IN THE COURT OF APPEAL OF TANZANIA
AT MBEYA

(CORAM: MBAROUK, J.A., MASSATI, J.A., And ORIYO, J.A.)

CRIMINAL APPEAL NO. 141 OF 2010

1. **MARKO PATRICK NZUMILA**
2. **FRANK WILLIAM @SHOKA** ..... **APPELLANTS**

VERSUS

THE REPUBLIC ..... **RESPONDENT**

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

(Lukelelwa, J.)

Dated the 15th December, 2009
in
(DC) Criminal Appeal No. 27 of 2009

JUDGMENT OF THE COURT

5 & 8 July, 2011

MASSATI, J.A.:

The appellants were charged with the counts of conspiracy, armed robbery and gang rape. The District Court of Mbeya which tried them, convicted them of the first two counts and sentenced them to three years and fifteen years imprisonemt and six strokes of the cane respectively. Their appeals against conviction in the High Court were dismissed, while their sentences on the second count were enhanced to 30 years imprisonment and the corporal punishment increased to twelve strokes to be levied in two instalments, of six each. Still protesting their innocence, they have now filed a second appeal.

Each of the appellants filed a separate memorandum of appeal. The first appellant had nine grounds, which could conveniently be concretized into five main ones. **First,** that the appellant was not properly identified. **Second,** that the PF3 of the victim was not legally tendered in evidence,. **Three**, the courts below wrongly based his conviction on the cautioned statement of the second appellant. **Four**, that the defence case was not considered. **Lastly**, (which was a general one), that the charge was not proved against him beyond reasonable doubt. On the other hand, the second appellant's memorandum contained eight grounds, but which could also be concretized into five major ones, more or less similar to those of the first appellant. The only difference is that on the ground relating to the cautioned statement, the second appellant's complaint is that the cautioned statement was improperly admitted. The Appellants adopted those grounds at the hearing of the appeal.

Before us, the appellants appeared in person and fended for themselves. The respondent Republic was represented by Mr. Prosper Rwegerera, learned State Attorney.

The brief background to this case is that, on the midnight of 15th August 2008, **ELIZAH ANTHONY** (PW1) was asleep in her house in Iyanga, Mjele village, Mbeya District, Mbeya Region. She was alone as

her husband, **ANTHONY ALIHOKA** (PW2), had travelled to visit a sick relative. PW1 then heard a child crying outside. When she tried to go out to respond to the cries, she was met by a horde of people who kicked the door open, entered inside, and started beating her. The men asked for money and when she could not tell where it was, they reached for PW2's jacket which was hanging by the rope, helped themselves with some shs 173,600/= and then started raping her in turns. She had a count of five men who did that. After ravishing her, the thugs left. Overcome by maternal instinct, she first located her children and found them hiding in a river bed. Then, she woke up her neighbours who came to the scene of crime and rushed her to the dispensary. Finally the matter was reported to the police on 18th August 2008, who took over the investigation.

On 20th August, 2008, 2983 DT SSGT DANSON (PW5) was assigned to investigate the case. On interviewing PW1, she mentioned five persons who raped her and robbed the money. She mentioned those as Marco, Ndele Julias, John, Chukuani, and Frank. On 26th August, 2008, the second appellant was arrested, and on interrogation, gave a cautioned statement (Exh.P2) in which he implicated other persons. This is what led to the arrest of the 1st appellant. It was on the basis of this and other evidence such as that of PW8 that the appellants were charged with the offences. In their defences, the

appellants denied being anywhere near the scene of the crime on the material day. The second appellant further explained how he was forced to write a cautioned statement which was produced as an exhibit in the prosecution case.

Some of the appellant's grounds of appeal were also considered by the first appellate court. On the question of identification, the High Court found that indeed there were weak conditions of identification, but that the evidence was corroborated by the second appellant's cautioned statement and the first appellant's oral admissions to PW6 and PW8 and his conduct of hiding away from arrest. On the admisibility and weight of the cautioned statement (Exh. P2) the first appellate court, opined that, it was voluntary, properly received, and acted upon against the second appellant. In any case, that, there was sufficient corroboration to support both the retracted confession against the maker and to be used to convict the first appellant. The first appellate court was also convinced that the prosecution case had been proved beyond reasonable doubt. The grounds on the admisibility of the PF3, and failure to consider the defence case were not considered by the first appellate court because they were not raised by the appellants in their memoranda of appeal. And we do not think they can legitimately be raised at this stage (see **GANDY v. CASPAR** (1959)23 EACA 139).

Mr. Rwegerera, the learned State Attorney declined to support the conviction. He has forcefully argued that, the evidence of identification was so weak that it cannot support the convictions of the appellants. Specifically, he submitted that the evidence of PW1, the key prosecution witness, was not admissible because she was not sworn or affirmed contrary to section 198(1) of the Criminal Procedure Act (Cap 20 RE 2002). The other eye witnesses of identification namely PW3 and PW4, were children of tender years whose evidence was taken contrary to the provisions of section 127(2) of the Evidence Act (Cap 6 RE 2002.) Besides, there were contradictions in the testimonies of these eye witnesses that could not be ignored.

After going through the record of appeal, we felt that we did not have to decide the appeal on merit. We shall explain.

Section 198(1) of the Criminal Procedure Act, (the CPA) requires that, every witness in a criminal case be sworn, or affirmed in accordance with the provisions of the Oaths and Statutory Declarations Act, subject to the provisions of any other written law to the contrary. Section 4 of the Oaths, and Statutoty Declarations Act (Cap 34 RE 2002) provides:-

"(4) subject to the provisons to the contrary contained in any written law, an oath shall be made by-

(a) any person who may lawfully be examined upon oath or give or be required to give evidence upon oath by or before a court;

(b) any person acting as interpreter of questions put to and evidence given by a person being examined by or giving evidence before a court:

provided that where any person who is required to make an oath professes any faith other than the christian faith or objects to being sworn,stating as the ground of such objection, either he has no religious belief or that the making of an oath is contrary to his religious belief, such person shall be permitted to make his solemn affirmation instead of making an oath and such affirmation shall be of the same effect as if he had made an oath".

Briefly, then the effect of section 4 of this law, is that in all judicial proceedings, all witnesses who are Christians must take oath, and all other witnesses (including those without religious beliefs) have to be affirmed. The evidence of children of tender years, however, is one of the recognized exceptions under section 198(1) of the CPA because, subject to certain conditions, their evidence may be accepted without oath or affirmation (see **GODI KASENEGALA v. R.,** Criminal Appeal No. 10 of 2008 (unreported).

In the present case, the evidence of PW1 ELIZA ANTHONY, PW2 ANTHONY ALIHOKA and PW7 JOSEPH NGAYA (all adults) was taken without affirmation, after the trial court had noted that they were pagans. As seen above, this was wrong in law. The evidence of PW3 SIKAI ANTHONY, who was a child of tender years was also taken contrary to section 127(2) of the Evidence Act, because, the voire dire test conducted on her, was most unsatisfactory.

The effect of non compliance with section 198(1) of the CPA is that such evidence must be discarded from the record (see **MWITA SIGOKE @ OGORA v. R.,** Criminal Appeal No. 54 of 2008 (unreported). The effect of non compliance with section 127(2) of the Evidence Act is also the same (see **GODI KASENEGALA v. R.,** (supra). But the total effect of all these irregulatires has to be weighed against the test set in

section 388 of the Criminal Procedure Act and it is **"whether such error has occassoned a failure of justice".** The term "failure of justice" has eluded a precise definition, but in criminal law and practice, case law has mostly looked at it from an accused/appellant's point of view. But in our view from the wording of section 388 of the CPA, that term is not designed to protect only the the interests of the accused. It encompasses both sides in the trial. Failure of justice or (sometimes, referred to as "miscarriage of justice") has, in more than one occassion been held to happen where an accused is denied an opportunity of an acquittal. (see for instance **WILLIBALD KIMANGATO v. R.,** Criminal Appeal No. 235 of 2007 (unreported) but in our considered view, it equally occurs where the prosecution is denied an opportunity of a conviction. This is because, while it is always safer to err in acquitting than in punishment, it is also in the interests of the state that crimes do not go unpunished. So, in deciding whether a failure of justice has been occasioned, the interests of both sides of the scale of justice have to be considered.

In the present case, by unwittingly allowing PW1, PW2 and PW7 to give unaffirmed testimony, the trial court certainly prejudiced the prosecution case substantially as those were crucial witnesses for its case but for which they were not to blame for giving of their evidence in

violation of the law. To that extent, we think, there was a failure of justice.

The proceedings of the trial Court cannot therefore be left to stand. The same fate will have to befall all the proceedings of the High Court on first appeal. In exercise of our revisional powers under section 4(2) of the Appellate Jurisdiction Act, Cap 141 RE 2002, we quash all the proceedings and judgments of the lower courts, and set aside the sentences.

In the circumstances of this case, and in the interests of justice, we order that the appellants be retried as expeditiously as possible.

It is so ordered.

DATED at **MBEYA** this 8th day of July, 2011.

M.S. MBAROUK
JUSTICE OF APPEAL

S.A. MASSATI
JUSTICE OF APPEAL

K.K. ORIYO
JUSTICE OF APPEAL

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

P.W. BAMPIKYA
SENIOR DEPUTY REGISTRAR
COURT OF APPEAL