IN THE COURT OF APPEAL OF TANZANIA

AT ARUSHA

(CORAM: MSOFFE, J.A., KILEO, J.A., And ORIYO, J.A.)

CRIMINAL APPEAL NO. 280 OF 2007

RENALD JOHN SHIRIMA..... APPELLANT

VERSUS

THE REPUBLIC.....RESPONDENT

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

(Jundu, J.)

dated the 25th day of September, 2006
in
Criminal Appeal No. 29 of 2006

JUDGMENT OF THE COURT

3rd & 6th September, 2010

ORIYO, J.A.:

This is a second appeal after the appellant was convicted by the District court of Rombo for the offence of incest by males contrary to section 158(1) of the Penal Code, Cap 16, R.E 2002.

The facts in a nutshell as appears in the Charge Sheet are that

"On or about the 17th day of April, 2003 at Kirongo Chini Chini Village, Rombo District in

Kilimanjaro Region the accused did have prohibited Sexual Intercourse with one PROSISTER RINALD a 14 years old girl, who was to his knowledge his daughter."

The appellant denied the charge. The prosecution called five witnesses to prove its case. The appellant testified on oath but did not wish to call any witness. At the end of the trial, the appellant was convicted as charged and sentenced to thirty years imprisonment. The appellant was aggrieved and his appeal to the High Court at Moshi was dismissed. Being still aggrieved the appellant has come to this court for a second appeal.

The appellant's petition has five grounds of appeal as follows:-

1. He was convicted on insufficient evidence.
2. Section 186(3) of the Criminal Procedure Act was not complied with in that proceedings were not held in **camera.**
3. Section 192(3) of the Criminal Procedure Act was not complied with, that there was no Preliminary Hearing conducted.

4. **Voire dire** test was not conducted prior to receiving evidence of children of tender years contrary to section 127(2) of the Evidence Act.
5. Failure to comply with sections 142 and 143 of the Criminal Procedure Act by not summoning the investigator of the case to testify.

At the hearing of the appeal, the appellant was unrepresented and he prosecuted the appeal unaided. The respondent Republic was represented by Mr. Zakaria Elisaria, learned State Attorney.

Tackling the first ground of appeal, Mr. Elisaria differed with the appellant. He stated that what was required here was evidence to prove the charge under section 158(1) of the Penal Code which was duly done. Starting with the fact that the victim, PW3, Prosister Renald, was the appellant's daughter; he stated that proof came from the appellant himself, his wife and the victim's mother Anna Renald – PW1; PW2 – Sesilia John, the appellant's sister; and PW4 – Esther Renald, another daughter of the appellant.

The next ingredient of the offence according to the learned State Attorney was whether the appellant raped PW3. He stated that the testimonies of the prosecution witnesses corroborate each other in that PW3 was raped by the appellant.

Mr. Elisaria urged us to dismiss ground 1 as it lacked merit.

On ground 2 of appeal, Mr. Elisaria stated that it also lacked merit because the record shows clearly that the proceedings were held in **camera.** Even if it were true that the proceedings were held in open court; that by itself would not have been fatal to the proceedings. He referred to the case of **Herman Henjewele vs R** Criminal Appeal No. 164 of 2005 (unreported) for support.

Responding to ground 3 of appeal, the learned State Attorney stated that it is not true because a Preliminary Hearing was conducted. And as he had argued in ground 2, he said that even if it was not held the omission would not have vitiated the trial proceedings. He referred us to the case of **Kalisti Clemence @ Kanyaga v R,** Criminal Appeal No. 19 of 2003. (unreported). He stated that ground 3 had no basis.

On ground 4 of appeal, the learned State Attorney contended that Section 127 (2) of the Evidence Act was complied with at the trial. He stated that a **voire dire** test was conducted in respect of the testimonies of PW3 and PW4 who were aged 15 and 12 years respectively.

Mr. Elisaria contended that he did not see the relevance of ground 5 of appeal because the provisions of sections 142 and 143 of the Criminal Procedure Act complained of are on summoning of witnesses. However, on the failure to summon the investigator to testify he stated that the number of prosecution witnesses who testified was adequate and proved the charge beyond reasonable doubt. Relying on the provisions of Section 143 of the Evidence Act, he submitted that there is no legal requirement that a certain number of witnesses is required to prove any fact.

Supporting the conviction and sentence, Mr. Elisaria urged us to dismiss the appeal because the charge was proved beyond reasonable doubt.

We agree with Mr. Elisaria that the appellant's allegation raised in ground 1 of appeal has no basis. It is undisputed that the victim, Prosister

Renald, is the appellant's own daughter. The issue that the appellant had repeatedly raped his daughter for a number of years is undisputed on the evidence of PW1, PW2, PW3, PW4 and PW5 (the Medical Doctor) who tendered the medical Report and was admitted in court as Exhibit "P1"

In view of the overwhelming evidence on record, the charge against the appellant was proved beyond reasonable doubt.

Regarding ground 2 of appeal, as correctly pointed out by the learned State Attorney, the proceedings were in fact held in **camera** in compliance with Section 186(3) of the Criminal Procedure Act. It is evident from the proceedings on record dated 9/8/2005 where, after recording the Coram the following is recorded.

"**PROSECUTION CASE STARTS:**
In chambers as the witness is a minor.
Signed
AA NGOWI
P.D. M"

However, this Court had occasion, in similar circumstances, to discuss the effect of failure to comply with the provisions of Section 186(3) in the case of **Herman Henjewele vR** (supra).

The Court stated:

> *"In the case under consideration we think that although both section 186(3) of the Criminal Procedure Act, 1985 and Section 3(5) of the Children and Young Persons Ordinance, Cap 13 imposed an obligation on a trial District court to sit in* ***camera,*** *the proceedings in the open court are not a nullity unless it could be shown that a miscarriage of justice occurred."*

Therefore unless there is evidence that a miscarriage of justice has been occasioned, failure to comply with section 186(3) of the Criminal Procedure Act is curable under Section 388(1) of the Criminal Procedure Act.

Ground 2 of appeal lacks merit.

We also agree with the learned State Attorney that the trial court conducted a Preliminary Hearing. He was correct in his submission that

even if the trial court had failed to conduct one, the proceedings would not have been vitiated. The legal position on the failure to comply with section 192 of the Criminal Procedure Act, was stated by this Court in the case of **Kalist Clemence @ Kanyaga v R** (supra) where it was held:

> *"..... Failure to conduct a preliminary hearing under section 192 of the Criminal Procedure Act, 1985 is an irregularity but it does not have the effect of rendering the trial proceedings a nullity."*

Ground 3 of appeal fails.

Going through the record, there is evidence that the trial court conducted a **voire dire** test under Section 127 (2) of the Evidence Act, before receiving the testimonies of PW3 and her young sister, PW4 whose ages were 15 and 12 respectively. In terms of section 127(5) of the Evidence Act, a **voire dire** test requirement is for children of tender age of below 14 years old. In the instant case, it is only the evidence of PW4 that required a **voire dire** test which was in fact conducted in compliance with Section 127(2) of the Evidence Act.

The appellant's complaint may be based on the procedure employed by the trial court in the conduct of the **voire dire** test. We have noted that the **voire dire** test conducted was not in the form of questions and answers. What is important here is that the trial court complied with the requirements of section 127(2) before it received the evidence of PW4, but the **voire dire** test may not have been as thorough as it ought to be. But even if the trial court had in fact not conducted any **voire dire** test at all before receiving the testimony of PW4 as the appellant alleges, it would not have been fatal as this court stated in the case of **Deemay Daati vs R,** Criminal Appeal No. 80 of 1994 (unreported).

> *"..... the evidence of a child of tender age which is given on oath but without the court conducting a **voire dire** examination under section 127(2) of the Law of Evidence Act, 1967 should be treated as unsworn evidence which requires corroboration."*

Regarding the fifth ground of appeal that the investigator was not summoned to testify, Mr. Elisaria conceded on this complaint and that may

have been so. But as correctly submitted by the learned State Attorney, this being a criminal case, the burden lies on the prosecution to establish the guilt of the appellant beyond all reasonable doubt.

This position was underscored by this Court in the case of **Goodluck Kyando vs** R, Criminal Appeal No. 118 of 2003 where the Court stated:-

> *"This in our view is not dependent upon the number of witnesses called upon to testify, (see section 143, Evidence Act, 1967) it is trite law that every witness is entitled to credence and must be believed and his testimony accepted unless there are good and cogent reasons for not believing a witness. The prosecution called three witnesses, PW1, PW2, and PW3 to prove its case. Their testimony was not challenged. What is important is the credibility and reliability of the evidence and not the number of witnesses called to testify."*

conviction was well founded and the sentence of 30 years imprisonment was appropriate.

In the event, and for reasons given, we dismiss the appeal in its entirety.

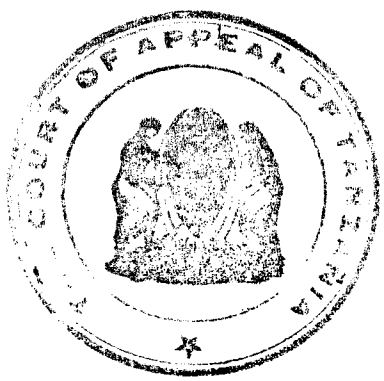
DATED at **ARUSHA** this 6th day of September, 2010.

J. H. MSOFFE
JUSTICE OF APPEAL

E. A. KILEO
JUSTICE OF APPEAL

K. K. ORIYO
JUSTICE OF APPEAL

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



(E. Y. MKWIZU)
DEPUTY REGISTRAR
COURT OF APPEAL