IN THE COURT OF APPEAL OF TANZANIA
AT DODOMA

(CORAM: LUBUVA, J.A., MROSO, J.A.. And NSEKELA, J.A.)

CRIMINAL APPEAL NO. 6 OF 2006

DOTTO s/o IKONGO ..... APPELLANT
VERSUS
THE REPUBLIC ..... RESPONDENT

(Appeal from the Judgment of the High Court of Tanzania at Dodoma)

(Somi, PRM/Extended Jurisdiction)

dated the 27th day of September, 2005
in
Criminal Appeal No. 9 of 2005

REASONS FOR THE JUDGMENT OF THE COURT

26 May 2006

LUBUVA, J.A.:

On 26.5.2006, we allowed the appeal, quashed conviction and set aside the sentence. The appellant was ordered to be released forthwith unless otherwise lawfully held. Reasons were reserved which we now give.

In the District Court of Dodoma, the appellant was charged with and convicted of the offence of rape contrary to sections 130 (1) (2) (e) and 131 (1) of the Penal Code as amended by Act No. 4 of 1998. He was sentenced to 30 years term of imprisonment. On first appeal to the High Court, Somi, PRM in exercise of extended jurisdiction dismissed the appeal. In addition, the appellant was

condemned to ten (10) strokes of the cane, a fine of 50,000/= shillings and payment of 200,000/= compensation to N d/o C (PW1), the victim of the rape.

Briefly stated, the case against the appellant entirely rested on the evidence of the complainant, N d/o C (PW1). It was alleged that on 21.2.2001, at about 1.45 p.m. at Nkuhungu, within the outskirts of Dodoma Municipality, when PW1, a school girl, was returning home from school, the appellant raped her. At the time of the incident there was no other witness around. PW1 reported the matter to her mother, JF (PW2), who in turn reported the matter to the police. The appellant was arrested and charged with the offence of rape.

Apparently, the trial magistrate was aware of the fact that PW1 was a child of tender age. This is borne out from the record where it is recorded: "*voire dire* examination of PW1, N d/o C". Thereafter, it is further recorded that PW1 is "a Christian of enough intelligence sworn and states as follows": This was followed by her narrative evidence on the sequence of events leading to the rape. Otherwise, there was no further *voire dire* examination conducted to determine whether PW1 understood the nature of an oath or was possessed of sufficient intelligence to justify the reception of her evidence and that she understood the duty of speaking the truth. Largely based on the evidence of

PW1, the appellant was convicted and was unsuccessful on appeal to the High Court and hence this appeal.

In this appeal, the appellant was advocated for by Mr. Stolla, learned counsel, and for the respondent Republic, Mr. Mwampoma, learned Senior State Attorney, appeared. Essentially, in grounds 1, 2 and 3 of the memorandum of appeal, Mr. Stolla raises one ground of complaint. That the learned Principal Resident Magistrate in exercise of extended jurisdiction erred in not addressing the issue that the trial magistrate did not conduct a voire dire examination on the evidence of PW1 in terms of the provisions of section 127 (2) of the Evidence Act, 1967. Counsel submitted that because no *voire dire* examination was conducted, the evidence of PW1 was improperly received and that such evidence should not have been relied upon in convicting the appellant.

The import of the other grounds of appeal was that the learned Principal Resident Magistrate in exercise of extended jurisdiction erred in not dealing with the grounds of appeal lodged in the High Court. He also charged that the magistrate failed to evaluate and analyse the evidence adduced at the trial. Counsel further maintained that had the magistrate scrutinized the evidence, he would have come to a different conclusion with regard to the guilt of the appellant.

On the other hand, Mr. Mwampoma, learned Senior State Attorney for the respondent Republic, did not support the conviction. He said he was in agreement with Mr. Stolla, learned counsel for the appellant, that there was merit in the appeal. Declining to resist the appeal, Mr. Mwampoma made the following submissions: First, because, N d/o C (PW1), was a child of tender age, it was a mandatory requirement of the law to conduct a *voire dire* examination on PW1 in order for the trial court to satisfy itself that PW1 was possessed of sufficient intelligence to understand the nature of an oath and that she understood the duty of telling the truth. Mr. Mwampoma, further submitted that as a result of the trial magistrate's failure to conduct a *voire dire* test, the evidence of PW1 was improperly received and relied upon in convicting the appellant. If the evidence of PW1 was discarded, there was no other evidence which links the appellant with the offence of raping PW1.

Secondly, Mr. Mwampoma also submitted that the learned Principal Resident Magistrate in exercise of extended jurisdiction erred in not considering the grounds of appeal lodged by the appellant on first appeal as contained at page 48 of the record relating to the uncorroborated evidence of PW1 and the burden of proof. He urged that had the Principal Resident Magistrate (Ext. J.) considered and evaluated the evidence on this aspect, he would have come to the conclusion that the charge against the appellant had

not been proved. For these reasons, he said it was highly doubtful that the case against the appellant had been proved.

We shall first deal with the ground regarding the evidence of N d/o C (PW1). From the charge sheet, the preliminary hearing and the memorandum of matters not in dispute, at the time of the incident, N d/o C (PW1), the victim of the alleged rape, was shown to be of the apparent age of 12 years. According to the provisions of sub-section (5) of section 127 of the Evidence Act, 1967, "child of tender age" means a child whose apparent age is not more than fourteen years. At the time of the incident, PW1 was therefore a child of tender age as provided under the law. Section 127 (2) of the Evidence Act, 1967 as amended, provides for the procedure to be followed in receiving the evidence of a child of tender age. It provides:-

> 127 (2) – Where in any criminal cause or matter any child of tender years is 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, to**

> **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.

From this provision of the law, it is clear to us that when a child of tender age is involved in giving evidence, the presiding judge or magistrate is obliged to conduct an investigation in order satisfy himself that the child is sufficiently intelligent to justify the reception of his evidence and that he understands the nature of an oath and the duty of speaking the truth. The findings and opinion of the trial judge or magistrate should be recorded in the proceedings. In this case the question is whether an investigation was conducted by the trial magistrate on of PW1 before her evidence was received. On this, we are with respect, in agreement with Mr. Stolla, learned counsel for the appellant, and Mr. Mwampoma, learned Senior State Attorney, for the respondent Republic, that there was no such investigation conducted in terms of the law. This is evident from the record which reads:

PW1

N d/o C

VOIRE DIRE EXAMINATION:

Xd. By Court:

I am schooking (sic) at Nkuhungu Std. 6. I am Nkuhungu with my parents (sic):
I am a Shristiab (sic) of enough intelligence sworn and states as follows:

Xd. By Pros: . . . . .

This can hardly be described as a *voire dire* investigation conducted by the trial magistrate on PW1. The procedure as laid down under section 127 (2) of the Evidence Act, 1967 was not complied with. Consequently, and as urged by Mr. Stolla, it follows that the evidence of PW1, a child of tender age, was improperly received and acted upon in convicting the appellant.

In a number of cases decided by the erstwhile Court of Appeal for Eastern Africa and this Court it has been held that failure to comply with the provisions of the law regarding the evidence of a child of tender age might result in the conviction not being sustained. See for instance, **Fransisio Matovu v. R** (1961) EA 260, a Uganda case. In that case, the appellant had been convicted by the High Court of Uganda of murder. One of the witnesses was a child of 8

years who had been allowed to give unsworn evidence. However, there was no finding on record on the boy's intelligence and understanding of the duty to speak the truth. The Court of Appeal for Eastern Africa held among others, that the trial judge should himself question the child in order to ascertain whether the child understands the nature of an oath and is possessed of sufficient intelligence to justify reception of his evidence and understands the duty of telling the truth. It is to be observed at this juncture that section 149 (3) of the Uganda Criminal Procedure Code 1958, was in *pari materia* with our section 127 (2) of the Evidence Act, 1967.

In another case, **Kibengeny Arap Kolil v. R** (1959) EA 92 the Court of Appeal for Eastern Africa also had occasion to make observation on the need for the trial judge or magistrate to satisfy himself that the child of tender age is possessed of sufficient intelligence to justify the reception of the evidence, and understands the duty of speaking the truth. Again, more recently, this Court dealt with a similar situation in **Jonas Raphael v. Republic,** Criminal Appeal No. 42 of 2003 (unreported). The Court *inter alia* stated:

> In the instant case the learned trial magistrate neither conducted any voire dire test to determine whether PW2 (aged 12) knew the nature of an oath

> nor did he make any finding whether in his opinion, PW2 was possessed of sufficient intelligence to justify the reception of her evidence and that she understood the duty of speaking the truth. He simply recorded as follows:

Then the Court further observed:

> This was not enough. Her evidence was received improperly and should not have been relied upon.

In the instant case, as already indicated, the trial magistrate similarly recorded with regard to the evidence of PW1, N d/o C, a child of tender age. Curiously, however, we are unable to understand what exactly happened. While on one hand the original record shows that PW1 when examined by the court stated to the effect that she was schooking (sic) at Nkuhungu Primany School Std. 6 and that she is a Christian, on the other hand, there appears some scribbling and insertion of words which, both the learned Senior State Attorney and Mr. Stolla, learned counsel, doubted that they were added at some stage later. We need not go further in speculating on what might happened in this regard. It would indeed be most undesirable in a judicial proceedings. Whatever might have happened, we are firmly of the view

that no *voire dire* test was conducted. Consequently, we agree with Mr. Mwampoma, learned Senior State Attorney and Mr. Stolla, learned counsel, that the evidence of PW1 was improperly received, it should not have been relied upon in convicting the appellant.

The next question falling for consideration is: what is the effect on the conviction of the appellant if the evidence of PW1 is discarded from the rest of the evidence. As observed earlier, at the time of the alleged rape, there was no other witness who could testify to have seen the appellant sexually assaulting PW1. The rest of the witnesses, namely PW2, PW3, PW4 and PW5 testified on what transpired after PW1 had been raped. In that situation, it would follow that there is no evidence linking the appellant with the rape of PW1. For this reason, we are respectfully in agreement with Mr. Stolla, and Mr. Mwampoma, that on the evidence, the case had not been proved against the appellant. While it may well be that PW1 was raped, there was no evidence to show that she was raped by the appellant.

We now turn to the next ground of complaint that the learned Principal Resident Magistrate in exercise of extended jurisdiction, neither dealt with the grounds of appeal nor evaluated and analysed the evidence adduced at the trial. Had he done so, Mr. Mwampoma and Mr. Stolla, urged, he

would have come to a different conclusion. From the record, it is apparent that after summarizing the submissions by the learned counsel for the appellant and the learned Senior State Attorney, for the respondent Republic, the Principal Resident Magistrate (Ext. J.) dismissed the appeal stating *inter alia:*

> Now, with the above observations in mind and having carefully gone through the proceedings, judgment and submissions in appeal, I am satisfied that the prosecution leaved (sic) to prove its case against the appellant beyond reasonable doubt that he raped the victim child (PW1) on the material day. --- In the end result the appeal against the conviction is hereby dismissed in its entirety.

From this extract of the judgment, it is apparent that the Principal Resident Magistrate (Ext. J.) neither dealt with the grounds of appeal lodged from the decision of the Senior Resident Magistrate, Awasi, RM nor did he analyse and evaluate the evidence adduced at the trial. We think the contention by Mr. Stolla and Mr. Mwampoma on this point is well-founded. This is so because had the Principal Resident Magistrate in exercise of extended jurisdiction on first

appeal, addressed and evaluated the evidence adduced at the trial, he would have found that the evidence of PW1 was improperly received. Therefore, as urged by both counsel for the appellant and respondent Republic, he would have come to a different conclusion. The duty of a first appellate court to consider, analyse the evidence and draw its own conclusion thereon was underscored in **Dinkerrai Ramkrishna Pandya v. R** (1957) EA 336 by the Court of Appeal for Eastern Africa. The Court held:

> The first appellate court erred in law in that it had not treated the evidence as a whole to that fresh and exhaustive scrutiny which the appellant was entitled to expect, and, as a result of its error, affirmed a conviction resting on evidence which, had it been duly reviewed, must have been seen to be so defective as to render the conviction manifestly unsafe.

In similar vein, in the instant case, the learned Principal Resident Magistrate with Extended Jurisdiction, on first appeal, did not consider the grounds of appeal, and did not also scrutinize, analyse and evaluate the evidence of PW1 upon which the conviction of the appellant was based. Had he done so, we think he would have come to the conclusion

that the charge against the appellant had not been proved.

Accordingly, for the foregoing reasons, we allowed the appeal.

DATED at DAR ES SALAAM this 28th day of June, 2006.

D.Z. LUBUVA
JUSTICE OF APPEAL

J.A. MROSO
JUSTICE OF APPEAL

H.R. NSEKELA
JUSTICE OF APPEAL

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

(S.M. RUMANYIKA)
DEPUTY REGISTRAR