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. 71 OF 2002

HASSANI HATIBU ..... APPELLANT
VERSUS
THE REPUBLIC ..... RESPONDENT

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

(Bubeshi, J.)

dated the 9th day of October, 2000
in
HC. Criminal Appeal No. 56 of 2000

JUDGMENT OF THE COURT

27 June & 10 July 2006

LUBUVA, J.A.:

This appeal arises from the decision of the High Court, (Bubeshi, J.) which originated from Criminal Case No. 692 of 1996 in the District Court of Ilala District. The appellant was charged with and convicted of the offence of defilement of a girl under the age of fourteen (14) years contrary to section 136 (1) of the Penal Code. He was sentenced to twenty (20) years imprisonment and twelve (12) strokes of the cane. In addition, the appellant was ordered to pay 20,000/= compensation.

Aggrieved with the decision the appellant has come to this Court on second appeal.

The charge and conviction of the appellant was premised on the following facts. Arafa Abeid (PW1), who at the time of the trial was 13 years old, a Std. IV pupil at Mtendeni Primary School, testified on oath to the following effect: That on the day of the incident, the appellant, her neighbour, asked her to accompany him to the mosque. She agreed and went along with him. On the way, they passed by Bondeni Guest House where the appellant invited her (PW1) to Room No. 16. While in the Guest House, the appellant had sexual intercourse with her without her consent. PW1 did not raise an alarm because the appellant threatened to kill her if she did. Later, PW1 reported the matter to her parents and the police. The complainant (PW1) was issued with PF3 (Exh. P1) for medical examination and treatment. The appellant was arrested and charged with the offence of defilement.

At the close of the prosecution case, the appellant did not have the opportunity of exercising any of the rights provided under section 293 (1) (a) and (b) of the Criminal Procedure Act, 1985. This was so because the appellant had jumped bail and could not be traced to appear in court after numerous orders for adjournment. As a result, judgment was passed without the defence of the appellant. In what seems to us a rather casual manner, the trial magistrate indicated that after going through the evidence for the prosecution he was satisfied that the case against the appellant had been proved. He convicted and sentenced the appellant.

On first appeal to the High Court, one of the main grounds of

dissatisfaction against the decision of the trial magistrate was that *voire dire* examination of PW1 was not conducted. In dismissing the appeal, the learned judge took the view that there was no need for corroboration if the trial court believed in the evidence of PW1. In support of this view, the learned judge made reference to the decision of this Court in **Chozi Andrea v R** (1987) TLR 68. The learned judge also held that the PF3 (Exh. P1) which was not objected to supported PW1.

Before us in this appeal, the appellant appeared in person while the respondent Republic was represented by Mr. Luoga, learned State Attorney. The appellant, being a layman, understandably did not have much to submit. However, he reiterated his complaint that the Doctor who examined PW1 and some one from Bondeni Guest House were not summoned to give evidence at the trial.

At the commencement of hearing the appeal, the Court *suo motu* raised the issue relating to the evidence of Arafa Abeid (PW1) to be addressed first. Mr. Luoga, learned State Attorney, who declined to support the conviction submitted that the evidence of PW1, the victim of the alleged defilement, was not properly received in terms of the provisions of section 127 (2) of the Evidence Act, 1967 (hereinafter the Act). He said that at the time PW1 testified she was a child of tender age because she was 13 years old. It was therefore necessary for the trial court to conduct a *voire dire* examination, the State Attorney urged. As the provisions of the law was not complied with, the

evidence of PW1 should not be relied upon without corroboration, Mr. Luoga insisted. In that situation, the State Attorney also submitted, there was no other evidence upon which the conviction against the appellant could be grounded. He referred to the decision of this Court in **Jonas Raphael v Republic,** Criminal Appeal No. 42 of 2003 and **Rashid Bakari v Republic,** Criminal Appeal No. 49 of 2001 (both unreported).

There is no denying the fact that Arafa Abeid (PW1) was 13 years of age when she testified at the trial. In terms of section 127 (5) of the Act, PW1 falls within the category of "child of tender age". Under the provision of this subsection, a child of tender age means a child whose apparent age is not more than fourteen years (14). For a child of tender age who is called as a witness in a criminal trial the procedure for receiving such evidence is provided under subsection (2) of section 127 of the Act (Cap. 6). As its application is central in the determination of this appeal on this point, we think it is appropriate to reproduce it in extenso; It reads:

> "127 (2) Where in any criminal cause or matter any child of tender age 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 these provisions, it is imperative for the trial judge or magistrate when the witness involved is a child of tender age to conduct a *viore dire* examination. This is to be done in order for the trial judge or magistrate to satisfy himself or herself that the child understands the nature of an oath. If in the opinion of the trial judge or magistrate, to be recorded in the proceedings, the child does not understand the nature of an oath but is possessed of sufficient intelligence and that the witness understands the duty of speaking the truth, such evidence may be received though not upon oath or affirmation.

It is apparent from our perusal of the record that the trial magistrate did not conduct a *voire dire* examination on PW1. With respect, the learned judge on first appeal apart from her attempt to look for corroborative evidence, did not address the issue relating to *voire dire* examination of PW1 in terms of section 127 (2) of the Act.

It is now settled that where in a criminal case involving the evidence of a child of tender age, the trial court does not conduct a *vire dire* examination in terms of the provisions of section 127 (2) of the Act, the reception of such evidence is improper. Decisions of the erstwhile Court of Appeal for East Africa and this Court are abound on

this point. More recently, this Court expressed the same view in **Jonas Raphael v The Republic,** Criminal Appeal No. 42 of 2003 (unreported). In the same vein, in this case as there was no *voire dire* examination conducted on PW1, her evidence was improperly received. It would follow that with the evidence of PW1 discarded, there is no other cogent evidence upon which the conviction of the appellant could be sustained.

In that situation, the case of **Chozi Andrew v R** (1987) TLR 68 to which the learned judge on first appeal was referred with regard to corroboration is not relevant. That case, we think would be relevant only if the evidence of a child of tender age is properly received. In the instant case, as the evidence of PW1 was improperly received, there is no further evidence which could be corroborated to justify the conviction.

All in all therefore, for the foregoing reasons we are satisfied that the case against the appellant was not proved to the required standard in a criminal case.

In the event, we allow the appeal, quash conviction and set aside the sentence. The appellant is to be released forthwith unless otherwise lawfully held.

DATED at DAR ES SALAAM this 5th day of July, 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

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Between

The Republic …….. Prosecutor

Versus

Hassani Hatibu …….. Accused

In Court this 5th day of July, 2006

Before: The Honourable Mr. Justice D.Z. Lubuva, Justice of Appeal
The Honourable Mr. Justice J.A. Mroso, Justice of Appeal
And The Honourable Mr. Justice J.H. Msoffe, Justice of appeal

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THIS APPEAL coming for hearing on the 27th day of June, 2006 in the presence of the appellant AND UPON HEARING the appellant and Mr. E. Luoga, State Attorney for the Respondent/Republic when the appeal was stood over for judgment and this appeal coming for judgment this day:-

IT IS ORDERED that the appeal be and is hereby allowed, conviction is quashed and sentence is set aside. The appellant to be released forthwith from prison unless he is otherwise lawfully held.

Dated this 5th day of July, 2006.

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

Extracted on the 5th day of July, 2006.