IN THE COURT OF APPEAL OF TANZANIA
AT DODOMA

(CORAM: KILEO, J.A., ORIYO, J.A., And JUMA, J.A.)

CRIMINAL APPEAL NO. 588 OF 2015

NALOGWA JOHN..... APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

(Appeal from a decision of the Resident Magistrates' Court at Singida)

(Lema, PRM (Ext. J)

dated the 3rd day of December, 2015
in
Criminal Appeal No. 40 of 2015.

REASONS FOR THE JUDGMENT OF THE COURT

15th & 29th April, 2016

ORIYO, J.A.:

On 15th April, 2016, the hearing of the appeal lodged in Court by Nalogwa John proceeded as scheduled. The appellant appeared in person and the respondent Republic was represented by Ms Lina Magoma, learned State Attorney. Upon its conclusion and in terms of Rule 39(6) of the Court Rules, 2009 we allowed the appeal, quashed his conviction of rape and set aside the sentence of thirty (30) years imprisonment imposed on him, with

twelve (12) strokes of the cane. We also ordered his immediate release from prison and that we would give reasons for our decision in due course.

We now give our reasons for the judgment. The events that led to the trial, conviction and sentence of the appellant occurred on 12th October, 2011, at about 6pm at Mgundu village within Iramba District, Singida Region, when the appellant allegedly raped one **Faraja Zakaria,** PW1. The charge sheet, in part, states as hereunder:-

"TANZANIA POLICE FORCE

CHARGE

NAME AND TRIBE OR NATIONALITY OF PERSONS (S) CHARGED

NAME : NALOGWA S/O JOHN

TRIBE : MNYIRAMBA

AGE : 18 YEARS

OCC : PEASANT

REL : CHRISTIAN

RES : MGUNDU VILLAGE

OFFENCE SECTION AND LAW: RAPE *C/S 130(1) and 131(1) Cap 16 of the Laws R.E. 2002)*

PARTICULARS OF OFFENCE: *That* ***NALOGWA S/O JOHN*** *charged on the 12th day of October, 2011 at about 18:00 hrs Mgundu village within Iramba District in Singida Region did rape one* ***FARAJA D/O ZAKARIA*** *a student at Kyengenge Secondary.*

STATION*: KIOMBOI* ***Sgd.***

Public Prosecutor

20/10/2011"

As evident from the Charge Sheet, the appellant was charged and convicted under **sections 130(1) and 131(1) of the Penal Code,** Cap 16, without being more specific on the relevant subsections. Dissatisfied with the outcome of his first appeal to the High Court, the appellant came to the Court on a second appeal. The learned State Attorney forthrightly informed the Court that the respondent Republic was in support of the appeal.

However, there is no concrete evidence on record whether PW1 was below or above 18 years of age. To begin with, the Charge Sheet does not state her age; while the court proceedings of 29/12/2011, the date she testified in court, the general information shows her age to be **fourteen (14) years.** The trial court did not have the benefit of having concrete

evidence on the true age of PW1 confirmed, as no parent, relative, teacher, close friend or any other person who knew PW1 well testified on her exact age in court. It was under these circumstances, on the uncertainty of the age of PW1 that misled the trial District Court of Iramba District at Kiomboi to receive the evidence of PW1 without conducting ***voire dire.*** As correctly submitted by the learned State Attorney, ***voire dire*** was essential to establish whether PW1 **understood the duty of telling the truth and the meaning of an oath.**

In his memorandum of appeal filed in this Court, the appellant's complaints can conveniently be condensed into two. **Firstly,** he complained that the evidence of PW1 was illegally admitted in the trial court without subjecting her to the mandatory ***voire dire*** examination. **Secondly,** he complained that he was convicted on the basis of a **confession** he made before a Justice of the Peace, which was not true.

At the hearing, the appellant felt more comfortable to have the learned State Attorney react to his grounds of appeal first, to enable him make a meaningful reply thereafter.

The learned State Attorney forthrightly submitted that she was in support of the appeal due to some obvious errors of law committed in the courts below. Her first attack was on the charge sheet in which the appellant was charged under **sections 130 (1) and 131(1) of the Penal Code**, without citing the relevant subsections thereof. She referred us to **Amos Palanzi v. Republic** Criminal Appeal No. 137 of 2012 (unreported), where in similar circumstances the victim's age was unknown and the charge was, as in the present appeal not specific on the relevant subsection. The learned State Attorney urged us to allow the appeal.

There is no gainsaying that the case of the appellant from the charge sheet, trial and in the first appellate court was riddled with errors, inconsistencies and legal irregularities.

Whereas **section 130(1)** states:

*"(1) It is an offence for a male person to rape a **girl** or a **woman".***

Section 131(1) thereof provides as hereunder:-

> *"131 – (1) Any person who commit rape is, except in the cases provided for in the renumbered subsection (2), liable to be punished with **imprisonment for life,** and*

in any case for imprisonment of ***not less than thirty years with corporal punishment,*** *and* ***with a fine,*** *and shall in addition, be ordered to pay compensation of an amount determined by the court, to the person in respect of whom the offence was committed for injuries caused to such person."*

As intimated above, the testimony of PW1 was nevertheless taken without being preceded by **voire *dire,*** in terms of section 127 (2) of the Evidence Act, Cap. 16. In terms of our decision in **Kimbute Otiniel v. R.** Criminal Appeal No. 300 of 2011, the complete omission to comply with section 127 (2) of the Evidence Act rendered the evidence of PW1 to be of no effect. Part of what we stated in that case concerning the construction and application of section 127 (2) of the Evidence Act is to the following effect:

"The commulative effect of our analysis and for the reasons afforded, we are of the considered view that the conflicting decisions of the Court on the consequences of the misapplication of or non direction in the conduct of a voire dire by a trial court under sections 127(1) and/or 127(2) should henceforth be resolved in the following manner:

1. Each case is to be determined on its own set of circumstances and facts.

*2. Where there is a **complete omission** by the trial court to correctly and properly address itself on sections 127(1) and 127(2) governing the competency of a child of tender years, the resulting testimony is to be discounted.*

3. Where there is a misapplication by a trial court of section 127(1) and/or 127(2) the resulting evidence is to be retained on the record. Whether or not any credibility, reliability, weight or probative force is to be accorded to the testimony in whole, in part or not at all is at the discretion of the trial court. The law and practice governing the admissibility of evidence; cross-examination of the child witness, critical analysis of the evidence by the court and the burden of proof beyond reasonable doubt, continue to apply.

4. In these same facts and circumstances (i.e. No.2) where there is other independent evidence sufficient in itself to sustain and guarantee the safe and sound conviction of an accused, the court may proceed to determine the case on its merit, always bearing in mind the basic duties incumbent upon it in a criminal trial and the fundamental rights of the accused.

5. However, in these same facts and circumstances (i.e. No. 2), where the evidence of the child witness is the only, decisive or vital evidence for the prosecution and its consideration would seriously prejudice the accused and his or her basic rights or occasion a miscarriage of justice or would result in an unsafe conviction, the evidence should be discounted and cannot form the basis of a conviction.

6. A first appellate court has a prompt and prime duty to ascertain compliance by a trial court with the strict requirements of sections 127(1) and 127(2). It is suitably posed to re-evaluate the matter, including the whole evidence and come to its own conclusion. Where appropriate, it may also order a retrial according to the law and/or make any other lawful order or decision.' [Emphasis added]

Further, we wish to emphasise here, for the benefit of the courts below, that it is of utmost importance to ascertain on the age of the victim instead of resorting to assumptions. We are also mindful of the Court's decision in In Criminal Appeal No. 173 of 2014, **Andrea Francis vs The Republic**, (unreported), where the Court made the following observation:-

> *".....it is trite law that the **citation by a magistrate regarding the age of a witness before giving evidence is not evidence of that person's age.** It follows that the evidence in a trial must disclose the person's age. In other words, in a case such as this one where the victim's age is the determining factor in establishing the offence, evidence must be positively laid out to disclose the age of the victim.....in the absence of evidence to the above effect it will be evident that the offence ..... was not proved beyond reasonable doubt."*

Another aspect that we noted was the imposition of the sentence of 30 years imprisonment to the appellant who was not above 18 years at time of commission of the crime. The law prohibits imprisonment for convictions of rape to boys who are of the age of eighteen or below. The relevant provision in Penal Code states:

> **"131. Punishment for rape**
>
> **(1) Any person who commits rape is, except in the cases provided for in the renumbered subsection (2), liable to be punished with imprisonment for life, and in any case for imprisonment of not less than thirty years with corporal punishment, and with a fine, and shall in addition be ordered to pay compensation of an amount determined by the court, to the person in respect of whom the offence was committed for the injuries caused to such person.**
>
> **(2) Notwithstanding the provisions of any law, where the offence is committed by a boy who is of the age of eighteen years or less, he shall–**
>
> **(a) if a first offender, be sentenced to corporal punishment only;**

(b) if a second time offender, be sentence to imprisonment for a term of twelve months with corporal punishment;

(c) if a third time and recidivist offender, he shall be sentenced to life imprisonment pursuant to subsection (1)."

It is in view of the preceding reasons that we agreed with the learned State Attorney in support of the appeal that it has merit. We therefore allowed the appeal, quashed the conviction and set aside the sentence imposed. We further ordered the appellant to be released from prison unless otherwise lawfully held.

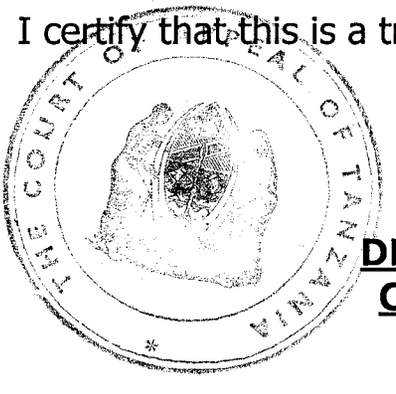
DATED at **DODOMA** this 28th day of April, 2016.

E.A.KILEO
JUSTICE OF APPEAL

K.K. ORIYO
JUSTICE OF APPEAL

I.H. JUMA
JUSTICE OF APPEAL

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



E.F. FUSSI
DEPUTY REGISTRAR
COURT OF APPEAL