IN THE COURT OF APPEAL OF TANZANIA
AT DODOMA

(CORAM: RUTAKANGWA, J.A., KIMARO, J.A., And MBAROUK,J.A.)

CRIMINALAPPEAL NO.253OF 2006

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

(Masanche, J.)

Dated7th August, 2006
In
Criminal Appeal No. 37 of 2006
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JUDGMENT OF THE COURT

27th Nov. & Dec., 2008

KIMARO, J.A.

In the District Court of Dodoma at Dodoma the appellant was arraigned for the offence of rape contrary to sections 130 (1), 130(2)(a) and 131(1) of the Penal code[CAP 16, R.E. 2002]. He was convicted and sentenced to life imprisonment. He lodged an appeal to the High court but it was dismissed. Still protesting his innocence, the appellant has now filed this second appeal.

The facts upon which the prosecution case was based are as follows: Agnes Mkwawa, (PW4) the complainant, a minor, aged about three and half years was staying with Oliver Daudi (PW1), her aunt. On 9th March, 2001 at about 1.00 p.m. PW1 accompanied Justina Zakayo, (PW3) a daughter of PW1 aged seven years to a shop. They were sent by one Shida to buy cooking oil. On their way they met the appellant who upon luring them by buying groundnuts for both of them, and a pair of sandals for PW4, took the complainant to his house.

When PW3 returned home, she informed her mother that PW4 was taken by a man she did not know. That information shocked PW1 and she raised an alarm. With assistance of her neighbours and good Samaritans PW4 was able to trace the residence of the appellant PW1 who was in the company of Rogers Paul (PW2), and Christina Malogo (PW5), her neighbours, and others who did not testify at the trial, knocked at the door of the appellant's house. The appellant opened the door but upon seeing PW1 and those who were with her, closed it abruptly. He was only dressed in a "bukta". As PW1 continued to knock at the door, the appellant opened it. PW4 was found in the appellant's house naked and she was taken by her aunt (PW1). The appellant was then required by PW2 to accompany them to the Village Chairman so that the incident could be reported but he refused and threatened them with an axe. Later, he ran to his father's house. According to PW1, when she examined PW4's vagina, she found her smearted with sperms.

The complainant was examined by a doctor on 13th march, 2001 and she was found with vagina infection which according to the expert opinion of the doctor was evidence of rape.

The appellant was later arrested and charged as indicated hereinbefore, the allegations being that he raped Agnes (PW4).

At the trial, the evidence of the two minors namely Justina (PW3) AND Agnes (PW4) was not recorded on oath. The trial magistrate, upon deducing from the "voire dire" examination he conducted on them, that they were too young to understand the meaning of oath, allowed them to give unsworn evidence. PW3 testified on how the appellant took PW4 after buying them groundnuts and sandals for her. As the complainant was cross examined by the appellant on what she meant when she said in examination in chief: **"alitoa dudu lake akaliweka huku"** she answered that the appellant inserted his penis in her vagina. The PF3 used to record the medical opinion after the examination which was carried out on the complainant was tendered and admitted in evidence as exhibitP1 and a pair of red small sandals allegedly recovered from the house of the appellant when the complainant was picked up was admitted as exhibit P2.

The appellant general denied the commission of the offence, alleging that he had previous grudges with PW5 who was her lover. But when he was cross examined by the Prosecution on why he did not raise that question during cross examination he was not able to give an satisfactory explanation. His only witness, Ephraim Ndaiga (DW4), his ten cell leader, confirmed the prosecution evidence that the appellant had no shirt but only a "bukta" and that he ran to his father's house.

On that evidence, the trial court was satisfied that the offence of rape was proved on the standard required and the appellant was convicted and sentenced accordingly. As already stated, the High Court sustained the conviction and the sentence.

The appellant listed five grounds of appeal but essentially, he is complaining about two major matters. The first one is that the offence of rape was not proved beyond reasonable doubt and the second one is that the doctor who examined the complaint was not called for cross examination. Instead, it was only the PF3 which was tendered in court and this denied him the opportunity for cross examining the doctor.

At the hearing of the appeal the appellant, like in two subordinate courts, appeared in person and Mr. Anselm Mwampoma, learned principal State Attorney, represented the respondent Republic. To the appellant, offence of rape was not committed because the complainant failed to state precisely what he did to her as in her examination in chief she simply stated that "nilimwingiza dudu". He was however reminded by the court that a clarification was given by the complainant during cross examination. As for the other grounds he left them for the determination of the court. He prayed that his appeal be allowed.

The learned principal State Attorney on the other hand supported the conviction and the sentence. To him, the evidence of the complainant alone was sufficient to base his conviction because despite being young, she was able to describe what

the appellant did to her and she also identified him. In his opinion, that evidence and the sandals which the appellant was said to have bought forPW4 was sufficient corroboration. The other corroborative evidence, submitted Mr. Mwampoma, is found in the other witnesses who found the complainant naked in his room and his conduct. He threat3ened those who wanted to arrest him and he ran away. Even his own witness, argued the learned Principal; State Attorney, corroborated the evidence of the prosecution on his conduct.

On the failure by the prosecution to summon the doctor for cross examination, Mr. Mwampoma admitted that it was an error of law. however he still believed that minus the evidence on the examination of the complainant, the prosecution had adduced sufficient evidence to base the conviction of the appellant. Upon the Court requiring the learned principal State Attorney to say whether the "voire dire" examination of the minor witnesses was conducted properly, he refrained from making comments and he opted to leave that to the decision of the Court. When he was called upon to comment on the quality of the judgment of the4 High Court, he was quick to point out that it leaves a loot to be desired as it contradicts the facts which were before the trial court. Still believing that the evidence on record is sufficient for the conviction of the appellant, the learned Principal State attorney prayed that the appeal be dismissed.

Let us start with our views on the judgment of the High Court. With greatest respect to the learned judge on first appeal, the judgment is not one which deserves being called a judgment at all. It is just a reproduct of the evidence with no re-evaluation of the evidence and independent findings. Some of the facts given in the judgment contradict those found in the proceedings in the trial court. We will reproduce a small portion of it to show the contradiction:-

The facts of the case were that on 9/3/2001, the mother of the complainant, Christina Malogo, PW5, and her neighbours, who included Rogers Paul, PW2, Oliver Daudi, PW1 Justina Zakiayo PW3; discovered that the complainant, the girl Agnes, was walking improperly. They asked her what the problem was and she told a story:-

The summary of the facts giving rise to the prosecution of the appellant in the trial court we have given above definitely differs with what the learned judge in the first appeal says. It is also apparent from the judgment that there was failure by the learned judge to reevaluate the evidence and make independent findings on the case. The appellant was entitled as of right to have the evidence of the trial court reevaluated by the first appeal court and an independent finding made. This was not done and as we will show later in this judgment, justice was not done. See **Lubeleje Mavuna V**s **Republic** CAT, Criminal Appeal No. 172 of 2006 (Dodoma) (unreported). Since the first appeal court failed to perform its duty we will step in its shoes.

There are two important matters for our discussion in this appeal. The learned principal State Attorney, and the appellant himself submitted, correctly in our view, that the only eye witness to the rape was the complainant herself – Agnes Mkwawa 9PW4). There was no dispute that the witness was a minor, as she was then three and half years old. The first question we ask is whether the "voire dire" examination was conducted properly. How was the "voire dire" examination

conducted? This is found in the record of appeal at page 14:

> Xd by Court
>
> My father is Mkwawa, we live at Msalato I am attending Nursery school Tobi, Taki, we have a teacher, Mwalimu Mkuu, I am a Christin cheating is bad. Saying the truth is good.
>
> Court
>
> The girl is too young and appears not to know the nature of oath, She will testify unsworn.

Section 127(2) of the law of Evidence Act, [CAP 6 R.,E. 2002] which guides the court on receipt of evidence from witnesses of tender age provides as follows:-

127(2)When in any criminal cause or matter any child of tender years called as a witness dies 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 receipt of his evidence and understand the duty of speaking the truth.

From the provisions of section 127(2) "voire dire" examination is conducted to ascertain two matters: one, the witness understands the nature of oath. If in that examination the answer is positive then the witness will testify on oath or affirmation. Two, if the witness does not understand the nature of oath, the court has to find out if he/she is possessed of sufficient intelligence to justify receipt of his/her evidence. In case that is found out to be the position, the court still has to find out if the witness understands the duty of speaking the truth. It is only after being satisfied that the minor witness satisfies the conditions laid down in the provisions that the evidence can then be taken either on oath or without oath depending on what the "voire dire" examination reveals in respect of the witness. See the case of **Justine Sawaki vs R** CAT Criminal Appeal No. 103 of 2004 (Arusha) (unreported).

Looking at the "voire dire" which the trial magistrate conducted, it is only the aspect of oath which was dealt with. He did not go further to ascertain the other aspect of possession of sufficient intelligence and the duty of speaking the truth before receiving the unsworn evidence of the complainant. This definitely, was a contravention of the section as the trial magistrate had not established the justification for receipt of the evidence of the complainant.

The first appellate court did not address this obvious breach of the law. In **Justine Sawaki** supra, the Court cited with approval the Kenyan case of Nyasani s/o Bichana Vs republic (1959) E.A. 190. The East African Court of Appeal in deciding pm section 19 (1) of the Kenya Statutory Declarations Ordinance, as amended by Ordinance No. 42 also of Kenya whose section 19(1) is similar to section 127(2) of our Evidence Act said the effect of failing to comply with the said provisions might result in the quashing of the conviction unless there is other sufficient evidence to sustain the conviction. We share the same view.

Another matter for our discussion is the failure to summon the doctor for cross examination by the appellant. Under section 240(3) of the Criminal Procedure Act [CAP 20 R.E. 2002] it was mandatory for the trial court to inform the appellant of his legal right to have the doctor summoned for cross examination on the PF3 Form. The trial court failed on this duty. This means that the evidence on the PF3 Form has to be expunged from record and we accordingly do so. See **Nyambuga Kamuoga Vs Republic** CAT Criminal Appeal No.90 of 2003 (Dodoma) (unreported).

As indicated earlier, the only evidence on the rape was that of PW4 the complainant. There was no compliance with section 127(2) of the Evidence Act, 1967. This means that the evidence of the complainant cannot be relied upon. The PF3 form (exhibit P1) has been expunged from there cord because of breaching section 240(3) of the Criminal procedure act.

After removing from the record that portion of the evidence, the question we ask is whether there remains other evidence to base the conviction of the appellant. The answer is no. What remains on the record is evidence which show how the complainant was traced, the arrest of the appellant and his subsequent prosecution. This evidence does not prove the offence of rape. Since both defects in the trial were occasioned by the trial court for failure to carry on its duty satisfactorily, and the High Court for failing to re-evaluate the evidence of the trial and make an independent findings, we allow the appeal quash the conviction, set aside the sentence and order a re-trial. It is accordingly ordered.

DATED at DODOMA this 2nd day of December, 2008.

E.M.K. RUTAKANGWA
JUSTICE OF APPEAL

N.P. KIMARO
JUSTICE OF APPEAL

M.S. MBAROUK
JUSTICE OF APPEAL

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

(S. S. MWANGESI)
SENIOR DEPUTY REGISTRAR