IN THE COURT OF APPEAL OF TANZANIA
AT IRINGA

(CORAM: RUTAKANGWA, J.A., LUANDA, J.A., And MJASIRI, J.A.)

CRIMINAL APPEAL NO. 113 OF 2013

ALKARD MAHAI.....APPELLANT
VERSUS
THE REPUBLIC..... RESPONDENT

(Appeal from the decision of the High Court of Tanzania at Songea)

(Mackanja, J.)

dated 15th day of March, 2000
in
DC. Criminal Appeal No. 49 of 1999

JUDGMENT OF THE COURT

26th & 29th July, 2013

RUTAKANGWA, J.A.:

The appellant was arraigned before the District Court of Mbinga District (the trial court) for raping a 14-year old Maria d/o Mbeya (PW2). He denied the charge. However, acting on the evidence of PW2 Maria, the trial court found him guilty as charged, convicted him and sent him to prison for thirty (30) years. He was also sentenced to suffer twenty four (24) strokes of the cane and to pay 100,000/= to PW2 Maria as compensation. His appeal to the High Court against the conviction and

sentences was summarily rejected by Mackanja, J. Convinced of his innocence, he has lodged this appeal.

The appellant's memorandum of appeal, lists seven (7) grounds of complaint against the High Court's summary rejection order. All the same, we have found only two grounds to be the most telling and deserving our attention. These are:-

a) That it was improper for the learned judge to reject the appeal summarily without considering the evidence on record which raised reasonable doubts as to his guilt.
b) That PW2 Maria's evidence was wrongly received, as no *voire dire* examination was conducted by the trial court.

When the appeal came up for hearing, the appellant appeared before us fending for himself. He had nothing to say in elaboration of any of his grounds of appeal, which he opted to adopt. On the side of the respondent Republic, which supported the appeal, Mr. Maurice Mwamwenda, learned Senior State Attorney, appeared.

In supporting the appeal, Mr. Mwamwenda agreed with the appellant that the trial court erred in law in receiving the evidence of PW2 Maria, a child of tender years by then, without attempting in any way to comply with the mandatory provisions of s. 127 (2) of the Evidence Act, Cap. 6 R.E. 2002. He accordingly urged us to expunge her evidence. He further pointed out that it was the prosecutrix herself who tendered her PF3 as exh. P1 in evidence, but the appellant was not informed of his statutory right under section 240 (3) of the Criminal Procedure Act, Cap. 20 R.E. 2002 (the Act), to have the doctor who examined PW2 Maria, called for purposes of cross-examination. He again urged us to discount exh. P1. Once the evidence of PW2 Maria is expunged, he stressed, the prosecution case against the appellant is left with no leg, be it legal or factual, to stand on. He would be entitled to an acquittal, he rightly asserted. He accordingly pressed us to allow the appeal.

We have found it apt to begin our discussion by agreeing from the outset, with both the appellant and Mr. Mwamwenda that PW2 Maria was a child of tender years, at the time of testifying without a *voire dire* examination being carried out. The learned trial District Magistrate, therefore, grossly erred in law in receiving her evidence without complying

with the mandatory provisions of s. 127 (2) of the Evidence Act. The said sub-section reads as follows:-

> *"(2) Where in any criminal cause or matter any child of tender years called as a witness does not, in the opinion of the court, understand the nature of an oath, his evidence may be received, though not given upon oath or affirmation, if in the opinion of the court, to be recorded in the proceedings, he is possessed of sufficient intelligence to justify the reception of his evidence, and understands the duty of speaking the truth."*

A "child of tender years", **per** sub-section (5), is one whose apparent age is not more than fourteen years. The evidence of PW2 Maria, therefore, could not be received without a *voire dire* being conducted to test her competence to testify in a criminal case. As this was not done, what ought to be the legal consequences? We think the law on the issue is well settled, and Mr. Mwamwenda invoked it correctly.

In **Justine Sawaki v. R.,** (CAT) Criminal Appeal No. 103 of 2004 (unreported) the Court succinctly stated, in relation to s. 127 (2) that:-

> *"The Court of Appeal for Eastern Africa, said...that there was need for strict compliance with the provisions of that section and then non compliance might result in the quashing of a conviction unless there was other sufficient evidence to sustain the conviction. We share the view."*

We, too, have no inhibitions in sharing this view. Indeed that has been the firm stance of the Court since then, and even of the Courts of Kenya and Uganda. See, for instance:-

a) **Hassan Hatibu v. R.,** (CAT) Criminal Appeal No. 253 of 2006,

b) **Willibard Kimangano v. R.,** (CAT) Criminal Appeal No. 235 of 2007,

c) **Omary Kulwa v. R.,** (CAT) Criminal Appeal No. 89 of 2007,

d) **Godi Kasenegela v. R.,** (CAT) Criminal Appeal No. 10 of 2008,

e) **Juma Mhagama v. R.,** (CAT) Criminal Appeal No. 71 of 2011 (all unreported),

f) **Yusufu Sabwani Opicho v. R.,** (CAT) [2009] eKLR, etc.

In **Yusufu S. Opicho** *(supra)*, the Kenya Court of Appeal after finding that the provisions of s. 19 (1) of the Kenya Oaths and Statutory Declarations Act, Cap 15 (which is identical with s. 127 (2)) were not complied with, concluded thus:-

> *"The child was a vital witness in the trial and the failure by the trial court to comply with the procedure in the reception of his evidence vitiates the evidence..."*

So was the case here. There was total failure by the trial court to comply with the compulsory procedure stipulated in s. 127 (2) of the Evidence Act before the evidence of PW2 Maria was received. This failure vitiated her evidence which we hereby expunge as correctly urged by Mr. Mwamwenda. We also expunge Exh. P1 for the good reason articulated by the same learned Senior State Attorney. As the evidence of PW2 Maria's parents, i.e PW1 John Mbeya and PW3 Tecla Haule, was purely hearsay, we are left with no other evidence, leave alone "other sufficient evidence", to sustain the conviction of the appellant. For this reason, we have found ourselves constrained to accept the appellant's other ground of complaint.

Indeed, the learned High Court judge erred in law in summarily rejecting his appeal.

In view of the above findings, we allow this appeal. The appellant's conviction and the sentences imposed on him are hereby quashed and set aside. When a conviction is quashed under these circumstances, more often than not, we usually order a re-trial. In this particular case, we have found two factors which militate against ordering a re-trial. Firstly, the appellant has been in prison for over fourteen years, an unnecessary unlawful confinement caused by the first learned appellate judge's failure to apply properly the provisions of section 364 of the Criminal Procedure Act, Cap. 20 R.E. 2002. Under this section, the High Court may summarily reject an appeal against a conviction and sentence if it "considers that the evidence before the lower court leaves no reasonable doubt as to the accused's guilt and ... the appeal is frivolous." Had the evidence been perused at all, it would have been gleaned therefrom that the appeal was neither frivolous, nor the appellant's guilt proved at all. To avoid such naked miscarriages of justice, we implore all first appellate judges and magistrates to study the Court's judgments **in Iddi Kondo v. R.** [2004]

Secondly, the prosecutrix was 14 years old when the incident took place. She is now nearly 28 years old. Most probably, she has a family of her own now. As this Court aptly observed in **Juma Mhagama v. R.,** (*supra*) "It will not serve any useful purpose to make her revive that horrible moment in her life." The traumatic effect on her would be more devastating to her and the public, than the public interests a re-trial would achieve or serve. We shall accordingly not order a re-trial.

All said and done, we order that the appellant be released forthwith from prison unless he is otherwise lawfully detained.

DATED at **IRINGA** this 26th day of July, 2013.

E. M. K. RUTAKANGWA
JUSTICE OF APPEAL

B. M. LUANDA
JUSTICE OF APPEAL

S. MJASIRI
JUSTICE OF APPEAL

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

M.A. MALEWO
DEPUTY REGISTRAR
COURT OF APPEAL