IN THE COURT OF APPEAL OF TANZANIA
AT TANGA

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

CRIMINAL APPEAL NO. 3 OF 2010

EMMANUEL JOHN .....APPELLANT

VERSUS

THE REPUBLIC .....RESPONDENT

(Appeal from the decision of the Resident Magistrate's Court at Tanga)

(Lema, PRM/Extended Jurisdiction)

dated the 1st day of November, 2007
in
Criminal Appeal No. 24 of 2007

JUDGMENT OF THE COURT

28 & 30 March 2011

MSOFFE, J.A.:

This is a second appeal against the decision of the Tanga Resident Magistrate's Court, Extended Jurisdiction (Lema, PRM Extended Jurisdiction) upholding the conviction and sentences of thirty years imprisonment and corporal punishment of six strokes of the cane meted on the appellant by the District Court of Muheza

(Chagike, SDM) for the offence of Rape contrary to sections 130 (1) and 131 (1) of the Penal Code.

Briefly, the prosecution case was that PW2 Nyamkota Mafuru and PW5 Sara Baraka Mafuru, a brother and sister respectively, and both being children of PW1 Baraka Mafuru, were pupils at Maramba "B" Primary School where the appellant happened to be a teacher. On 28/11/2005 PW2 and PW5 went to school as usual. During the school break (recess), which was at around 10 a.m., the appellant sent PW2 to buy him some drinking water. Once he had brought in the water the appellant gave PW2 a sum of Shs. 50/= for buying cassava. In the meantime, the appellant called PW5 into a room and raped her. On her way home PW5 met PW3 Prosper Mbise. PW5 narrated the incident to PW3 after which the latter advised her to inform her father PW1 about the incident. PW5 did as advised and the incident was later reported to the police where a PF3 was issued and the appellant was eventually arrested. It is also known that, at some stage, the appellant's cautioned statement was recorded and subsequently exhibited in court.

The appellant filed a memorandum of appeal and a written submission in support of his appeal. The memorandum of appeal in particular consists of a litany of complaints. For our purposes it will suffice to say that we will not address all the complaints raised in the memorandum of appeal. We will only deal with certain salient and unpleasant features in the trial which were pointed out to us by Ms. Pendo Makondo, learned State Attorney for the respondent Republic, who argued in support of the appeal.

It is common ground that PW2 and PW5 were aged 8 and 7 years respectively. They were therefore children of tender age for purposes of **Section 127 (5)** of the **Evidence Act** (CAP 6 R.E. 2002) where the expression "child of tender age" means a child whose apparent age is not more than fourteen years. In this sense, there was need to conduct a *voire dire* examination in line with the requirements under **sub-section (2)** thereto.

In **Augustino Lyanga v Republic,** Criminal Appeal No. 105 of 1995 (unreported) this Court stated:-

> *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 did not examine PW2 and PW5 on whether or not they were possessed of sufficient intelligence to justify the reception of their evidence, and whether or not they knew the duty of speaking the truth. The intelligence test and the duty of speaking the truth ought to have been recorded as part of the court proceedings. We appreciate that the trial magistrate recorded the words "He so know the meaning of oath" and "she does not know the meaning of oath" in respect of PW2 and PW5 respectively, but in a true *voire dire* examination there ought to

have been a record of the actual examination, usually in the form of questions and answers, preceding the final findings of the court on the point. So, in the absence of *voire dire* examination(s) known in law and in the context of this case the evidence of PW2 and PW3 was as good as no evidence at all.

This brings us to the other aspect of the case against the appellant contained in the PF3 which was produced in evidence by PW1. This document was produced and admitted in evidence without complying with the mandatory provisions of Section **240 (3)** of **The Criminal Procedure Act** which reads:-

> *(3) when a report referred to in this section is received in evidence the court may if it thinks fit, and shall, if so requested by the accused or his advocate, summon and examine or make available for cross-examination the person who made the report;* ***and the court shall inform the accused of his right to require the person who made the report***

to be summoned in accordance with the provisions of this subsection.

(Emphasis supplied.)

In this case, there is no record that the appellant was informed of his right to have the doctor who filled in the PF3 summoned for purposes of cross-examination.

So, if we are to expunge the evidence of PW2, PW3 and the PF3 from the record it follows that the only other remaining evidence is the cautioned statement. But yet again, this statement has its own shortcomings. It is in the evidence of PW4 E 7645 Pastory that this statement was recorded by one Cpl. Chema who did not testify. As it is, therefore, the statement was produced in evidence by someone who did not record it. We think, this was improper. We are of the view that in terms of **section 69** of the **Evidence Act** it was imperative that the document be produced in evidence by Cpl. Chema because at the end of the day she was the only person who could prove that it was in her own handwriting. As it is, the statement was wrongly produced and admitted in evidence.

The cumulative effect of the above shortcomings is that there was no strong, cogent and positive evidence upon which a conviction could safely lie. For this reason, the appeal has merit. We hereby allow the appeal, quash the conviction and set aside the sentences. The appellant is to be released from prison unless lawfully held.

DATED at TANGA this 29th 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