IN THE COURT OF APPEAL OF TANZANIA
AT MWANZA

(CORAM: MUNUO, J.A., MASSATI, J.A And MANDIA, J.A.)

CRIMINAL APPEAL NO. 320 OF 2010

KHAMIS SAMWEL ..... APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

(Appeal from the Decision of High Court of Tanzania, at Bukoba)

(Lyimo, J.)

dated the 22nd day of July, 2009
in
Criminal Appeal Case No. 39 of 2007

JUDGMENT OF THE COURT

25th & 28th November, 2011

MASSATI, J. A.:

This is a second appeal. The appellant was charged with and convicted of rape contrary to section 130 (1) and 2 (e) and 131 (1) of the Penal Code (Cap. 16 R.E. 2002) by the District Court of Karagwe. He was sentenced to 30 years imprisonment and ordered to pay compensation of Tshs 300,000/= to the victim. On first appeal, his appeal was dismissed and the sentence was enhanced to that of life imprisonment since the victim was under the age of ten years.

What happened is this. The appellant and the prosecution witnesses were all residents of Nyarugando village. On the morning of 5th November, 2005, JULIETH JOHN (PW1), her two children, and MARGARETH PETRO (PW2) were going to their farms. One of PW1's children, was a girl, ELIETH JORAM (PW3) who was by then 6 years old. On the way, they met the appellant. The appellant asked PW1, and she agreed to the appellant's kind gesture and entrusted PW3 to the appellant, to take PW3 in order to give her milk. But a little later, she had a second thought, after remembering that recently someone had been murdered around that area. She returned and started tracing the appellant and her daughter. No sooner, had she walked a few steps, than she heard cries of agony from a baby girl from the nearby bush which she recognized as PW3's. She followed the alarm; and alas and behold, she found the appellant on top of PW3 who was then seething in pain. She too, raised an alarm which attracted PW2. PW2 briefly visited the scene and witnessed the appellant putting on his pair of trousers, before proceeding to report to the street chairman, who did not testify. The appellant was subsequently arrested and charged. In his defence, the appellant simply denied commiting the

offence; but the trial court and the first appellate court found the prosecution witnesses credible, hence the conviction.

Before this Court, the appellant appeared in person and fended for himself. He had earlier on filed a memorandum of appeal containing four grounds of appeal, but basically one can gather three main ones. The first is that the prosecution case as a whole was not proved beyond reasonable doubt; secondly that the prosecution witnesses being related were not credible, and lastly, the evidence of PW3 was taken contrary to section 127 (2) of the Evidence Act Cap. 6 R.E. 2002. He urged us to allow the appeal.

Responding to the grounds of appeal, Mr. Castuce Ndamugoba learned State Attorney who represented the respondent/Republic submitted that even if the PF3 (Exh P1) was expunged from the record by the High Court on first appeal, there was still some other cogent evidence to prove the offence. On the credibility of the prosecution witnesses, the learned counsel submitted that, what counts is not their relationship but their credibility and in his view, PW1, PW2 and PW3 were credible witnesses. On the violation of section 127(2) of the Evidence Act in

receiving the evidence of PW3, he submitted that failure to comply with the provision only reduced the evidence of PW3 to that of unsworn evidence which required corroboration and that corroboration was available in the testimonies of PW1 and PW2. In the alternative, the learned counsel argued that even without the evidence of PW3, the fact that the appellant was caught in *flagrante delicto* ravishing PW3 was self sustaining and could stand alone to support the conviction. He cited the decision of this Court in **SALU SOSOMA v R** Criminal Appeal to 31 of 2006 (unreported) as authority.

We will start with the issue of non compliance with section 127(2) of the Evidence Act. The construction of that provision rests on three major premises. The **first** premise is that under section 127 (1) of the Evidence Act, all persons shall be competent to testify unless the court considers that they are prevented from understanding the questions put to them or from giving rational answers to those questions, by reason of tender years, extreme old age, disease (whether of body or mind) or any other similar case. The **second** premise is that under section 198 (1) of the Criminal Procedure Act, every witness in a criminal cause or matter, shall be

examined either on oath or affirmation subject to the provisions of any other written law to the contrary. The **third** premise is that section 127 (2) of the Evidence Act provides an exception to both sections 127 (1) of the Evidence Act and section 198 (1) of the Criminal Procedure Act because it allows not only children of tender age (which is defined to be of or below the age of 14) to give evidence but also to do so not on oath or affirmation, but only on certain conditions. These conditions- precedent are that, the trial court must, first find and form an opinion and record in the proceedings; **first**, that the child is of sufficient intelligence, and **secondly** that the child understands the duty of speaking the truth. In practice, this is preceded by a process called *voire dire* examination. The purpose of a *voire dire* examination is for the record to show how and why the court came to those opinions. These are statutory requirements, and the trial court has no option but to do such examination and record its opinion. If this stage is omitted or if the child does not satisfy those tests a trial court cannot receive the evidence of such child, because then the child still remains an incompetent witness by reason of tender age as per section 127(1) of the Evidence Act. (See **OMARY KURWA V R Criminal Appeal No. 89 of 2007, JUMA RAPHAEL V R Criminal Appeal No. 42 of**

2003, HASSAN HATIBU V R Criminal Appeal No. 71 of 2002, JUSTINE SAWAKI V R Criminal Appeal No. 103 of 2004, SOKOINE CHELEA V R Criminal Appeal No. 252 of 2006, and **JUMA CHOROKO V R Criminal Appeal No. 23 of 1999** (all unreported)

In the present case, the trial court, on seing PW3, remarked:

> "Court: From the face of the witness, and the way she is behaving in court she cannot make evidence unsworn (sic)
>
> Order: Witness to make unsworn evidence"

Obviously, this was not proper. Even if the court did not want to show in detail how it conducted the *voire dire* examination on the child (if at all it did so) at least it ought to have recorded its opinion on:

(1) Whether she had sufficient intelligence; and

(2) Whether she understood the duty of speaking the truth.

In the absence of these two findings, and with due respect to the first appellate court, it was wrong for the trial court to receive the evidence of PW3. She was an incompetent witness by reason of tender age. Therefore her evidence is no evidence at all and should be expunged from the record. Therefore, it could neither corroborate, nor be corroborated, because a nothing cannot corroborate, and you cannot corroborate a nothing. We therefore agree with the appellant on this ground of appeal.

However, the law is, and has always been that although in sexual offences, evidence of the victim is the best, (see **SELEMANI MKUMBA V R Criminal Appeal No. 94 of 1999** (unreported) and that failure to comply with section 127 (2) of the Evidence Act, could occasion a miscarriage of justice if the evidence of the child is of a vital nature, (see **WILIBARD KIMANGANO V R Criminal Appeal No. 235 of 2007** (unreported), and on the authority of section 178 of the Evidence Act, a conviction may still be sustained if there is some other cogent evidence on record (see **NYASANI S/O BICHANA V R (1958) E.A. 190.** So, as is always the case in cases of improper admission of evidence, the question in the present case is, whether, after, expunging the evidence of PW3, and

the High Court on first appeal having also expunged Exh P1 (the PF3) there is any other evidence to support the conviction of the appellant? We think there is. PW1 came to the scene when the appellant was in the thick of the act, and was still lying on top of the victim. This is what in **SALU SOSOMA's case** (*supra*) we found was an in *flagrante delicto* action (caught in the action). PW1 then examined the victim's private parts and found blood; and the child was crying in pain. The appellant was found naked, and was found dressing by PW2 which further corroborates PW1's story. The lower courts found both PW1 and PW2 as credible, and we are unable to fault those findings because they properly evaluated the evidence and we are satisfied that the appellant's defence and his attempts to discredit those witnesses did not introduce any reasonable doubts in the prosecution case. To that extent we agree with Mr. Ndamugoba, learned State Attorney.

For the above reasons, this appeal must fail. We dismiss it in its entirety.

DATED at MWANZA this 28th day of November, 2011

E. N. MUNUO
JUSTICE OF APPEAL

S. A. MASSATI
JUSTICE OF APPEAL

W. S. MANDIA
JUSTICE OF APPEAL

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

P. W. BAMPIKYA
SENIOR DEPUTY REGISTRAR
COURT OF APPEAL