IN THE COURT OF APPEAL OF TANZANIA

AT ZANZIBAR

CORAM: NYALALI, C.J.; MUSTAFA, J.A.: MAKAME, J.A.: KISANGA, J.A. AND OMAR, J.A.

CRIMINAL APPEAL NO. 81 OF 1986

MOHAMED RAFIK RAMZAN ..... APPELLANT

And

S.M.Z. ..... RESPONDENT

(Appeal from the Conviction of the High Court of Zanzibar at Zanzibar) (A. Ramadhan, C.J.) dated 5th September, 1983

in

Criminal Sessions Case No. 4 of 1983

JUDGEMENT OF THE COURT

KISANGA, J.A.

This appeal arises from the decision of the High Court for Zanzibar (Ramadhani, C.J.) sitting at Zanzibar in which the appellant Mohamed Rafik Ramzan was convicted of the murder of his wife and was sentenced to death.

The brief facts of the case were as follows:- The appellant and the deceased had been married for quite some time during which they brought forth five children. Their married life, however, was not a very happy one; it involved quarrels, sometimes between the spouses themselves and sometimes between the appellant or the deceased on the one hand and members of the deceased's family on the other. It would seem also that the appellant was a man of straw, and the deceased carried on petty businesses from which she secured an income with which to sustain the family. The case for the prosecution was that on the material day, the deceased had sent the appellant to buy some rice, but that the appellant brought less rice than he was given money for. This led to a quarrel resulting in the appellant pouring kerosene on the deceased and setting her on fire. The deceased suffered severe burns all over her body. She died nine days later as a result of shock and consequencial effects of such severe burns. The appellant's defence was that the burning of the deceased was accidental. It happened when the deceased was in the kitchen cooking while he was in his room sleeping. He was awakened by the noises being made by the deceased and when he went to the kitchen and saw her

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The learned Chief Justice then went on to consider the evidence of children. In connection with the dying declaration, he properly directed himself that the evidence of children could not corroborate the dying declaration because that evidence itself required corroboration, citing the case of Solu wa Tatu v. R. (1934) E.A.C.A. 183. However he went further and said that despite the rule that evidence which requires corroboration cannot itself corroborate, he found that the evidence of Saida (P.W.12), one of the children in this case, was consonant or in agreement with the version of the dying declaration which he chose to accept. We are not at all sure what the learned Chief Justice meant by this. We cannot quite reconcile that observation with the rule in Solu Tatu's case which he cites. However, for our part since we have come to the conclusion that the said dying declaration was of no probative value, it follows that the question of its corroboration no longer arises and we shall only proceed to consider the children's evidence, independently of the declaration, with a view to seeing whether that evidence by itself or together with some other credible evidence could support the charge.

Counsel for the appellant raised two main criticisms in connection with the children's evidence, namely, that no voire dire examination was conducted before receiving that evidence, and that there was no other evidence to corroborate it. Three children gave evidence in this case as P.W.10 (Ramzan), P.W.11 (Marzia) and P.W.12 (Saida), all being the children of the appellant and the deceased. The learned Chief Justice found that at the time of giving evidence P.W.10 and P.W.11 were under 12 years of age while P.W.12 was about 12½ years old. He permitted P.W.10 & P.W.11 to give evidence without affirmation but recorded P.W.12's evidence after affirming her. In the course of his judgement he stated that in so doing he had acted under the provisions of section 118 of the Evidence Decree (Cap.5) and section 145 of the Criminal Procedure Decree (Cap.14). The relevant part of what he said reads as follows:-

> "Niliporidhika chini ya kifungu 118 cha Evidence Decree (Cap.5) kuwa (watoto) wote watatu wana ufahamu na akili za kutosha kuelewa maswala na kutoa majibu yake niliwakubali kutoa ushahidi. Ramzan na Marzia nikuwalisha kiapo. Kifungu cha 145 cha Criminal Procedure Decree (Cap.14) kinahitaji ushahidi wote katika kesi za jinai uwe kwa kiapo ila Mahkama inaweza kuchukua bila kiapo ushahidi wa mtoto mdogo."

A free translation of this reads:-

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> "Upon being satisfied under section 118 of the Evidence Decree (Cap.5) that all the three (children) are possessed of sufficient knowledge and intelligence to understand questions and to give answers thereto, I admitted them to give evidence. Ramzan and Marzia I did not affirm them. Section 145 of the Criminal Procedure Decree (Cap.14) requires all the evidence in criminal cases to be upon affirmation, provided the Court may take without affirmation the evidence of a small child."

Mr. Lakha bitterly complained that the reception of that evidence was not preceded by any or sufficient investigation by the Court with a view to assessing the children's level of intelligence and ability to understand questions put to them and the answers to those questions. In the circumstances Mr. Lakha submitted that the evidence so recorded was either inadmissible or should be accorded no weight at all. In support of that view he cited the case of Kibangeny arap Kolil v. R. (1959) E.A. 98.

It is pertinent first of all to set out the provisions of section 118 of the Evidence Decree (Cap.5) of Zanzibar which the learned Chief Justice relied upon to receive the evidence of the three children generally. That section says:-

> "118 - (1) All persons shall be competent to testify unless the court considers that they are prevented from understanding the questions put to them, or from giving rational answers to those questions, by tender years, extreme old age, disease, whether of body or mind or any other cause of the same kind."

The rest of the section is not relevant to the issue at hand. In the context of the present case the sub-section is saying in effect that although every person is prima facie competent to give evidence, a child should not be admitted to give evidence if the court is satisfied that by reason of its tender age the child does not understand the questions put to it or cannot give rational answers to those questions. This means that there must be some material by way of a preliminary examination of the child on which the court is to base its opinion or is to be satisfied that the child is or is not prevented from understanding the questions put to it or from giving rational answers to those questions.

Indeed it would seem that the learned Chief Justice was aware of the need under this section for him to be so satisfied, and that is why he made the endorsement, as quoted above, citing the relevant law.

But he made that endorsement only in the course of the judgement. This is where he went wrong; he ought to have made it earlier. To be exact, the endorsement which is to follow upon a preliminary examination should precede the actual recording of the witness's evidence so that in the event the court considers or is satisfied that the child is not competent to testify at all then it should proceed to exclude the child from giving evidence.

Section 145 of the Criminal Procedure Decree (Cap.14) which the learned Chief Justice relied upon to receive the evidence of P.W.12 upon affirmation and that of P.W.10 and P.W.11 without affirmation reads:-

> "145. Every witness in any criminal cause or matter shall be examined upon oath or affirmation, and the court before which any witness shall appear shall have full power and authority to administer the usual oath or affirmation:
>
> Provided that the court may at any time, if it thinks it just and expedient (for reasons to be recorded in the proceedings), take without oath the evidence of any person declaring that the taking of any oath whatever is according to his religious belief unlawful, or who by reason of immature age or want of religious belief ought not, in the opinion of the court, to be admitted to give evidence on oath; the fact of the evidence having been so taken being also recorded in the proceedings."

Once again in the context of this case the provision means that although the evidence of witnesses in criminal cases is receiveable upon affirmation, the court may admit a child to give evidence without affirmation if, for reasons to be recorded, the court is satisfied that by reason of its immature age the child ought not be admitted to give its evidence upon affirmation. As under the provisions of section 118 of the Evidence Act discussed earlier, this necessarily means that there must be a preliminary examination of the child on which the Court shall base its opinion whether or not the child should be affirmed. If, on the information before it and for reasons to be recorded, the Court is satisfied that by reason of its immature age the child ought not to be affirmed, then the court should proceed to receive the evidence of such child without affirmation. If, on the other hand, the court is satisfied that the child, despite its immature age, should give evidence upon affirmation then it should accordingly proceed to admit such child to give its evidence upon affirmation, again giving its reasons for doing so.

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As intimated earlier, the learned Chief Justice attempted to give his reasons for allowing P.W.10 and P.W.11 to give evidence not upon affirmation but, again as pointed out before, this was done only in the course of the judgement and it was not preceded by any preliminary examination of the children. What is more, the learned Chief Justice gave no reason whatsoever why he decided to receive upon affirmation the evidence of P.W.12 who, being of the apparent age of only 12½ years, was clearly a child of tender years.

While it is apparent that the provisions of section 118 of the Evidence Decree (Cap.5) and the Criminal Procedure Decree (Cap.14) of Zanzibar are complimentary, it seems desirable here to summarize briefly on the combined operation of the two provisions, respecting the evidence of children of tender years as follows:- When a child of tender years is presented before the court as a prospective witness in a criminal case, the court is to conduct a preliminary examination first, with a view to being satisfied whether in the light of its tender age the child is rendered incompetent to testify, that is, whether the child is prevented from understanding the questions put to it or from giving rational answers to those questions. If the court is so satisfied, then it should proceed to exclude the child from giving evidence at all and that would be the end of the matter. If, however, the court is satisfied that the child is competent to testify then it should go further in its preliminary examination with a view to being satisfied further whether or not the child, by reason of its tender years, ought not to be sworn or affirmed before it gives the evidence. If the court is satisfied in favour of an oath or affirmation then it should accordingly proceed to receive that evidence upon oath or affirmation, if it is satisfied otherwise then it should accordingly proceed to admit the child's evidence without oath or affirmation, in either case giving reasons for adopting the particular course.

At first Mr. Lakha took the view that since the procedure as outlined above was by and large not complied with when recording the evidence of the three children, then the evidence of the said children was rendered inadmissible and should be ignored as a result. However, on second thoughts he rightly conceded that such error did not render that evidence inadmissible but only affected the reliability of, or the weight to be attached to, such evidence.

The matter took a more interesting turn when Mr. Hamidi Mahamud, learned State Attorney appearing for the State, submitted that in any event the trial judge was not bound by the rule requiring corroboration of children's evidence. In support of this view he cited the provisions of section 9 of Presidential Decree No. 11 of 1969 which reads:-

> "9. The Court shall formulate its own procedure and rules of evidence and shall not be bound by rules of procedure or evidence contained in any existing laws."

He strenously contended that it was open to the learned Chief Justice, acting on that provision, to depart from the rule requiring corroboration of children's evidence. This matter was dealt with at length in Criminal Appeal No. 80 of 1986 which we heard during this same Sessions of the Court and in which substantially the same point was raised. It is not intended to recapitulate here what we said in that case. Suffice it to say that in this case the learned Chief Justice made it very clear that he was acting under the provisions of the Evidence Decree (Cap.5), the Criminal Procedure Decree (Cap.14) and the Oaths Decree (Cap.7) of the Laws of Zanzibar and the case law pertaining thereto; so that the question of his having acted under some other set of rules does not really arise.

Apart from the dying declaration of the deceased and the evidence of children, there was no other evidence tending to implicate the appellant with the offence charged. But as stated earlier, no weight at all could be attached to the dying declaration and, as the learned Chief Justice properly directed himself, the evidence of the children cannot be acted upon in the absence of corroboration. Thus we are satisfied that the evidence so far adduced did cast some suspicion on the appellant as the culprit, but that it fell far short of the standard of proof required in a criminal case. In the event we allow the appeal, quash the conviction and set aside the sentence. It is further ordered that the appellant be set free forthwith unless he is otherwise lawfully held in custody.

DATED at ZANZIBAR this day of 1987.

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F. NYALALI
CHIEF JUSTICE

A. MUSTAFA
JUSTICE OF APPEAL

L.M. MAKAME
JUSTICE OF APPEAL

R.H. KISANGA
JUSTICE OF APPEAL

A.M.A. OMAR
JUSTICE OF APPEAL

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

(L.A.A. KYANDO)
REGISTRAR