IN THE COURT OF APPEAL OF TANZANIA
AT ARUSHA

CRIMINAL APPEAL NO. 284 OF 2007

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

JOSEPH ATHANAS..... APPELLANT
VERSUS

THE REPUBLIC .... RESPONDENT

(Appeal from the decision/Sentence/Judgment/Order of the High Court of Tanzania at Moshi)

(Mgaya, PRM, (EXT. JURD)

dated the 5th day of April, 2007

in

DC Criminal Appeal No.26 of 2005

JUDGMENT OF THE COURT

23rd February & 2nd March, 2012

MANDIA, J.A:

The appellant Joseph Athanas appeared before the District Court of Moshi at Moshi on a charge of Rape C/S 130 and 131 of the Penal Code. He was convicted and sentenced to thirty (30) years imprisonment. He appealed to the High Court of Tanzania at Moshi. His appeal was transferred to the Court of Resident Magistrate of Moshi under Section 45 (2) of the Magistrate Court Act No. 2 of 1984 as amended, and was

determined by F. W. Mgaya, Principal Resident Magistrate with extended Jurisdiction. The Principal Resident Magistrate (Extended Jurisdiction) dismissed the appeal in its entirety. The appellant was aggrieved by the dismissal of his appeal and has filed the second appeal.

The memorandum of appeal filed by the appellant contains six grounds centered on non-observance of Section 127 (2) of the Evidence Act, non-calling of witnesses who the appellant thought were crucial to the proof of the charge, the trial court basing its conviction on the hearsay evidence of PW3 and PW4 and non- observance of S. 312 (2) of the Criminal Procedure Act. At the hearing of the appeal the applicant appeared in person while the respondent /Republic was represented by Mr. Zakaria Elisaria, learned Senior State Attorney. From the way the grounds were argued we will discuss the arguments raised in the memorandum generally.

The evidence presented in the trial District Court is short and clear. On 25/2/2001 PW2 Henerico Sebastian, a villager living at Mvuleni Village in Moshi District, was walking back home at an hour which he did not specify. While walking home he heard shouts from inside a house saying

The mother of the victim, PW3 Immaculata Joseph, was away when the incident happened. She had gone to attend a confirmation ceremony for her sister and she joined the group at the house of the Village Executive Officer. She examined Esta's private parts and found her bleeding. Inside her house she found blood on the bed sheets, bed, Ester's clothes, mosquito net and on the ground. PW3 Immaculate Joseph was part of the group which went to Moshi Police Station to report the incident and from there they went to K.C.M.C Hospital.

On 26/2/2001, a day after the incident PW4 WP 3134 Constable Janet visited the scene of the crime and saw the window from which the appellant is alleged to have escaped and was also shown the blood-stained clothers belonging to the victim. She also visited the victim at K.C.M.C Hospital on the same day 26/2/2001 but failed to interview her as she could not talk.

The doctor who treated the victim is PW5 Dr. Oneko of K.C. M.C Hospital, Moshi. He tendered as Exhibit P2 the PF3 in which he recorded his medical findings after examining the victim. Dr. Oneko reported

bleeding from the Vagina and rupture of the victim's hymen 1 ½ inches long, and injury which she categorized as a "Harm."

The victim of the alleged rape is Esta John and she testified as PW1. She was a twelve year old girl in Standard Three at Mivuleni Primary School. The trial court put her on oath and she testified, giving a graphic and horrifying account of ordeal she went through. The trial court, despite recording the age of the victim as twelve years, did not conduct a *voire dire* test on her. The conduct of *voire dire* examination is a practice developed by the courts to enable them to determine the competence children of tenders years, as define in Section 127 (5) of the Evidence Act, to testify or not. The practice involves subjection a child of tender years to questions, the aim of which is to determine whether or not a child of tender years is possessed of sufficient intelligence to justify the reception of his evidence, **and** whether or not the child understands the duty of speaking the truth. We have underscored the word **and** to show that the two obligations are mutually inclusive and not exclusive i.e. the court must make a finding on each of the two obligation simultaneously.

The opinion of the court on the intelligence test and the duty to speak the truth must be recorded in the proceedings. It is only after a positive finding in these two obligations that the court can delve into the question on whether the child of tender years understands the nature of an oath or not. If the child understands the nature of an oath, his/her evidence is taken on oath in conformity with section 198 of the Criminal Procedure Act, chapter 20 R.E. 2002 of the laws. If the child does not understand the nature of an oath but has passed the intelligence and duty to speak the truth test, he or she gives unsworn testimony.

The intelligence/duty to speak the truth test is mandatory. Dereliction in conducting the test makes a child of tender years an incompetent witness by reason of tender age as described in Section 127 (1) of the Evidence Act, Chapter Six R.E 2002 of the laws. In the present case no attempt was made to conduct the intelligence/duty to speak the truth test on PW1 Esta John. Esta John has given a graphic and detailed description of what happened on that fateful day. The detailed narration of events is, however, useless because in law Esta John is an incompetent witness whose evidence should not have been taken by the trial court and

relied upon by the first appellate court. This evidence must be discarded and be expunged from the record as we hereby do.

The appellant argues in ground number one that failure to observe Section 127 (2) of the Evidence Act renders the whole trial null and void. On his part Mr. Zakaria Elisaria, puts forth the argument that failure to observe S. 127 (2) of the Evidence Act, fact which he conceded has happened in this case, reduces the evidence of the witness to unsworn evidence which requires corroboration. Mr. Zakaria Elisaria quoted the case of **Alfeo Valentino Versus Republic,** Criminal Appeal No. 92 of 2006, at page six where he quoted the passage going thus:-

> " *Their evidence having been taken on oath without complying with this mandatory requirement of the law, he argued, the same should be reduced to the plane of unsworn evidence which would need to be corroborated."*

With due respect to the learned Senior State Attorney, the quotation at page six comes from the argument of Mr. Boniface then learned Senior State Attorney, when he was arguing the appeal, and are not the **ratio**

of the Evidence Act. The **ratio decidendi** is at page twelve of the judgment and it goes thus:-

> *" All the same, in this particular case the evidence of PW1, and PW3 was taken on oath without conducting any voire dire at all. This was highly irregular. For the present purpose we shall treat their evidence as unsworn evidence, although in some cases it is discounted altogether."*

As we pointed above we were inclined towards discarding the evidence of section 127 (2) of the Evidence Act, in particular the failure to conduct the intelligence test which is the key to whether or not the evidence of a child of tender years should be taken at all. For these reasons ground number one is allowed in part.

The second limb of ground number one is that failure to observe section 127 (2) of the evidence Act by a trial court vitiates the whole trial. We are not persuaded by this argument. PW1 Esta John was just one of the prosecution witnesses amongst five witnesses fielded. The trial court, and the first appellate court, assessed the whole case as presented by the

prosecution, found the demeanor and credibility of the witnesses beyond reproach. We have no reason to differ. If we may add in emphasis the evidence of PW2 Henerico Sebastian deserves special note. He is the witness who heard the distress, call of "Nakufa, nakufa, kuna mtu ananibaka" coming out of the house where the victim was. He is the witness who ran towards the cries, and as he so ran, he saw his village mate, the appellant, jumping out of a window of the house from which the cries came. He is the witness who made a split-second decision not to go to the house from which the cries came and instead pursue the person who had just fled from the house through the window. PW2 is the person who caught the appellant while also crying out for help, and him and other villagers cornered and caught the appellant. PW2 is the villager who took the appellant back to the house where the victim was and they gained access into the house by breaking the front door which was locked.

PW2 is the witness who described the gory scene they found inside the house with the girl Esta John lying prostrate on the ground with blood coming out of her private parts: blood which was also found on the bed, bed sheets, mosquito net and on the floor. The description of the charnel house atmosphere is lent credence by the evidence of the mother who

joined the group soon after his arrival from confirmation celebrations. Apart from describing the bloody atmosphere inside the room, PW3 Immaculata Joseph told the trial court how she examined her prostrate daughter and found her still bleeding from her private parts. The police officer who visited the victim on the following day after the sexual attack, PW4 WP3134 Constable Janet testified that on 26/2/2001 the victim was still unable to talk, and it was not until 5/3/2001, eight days after the attack, that the girl Esta could talk about her ordeal and record a statement. This evidence tallies with that of PW5 Dr. Oneko of K.C.M.C. hospital who, apart from giving evidence on the extent of injuries suffered by the girl Esta, testified that the girl was in shock and afraid. There is nothing hearsay about the evidence of PW2, PW3, PW4 and PW5 so the complaint about hearsay evidence is dismissed.

The appellant also raised issue with the fact that the village chairman was not called. This drew a retort from Mr. Zacharia Elisaria that this default is not fatal as the appellant was caught at the scene. We agree with the learned Senior State Attorney. The village chairman did not witness the appellant breaking out of the victim's house so his evidence would have been hearsay. This ground of complaint also has no basis and is dismissed.

trial court which invalidates the judgment against him. The record is clear on this. The last sentence of the judgment reads thus:

> *"In the circumstances, I outright reject the accused defence and find his guilt established beyond all doubts. Accused is therefore convicted as charged."*

The ground impugning the conviction is therefore baseless. We are satisfied that the appeal lacks merit. The same is dismissed in its entirety.

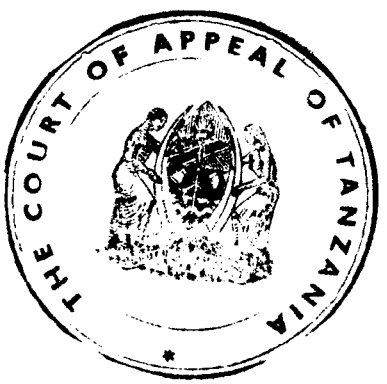
DATED at ARUSHA this 01st day of March, 2012.

E. N. MUNUO
JUSTICE OF APPEAL

E. A. KILEO
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