IN THE COURT OF APPEAL OF TANZANIA
AT ARUSHA

(CORAM: KAJI, J.A. KILEO, J.A. and KIMARO, J.A.)

CRIMINAL APPEAL NO. 210 OF 2006

VENANCE GABRIEL ……...APPELLANT
VERSUS
THE REPUBLIC ……RESPONDENT

(Appeal from the decisi9on of the High Court of Tanzania At Arusha)

(Mussa, J)

Dated the 30th day of March, 2006
In
HC Criminal appeal No. 25 of 2005

JUDGMENT OF THE COURT

17 & 23 April, 2008

KAJI, J.A.:

The appellant, Venance Gabriel, was charged with and convicted of the offence of grave sexual abuse contrary to section 138 C (1) (a) and (a) of the penal code Cap 16, as amended by the Sexual Offences special provisions Act No. 4 of 1998. He was sentenced to 20 years imprisonment
His first appeal was dismissed by the High Court (Mussa,J) for want of merit.

At the trial the prosecution adduced evidence to the effect that the appellant was employed by Victoria Abel Mollel (PW1) as a houseboy. PW1 had a daughter called Mary Peter (PW2) by then aged 8 schooling in standard III at Amani Primary School at Usa River. On 15.5.2004, at about 11 am, the appellant was alleged to have dipped his finger into PW2's private parts (vagina) while she had put on a pair of trousers. She felt pains. She reported the matter to her mother PW1 who examined her and found some bruises in her private parts. PW2 complained that the appellant has been doing so and touching her chest on many occasions previously. Pw1 called some relatives and the appellants was asked about it. At the first he denied. But later after being coxed and promised to be pardoned he was alleged to have admitted.

He was taken to Usa River Police station where he was charged with the above offence. PW2 was alleged to have been medically examined and found with some bruises in her private parts but the hymen was intact (PF3 Exhibit P1).

The appellant denied the allegation. He suspected his employer PW1 to have concocted the case to swindle his money. He said PW1 had borrowed some money from him but every time he demanded for payment she kept on promising to pay him later. Also there was a day when PW1's husband telephoned her when he was on safari, but she was not present at home, and so the appellant received it and informed the caller that PW1 was not yet back from work. He said when he informed her about it she got angry and blamed him why he did so in that he was endangering the stability of their matrimonial life. When the husband returned from his safari he never talked to PW1 that day. It was the appellant's assertion that this also contributed to his being framed up by PW1. He was however convicted and sentenced as above. On first appeal the appeal was dismissed for want of merit as the court held the view that the prosecution witnesses proved the guilt of the appellant to the standard required by law.

Still daunted the appellant lodged this second appeal based on six (6) grounds. At the hearing of the appeal the appellant appeared in person and the respondent Republic was represented by Mr. John Mapinduzi, learned State Attorney. The appellant suggested the learned State Attorney should reply to his grounds of appeal and thereafter he would decide whether to give a reply.

In reply to the grounds of appeal the learned State Attorney supported the appeal on the following grounds:-

One, that PW2, the victim of the alleged assault, was aged 8 at the time she was testifying. She was therefore a child of tender age and before recording her evidence the trial magistrate ought to have conducted *voire dire* test to satisfy herself that PW2 was possessed of sufficient intelligence and knew the importance of telling the truth. The learned State Attorney observed that, in the instant case the learned trial magistrate died not do so. She merely scribbled a few words in a form of answers by PW1 and did not make any finding whether PW2 was possessed of sufficient intelligence to justify the reception of her evidence, and understood the duty of speaking the truth.

Two, the doctor who was alleged to have examined PW2 was not called as a witness and the appellant was not explained his right under section 240 (3)of the criminal procedure Act to have the doctor summoned for cross examination. The learned State Attorney pointed out that, had the doctor been called as a witness he would have clarified whether he really examined PW2 and found the alleged bruises or whether the PF3 was forged by PW1 as alleged by the appellant, especially that the PF3 was not signed by the doctor

who was alleged to have examined her but was signed by somebody else on his behalf.

Three, the appellant had raised two points in his defence, that is, the money issue and the telephone issue. The learned trial magistrate did not consider them and instead she simply held the view that the appellant's defence was merely an afterthought without analyzing and giving reasons why she held that view. This, the learned state Attorney asserted, worked injustice to the appellant.

The learned State Attorney having supported the appeal, the appellant had nothing in reply other than concurring with the learned State Attorney.

We have carefully considered the appellant's grounds of appeal and the learned State attorney's reply thereat. The legal position in recording the evidence of a child of tender age is as stated by the learned The legal position in recording the evidence of a child of tender age is as stated by the learned State attorney. This an be found under section 127 (2) of the Evidence ct [CAP 6 R.E. 2002. The main purpose for conducting a ***voire dire*** examination is to find out whether the child witness is possessed of sufficient intelligence and understands the duty of speaking the truth. This is normally done by asking the child witness questions. From the answer given one can easily decide whether the child witness is possessed of sufficient intelligence and understands the duty of speaking the truth.

Thereafter a finding is made and recorded. In the instant case it would appear the learned trial magistrate asked PW2 some questions whereby PW2 answered as follows:-

I am 8 years old. I am a Lutheran. I go to church. I know that lying is a sin.

However, the learned magistrate did not record her finding whether she was satisfied that PW2 was possessed of sufficient intelligence and understood the duty of speaking the truth and the reason for so finding/holding. This was a terrible mistake because it made the exception provided under section 127 (7) of the Evidence Act almost impotent. A court can only be satisfied that the child witness is telling nothing but all truth only after satisfying itself that the child witness is possessed of sufficient intelligence and understands the duty of speaking the truth and the record must be clear to that effect. We are live to the decision of the court in the case of **Rungu Juma** v **R** ((1994) TLR 176 where the Court held that, where there are circumstances showing that the child is possessed of sufficient intelligence and understands the duty of speaking the truth, his evidence may be received even if no **voire dire** test is conducted. In the instant case with the limited information in the record, it is not easy to say with certainty that PW2 was possessed of sufficient intelligence and understood the duty of speaking the truth. PW2 was the sole

witness to the fact that the appellant dipped his finger into her private parts as alleged while dressed in a pair of trousers. The record is also not clear as to how the appellant dipped his finger into her private parts while she was dressed in a pair of trousers.

The second obstacle in this case is that the appellant's defence on the two issues raised was not considered. The learned magistrate simply held the view that it was an afterthought without giving reasons why she thought so. This worked injustice to the appellant.

Lastly is the PF3 – PW1 was a midwife at the hospital where PW2 was alleged to have been medically examined. It was not signed by the doctor who was alleged to have examined her. It was signed by somebody else whose name does not even appear thereat but a mere illegible signature. There is an allegation by the appellant that it was forged by PW1, the mother of PW2, in order to implicate him with the offence charged. Since section 240 (3) of the Criminal Procedure Act was not complied with, and the doctor who was alleged to have examined her was not called as a witness, there is much doubt about its authenticity. Had this been the only obstacle we could discard the evidence pertaining to it (PF3) and act on the other evidence. But since this is not the only obstacle, and the other evidence is lame for the reasons we have already stated, discarding it will not salvage the sinking boat of the prosecution.

For the foregoing reasons we agree with the learned State Attorney and the appellant that the prosecution did not prove the guilt of the appellant beyond all reasonable doubt as required by law. In the upshot we allow the appeal, quash the conviction and set aside the sentence The appellant is to be released from prison forthwith unless lawfully held.

DATED at ARUSHA this 18th day of April, 2008.

S.N. KAJI
JUSTICE OF APPEAL

E..A. KILEO
JUSTICE OF APPEAL

N.P. KIMARO
JUSTICE OF APPEAL

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

(F.L.K. WAMBALI)
SENIOR DEPUTY REGISTRAR