**IN THE HIGH COURT OF TANZANIA**

**AT MBEYA**

**DC. CRIMINAL APPEAL NO. 97 OF 2014**

*(From the District Court of Kyela. Original Criminal Case No. 105 of 2012)*

**ISMAIL s/o MOHAMED ..... APPELLANT**

**VERSUS**

**THE REPUBLIC ..... RESPONDENT**

**JUDGMENT**

*Date of last Order: 30/04/2015*
*Date of Judgment: 20/05/2015*

**HON. A.F. NGWALA, J.**

The Appellant, Ismail s/o Mohamed was charged before the District Court of Kyela with Rape c/s 130 (1) (2) (c) and 131 (1) both of the Penal Code [Cap.16 R. E. 2002]. He was convicted and sentenced to life imprisonment. He is dissatisfied with both conviction and sentence.

The facts from the record are that; on the 1st day of July, 2012 at about 20:00 hrs at Ndandalo Street - Amazon Chaka area within the township of Kyela District in Mbeya region, the appellant did have unlawful carnal knowledge of one Ester d/o Chande a school girl of 9 years of age. The appellant is a

petty businessman who used to sell soap at Mzomozi Bar in Kyela town. The prosecutrix is a standard four pupil at Kyela Primary School. The appellant filed a total of eight grounds of appeal in his petition. For easy of reference the same are reproduced hereunder in verbatim:-

"*1. That, the Hon. Trial Magistrate erred when he partially conducted voire – dire test against PW1, PW3 and PW5 to see only whether witnesses understood the meaning of oath but heded not conduct to satisfy himself whether witnesses were intelligent enough to testify the truth.*

*2. That the Hon. Trial Magistrate erred in law when he convicted the Appellant relying on the evidence of $PW_5$ a child of tender age without conducting a voire dire test at all.*

*3. That the Learned Trial Magistrate erred in Law and in fact when he convicted the Appellant relying on the evidence of improper identification of the prosecution witnesses without considering the possibilities of witnesses to make honest mistaken identification as the event was alleged to occur during the night.*

*4. That conditions which favoured $PW_1$, $PW_3$, $PW_5$ and $PW_2$ to make correct identification were not eliminated such as amount of light at the scene of crime, time taken by them to observe the culprit and distance from the suspect to witnesses.*

*5. That, the Hon. Trial Magistrate erred in law and in fact by convicting the appellant on the evidence of $PW_6$ (doctor) without considering that he was not the one who examined $PW_1$ and there was no any*

*evidence to prove that the qualified doctor who examined $PW_1$ was away and it was not possible to be found.*

6. *That the Learned trial Magistrate erred in law and fact when he sentenced the appellant to life imprisonment by beleaving that $PW_1$ was under 10 years of age while there was no any birth certificate to corroborate the age.*
7. *That the Hon. Trial Magistrate did not consider the defence evidence. and*
8. *That the charge against the appellant was not proved by the prosecution side beyond reasonable doubt".*

When the case was called on for hearing, the appellant was unrepresented while the Respondent/Republic was represented by Miss Prosista Paul, learned State Attorney.

The Appellant did not have anything to add. He only prayed to court for adoption of the above quoted grounds of appeal and that his appeal be allowed.

Miss Prosista, in support of the appeal averred that the prosecution evidence was weak and as such could not ground a conviction.

Arguing on grounds one and two, Miss Prosista submitted that it is true as per page 4 of the typed proceedings on the *"voire dire"* test, the evidence on record did not show the findings. In the proceedings, $PW_3$; Rhoda Henry testified after

the court had conducted "*voire – dire*" test, but the Magistrate did not record the findings on that "*voire dire*" test. Miss Prosista submitted further that the evidence of PW5 another child of 13 years was received without conducting "*voire dire*" test. This offended the provisions of Section 127 (2) of the Evidence Act, Cap. 6 R. E. 2002. She cited the case of **Mohamed Sainyenye versus Republic, Criminal App. No. 57 of 2010** (unreported) as the proper law that provides guidance on how to conduct "*voire dire*" test and reception of the evidence of a child of tender age.

Miss Prosista went further stating that the "*voire dire*" test was partially conducted as it is not indicated if the witness knew the meaning of oath.

Submitting on the sixth ground that, there was no evidence to prove the date of birth of the child, the learned State Attorney stated that, the key witness prosecutrix herself did not mention her age. Neither the parents nor the guardians who could do that, mentioned the prosecutrix age as well. The case of **Sahi Sosoma versus Republic Criminal App. No. 31/2006,** unreported by the Court of Appeal of Tanzania was quoted in support of her contention that; in the absence of birth certificate it is the parent who can prove the age of the

child. In addition to the cited authority *Section 114 (2) of the Child Act No. 2 of 2009* was also cited as the relevant provision of the law that provides to that effect.

On the 8th ground of appeal, Miss Prosista, agreed with the appellant that the offence was not proved beyond reasonable doubt. There were material contradictions on the prosecution witnesses. She pointed the said contradictions on the evidence adduced by PW1, Ester Chande, and that of Sam Ngonyani. Again there was no proof to show who arrested the accused person. PW4 summarized his evidence that there was a person who took Ester. It was the children who said that the accused person left with Esta to Amazon forest, but they never went to Amazon Forest. The learned State Attorney finalized her submission by praying this court to quash the conviction and set aside the sentence.

I have carefully and painly gone through the grounds of appeal in the petition of appeal and the thorough submission by the learned Attorney for the Respondent. I am now of the settled view that this appeal can be satisfactory be disposed of on the basis of four grounds only. That is ground one, two, three and four.

The first two grounds are essentially consolidated on point regarding "*voire dire*" test. The third and fourth grounds are on identification.

There are a variety of authorities that tend to elaborate on how to conduct *"voire dire"* test and the proper way of receiving the evidence of a child of tender age. As properly submitted by learned counsel for the Respondents, Republic, one of those authorities is the case of **MOHAMED SAINYEYE versus Republic Criminal Appeal No. 57 of 2011**. In this case the Court of Appeal cited with approval the case of **NYASANI s/o BICHANA versus Republic (1958) E.A. 90** which emphasized on the need to comply with Section 127 (2) of the Evidence Act. 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".*

Other relevant authorities that stressed on the need to conduct *"voire dire"* test before reception of the evidence of a child of tender age among many are the following: **Hassan Hatibu versus Republic Criminal Appeal No. 71 of 2002, Dhahiri Ally versus Republic [1989] TLR 27; Sakila versus Republic [1967] E.A. 403; Khamis Samwel versus Republic Criminal Appeal No. 320 of 2010 Court of Appeal of Tanzania (unreported); Kisiri Mwita s/o Kisiri versus Republic. [1981]T.L.R.218 and Kibangemy versus Republic [1959] E.A. 94**.

For *Mohamed Sainyeye's case (Supra)* the Court of Appeal laid down the procedure to ascertain whether a child of tender age is competent to testify. The court laid down the procedure as follows :-

> *"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 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. 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 and B):***

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

In the instant case, before PW1, Ester Chande gave evidence, the trial Court according to the record shows thus:-

*"**Voire dire test conducted***

*I know the meaning of telling the truth. It is nothing other that telling what has happened. I know the meaning of telling lies, if you tell dies you become a daughter of a devil. If you tell lies you will be sentenced to serve into fail imprisonment. I know the meaning of oath. Oath is nothing but telling the truth. I know that I am before your court; I am compelled to tell the only truth. I prefer to take oath in my evidence".*

After that $PW_1$ gave her evidence. Based on the procedure laid down, can it be said that, the trial court properly conducted "*voire dire*" test? Certainly not. In the procedure followed by the trial court, there was no finding made by the court that the witness understood the nature of an oath or that she is possessed of sufficient intelligence and understood the duty of speaking the truth. As such $PW_1$ was not a competent witness. Whence consequently her evidence is of no evidential value.

The same kind of "*voire dire*" test was conducted to $PW_3$ and $PW_5$. It follows therefore that, the evidence adduced by $PW_3$ and $PW_5$ had no evidential value as well.

The trial court therefore failed to comply with the mandatory provisions of Section 127 (2) of the Tanzania Evidence Act CAP. 6 R.E. 2002. The evidence of PW1, PW3 and PW5 was wrongly admitted and consequently acted upon. Bearing in mind that the evidence of $PW_1$ is very vital to build the prosecution case, the issue in whether expunging this evidence from the record can leave behind any evidence worthwhile to prove the case beyond reasonable doubt.

In the Land mark case of **KIMBUTE OTINIEL v. REPUBLIC, Criminal Appeal No. 300 of 2011,** the Court of Appeal of Tanzania inter alia stated that where there is a complete omission by the trial court to correctly and properly address itself on Section 127 (1) and (2) of the Evidence Act, governing the competency of a child of tender years, the resulting testimony is to be discounted.

The Court of Appeal of Tanzania further held that in the facts and circumstances held above, 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.

In view of the above authority, it means that although the evidence of $PW_1$ (the victim) and that of $PW_3$ and $PW_5$ is expunged from the record, if the remaining witnesses adduced strong evidence capable of sustaining and guaranteeing safe and sound conviction, then the court may proceed to determine the case on its merits.

In the instant case, as it has been found that the evidence of $PW_1$, $PW_3$ and $PW_5$ is of no evidential value and hence should not have been acted upon by the trial court, we are remained with the evidence of $PW_2$, $PW_4$ and $PW_6$.

$PW_2$, Rhoda Henry and $PW_4$ Said Maulid gave similar pieces of evidence. Their evidence was to the effect that, on the material date, (01.07.2012) at about 8:00 pm, $PW_2$'s grand mother noticed that the victim ($PW_1$) was missing. She followed $PW_2$ so that together they could go and look for $PW_1$. The two asked Ester's ($PW_1$'s) friends and they were told that a young man called Ismail went with her to Amazon bushes. They went to Amazon bushes, but could not find $PW_1$. On the way back, they found the accused coming from Amazon bush. When they reached home, they found the victim crying that she was raped at the Amazon bush.

$PW_6$, told the court that he is a medical doctor, who filled the $PF_3$ of the victim. The evidence allege that the report showed that there were bruises and greenish discharge on the vagina. The report also showed that some sperms were found on the vagina together with some red blood cells.

As such this evidence is purely circumstantial. The principle on circumstantial evidence is trite. Where circumstantial evidence is relied on, the facts from which an inference of guilt is drawn must be proved beyond reasonable doubt, **(See: Republic versus KERSTIN CAMERON [2003] T.L.R. 84, NATHANIEL ALPHONCE MAPUNDA AND ANOTHER versus Republic (2006) T.L.R. 395).**

It follows therefore that the aforesaid evidence leaves a lot to be desired. As properly submitted by the learned State Attorney for the Respondent, conditions of identification of the appellant are not stated. Penetration is not proved as, the evidence of PW1, the crucial witness, has been expunged from the record. It is not clear at what distance the appellant was seen coming from the Amazon bush. Generally the evidence is weak so as to ground a conviction.

In the circumstances, I entirely agree with both the appellant and the respondent's counsel, that the case was not proved beyond reasonable doubt. I therefore do not see the reason detain myself much on the other grounds, having so opined.

For the reasons stated, I allow the appeal, quash the conviction and set aside the sentence. The appellant is to be released from prison forth with unless otherwise lawfully held.

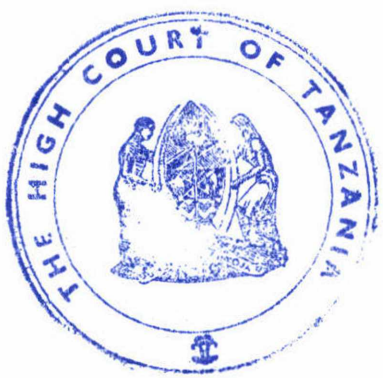
Order accordingly.

**A. F. Ngwala**

**Judge**

**20/05/2015.**

Right of Appeal to Court of Appeal of Tanzania explained.




**A. F. Ngwala**

**Judge**

**20/05/2015**