ages then they could remember such detailed descriptions of the appellant three years down the road equally or more than when they could, if the trial had taken place earlier. We also learn from the record that the appellant used to frequent the village for the purposes of selling vegetables, a fact supported by PW4. The appellant's explanation that he had attended the deceased's funeral, was also not disputed; nor that by then some one else in the name of Tabuyahela had been arrested in connection with the offence and detained by the police. We are not told the circumstances in which this other person was arrested, except a glimpse from PW4, that he was arrested because the deceased's body was found in his neighborhood. But PW4 is not a police officer. Here, the evidence of the arresting officer would have been of immense assistance.

The investigation officer would also have assured the trial court whether PW1 and PW2 gave the same description of the appellant as

they did at the trial. It is now established law that the earlier a witness describes or mentions a suspect, the more credible he/she may be rated (See **JARIBU ABDALLAH v R** (2003) TLR 271. In this case, PW1 told the trial court that she first described the person who kidnapped the deceased to her aunt. The aunt did not testify. On the other hand, except for the dock identification, and to the effect that he told PW4 about the incident that same day, there is no clue that PW2 gave the appellant's description to PW4. It took PW1's aunt to describe to PW4 what PW1 told her as to how the kidnapper looked like. The effect of the infancy of those witnesses is now glaring in that they did not take the whole thing seriously. We ask ourselves whether this could not seriously have impaired their powers of concentration on what was happening before them.

Our suspicion is borne out by the differences in the description of the appellant given by the witnesses. Except for the clothes which the suspect was wearing, PW1 thought that the man was short, black with a bald head, but PW2 only described him as black and a bit fat. There was no mention of a bald head. We are unable to comprehend why and how if PW1 and PW2 were concentrating and

describing the same person, PW2 could have forgotten such a conspicuous facial description as a bald head that PW1 claimed the appellant had. But there is also a contradiction between the witnesses as to whether it was the appellant who carried the deceased away or "the other guy." According to PW1, it was the appellant, but according to PW2 in cross examination."

"It was the other who took Nora on back."

It was not accused who took Nora."

I don't' know why he was there."

Mr. Haule has submitted that these contradictions are not material. With respect, we do not agree. We think that the contradiction goes to the root of the prosecution case; which is whether the appellant was properly identified by PW1 and PW2 as the last person who was seen with the deceased alive. Our finding is that there are reasonable doubts whether he was.

For section 127(3) of the Evidence Act to come into play the court must be satisfied that the witness(es) must be telling nothing but the truth. If, the trial court is in doubt, it ought, as a matter of

prudence to look for corroboration. **As SARKAR ON EVIDENCE** (15th ed.) vol. 2 at p. 1957 puts it:

> *"The testimony of a child witness should only be accepted after the greatest caution and circumspection. The rationale for this is that it is common experience that a child witness is most susceptible to tutoring. Both on account of fear and inducement, he can be made to depose along things which he has not seen and once having been tutored he goes on repeating in a parrot like manner what he has been tutored to state. Such witnesses are most dangerous witnesses."*

Our worst fears are confirmed when PW1 admitted in re examination on p. 12 of the record, that she was

> *"forced by may sail (sic) to tell that I have seen the person who took Nora after knowing Nora was dead."*

This gives a hint that PW1 may have been driven by fear in giving testimony. This might also explain the infirmities of

description on the point of proper identification of the suspect, between the two child witnesses.

In view of our analysis above, we have a lot of reservations on whether PW1 and PW2 had told the trial court, nothing but the truth. The question is whether there is any corroborative evidence on record.

It has been held that the purpose of an identification parade is to corroborate the dock identification of a suspect. It is not substantive evidence (See **MOSES DEO v R** (1987) TLR. 134. This is what the identification parade in the present case was intended to achieve. But it is also the law that an identification parade is useless if the person put on the parade to be identified is known to the person who is to make the identification (See **HASSAN KANENYERA AND OTHERS v R** (1992) TLR 106. In the present case, both PW1 and PW2 had previously seen the appellant at the village prior to and during his arrest. The identification parade was therefore a mere mockery and useless. What it means is that it cannot corroborate the evidence of PW1 and PW2.

Given all the circumstances in this case, we are not persuaded that the charge was proved with that degree of certainty required in a capital offence. The conviction of the appellant is therefore not safe.

In the result, we allow the appeal. We quash the conviction and set aside the sentence. We order that the appellant be released from prison forthwith unless otherwise lawfully held.

DATED at **DAR ES SALAAM** this 13th day of July, 2012.

J.H. MSOFFE
JUSTICE OF APPEAL

E.A. KILEO
JUSTICE OF APPEAL

S.A. MASSATI
JUSTICE OF APPEAL

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

Z.A. MARUMA
DEPUTY REGISTRAR
COURT OF APPEAL