IN THE COURT OF APPEAL OF TANZANIA

AT ARUSHA

(CORAM : MSOFFE, J.A., MJASIRI, J.A., And MASSATI, J.A.)

CRIMINAL APPEAL NO. 111 OF 2008

CHARLES ELIAS..... APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

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

(Munuo, J.)

dated the 7th day of January, 2003
in
DC Criminal Appeal No. 56 of 2002

JUDGMENT OF THE COURT

20th & 26th September 2011

MJASIRI, J.A.

This is a second appeal. The appellant Charles Elias was charged and convicted by the Moshi District Court of the offence of rape contrary to section130 (1) and (2) and 131 (1) and (3) of the Penal Code Cap 16, R.E. 2002 as amended by the Sexual Offences Special Provisions Act (Act No. 4 of 1998) and was sentenced to 30 years imprisonment. Being aggrieved by the decision of the District Court, he appealed to the High Court against both conviction and

sentence. His appeal to the High Court was not successful. The High Court enhanced the sentence to the mandatory life imprisonment, hence his appeal to this Court.

The background to this case is as follows. This appalling incident occurred at Shiri Matunda Village in the municipality of Moshi. The appellant was employed as a domestic servant by one Redemta Mosha (PW1) who is the mother of the complainant, PW2. He lived in the same house with PW1 and her two children who were 3 and 8 years old. On June 14, 2000, PW1 went to Marangu to attend a funeral. She left her two children in the care of the appellant. She returned home the next day. Upon arrival she found the appellant washing dishes outside the house. She found her daughter lying in bed crying in pain. PW2 recounted to her mother what transpired during the night while she was away. She disclosed to her that while sleeping with her sister, she found the appellant in their bed. He removed her underwear, inserted his fingers in her private parts and then had intercourse with her. She tried to call out for help but the appellant covered her mouth with a blanket. The incident was

reported to the police which led to the arrest of the appellant who was subsequently charged with the offence of rape.

At the hearing of the appeal the appellant was unrepresented and the Republic was represented by Mr. Juma Ramadhani, learned Senior State Attorney.

The appellant filed five (5) grounds of appeal. The main grounds of appeal can be summarized as follows:-

1. *Failure by the trial Court to conduct a proper* voire dire *examination as required under section 127 (2) of the Evidence Act, Cap 6, RE.2002.*

2. *The charge against the appellant was not proved beyond reasonable doubt.*

When the appeal was called on for hearing the appellant sought leave of the Court to file written submissions. As no objection was raised by the learned State Attorney, the appellant was allowed to file the submissions. The appellant being a lay man did not make any oral arguments in support of the appeal. He asked the Court to adopt his grounds of appeal and the written submissions and to give them due consideration.

Mr. Ramadhani on his part, did not support the conviction. He submitted that the trial magistrate failed to comply with the requirements under section 127(2) of the Evidence Act (hereinafter "the Evidence Act"). The *voire dire* examination was improperly conducted. The trial Court failed to record his findings as to whether the witness understood the meaning of oath and the duty of speaking the truth. He further submitted that this non-compliance was not faulted by the first appellate Court, thereby not interfering with the conviction of the appellant. Mr. Ramadhani submitted further that the evidence of PW1 needs corroboration. He made reference to the case of **Herman Henjewele v R.** He stated that in view of the non compliance with section 127(2) of the Evidence Act, section 127(7) cannot be utilized. The Court can only proceed to enter a conviction under section 127(7) when the Court is satisfied that the witness is telling nothing but the truth.

We on our part, entirely agree with the learned State Attorney that the trial magistrate failed to comply with the provisions of section 127(2) of the Evidence Act. This non compliance is very apparent on the record. The relevant part of the record is reproduced as under:-

" Question : Which is good to speak false or truth.

Answer : To speak the truth is good.

Question: In which school are you learning.

Answer: Mawenzi Primary School.

Question: Who is the President of this country.

Answer: I don't know."

After this question and answer session, the Court did not record its opinion in terms of Section 127(2) of the Evidence Act.

Section 198 (1) of the Criminal Procedure Act Cap 20, RE.2002 provides as under:-

> *"Every witness in a criminal cause or matter shall, subject to the provision of any other written law to the contrary, be examined upon oath or affirmation in accordance with the provisions of the Oaths and Statutory declaration Act."*

The only exception under this section is when a child of tender years gives evidence. The procedure to be followed is as provided under Section 127(2) of the Evidence Act.

Under Section 127 (5) of the Evidence Act it was necessary for the trial Court to address itself to the procedure under sub-section 2 thereto before taking the evidence of PW1. Section 127 (2) of the

Evidence Act provides as follows:-

> *"Where in any criminal cause or matter a child of tender age called as a witness does not, in the opinion of the court, understand the nature of an oath, his evidence may be received though not given upon oath or affirmation, if in the opinion of the court, which opinion shall be recorded in the proceedings, he is possessed of sufficient intelligence to justify the reception of his evidence, and understands the duty of speaking the truth."*

The Court is required to ascertain by conducting an investigation as to whether or not the child understands the nature of an oath. If the child does not understand the nature of the oath by conducting an investigation as to whether or not he or she is possessed of sufficient intelligence and understands the duty of speaking the truth. The investigation must appear on record. See **Kinyua v Republic** [2002] 1 K.L.R. 256

As this is a second appeal, we are fully aware that the Court will not interfere with the findings of fact by the courts below unless it is shown that there has been a misapprehension of the evidence, a

miscarriage of justice or a violation of the principle of law or practice. The principles to be followed are well established. See **R v Hassan bin Said** (1942) 9 E.A.C.A 62; **R v Gokaldas Kanji Karia and another**, (1949) 16 E.A.C.A 116; **Reuben Kararis/o Karanja v R** (1950) 17 E.A.C.A. 146; **Peter v Sunday Post** 1958 EA 424; **Amratlal t/a Zanzibar Silk Stores v Jariwara t/a Zanzibar Hotel** [1980] T.L.R. 31 (CA); **DPP v J. M. Kawawa** [1981] T.L.R. 143 and **Musa Mwaikunda v R**, Criminal Appeal No. 174 of 2006 (unreported).

It is apparent from the evidence on record that the trial magistrate did not properly conduct the *voire dire* examination. What is outlined hereinabove cannot be equated to a *voire dire examination.* The trial magistrate did not make any specific findings as to whether or not the complainant understood the nature of oath and /or the duty of speaking the truth. Nothing was also said on the credibility of the complainant.

The legal position in respect of *voire dire* examination is settled.

Where the trial Court fails to conduct a *voire dire* examination in a criminal case, in terms of the provisions of section 127 (2) of the Evidence Act, the reception of such evidence is improper. In view of that, PW2 was not a competent witness and her evidence was improperly received by the Court. See **Hassan Hatibu v R**, Criminal Appeal No. 71 of 2002 CA (unreported); **Doto Ikongo v R**, Criminal Appeal No. 6 of 2006 (unreported); **Justine Sawaki v R,** Criminal Appeal No. 103 of 2004 (unreported).

A similar approach has been used by the Courts in Kenya when there was non compliance with section 19 (1) of the Oaths and Statutory Declarations Act Cap 15 which is more or less identical with our section 127 (2) of the Evidence Act. In **Yusuf Sabwani Opicho v R**, [2009]e KLR it was stated as under:

> *"The child was a vital witness in the trial and the failure by the Court to comply with the procedure in the reception of his evidence vitiates that evidence".*

In **Cleophas Ochieng Otieno v R,** Criminal Appeal No. 328 of 2009 [2010]e KLR, it was held as follows:-

> *"In the absence of an enquiry and a finding that the child was possessed of sufficient intelligence and understood the duty of speaking the truth, it cannot be said that the child was a competent witness or that her statement had evidentiary value."*

On looking at the evidence on record, it has been clearly established that PW2 was raped, given the evidence of PW1 and PW2 and the PF. 3 report (Exhibit P1). The PF.3 report was improperly admitted in Court contrary to the requirement under section 240 (3) of the Act. However as the objective of section 240 (3) is to give a right to the appellant to cross-examine the doctor on the medical report. This objective was met since the doctor was called as a witness (PW3).

While it has been clearly established that PW2 was raped, given the evidence of PW1 and PW2 and the PF. 3 report, there is no evidence whatsoever to prove that it was the appellant who committed the rape. PW1 was not at home when this unfortunate incident took place. She only relied on the sequence of events narrated to her by PW2. The only evidence which could have linked the appellant with

the crime was the conduct of the appellant. According to the testimony of PW1, when she confronted the appellant on the alleged rape, the appellant apologized. The appellant did not cross examine PW1 on this. However PW1 did not elaborate on the nature of the apology made by the appellant nor did she narrate the details. We therefore have no basis to use this against the appellant. Rape is a very serious offence and carries a heavy penalty of life imprisonment when committed against a child of the tender age of 10 years and below. As this is a criminal offence, the burden is always on the prosecution to prove the case beyond reasonable doubt. The burden never shifts.

We are satisfied that the evidence against the appellant is not sufficient to support the conviction.

For the foregoing reasons, we allow the appeal, quash the conviction and set aside the sentence of life imprisonment. The appellant is to be released from prison forthwith unless otherwise lawfully held.

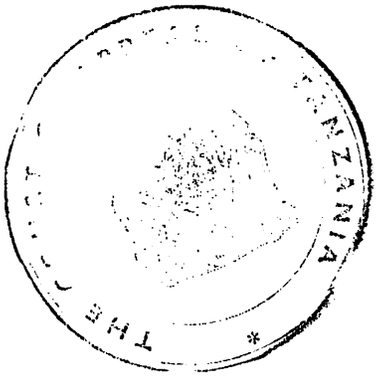
DATED at **ARUSHA** this 23rd day of September, 2011

J.H. MSOFFE
JUSTICE OF APPEAL

S. MJASIRI
JUSTICE OF APPEAL

S.A. MASSATI
JUSTICE OF APPEAL

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



E.Y. MKWIZU
DEPUTY REGISTRAR
COURT OF APPEAL