IN THE COURT OF APPEAL OF TANZANIA
AT MTWARA

(CORAM: RAMADHANI, C.J.; MUNUO, J.A. And MJASIRI, J.A.1

CRIMINAL APPEAL NO. 127 OF 2005

JACKSON DAVIS.....APPELLANT
V E R S U S
THE REPUBLIC.....RESPONDENT

(Appeal from the decision of the
High Court of Tanzania at Mtwara)

(Lukelelwa, J.)

dated the 27th day of June, 2005
i n
Criminal Appeal No. 35 of 2005

JUDGEMENT OF THE COURT

16th & 20th November, 2009

MUNUO, J.A.:

The appellant, Jackson Davis, was convicted of unnatural offence c/s 154(1) of the Penal Code, Cap 16 R.E 2002 as amended by section 16 of the Sexual Offences Special Provisions Act No. 4 of 1998. He was sentenced to thirty years imprisonment in Criminal

Case No. 183 of 2004 in Masasi District Court whereupon he unsuccessfully appealed to the High Court of Tanzania at Mtwara in Criminal Appeal No. 35 of 2005, before Lukelelwa, J. Hence this second appeal.

It was alleged by the prosecution that on the 8th October, 2004 at about 01.00P.M at Mkuti area within Masasi township in Mtwara Region, the appellant sodomized a little boy, one H M, then aged 9 years.

HM deposed as P.W.1 after the trial magistrate haphazardly conducted *voire dire* examination as follows.

Court: *The witness questioned to notice whether he knew the Oath.*

The witness questioned whether he knew what is truth he answered to say truth is to tell somebody the true story. The witness questioned if he told someone he (sic) story it is good or not, the witness says it is sin and the God not like it.

For that answer the court accept the witness to produce evidence without oath.

The complainant then told the trial court that on the material morning he was playing with other children when the appellant, Jack, who lived in the neighborhood approached him

and told him that he wanted to give the said complainant biscuits at the former's home. P.W.1 followed the appellant and on arrival at the latter's home, forced the boy to enter the house. In the house, the appellant sodomized him causing PW. 1 to cry for help. When the appellant completed the dirty act, the victim rushed home and reported the unnatural sexual assault to his father who reported the matter to the Police at Masasi. P.W.1's father, MS testified as P.W.3.

P.W.3 stated that upon receiving the complaint from his son, he reported the same to the Police who issued a PF. 3 form for medical examination. The PF 3, Exhibit P1, shows that spermatozoa were found in the child's anus thereby confirming that he had been sodomized.

A small boy who had been playing with the complainant stated that the appellant took PW1 into his room. After a few minutes, PW1 emerged from the room crying, naked, and carrying his clothes in his hand, whereafter PW1 went home to tell his father that the appellant sodomized him.

Like in the case of P.W.1, the trial magistrate conducted a Shoddy *voire dire* examination for PW2 as follows:-

Court: The witness is a young person the court tried to questions to notice whether he knows the consequences of the person who is telling lies. He said it is the sin, the God did not who a person like him, and when your telling

you parent you done sin. For that statement, the court permit him to produce the evidence without oath.

The trial magistrate then recorded the unsworn testimony of the witness.

In this appeal, the appellant was unrepresented. He filed eight grounds of appeal and an additional three grounds of appeal complaining that his guilt had not been proved beyond all reasonable doubt because the conviction was based on the uncorroborated unsworn testimonies of PW1 and PW2.

Ms. Evetta Mushi, learned State Attorney, did not support the conviction due to the above unsatisfactory conduct of the ***voire dire examination*** at the trial. The learned State Attorney submitted that the trial magistrate failed to comply with the mandatory provisions of section 127(2) of the Evidence Act, Cap. 6 R.E. 2002 which state, ***inter alias***

> *127(2) where in any criminal cause or matter a child of tender age 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,*

which opinion shall 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.

The learned State Attorney cited the cases of **Remigious Hyera versus Republic, Criminal Appeal No. 167 of 2005, Court of Appeal of Tanzania,** (unreported) wherein the court held that:

*It is settled law that the omission to conduct **voire dire** examination of a child of tender years brings such evidence to the level of unworn evidence of a child which requires corroboration. In **Hyera's** case, cited supra, the court referred to three other cases namely:-*

(i) Kibangeny Arap Kolil versus R. [1959] E.A. 92;

(ii) Kisiriri Mwita versus Republic [1981] ELI? 218; and

(iii) Dhahir Ally versus Republic [1989] T, L, 27

In Kibangeny Arap Kolil**,** case, the Court of Appeal of East Africa allowed the appeal because among other things, the conviction

for murder was based on the unsworn evidence of two children. In that case, the trial judge neither warned himself nor the assessors of the danger of convicting on the uncorroborated evidence of child witnesses.

In the cases Kisiriri Mwita and Dhahir Ally, cited *supra,* the High Court of Tanzania quashed convictions based on the unsworn evidence of children on the ground that ***voire dire*** examination had not been conducted properly or had been omitted.

Ms. Mushi further observed that as was held in Dhahir Ally's case, cited *supra,* a trial court must satisfy two conditions before conducting ***voire dire;***

(a) whether a child of tender years is possessed of sufficient intelligence to testify; and

(b) whether the child understands the duty to tell the truth. We think there is a third condition which is;

(c) whether the child knows the meaning of an oath.

In this case, the record shows clearly that the trial magistrate failed to comply with the provisions of section 127(2) of the Evidence Act, the learned State Attorney urged. She proposed that we nullify

the proceedings and judgements of the courts below and that we order a retrial of the case.

We do not have a speck of doubt in our minds that the trial magistrate failed to reflect in the scanty *voire dire* examination he conducted, whether P.W.1 and P.W.2, then aged 9 and 8 years respectively, knew the meaning of oath; or whether they were possessed of sufficient intelligence to give evidence on oath or not; or whether the said child witnesses understood the duty to tell the truth. *Voire dire* examination as held in the cases cited by the learned State Attorney and in many others, must establish those three factors before the trial magistrate can proceed to record the testimony of a child of tender years. Here the trial magistrate omitted to do so. The omission is, undoubtedly, a fatal irregularity.

However, we wish to note that we are mindful of the provisions of section 127(7) of the Evidence Act 1967 which allow a trial court to ground a conviction on uncorroborated evidence in sexual offence matters in certain circumstances. Section 127(7) of the Evidence Act, Cap 6 R.E 2002 states verbatim;

> *127(7) notwithstanding the preceding provisions of this section, where in criminal proceedings involving sexual offences the only independent evidence is that of a child of tender years of a victim of the sexual offence, the court shall receive the evidence, and may, after assessing the credibility of the evidence*

of the child of tender years or as the case may be the victim of sexual offence on its own merits, notwithstanding that such evidence is not corroborated, proceed to convict, if for reasons to be recorded in the proceedings, the court is satisfied that the child of tender years or the victim of the sexual offence is telling nothing but the truth.

It is apparent from the evidence on record that the trial magistrate conducted ***voire dire*** examination unsatisfactorily. Furthermore, it is also apparent from the record that the trial magistrate made no specific findings on the credibility of the complainant. No reasons are reflected in the proceedings to establish that the trial court was satisfied the complainant was telling the truth in compliance with the provisions of section 127(7) of the Evidence Act, Cap 6 R.E. 2002.

We have, furthermore, carefully considered the prayer for a retrial of this case.

The sodomy was committed on the victim when the victim was nine years old. We are doubtful whether it will be in the best interest of the victim who is now aged 14 to put salt on the old wound and trauma the small boy suffered mentally and physically when the appellant sodomized him. We are fortified in our view by the provisions of article 3(1) of the United Nations Convention on the Rights of the Child (CRC) , 1989, which Tanzania has ratified. Article

3(1) of the CRC places an obligation on courts of law to give the best interests of the child paramount importance in child matters by stating:-

> *Article 3 (1) In all actions concerning children, whether undertaken by Public or private social welfare institutions,* ***Courts of law,*** *administrative authorities or legislative bodies,* ***the best interests of the child shall be of primary consideration.***

Furthermore, much water has passed under the bridge since the trial was conducted. On the other hand, the appellant has been in prison, initially in remand and after conviction, in jail from time he was arrested to date. In those circumstances, we refrain from ordering a retrial.

In the light of the above, we quash the conviction and set aside the sentence. We accordingly allow the appeal. We order that the appellant be set at liberty forthwith unless otherwise held for other lawful cause.

DATED at MTWARA this 20th day of November, 2009.

A.S.L. RAMADHANI
CHIEF JUSTICE

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

(K I T U S I)

SENIOR DEPUTY REGISTRAR