IN THE COURT OF APPEAL OF TANZANIA
AT TANGA

(CORAM: MSOFFE, J.A., LUANDA, J.A., And MANDIA, J.A.)

CRIMINAL APPEAL NO. 103 OF 2010

NOEL SUNJILA ..... APPELLANT

VERSUS

THE REPUBLIC ..... RESPONSENT

(Appeal from the judgment of the High Court of Tanzania at Tanga)

(Teemba, J.)

dated the 15th day of December, 2009
in
Criminal Appeal No. 22 of 2009

JUDGMENT OF THE COURT

25 & 29 March 2011

MANDIA, J.A.:

The appellant was charged with committing an Unnatural Offence c/s 154 (1) (a) of the Penal Code in the District Court of Tanga at Tanga. He was found guilty, convicted and sentenced to imprisonment for thirty years. He was aggrieved by both the conviction and sentence and preferred an appeal to the High Court of Tanzania at Tanga. He lost the appeal and has now come to this Court. The appellant appeared in person while the

respondent/Republic was represented by Mr. Faraja Nchimbi, learned State Attorney, assisted by M/S Pendo Makondo, learned State Attorney.

The memorandum of appeal filed by the appellant is a self-help job, understandably so because the appellant is currently serving a prison sentence.

Inelegant as it is, the memorandum raises the following salient points, namely:-

> *(1)* ***that*** *the prosecution has failed to prove penetration in the charge leveled against the appellant,*
>
> *(2)* ***that*** *the trial court and the appellate High Court relied on the uncorroborated evidence of the victim,*
>
> *(3)* ***that*** *the lower courts erred in relying on the PF3 and the evidence of the doctor PW4 and*

*(4) **that** the lower courts erred in failing to consider the defence of the appellant, and also in shifting the burden of proof from the prosecution to the defence.*

A brief background of the evidence on record shows that on 6th August, 2007, at 6 p.m. in the evening, PW Blandina Thomas was at home. She discovered that her second born child PW2 Vincent Eliya had lost the ability to control his bowel movement and was soiling himself with excrement. She asked PW2 Vincent Eliya why he was soiling himself. The latter said the appellant had sodomised him. PW1 then took Vincent to the appellant's home on the same day but they did not find the appellant at home. On the following day 7/8/2007 PW1 took Vincent again to the appellant's home where the appellant denied the allegations leveled against him. PW1 then sought the help of PW3 John Simon, a militiaman, who arrested the appellant and sent him to Chumbageni Police Station. On the following day 8/8/2007 PW5 Detective Constable Abia of Chumbageni Police Station took Vincent Eliya (PW1), in the company of his mother PW1 Blandina Thomas, to Bombo Hospital for medical examination.

At the hospital PW2 Vincent Eliya was examined by PW4 Dr. Simon Godfrey who filled in and tendered in court the PF3 as Exhibit P.E.1. The appellant was then arrested and charged.

In his defence the appellant acknowledged being arrested on 7/8/2007, taken to Chumbageni Police Station where he learned of the allegations of sodomy leveled against him. He alleged he was framed up after demanding his salary from his employer.

Despite the protestations of innocence, the appellant was found guilty and convicted as earlier indicated. On appeal to the High Court, his appeal was dismissed in its entirety on the ground that **one,** penetration was proved through the PF3 filled in and tendered by PW4 Dr. Simon Godfredy, **two,** the trial court conducted *voire dire* on the victim who was a child of tender years and thereafter his evidence taken and **three,** there was no evidence of conspiracy against the appellant.

We will start with the grounds relating to penetration and the medical report (PF3) as they are related. The PF3 Exhibit P.E.1 and the oral testimony of the doctor PW4 Dr. Simon Godfrey shows that the victim's sphincter was loose but there were no bruises and that this situation indicated penetration. When the PF3 was tendered there was no objection from the appellant. The grounds relating to penetration and the PF3 therefore lack merit and are hereby dismissed.

The appellant has also raised issue with how the lower courts treated his defence, arguing that his defence was not considered and the burden of proof was shifted to the defence. We have examined the record, and it is clear that the trial magistrate at page 24 considered whether or not the case against the appellant had been "cooked up", an allegation which he discounted and gave reasons for doing so. The appellate High Court also considered the allegation of a frame up which the appellant raised as one of the grounds of appeal in the High Court. The learned appellate High Court judge dismissed the allegation and gave grounds for doing so. The

allegation of failure to consider his defence and shifting the burden is not supported by the record and is accordingly dismissed.

Only one ground remains, and this is that the lower courts erred in acting upon the uncorroborated evidence of the victim, PW2 Vincent Eliya. In this regard, the only evidence in chief before cross-examination given by PW2 Vincent Eliya goes as follows:-

> *"On the material day, I was going to the shop, I met the accused person on my way he took me by force took me to the Michongoma he pulled my trousers off by force and sodomized me, I did shouted for help, this was the first time he did it to me. It was me who told PW1 what accused did to me."*

Just before PW2 Vincent Eliya testified, the court had conducted what it called VOIRE DIRE test which went thus:-

> *"Court. VOIRE DIRE conducted pursuant to the provisions of the law, and does seem to understand the nature of an oath."*

In **AUGUSTINO LYANGA v REPUBLIC,** Criminal Appeal No. 105 of 1995, this Court said:-

> *"If we are to paraphrase the provisions of Section 127 (2) a Court may only receive evidence of a child of tender years who does not understand the nature of an oath if in the opinion of the Court the child is in possession of sufficient intelligence and understands the duty of speaking the truth. These requirements must be recorded in the proceedings ... It is our considered view that the two requirements are conditions precedent to receipt of evidence from a child of tender years whose evidence has not been received on oath or affirmation."*

The record before us shows that the trial court examined PW2 Vincent Eliya only on whether or not he understood the nature of an oath. It did not examine the witness on whether or not he was possessed of sufficient intelligence to justify the reception of his evidence, and whether or not he knew the duty of speaking the truth. The **intelligence test** and the **test on duty of speaking**

the truth should have been recorded as part of the proceedings, a lapse which is evident in the trial court record. This Court has, under similar circumstances, quashed the convictions based on evidence received without compliance with Section 127 (2) of the Evidence Act – see:-

1. *WILBARD KIMANGANO Vr, Criminal Appeal No. 235 of 2007*

2. *OMARY KURWA v REPUBLIC, Criminal Appeal No. 89 of 2007*

Leaving aside the fact that in taking the evidence of PW2 Vincent Eliya did not comply with Section 127 (2) of the Evidence Act, the trial magistrate did not also indicate the age of PW2. The record of trial appears thus:-

> *"PW2 VINCENT ELIYA, A STD II PUPIL, RESIDENT OF NEW NGUVUMALI AND A CHRISTIAN."*

If the trial magistrate saw the need to conduct a *voire dire* test, it means he was convinced that the child was of tender years as

defined in Section 127 (3) of the Evidence Act. Section 127 (5) of the Evidence Act gives the threshold of a child of tender years **one whose apparent age is not more that fourteen years.** In the present case the mother of Vincent Eliya PW1 Blandina Thomas did not give the age of her child, and the child himself did not give his age. Instead of ascertaining the age, the trial court took refuge only in noting the class the child was in i.e. Standard II. Surprisingly, when composing the judgment the trial magistrate gave the age of the victim as seven years, and the judgment of the High Court also took it as a fact that the victim was aged seven years. The figure of seven years could not have come from the record since the record is silent on age. In **REPUBLIC v WAMBOI KAMAU** (1965) E.A. 548 it was held, *inter alia,* thus:-

> *"**Held:** (i) the court has a duty in cases of doubt to satisfy itself judicially as to the age of the accused when that affects the criminal responsibility and this is best dealt with at the commencement of the proceedings without waiting for evidence relating to the general issues;"*

The above authority refers to the age of an accused person, but the principle could as well be transposed to the requirements of Section 127 (2) of the Evidence Act. This is because delving into Section 127 (2) depends on determination of age. A court cannot determine whether or not a witness before it is a child of tender age unless the apparent age of the witness has been determined. If age has not been determined through direct evidence of parents, birth certificates etc. then the court must satisfy itself as to the apparent age before proceeding to act under Section 127 (2) of the Evidence Act.

We are satisfied that the evidence of PW2 Vincent Eliya was wrongly received and acted upon.

In the absence of evidence from the victim, can we say there is evidence on record to connect the appellant with this offence? There is none. The learned State Attorney also did not support the conviction and sentence. The appeal is accordingly allowed. The conviction is quashed and the sentence imposed upon the accused

person is set aside. The appellant should be released from custody forthwith unless he is held on some other lawful cause.

DATED at TANGA this 28th day of March, 2011.

J.H. MSOFFE
JUSTICE OF APPEAL

B.M. LUANDA
JUSTICE OF APPEAL

W.S. MANDIA
JUSTICE OF APPEAL

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

(E.Y. Mkwizu)
DEPUTY REGISTRAR