IN THE COURT OF APPEAL OF TANZANIA
AT DAR ES SALAAM

(CORAM: RUTAKANGWA, J.A.; KIMARO, J.A. And MANDIA, J.A.)

CRIMINAL APPEAL NO. 406 OF 2007

SUNDAY JUMA ..... APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

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

(Shaidi, J.)

dated the 18th day of June, 2007
in
HC. Criminal Appeal NO. 155 OF 2005

JUDGMENT OF THE COURT

26th May & 25 June 2009

MANDIA,J.A:

The appellant SUNDAY JUMA was charged with Rape c/ss 130 (2) and 131 of the Penal Code as amended by sections 5 and 6 of the Sexual Offences (Special Provisions) Act, No. 4 of 1998. He was convicted by the trial District Court of Morogoro and sentenced to life imprisonment and ordered to pay compensation sh. 300,000/= to the

victim of the alleged rape. Aggrieved by both the conviction and the sentence, the appellant filed an appeal in the High Court of Tanzania. The High Court dismissed the appeal in its entirety, hence the present appeal.

The complainant, PW5 MOZA d/o OMARI, was at the time of trial, aged four. She lived with her aunt PW1 SALIMA d/o ISSA at MODECO area in Morogoro Municipality. PW1 owns the house she lives in, which she shares with a tenant PW2 PASCHAL s/o KAMIRI and the appellant's brother, one Baba Charles who was not called to testify. The appellant is a resident of Dar es Salaam who frequently visits his brother Baba Charles in Morogoro. On 12/12/2004 the appellant was in Morogoro on one of such visits. On this day, the appellant's brother, who rents one room in a house adjoining the main house which PW1 described as the back house, asked PW1, as the landlady, to provide a sleeping place in the main house to the appellant. PW1 obliged. At 11 p.m. while PW1 was making ice cream while watching the 11 p.m. television news, she saw the appellant from twenty five paces away tiptoeing into the main house

from the back house. PW1 testified that all the electricity light's were on, including that in her bedroom where her niece MOZA d/o OMARI was sleeping. Instead of going into the room where PW1 had provided him a place to sleep in, the appellant entered into the bedroom of PW1. PW1 testified that she thought the appellant had entered her room with an intention of stealing therefrom, so she waited for quarter of an hour to watch what the appellant was up to without being seen. After quarter of an hour she entered her bedroom when the appellant had left. She found MOZA crying and saying "Sunday amenivua chupi kaingiza mdudu wake damu inatoka". PW1 testified that she checked MOZA in her private parts and found semen and blood. She reported the matter to her tenant PW2 who also saw blood in the child's private parts. PW1 then went up to the room in which the appellant was sleeping, locked it from outside and secured it with a padlock. She then went to report to the Police where she was given a PF3 to take to hospital for PW5's medical examination. She tendered the PF3 in evidence which was admitted as Exhibit P1. While PW1 was away, the appellant scaled the wall of the room he was sleeping in and dropped into the next

room whose tenant was PW3 Sauda Mussa. Sauda Mussa (PW3) asked the appellant why he used such unorthodox means to get into her room and the appellant reportedly said "Mama Salma Sauda Musa amenifungia mlango kwa nje". Sauda Musa told the trial Court that the appellant could scale the wall of one room and jump into another room because there was no ceiling in the rooms of the house they lived in.

The appellant gave a sworn statement in his own defence. He professed no knowledge of the events of 10/12/2004 and acknowledged only the events of 13/12/2004 when he was arrested to 15/12/2004 when he was taken to court.

In his memorandum of appeal to the High Court the second ground of appeal faulted the trial court's admittance of the PF3 without informing him of his right to have the medical expert who made the report summoned to court to testify on the contents of the report. The appellate High Court acknowledged in its judgment, at page 36 of the record, that section 240 (3) was not complied with

but brushed aside this ground on the argument that the appellant had not been prejudiced. The High Court found the witnesses who testified competent and worthy of belief. The learned first appellate judge dismissed the appellant's defence offhand and dismissed the appeal in its entirety. This led to the present appeal.

The memorandum of appeal filed by the appellant contains eight grounds of appeal, and one prayer. It is a personal effort of a lay person so it consists of a narration of what transpired in the two lower courts. The appellant opted to say nothing in elaboration. We will treat the grounds generally because of the format in which they appear to us. Generally, the issues raised in the memorandum can be summarized thus:-

1. That the trial court erred in accepting in evidence the PF3 tendered in court as Exhibit P1 without calling the medical expert who filled in the document.
2. That the trial court erred in accepting the unsworn evidence of a child of tender years.

3. That the trial court did not assess properly the credibility of the evidence of PW2 and PW3.

The respondent Republic, represented by Mr. Mganga, learned State Attorney, did not resist the appeal.

The first point for discussion is the medical evidence in the form of the PF3 tendered as Exhibit P1. The record shows clearly that the trial court did not inform the appellant of his right to have the medical officer summoned as a witness. This clearly offends section 240 (3) of the Criminal Procedure Act. This Court has held in ***TATIZO ISSA @ HASSAN versus R*** Criminal Appeal No. 280 of 2005 (Dsm Registry – unreported), ***KASHANA BUYOKA v R*** Criminal Appeal Number 176 of 2004 (Mwanza Registry – unreported) and again in ***JACKSON MLONGA V R*** Crim. App. No. 200 of 2007, that failure by the court to inform the accused person of his right to have the medical expert summoned as a witness is fatal to the trial before a subordinate court. For this reason we discount the PF3 tendered in evidence during the trial as Exhibit P1.

After discounting the PF3 can we say there is sufficient independent evidence upon which a conviction could be based? We start with the testimony of the victim, PW5 MOZA d/o OMARI. According to the record, the victim is aged four years. According to the record at page 12 what goes as voire dire by the trial court goes thus:-

"VOIRE DIE (sic) EXAMINATION

COURT TO ACCUSED

a) Do you go to school?

b) Siendi (I don't go to school)

c) Do you know the meaning of truth

d) Yes /Ndio

e) Telling lies is bad

f) Yes /Ndio

g) Do you believe in God

h) Yes /Ndio

Court. After the Voire Die (sic) Examination, I hereby hold that she can testify without oath and hereby states:-"

The evidence of minors is governed by Section 127 (2) of the Evidence Act, Chapter 6 R.E. 2002 of the laws, which provides that where a trial court in a criminal matter forms the opinion that the child witness does not understand the nature of an oath, it may receive the evidence though not given under oath or affirmation if such court forms the opinion that the child is possessed of sufficient intelligence to justify the reception of his evidence, and understands the duty of speaking the truth. There are two opinions which the court makes. The second opinion, to be recorded in the proceedings, is whether the child is intelligent enough at all to testify and understands the duty of speaking the truth. The Court of Appeal for Eastern Africa has held in ***NYASANI s/o BICHANA V R*** (1960) EA 190 thus:-

"(i) a trial judge must before the reception of the unsworn evidence of a child record in his notes that

the child "is possessed of sufficient intelligence to justify the reception of the evidence and understands the duty of speaking the truth;"

The same point was emphasized in ***KASHANA BUYOKA V R*** (supra). The first opinion is whether the child understands the nature of an oath or not. If the answer to this is in the negative, the court takes the evidence without oath/affirmation subject to the answer on the second opinion. The question and answer session between the court and the child PW5 Moza, and the decision of the court to take unsworn testimony of the child, seems to concentrate on the first task of the court under section 127 (2) namely to form an opinion whether or not the child understood the nature of an oath. The court did not perform the second task of forming an opinion on whether Moza was possessed of sufficient intelligence to justify her evidence being taken. This is the task which is required to be put on record. There is no record of such opinion so the trial court failed the test put down by ***NYASANI BICHANA v R*** (1960) EA 190. The test is meant to lay the basis of the competence and credibility of the

evidence of the child so as to comply with Section 127 (1) of the Evidence Act. Failing in this test is, therefore, fatal. The evidence of the child MOZA OMARI is hereby discounted. This leaves only the evidence of the aunt SALIMA ISSA PW1.

PW1's evidence is that she allowed the appellant to walk into and out of her bedroom unhindered, and stays therein for fifteen minutes, because she thought the appellant was a thief. Added to this is the fact that no witness testified that during the time the appellant was inside the bedroom of PW1 the child cried out. In her evidence in chief PW1 Salima Issa testified that she noted Moza crying after she entered the bedroom, not before. A sexual act on a child aged four years which draws blood but is treated by the victim as not something to even draw a wince is a very unreal thing. We also note that the underpants, which were allegedly soiled with blood, were not tendered in evidence. We also note the fact PW1 Salima Issa testified on reporting to the police and taking her child to hospital and the other witnesses PW2 Paschal Kamiri and PW3 testified on the reporting of the matter to the Police, but there is no

evidence of the appellant being arrested on 12/12/2004. In his defence the appellant disowns the evidence of the alleged rape and testified on his arrest on 14/12/2004 when he was at his uncle's house.

We also take note of the fact that the charge sheet shows the appellant's age as nineteen years. When the appellant gave his sworn defence he gave his age as fifteen years, and he was not challenged on this. We have laboured to point out the loose ends in the evidence of the only witness left, that is, PW1 Salima Issa. The loose ends did not give a picture of a watertight case based on which a conviction for a charge of rape could stand. The unchallenged evidence of the appellant himself being a young person at fifteen years means he was below the age for which he could be sentenced under section 131 of the Penal Code. It was for these reasons that the respondent Republic did not support the conviction. We are not surprised by this stance. We are also of the opinion that the conviction and sentence cannot stand. We accordingly quash the

conviction and set aside the sentence. The appellant should be set at liberty forthwith unless he is held on some other lawful cause.

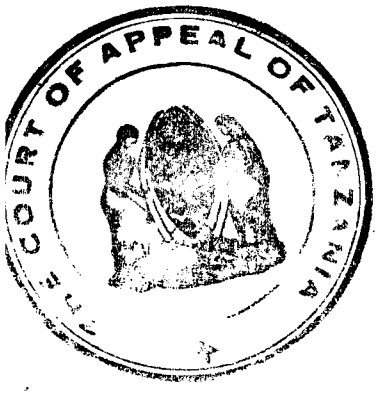
DATED at DAR ES SALAAM this 17th day of June, 2009.

E.M.K. RUTAKANGWA
JUSTICE OF APPEAL

N.P. KIMARO
JUSTICE OF APPEAL

W.S. MANDIA
JUSTICE OF APPEAL

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



J.S. MGETTA
DEPUTY REGISTRAR