IN THE COURT OF APPEAL OF TANZANIA
AT ARUSHA

(CORAM: RUTAKANGWA, J.A., MJASIRI, J.A., And MANDIA, J.A.)

CRIMINAL APPEAL NO. 239 OF 2007

GIDION YONA MARO..... APPELLANT
VERSUS
THE REPUBLIC ..... RESPONDENT

(Appeal from the conviction of the High Court of Tanzania at Moshi)

(MCHOME, J.)

dated the 17th day of AUGUST, 2000
in
Criminal Appeal. No. 102 of 1998

JUDGMENT OF THE COURT

23rd & 26th February,2010

MANDIA, J.A.

The appellant GIDION s/o YONA MARO was charged with Defilement of a girl under 14 years c/s 136 (1) of the Penal Code in the District court of Moshi. He was found guilty and convicted and sentenced to twenty five years imprisonment. Aggrieved, he preferred an appeal to the High Court of Tanzania at Moshi where he lost the appeal. He has now come to this Court. In this appeal, the appellant is self-represented, while the Republic/Respondent is represented by Miss Veritas Mlay, learned Senior State Attorney.

From the memorandum of appeal filed, this Court could glean the following points for determination:-

1. That the report on medical examination was considered in evidence by the trial court against the provisions of Section 240(3) of the Criminal Procedure Act.
2. That the evidence of PW2 who is the victim of the offence was taken and acted upon by the trial court in violation of the provisions of Section 127 (2) of the Evidence Act.

On 29/5/1998 at 4 p.m. PW1 Ndenegosia Simon of Uru Shimbwe village was alerted by cries of her four year old daughter Omega Simon who was passing water in the latrine. She went over and asked Omega what was wrong. Omega told PW1 she (Omega) felt pains when passing water. PW1 examined Omega and found her private parts swollen. Omega said Gidion took her to his room and had sex with her. PW1 took Omega to Shimbwe Dispensary. The exact date of the visit to the Dispensary is disputable, because PW1 Ndenegosia says she took her daughter to the Dispensary "on the following day" after 29/5/1998 which must be on 30/5/1998, while the Rural Medical Aid of Shimbwe Dispensary PW4 Caroline Julian says she received the child on 1/6/1998 which must be three days

after the alleged incident. All PW4 Caroline Julian did was to examine the child and recommend that the child be taken to Mawenzi Hospital. It appears PW1 followed this advice because she tendered in evidence a PF3 (Exhibit P1) which showed that it was issued by Majengo police Station on 3/6/1998 and filled in by the Medical officer, Mawenzi Government Hospital, on the same day 3/6/1998. Neither the police officer who issued the PF3 nor the medical officer testified in court. The only police officer who testified is PW5 D 742 Detective Corporal Lucas whose only role was to record statements from witnesses. Detective Corporal Lucas testified that when he recorded the statements on 4/6/1998 the appellant was already in police custody. The appellant appears to have been taken into custody on 3/6/1998 on the orders of PW3 Felician Kaunara Temba, the village administrator of Shimbwe Uru Village to whom PW1 Ndenegosia Simon complained on 2/6/1998.

The victim of the alleged offence was four years old. When time came for her to testify the record of the trial court at page 4 reads thus:-

" PW2 OMEGA SIMON, 4 YEARS, LUTHERAN, TANZANIA

Court. The witness is a child of tender age. According to

statements of her mother, the child is 4 years of age.

VOIRE DIRE EXAM.

XD – COURT:- My name is Omega.

- That is my mother (she points)
- That is known as Gidion (she points)
- I know him.
- He took me to his home.
- I don't know what you are saying

Court: The child is too young to understand the meaning of oath but is able to answer".

After the above examination the court allowed the child Omega Simon to give an unsworn statement as PW2.

As the record shows the PF3 tendered as Exhibit P1 was filled in by a medical officer at Mawenzi Hospital whose identity is not disclosed. When PW1 Ndenegosia put in the PF3 as an exhibit the trial court did not inform the appellant of his right to have the medical officer who made the report summoned as a witness as provided for in section 240 (3) of the Criminal Procedure Act. There is a string of authorities laying down the rule of law that infringement

of section 240 (3) of the Criminal Procedure Act results in a medical report being discounted. See:

(i) **ALFEO VALENTINO V REPUBLIC** Criminal Appeal No. 92 of 1996

(ii) **JAFARI JUMA V REPUBLIC** Criminal Appeal No. 104 of 2006

We therefore join issue with learned Senior State Attorney Miss. Verithas Mlay that the PF3 should be expunged from the record and we accordingly do so.

If we have the medical report out of the record the only eye witness account to the offence is that of four year old Omega Simon, PW2. She is a child of tender years whose evidence can only be taken into account if Section 127 (2) of the Evidence Act, Chapter 6 R.E 2002 is complied with. Again this Court has set the standards which must be followed before the evidence of a child of tender years is considered. First, the court must form an opinion on whether or not the child understands the nature of an oath. Second, the court must form an opinion, and record this opinion in the proceedings, whether or not the child is possessed of sufficient intelligence to justify the taking of the child's evidence at all, and if the court finds that the child is intelligent enough to testify, whether or not the child

understands the duty of speaking the truth. The court record at page 4 of the trial proceedings shows that the trial court examined the child Omega Simon only on her capacity to understand the meaning of an oath and did not bother with the other two tests we have enumerated above. In particular we take note of the last reply the child gave when she said "I don't know what you are saying". This gave an indication of bewilderment which should have made the trial court more careful than it did. Case law has it now that it is improper for a trial court to accept the evidence of a child of tender age without complying strictly with the provisions of section 127 (2) of the Evidence Act. See for example:

(1) **HASSANI HATIBU V REPUBLIC** – Criminal Appeal No. 71 of 2002 (unreported),

(2) **JUSTINE SAWAKI V REPUBLIC** – Criminal Appeal No. 103 of 2004 (unreported), and

(3) **SOKOINE CHELEA V REPUBLIC** – Criminal Appeal No. 252 of 2006 (unreported)

In the present case the situation is more worrying. The last reply given by the child during the ***voire dire*** examination shows she was not even aware of her surroundings when she said "I don't know what you are saying". This should have put the court on guard and

make a conscious decision on whether to take the evidence of the child at all. What is on record as evidence from the child cannot be relied upon in the circumstances of this case.

In the absence of the medical report and the evidence of the victim was there any other evidence on record to support the conviction? The record of trial, at page 22, has the following observation from the first appellate judge:-

> *"The offence was committed at about 4.p.m on (sic) broad daylight and there is no question of mistaken identity. There is no reason either that the complainant would be defiled by someone else and accused (sic) the appellant instead. I therefore find no reason to interfere with the trial court's findings".*

This conclusion of the first appellate court does not tally with the record, which does not disclose when, and by whom the offence was committed. The first indication that something was wrong was when the child Omega Simon was asked by her mother on 29/5/1998 why she was crying when passing water. This is the time Omega

said her private parts were hurting, and that the hurt was caused by the appellant. The record is however silent on whether the hurt was caused the same day or previously. It is also on record that the alleged hurt was discovered on 29/5/1998 but PW1 went to see the Rural Medical Aid on 1/6/1998, three days later, and the report to the police was made on 3/6/1998, six days later. The appellant was arrested on 3/6/1998,six days after the alleged incident despite living in the same Uru Shimbwe village with PW2. It is also noted that the appellant was not arrested in his village but was arrested in another village called Ngaruma when he went to visit a sick relative. Given these facts, the conclusion by the first appellate court that the offence was committed "in broad daylight" flies in the face of reason. We are satisfied that there is no evidence on record upon which the appellant could be found liable of the offence he is accused of. We allow the appeal and quash the conviction. The appellant should be released from custody unless he is held on some other lawful cause.

DATED at ARUSHA this 25th day of February,2010.

E.M.K RUTAKANGWA
JUSTICE OF APPEAL

S. MJASIRI
JUSTICE OF APPEAL

W.S. MANDIA
JUSTICE OF APPEAL

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

M.A. MALEWO
DEPUTY REGISTRAR
COURT OF APPEAL