IN THE COURT OF APPEAL OF TANZANIA

AT ARUSHA

(CORAM: NSEKELA, J.A., KIMARO,J.A.,And MBAROUK, J.A.)

CRIMINAL APPEAL NO.105 OF 2008

PETER YUSTO.....APPELLANT

VERSUS

THE REPUBLIC.....RESPONDENT

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

(Jundu, J.)

dated 27th February, 2007

in

Criminal Appeal No. 34 of 2005

JUDGMENT OF THE COURT

23rd & 28th February, 2011

KIMARO, J.A.:

The District Court of Mwanga, sitting at Mwanga convicted the appellant of the offence of grave sexual abuse contrary to section 138 C (1) (2)(a) of the Penal Code, CAP 16 as amended by the Sexual Offences (Special Provisions), Act , No 4 of 1998. He was sentenced to suffer imprisonment for a term of twenty years. He was, in addition, ordered to

pay a compensation of T.shs 100,000/= to the victim of the offence. His appeal to the High Court was dismissed, hence this second appeal.

The facts of the case in the trial court were very brief. On the 9th of February, 2004 Elisia George, (PW3) by then aged seven years old, was left at home alone. Her grandmother, (PW2) went to hospital. As she was on her way to hospital, PW2 met the appellant. She informed the appellant that her husband required him at their house. According to PW3, the appellant went to the house and met her alone, cleaning utensils. The appellant inquired from PW3 what her name was, and whether she was schooling of which PW3 responded by telling the appellant her name, and that she was schooling and was in STD 11. It was then the appellant inserted his fingers in PW3's vagina. PW3 felt pains and she shouted. Maria Elisamehe (PW1), their neighbour, heard the girl shouting. She went to the house where she found PW3 alone and she disclosed to her that she had stomach pains.

As she was leaving, she saw the appellant coming from a neighbouring house and told PW3 to tell her grandfather that they will meet on the next day. According to PW1, as he started to leave, PW3 followed her and told her that she was afraid to remain at home alone

because the appellant had committed sexual abuse on her and had promised to give her T. shs. 200/=. PW1 left with PW3 to her home and when PW2 returned from hospital and found PW3 at the residence of PW1, PW3 disclosed to her what the appellant did to her. Both PW1 and PW2 said they inspected the private parts of the complainant (PW3) and found her with small bruises and water discharge from her vagina. PW3 was then taken to hospital and when she was examined by a nurse, she said that the complainant was not raped. It was then the matter was reported to the village officers and to the police. Evidence of PF 3 was admitted in court as exhibit P1.without any objection from the appellant. The appellant was then charged as aforesaid.

The appellant in his defence denied the commission of the offence. He said on 12th February 2004 he was arrested and taken to the village authorities where PW3 said the appellant put his penis in her vagina. During cross -examination the appellant admitted knowing PW3 very well. He wondered why he was not charged with rape and instead, he was charged with sexual abuse. According to him the charges must have been preferred to him because he had grudges with the grandmother of PW3 who suspected him for stealing her T.shs.50,000/=.

The appellant's appeal to the High Court raised six grounds of appeal which were all dismissed, the learned judge on first appeal holding that:

> "In general, I am convinced that the evidence of the prosecution witnesses in the trial court did prove the charge against the appellant beyond reasonable doubt."

Before the Court the appellant raised ten grounds of appeal. His complaint is that the evidence against him was cooked, other witnesses were not summoned, non-compliance with section 240(3) of the Criminal Procedure, Act CAP 20 R.E.2002, and evidence of PW3 was not corroborated. Others are that the prosecution case was determined on circumstantial evidence, his defence of alibi was not considered, burden of proof was shifted to the appellant, "voire dire examination" was unnecessarily conducted because the appellant was not facing a rape charge and that generally, the prosecution did not prove the charge against the appellant on the standard required.

At the hearing of the appeal the appellant appeared in person. For the respondent /Republic it was Ms Javelin Rugaihuruza, learned State Attorney who appeared and she supported the appeal.

The appellant also filed written submissions to support his appeal. In his submission, the appellant lamented that the first appellate judge did not make his own re-evaluation of the case. Citing the case of **D.R.Panya V R** (1957) E.A. 336 the appellant said the first appellate judge was duty bound to make a reassessment of the evidence and make a finding whether the trial court made a proper assessment of the evidence. He also attacked the evidence of PW3 claiming that without corroboration, it was not sufficient to base his conviction. On the evidence of the PF3 the appellant said it was doubtful because the doctor was not summoned to testify about his/her observation in the examination made on (PW3). Moreover, said the appellant, the evidence of PW2 was that PW3 was taken to hospital on 9th February 2004 and the nurse who examined her on that day said she was not raped. Yet the PF3 shows that PW3 was referred to hospital on 12th February, 2004. He prayed that the appeal be allowed.

As we have indicated, the learned State Attorney supported the appeal. She supported the appeal on one ground only, that PW3 was a child witness, her evidence was taken without oath, but was not corroborated. As for the rest of the grounds, she said that they were baseless. Citing the case of **Godi Kasenegala Vs R** CAT Criminal Appeal No. 10 of 2008 (unreported) the learned State Attorney said the appellant was convicted on the sole evidence of PW3. The "voire dire examination" conducted on PW3 showed that (PW3) did not know the meaning of oath, and so her evidence was taken without oath. According to the learned State Attorney, this being the position, her evidence had to be corroborated. On such circumstances, said the learned State Attorney, the evidence of PW3 has to be discounted. If such a position is taken, there will be no evidence to convict the appellant. She prayed that the appeal be allowed.

On our part we entirely agree with the learned State Attorney that the other grounds raised by the appellant had no merit. But as we shall show later, we disagree with her on the ground which she supported. Starting with the ground that there was need to call other witnesses apart from the three prosecution witnesses, the law is settled that section 143 of

the Law of Evidence Act, CAP 6 R.E.2002 does not specify the number of witnesses to be summoned. What matters is the credibility of the witnesses and not the number. See the case of **Edward Nzabuga Vs R.** CAT Criminal Appeal No. 136 of 2008(Unreported). Also on this point is the ground on evidence of family members. The law is settled that there is no law forbidding family members from testifying so long as their evidence is credible. See the case of **Mustafa Ramadhani V R.** [2006] T.L.R.323. As for the ground that a PF3 was admitted in evidence without the doctor being summoned for cross examination by the appellant, our response is that in a case where evidence of PF3 is relied upon to convict the appellant, the appellant is entitled under section 240(3) of CAP 20 as a matter of right to be informed of his right to have the doctor summoned for cross-examination. However, in this case the conviction of the appellant was not based on the evidence of the PF3 so this ground has no merit. We also observe that, and as correctly pointed out by the learned State Attorney that the appellant was not convicted on circumstantial evidence but on direct evidence of PW3.

As for the ground that there was a shift of the burden of proof, the record of appeal does not support the appellant. On his defence of alibi it

was determined by the learned judge on first appeal and we see no fault in his finding. On the ground raised by the appellant that the first appeal court is duty bound to re-evaluate the evidence of the trial court to satisfy itself of the correct findings of the trial court, we agree that is the position in law, and indeed that is what the learned judge on first appeal did.

Coming now to the testimony of PW3, we agree that the appellant's conviction was solely based on the evidence of PW3. PW3 was a child aged seven years when she gave her testimony. A "voire dire examination" was conducted properly by the trial magistrate under section 127(2) of CAP 6, and a finding made, that PW3 possessed sufficient intelligence to testify, but not on oath, as she did not understand the meaning of oath. The first appellate judge was satisfied with the assessment of the evidence by the trial court and sustained the conviction on the uncorroborated evidence of PW3. In sustaining the conviction the learned judge on first appeal said:

> "As we have seen, PW3 was the only key witness in the case. She was an infant aged seven (7) years old, hence in terms of sections 127(5) of the Evidence Act, 1967 a witness of tender age. In his assessment, the trial

magistrate as is evident in his judgment found PW3 truthful, credible, confident and consistent in her evidence she adduced during the trial. In such situation, the law as above quoted and as stated by the trial magistrate allowed the trial magistrate to convict the appellant on the evidence of PW3 without corroborative evidence. I so hold."

The learned State Attorney faults the above finding by citing the case of **Godi Kasenegala**(supra). With great respect to the learned State Attorney, she did not read the whole judgment and appreciated the facts of the case. Indeed the facts in the case of **Godi Kasenegala** (supra) and this case are far apart. In the said case the appellant was charged with the offence of rape contrary to sections 130 and 131(1) of the Penal Code. The victim of the offence was Nelia (PW3) a child of tender age. The Court did not say as "ratio decidend" that in all cases evidence of witnesses of tender age, taken without oath cannot be used to sustain a conviction without corroboration. The finding of the Court in the case of **Godi Kasenegale** was that the" voire dire examination "showed that the evidence of the child witness was not taken in compliance with section

127(2) of CAP 6 and so Nelia (PW3) should not have testified at all, as she did not possess sufficient intelligence to testify. The Court cited various cases including the case of **Augustino Lyanga V R** Criminal Appeal No. 105 of 1995 (unreported) to emphasize the importance of compliance with section 127(2) of CAP 6 and the consequences of which follow where there is non –compliance. The assessment of evidence generally showed that the evidence to support the prosecution case was contradictory hence unreliable to sustain a conviction. The evidence of the complainant (PW3) had to be expunged from the record and so the evidence that was left was not sufficient to sustain the conviction of the appellant. In conclusion the Court said:

> "Admittedly there was a flagrant breach of the provisions of section 127(2) of the Evidence Act as well as section 198(2) of the Act. Under these provisions, the unsworn evidence of Nella ought not to have been received at all unless and until the trial court was satisfied that she was possessed of sufficient intelligence to justify the reception of her evidence and further that she understood the duty to speak the truth. We wish to re-

emphasize here that these two conditions in the second stage must be satisfied conjunctively before the unsworn or affirmed evidence of a child witness is received. If upon a proper examination of the child, either both attributes or any one of them are found wanting, then his or her evidence must be dispensed with, in conformity with the mandatory requirements of both the Evidence Act and the Act. In the light of these clear statutory provisions, unsworn evidence of a child witness received outside the ambits of the provisions of section 127(2) is as good as no evidence at all in a criminal trial. It should always be discarded or discounted."

From what we have indicated above, it is obvious that the facts of the two cases are different. Whereas in this appeal section 127(2) was complied with and the child witness found to possess sufficient intelligence to testify but not on oath, in the case relied upon by the learned State Attorney the contrary was the case. Section 198(2) which is referred to in the quotation from the case of **Godi Kasenegala** is under the Criminal Procedure Act, CAP 20.

In as far as this appeal is concerned, and with respect to the learned State Attorney, we do not agree with her that the evidence of Elisaria (PW3), the complainant, and a child witness should be discounted. The courts below found her a truthful and credible witness. We have no reason to interfere with their finding.

In the event, the appeal is dismissed in its entirety. It is so ordered.

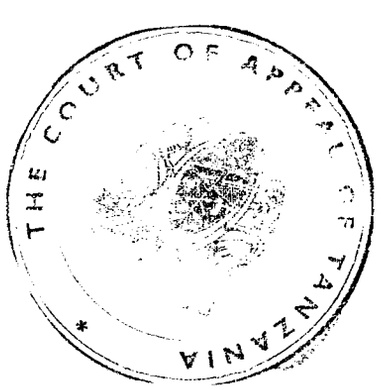
DATED at **ARUSHA** this 28th day of February, 2011.

H.R. NSEKELA
JUSTICE OF APPEAL

N.P. KIMARO
JUSTICE OF APPEAL

M.S. MBAROUK
JUSTICE OF APPEAL

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



Z. A. Maruma
DEPUTY REGISTRAR