IN THE COURT OF APPEAL OF TANZANIA
AT MBEYA

(CORAM: RUTAKANGWA, J.A., MASSATI, J.A., And ORIYO, J.A.)

CRIMINAL APPEAL NO. 201 OF 2009

ABENES WITSON ..... APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

(Appeal from the decision of the High court of Tanzania at Mbeya)

(Lukelelwa , J.)

dated the 25th day of May, 2009

in

Criminal Appeal No. 40 of 2008

JUDGMENT OF THE COURT

Date 21 & 30 June, 2011

ORIYO, J.A.:

This is a second appeal. In Criminal Case No. 86 of 2007 in the District Court of Kyela at Kyela, the appellant, **Abenes Witson** was charged with one count of rape contrary to sections 130 (1) and 2 (e) and 131 (3) of the Penal Code, Cap 16, R.E. 2002. The particulars of the offence in the charge sheet were:-

> "That ABENES s/o WITSON is charged on 12th day of May, at about 17 hours at Ikolo Village within Kyela District in Mbeya Region did have

unlawful carnal knowledge of one SUBIRA D/O SAMWELI, a girl 3 years of age."

The appellant denied the charge and the prosecution called five (5) witnesses to prove the charge.

After hearing the testimonies of the five prosecution witnesses and admitting two exhibits, "P1" (PF3 of the victim) and "P2" (a sketch map), the trial court was satisfied that the prosecution had proved the case beyond reasonable doubt in the following words:-

"From all these facts I am satisfied beyond all doubts with the evidence which has been corroborated that the rapist is the accused person Abenes Witson."

The trial court proceeded to convict the appellant as charged and sentenced him to life imprisonment, on 31/12/2007.

The appellant was aggrieved by the conviction and sentence and preferred an appeal to the High Court. The learned High Court Judge agreed with

the trial court, save for the evidence of PW2 (the victim) and PF3 which he found to be incompetent having been admitted contrary to law and ordered expunged from the record. The appeal was accordingly dismissed in its entirety, hence this appeal.

The appellant filed a seven-point memorandum of appeal. His complaints can be summarized as follows. **One,** PF3 was admitted without compliance with the mandatory provisions of section 240 (3) of the Criminal Procedure Act, Cap 20, R.E. 2002. **Two,** there was a possibility of mistaken identity. **Three,** the complaint here is on the evidence of PW2 and the ***voire dire*** test. **Four, that** defence case was not considered. **Five**, the prosecution failed to prove the charge to the required standard.

At the hearing of the appeal, Mr. Tumaini Kweka learned State Attorney appeared for the respondent/Republic while the appellant was unrepresented and he appeared in person.

Arguing in support of the appeal, Mr. Kweka vigorously criticized both lower courts for convicting the appellant of rape without concrete evidence. He stated that the basis of the appellant's conviction was the testimonies of

PW1 Samwel Mwambwangilo, PW3 Daudi Mwakafila and PW5 WP 3212 D/C Rose. This, he said, was so, after the High Court discounted the evidence of PW2 and the PF3. The learned State Attorney further argued that to sustain a conviction of rape there must be evidence of **penetration**, however slight, in terms of section 130 (4) of the Penal Code.

After analysing the testimonies of PW1, PW3 and PW5, Mr. Kweka submitted that none of the witnesses' testimonies proved **penetration.** He said that though PW3 was an eyewitness to the incident he did not testify on penetration. Similary, PW1 who was invited by the Medical Doctor who examined the victim to witness the injuries inflicted on the victim did not testify that the injuries were caused by penetration.

After reviewing the evidence on record and the submissions made by the learned State Attorney, we are of the view that the appeal centres on the issue of whether or not PW2 was raped in terms of section 130(4) of the Penal Code. To this, Mr. Kweka observed that had it not been for the omission of the trial court to summon the author of the victim's PF3 (Exh.

'P1'), the evidence of PF3 would have been sufficient to prove penetration and provide the required corroboration to the testimonies of PW1, PW3 and PW5. He urged the Court to exercise its revisional powers under section 4(2) of the Appellate Jurisdiction Act, Cap 141, R.E. 2002, quash the conviction and sentence and order a retrial.

Section 240 of the Criminal Procedure Act, provides:-

> "(1) In any trial before a subordinate court, any document, purporting to be a report signed by a medical witness upon any purely medical or surgical matter shall be receivable in evidence.
>
> (2).....
>
> (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."

The Police Form 3 issued to the victim **Subi Kenneth** on 12 May 2007 was filled in by the Medical Officer in Kyela who examined the victim and the following is the report. The nature of injuries sustained are stated as **bruises** and **tear** of **1°** whose size was given as 2 cm each. As for the part of the body injured it is stated as the **Labias** and **Pereneal.** On the type of harm sustained, it is given as **Grievous Harm** which was caused by a **Blunt Object.** The author of the report remarked at the end of the report that:-

"The patient seen with **tear** on the **pereneal** about 2cm and **Bruises** on **Labias,** also **spermatozoa**

The patient is raped (signed)" (Emphasis supplied).

This report was tendered in the trial court by PW4, WP 5067 PC Sekela and was admitted and marked as Exhibit "P1". That was contrary to the dictates of Section 240(3) of the Criminal Procedure Act, (supra), in that the trial court neither decided to call the doctor nor advised the appellant of his right to have the doctor summoned and make him available in court for cross examination by the appellant.

In the instant case, the accused had no legal representation and may not have been conversant with his rights under section 240(3) above to request the court to summon the author of PF3 to enable accused cross examine him. And the trial court did not think it fit to summon the medical doctor.

Our perusal of the evidence on record clearly shows that the author of the PF3 of the victim was a necessary witness in the trial, if justice was to be seen to be done. In the circumstances of this case which we consider exceptional, where PW2, a child of tender age, was unable to testify after failing the **voire dire** test under section 127 (2) of the Evidence Act, the trial court should have summoned the medical doctor who authored the PF3. He did not. We think that this is a fit case where

the trial court should have called the Medical Officer to testify due to the exceptional circumstances.

The exclusion of the PF3 from the case, in our opinion, has adversely affected the prosecution case because of the oversight and/or omission by the trial court to summon the author of PF3.

We agree with the learned State Attorney that a **retrial** should be ordered here, but as stated already, let it be treated as an exceptional case and in exceptional circumstances. As stated in the case of **Fatehali Manji vs R,** (1966) E.A. 343 that:-

> "In general, a retrial may be ordered only where the original trial was illegal or defective; it will not be ordered where the conviction is set aside because of insufficiency of evidence or for purposes of enabling the prosecution to fill in gaps in its evidence at the first trial..... each case must depend on its own facts and an order for retrial should only be made where the interests of justice require it."

Similar sentiments were echoed by this Court in **Selemani Makumba vs R,** Criminal Appeal No. 94 of 1999 as follows:-

> "A fresh trial is ordered where the original trial was fundamentally defective and had caused a miscarriage of justice."

In the case of **Sultan Mohamed vs R**, Criminal Appeal No. 176 of 2003, where the circumstances were similar to the instant case, this Court's decision was to the following effect:-

> "Where a PF3 is excluded due to failure to comply with section 240(3) of the Criminal Procedure Act and results in a miscarriage of justice the Court would not hesitate to make an order for retrial".

In view of the peculiar circumstances of this case, the exclusion of the PF3 which was due to the error committed by the trial District Court, greatly adversely affected the prosecution case. In our considered opinion, this occasioned a failure of justice. In the event, we are constrained to

exercise the revisional powers of the Court under section 4 (2) of the Appellate Jurisdiction Act, as we hereby do; quash the proceedings, judgment and sentence by the lower courts. Further we order that a retrial be conducted as expeditiously as possible before another magistrate of competent jurisdiction.

DATED at **MBEYA** this 24th day of June, 2011.

E.M.K. RUTAKANGWA
JUSTICE OF APPEAL

S.A. MASSATI
JUSTICE OF APPEAL

K.K. ORIYO
JUSTICE OF APPEAL

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

P.W. BAMPIKYA
SENIOR DEPUTY REGISTRAR
COURT OF APPEAL