IN THE COURT OF APPEAL OF TANZANIA
AT TABORA

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

CRIMINAL APPEAL NO. 454 OF 2007

EMMANUEL S/O MIGESHI @ BADATU.....APPELLANT

VERSUS

THE REPUBLIC.....RESPONDENT

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

(Mziray, J.)

dated the 10th day of September, 2007
in
Criminal Appeal No. 9 of 2005

JUDGMENT OF THE COURT

13 & 20 June, 2011

MANDIA, J.A.:

On 11/5/2004 the appellant appeared before the District Court of Nzega at Nzega on a charge of Rape c/s 130 and 131 of the Penal Code as amended by Sections 5 and 6(e) of the Sexual Offences Special Provisions Act, Act No. 4 of 1998. The trial court found the appellant guilty, convicted and sentenced him to life imprisonment. Aggrieved by both the conviction and sentence, the appellant preferred an appeal to the High Court of

Tanzania sitting at Tabora. The High Court found the appeal devoid of merit and dismissed it in its entirety. Still aggrieved, the appellant has filed a second appeal in this Court. At the hearing of this appeal the appellant appeared in person, while the respondent/Republic was represented by Mr. Juma Masanja, learned State Attorney.

The appellant has filed a memorandum of appeal consisting of six grounds. The memorandum appears to be convoluted and repetitive which is not surprising because it is a self-help job. The content of the memorandum, however, seems to suggest that the main ground of complaint by the appellant is the credibility of the witnesses who testified against him in proof of the charge.

To recapitulate on the facts of the case as established in the trial court and accepted in the first appellate court, it is on record that on 7/5/2004 PW4 E 541 Detective Constable Veri of Nzega Police C.I.D. was handed over a police file for investigation on a charge of Rape. Detective Constable Veri testified that when he received the file the suspect one Emmanuel Migeshi had already been arrested, but PW4 did not disclose the

officer who effected the arrest. PW4 also testified that the complainant had already been issued with a PF3 by Puge Police Station, but did not disclose the identity of the police officer from Puge Police Station who issued the PF3. The role of PW4 Detective Constable Veri was to tender the PF3 in court as an exhibit despite the fact that he did not issue it. All the same the trial court accepted the PF3 tendered and marked it Exhibit P1.

The PF3, Exhibit P1, was filled in by PW3 Dr. Emanuel Mshelele, a Medical Assistant at Puge Dispensary. The substance of his evidence is that on 6/5/2004 he examined the complainant and found her with an intact hymen but with bruises in her female organ and that the bruises could be seen with the naked eye.

The witness who set the ball rolling in this case is PW2 Prisca d/o Juma, a housewife living at Igoko Village. She testified that on a day she did not remember her step-daugher Tatu d/o Rashid came back from school at 10 a.m. while carrying sweets (pipi). On asking Tatu why she came back earlier than normal and where she got the sweets, Tatu

reportedly told PW2 that on the way to school she (Tatu) met the appellant who bought sweets and medicines for her and gave her fifty shillings, after which he (the appellant) took her to the grass and raped her. In her evidence in chief PW2 Prisca d/o Juma gave two contradictory statements on what she did after Tatu reported the alleged rape. At first she said: -

> *"I never checked her instead I sent her to her grandmother who checked her and said that she was a bit tampered with on her private part."*

Soon after uttering the above-quoted words, PW2 made the following statement: -

> *"I checked her and found her hymen intact. She was not seriously injured, she was not bleeding. I sent Tatu to Puge Police Station and given a chit for the hospital."*

While under cross-examination by the appellant PW2 Prisca d/o Juma said: -

> *"Her grandmother said that the child hymen was not perforated but the vagina lightly tampered with."*

During re-examination by the public prosecutor PW2 Prisca d/o Juma said: -

> *"Tatu was examined by her grandmother on the very day at about 5 p.m."*

It is evident that there is a contradiction in the evidence of PW2 Prisca d/o Juma on whether the complainant was examined by the un-named grandmother or by PW2 Prisca d/o Juma or by both. The trial court tried to resolve the contradiction at page 19 of the record by a note in the judgment which goes thus: -

> *"PW2 Prisca on hearing thus she took the complainant to her grandmother who checked her private parts and the grandmother detected that the vagina was tampered with though the hymen was intact. On hearing thus PW2 Prisca also checked her and found that the vagina was tampered with slight injury leaving the hymen intact."*

The above extract of the judgment of the trial court removed the contradiction in the evidence of PW2 Prisca d/o Juma by showing that **the grandmother started first checking the complainant and was**

followed by Prisca who conducted a second check. This observation by the trial court is, however, not supported by the record. Since the grandmother was not called to testify, the record has only the evidence of PW2 Prisca d/o Juma on the physical check of the complainant's female organs, and, as we have shown above, the evidence of PW2 contradicts itself on what happened in the check. The trial court ought to have resolved the contradiction in the testimony of PW2 Prisca d/o Juma on the basis of the evidence on record. In the instant case, the trial court tried to resolve the contradiction by importing into the record evidence which is not part of the record. The contradiction in the evidence of PW2 therefore remains unresolved. In **MOHAMED SAID MATULA v REPUBLIC** (1995) TLR at page 3 it was held, inter alia, thus: -

> "**Held.**
>
> *(i) Where the testimonies by witnesses contain inconsistencies and contradictions, the court has a duty to address the inconsistencies and try to resolve them where possible, else the court has to decide whether the inconsistencies and contradictions are only minor, or whether they go to the root of the matter;"*

In the present case the trial court did not address the inconsistencies along the lines of the **Matula** case by sticking to the record. This means the inconsistencies still remain on record and render the evidence of PW2 Prisca d/o Juma unworthy of credit, leading to an erronous finding of fact. We are a second appellate court, and are thus supposed to deal with questions of law only. Where however, it is found that both lower courts have failed to appreciate facts correctly because they have failed to apprehend correctly the substance, nature and quality of evidence which results in an erronous finding of fact, we are duty bound to intervene. We gather support for this view in **Ludovick Sebastian v R**, Criminal Appeal No. 318 of 2009 (unreported). We therefore find that the inconsistent testimony of PW2 is unworthy of credit and is hereby discounted. This leaves the evidence of the complainant only as the sole plank on which the charge could possibly stand.

The complainant was an eight year old pupil at Igogo Primary School. The record of trial, at page 6, shows some words in brackets going thus: -

"(I am in class one at Igogo Primary School. We have closed shool until 12/7/2004. I know to tell the truth and I will tell the truth)."

After these words in brackets the trial magistrate made the following endorsement: -

"Having conducted viva voce dire examination find (sic) the girl is intelligent enough to take an oath and she affirms and states: -"

After this so-called voire dire examination the trial court allowed the complainant to testify on affirmation in which testimony the complainant said: -

"I am schooling at Igoko Primary School. One day in the morning I went to school. I don't recall the date. On that day my right leg was aching. At that time I was in the company of one Kitalina. On the way I met with one Migeshi who is here. Migeshi told me to go with him to the grass. He then sent me to the hospital. He bought me some medicine and (pipi) sweet. The accused took me a-mid the grass and raped me. He told me to lie down. He told me to take off my school clothes. He laid on my private parts. (The witness points out the private area

with her hand). He scratched me with his hand down here (she shows the private part with her hand). He played my private parts with his fingers. I felt some pain nothing got inside me. He put dudu lake in my private part. He gave me shs. 50/=. I felt much pains. I walked for home. My mother asked me and I told her that Migeshi (amenibaka) raped me in the grass. My mother sent me at Puge Hospital. We first went at the police station. I was given a chit and went to hospital. I am called Tatu Rashid or Semeni Rashid. This is the very chit which was issued to me. PF3 duly identified and put in as identificaiton P.1."

We have taken time to reproduce the evidence of the complainant during examination in chief as well as the so called voire dire examination because we are of the opinion that her evidence is the central plank of the case. As held by this Court in **SELEMANI MAKUMBA V REPUBLIC**, Criminal Appeal No. 94 of 1999 unreported: -

"True evidence of rape has to come from the victim if an adult, that there was penetration and no consent, and in the case of any other women where consent is irrelevant that there was penetration."

In assessing the evidence of the complainant, we start with the fact that the complainant PW1 Tatu Rashid was a child of tender years aged eight at the time she gave evidence. Regarding the evidence of a child of tender years, this court made the following remark in **Augustino Lyanga** v **Republic**, Criminal Appeal No. 105 of 1995 (unreported): -

> *"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 possessed 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."*

To our understanding, the Court is required under Section 127(2) to perform two tasks, namely: -

1. *Form an opinion, which must be recorded in the proceedings, that the child is possessed of sufficient intelligence to justify*

the reception of his evidence, and understands the duty of speaking the truth.

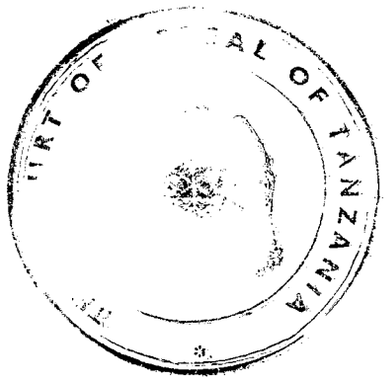
2. *If the court finds that the child is possessed of sufficient intelligence to justify the reception of his evidence and understands the duty of speaking the truth, the court then proceeds to form an opinion on whether the child understands the nature of an oath or not. If the child understands the nature of an oath then he is taken to be a competent witness under Section 127(1) of the Evidence Act and is sworn or affirmed. If the child does not understand the nature of an oath then his evidence is received though not on oath or affirmation.*

The test envisaged by Section 127(2) whose requirements we have set out above is the *voire dire examination*. We have quoted above what the trial District Magistrate recorded as compliance with Section 127(2) of the Evidence Act. The perfunctory manner in which the trial District Magistrate treated the evidence of PW1 Tatu Rashid cannot by any stretch of the imagination be taken to be *voire dire examination*. We are therefore satisfied that the evidence of PW1 Tatu Rashid was taken in breach of

Section 127(2) of the Evidence Act. We take note of the fact that the appellate High Court did not address itself on the requirement of the trial court observing the provisions of Section 127(2) of the Evidence Act. Instead the appellate High Court concentrated on the provisions of Section 127(7) of the Evidence Act, thereby taking it that the victim was a competent witness. Since we have found that the complainant's evidence was taken in breach of Section 127(2) of the Evidence Act, such evidence is discounted.

After discounting the evidence of the complainant, and after having showed the contradictions in the evidence of PW2 Prisca d/o Juma and also discounted it, there remains the evidence of the medical officer PW3 Dr. Emanuel Mshelele. The evidence shows bruises on the female organ, no blood and a hymen which is intact. Such evidence can only corroborate evidence of rape, previously given. There is no such evidence, which means the conviction and sentence cannot be sustained. We accordingly quash the conviction and set aside the sentence imposed upon the appellant. The appellant should be released from custody unless he is held on some other lawful cause.

DATED at **TABORA** this 18th day of June, 2011.



J. H. MSOFFE
JUSTICE OF APPEAL

N. P. KIMARO
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
COURT OF APPEAL