IN THE COURT OF APPEAL OF TANZANIA
AT DAR ES SALAAM

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

CRIMINAL APPEAL NO. 90 OF 2000

SELEMANI MWITU ..... APPELLANT
VERSUS
THE REPUBLIC ..... RESPONDENT

(Appeal from the decision of the High Court of Tanzania at Dar es Salaam)

(Manento, J.)

dated the 17th day of July, 2000
in
HC. Criminal Appeal No. 51 of 1998

REASONS FOR THE JUDGMENT OF THE COURT

19 June & 3 July 2006

MSOFFE, J.A.:

On 19/6/2006 after hearing the appellant and Mr. Magoma, learned Principal State Attorney for the respondent Republic, we allowed the appeal, quashed the conviction and set aside the sentence. We ordered that the appellant be released from prison forthwith unless otherwise lawfully held. We reserved our reasons which we are now set to give.

In the District Court of Ilala at Samora the appellant was charged with rape contrary to sections 130 and 131 of the Penal Code. At a later stage the charge was substituted with one of defilement contrary to section 136 (1) of the Penal Code. Thereafter, the prosecution side proceeded to adduce evidence on the substituted charge. After a full trial the District Court (Asajile, DM) wrote and delivered a judgment on the charge of rape. The trial magistrate convicted the appellant and sentenced him to a term of twenty years imprisonment and corporal punishment of twelve strokes of the cane. Aggrieved, the appellant made a first appeal to the High Court of Tanzania at Dar-es-Salaam. The High Court [Manento, J., as he then was] quashed the conviction of rape and substituted it with one of defilement and accordingly sentenced the appellant to twenty years imprisonment and twelve strokes of the cane. Still aggrieved, the appellant preferred this second appeal.

The background giving rise to the case is that the complainant, PW1, Fatuma Chuma, was at the material time a child of eleven years of age and a pupil at Uhuru Girls Primary School in Dar-es-

Salaam. She was staying at Sadani Street in Ilala District. The appellant was working in a nearby house where the complainant and members of her family used to draw water for their personal use. On 3/5/1996 at about 14.00 hrs. the complainant went to draw water from the house. She met the appellant who opened the gate for her. The appellant did not allow the complainant to draw water. Instead, he held her, pulled and tore the little girl's underwear and raped her. At the time of raping her, the appellant put a piece of cloth on the complainant's mouth while at the same time threatening to kill her. Eventually the incident was reported to the police and a PF3 issued. The appellant was admitted to Muhimbili Medical Centre for two weeks. The PF3 which was produced and admitted in evidence showed that the complainant was sexually assaulted.

Dealing with the appeal the learned judge addressed the central issue whether the appellant defiled the complainant on the material day and time. He answered the issue in the affirmative. This is how he reasoned and concluded on the point:-

The prosecution had proved without any dispute that the complainant, Fatuma Chuma was a girl of eleven years old. Secondly, by the evidence of Fatuma herself, and the doctor's report, PF3 Exhibit P1, there was carnal knowledge of the girl by Selemani Mwitu, who according to the charge sheet, was 29 years old on 7/5/1996. Therefore then, the prosecution had proved the offence beyond all reasonable doubts in the mind of the court, only that the trial magistrate directed his mind into the offence of rape instead of defilement.

With respect, there were other important aspects of the case which the judge on first appeal ought to have addressed. Under **S. 127 (5)** of the Evidence Act, 1967 the complainant was a child of tender age. It was necessary for the trial court to address itself to the procedure under **sub-section 2** thereto before taking her evidence. Apparently this was not done. The **sub-section** reads as follows:-

> (2) Where in any criminal cause or matter any child of tender years 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 understand the duty of speaking the truth.

It is common ground that in the instant case no *voire dire* examination was conducted to determine whether or not the complainant knew the nature of an oath or whether she was possessed of sufficient intelligence to justify the reception of her evidence and whether she understood the duty of speaking the truth. The trial magistrate simply proceeded to receive her evidence without conducting a *voire dire* examination. With respect, he erred. In more or less similar situation, this Court in **Jonas Raphael v Republic** – Criminal Appeal No. 42/2003 (unreported) underscored the procedure obtaining under **sub-section 2** in receiving the evidence of a child of tender age. The court stated:-

> This provision of the law imposes on the presiding magistrate or judge, when confronted with a child of tender years as a witness a duty to investigate in order to satisfy himself whether that child understands the nature of an oath. If his investigation reveals that he does not understand the nature of an oath, then he must investigate to ascertain himself whether, in his opinion, (a) the said child is possessed of sufficient intelligence to justify the reception of his evidence and (b) understands the duty of speaking the truth. If his finding is in the positive, he can then receive his evidence.

The next point we have to consider is the effect of the omission to conduct *voire dire* examination of a child of tender age. The law is settled that the omission brings such evidence to the level of unsworn evidence of a child which requires corroboration. There are a number of decided cases on the point. See for instance **Kibangeny Arap Kolil v R** (1959) EA 92, **Kisiri Mwita s/o Kisiri v R** (1981) TLR 218, **Dhahiri Aly v R** (1989) TLR 27, and **Deema**

Daati and two Others v Republic (CAT) Criminal Appeal No. 80/1994 (unreported).

The crucial issue for us to consider at this stage is whether there was evidence which corroborated the evidence of the complainant, Fatuma Chuma. Mr. Magoma, at first, sought to say that corroborative evidence was to be found on the PF3. On reflection, he conceded that the PF3 could not corroborate the complainant's evidence. With respect, Mr. Magoma was justified in conceding that much. We say so for two reasons. **One,** at best the PF3 was evidence that the complainant was raped. It was not evidence to the effect that she was raped by the appellant. **Two,** there was another shortcoming based on the reception in evidence of the PF3. Under **S. 240** (3) of the **Criminal Procedure Act, 1985** the trial court was duty bound to inform the appellant of his right to require the person who made the report to be summoned for cross-examination. This was not done, thereby offending the relevant mandatory provisions of the **sub-section.** The **sub-section** reads:-

> (3) When any such report is received in evidence, the court may, if it thinks fit, and shall if so requested by the accused or his advocate, summon and examine or make available for cross-examination, the person who made the report. **The court shall inform the accused of his right to require the person who made the report to be summoned in accordance with the provisions of this subsection.** (Emphasis supplied)

In conclusion, the cumulative effect of the failure in this case to conduct *voire dire* examination before receiving the evidence of the complainant, and the shortcomings on the PF3, is that there was no evidence which could safely be concluded that the appellant raped the complainant (PW1). Had the learned judge considered the above aspects we think he would have come to the inevitable finding that it was not safe to sustain the conviction.

For these reasons, the Court allowed the appeal.

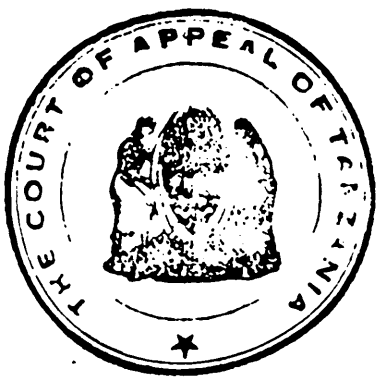
DATED at DAR ES SALAAM this 26th day of June, 2006.

D.Z. LUBUVA
JUSTICE OF APPEAL

J.A. MROSO
JUSTICE OF APPEAL

J.H. MSOFFE
JUSTICE OF APPEAL

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



(S.A.N. WAMBURA)
SENIOR DEPUTY REGISTRAR