IN THE COURT OF APPEAL OF TANZANIA

AT ARUSHA

(CORAM: MSOFFE, J.A.,ORIYO,J.A., And KAIJAGE,J.A.)

CRIMINAL APPEAL NO. 160 OF 2011

HAMISI MASANJA .....APPELLANT

VERSUS

THE REPUBLIC .....RESPONDENT

(Appeal From the Judgment of the High Court of Tanzania at Arusha)

(Nyerere, J.)

Dated the 19th day of November, 2011
in
Criminal Appeal No. 13 of 2010

.....

JUDGMENT OF THE COURT

13 & 18 June, 2013

ORIYO, J.A:

The District Court of Babati found the appellant guilty of the offence of Rape contrary to sections 130 (1),(2)(e) and 131(1) of the Penal Code, CAP 16. R.E. 2002. He was sentenced to a prison term of thirty (30) years. Dissatisfied, he unsuccessfully challenged the conviction and sentence in

the High Court at Arusha. Still dissatisfied he has come to this Court on a second appeal.

The appellant, initially, lodged five (5) grounds of appeal. Subsequently, he added one more ground making a total of six grounds of appeal.

Before discussing the merits of the appeal, we shall briefly set out the facts as found credible by the lower courts. It was alleged that one Upendo Emanuel, a girl of tender age, (PW2), disappeared from her parents home in Magugu, on the night of 2/11/2006. Her whereabouts were unknown to her parents until 1/6/2007 when Shabani Ally, (PW3), met her at Matangalimo, Kondoa. PW2 told PW3 on her plight in that she left Magugu with Hamisi Masanja, the appellant herein and that she was in need of money after the appellant returned to Magugu, thus abandoning her. PW2 told PW3 in confidence that during the entire period she was with the appellant, he forced her to sleep in the same bed with him and he was raping her in the night. It was due to efforts made by PW3 to contact her father, that PW2 was eventually rejoined with her parents in Magugu.

The appellant appeared before us in person and prayed to adopt the written submissions he had earlier on filed in Court elaborating on the grounds of appeal. For the respondent Republic, it was represented by Mr.

Innocent Njau, learned State Attorney. Mr. Njau pointed out a number of deficiencies in the case, starting from the Charge Sheet to non compliance with section 127 (2) of the Evidence Act in admitting the evidence of PW2.

Due to the importance of the additional ground of appeal we have decided to make it our starting point. Mr. Njau, learned State Attorney, supported the appeal on this ground. He stated that PW2, the victim, was thirteen (13) years old when the charge was preferred against the appellant. And as of the date she testified on 27/03/2008, she was fourteen years old, according to the testimony of her father, Emmanuel Pondi, (PW1).

He submitted that as PW2 was still of tender age, she ought to have testified only after the trial court had conducted a ***voire dire*** examination to determine her competence to testify –whether to receive her evidence on oath/ affirmation or not. The learned State Attorney concluded that since no ***voire dire*** examination was conducted before receiving the evidence of PW2, her evidence has no evidential value; it is rendered useless.

It is trite law that every witness in a criminal cause or matter has to be sworn/affirmed. Section 198 (1) of the Criminal Procedure Act provides:-

> *"198-(1)Every witness in a criminal cause or matter shall,* ***subject to the provisions of any other written law to the contrary,*** *be examined upon oath or affirmation in accordance with the provisions of the Oaths and Statutory Declarations Act." (Emphasis ours).*

That is the general rule, but there are exceptions to the rule, including section 127 of the Evidence Act, Cap 6, R.E 2002.

Section 127 of the Evidence Act states:-

> *"(1).Every person shall be competent to testify unless the Court considers that he is incapable of understanding the questions put to him or of giving rational answers to those questions by reason of tender age, extreme old age, disease(whether of body or mind) or any other similar cause.*

(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, which opinion shall 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.*

*(5) For the purposes of subsections 2, 3 and 4, the expression "****Child of tender age****' means a child* ***whose apparent age is not more than fourteen years.****"*

Therefore, in terms of subsection (5), a child of tender age is a competent and compellable witness in criminal proceedings, provided that such child understands the nature of an oath and possesses sufficient intelligence to enable the child to know the difference between what is right and what is wrong.

As earlier observed, at the time of the hearing of the case, the victim, Pendo Emmanuel, was fourteen years old as testified by her father, PW1. In terms of section 127(5)(supra), she was a child of tender age and it was

imperative that the provisions of section 127(2) of the Evidence Act be complied with before receiving her testimony; See **Mohamed Sainyenye. V.R;** (CAT) Criminal Appeal No.57 of 2010(unreported). There is no dispute here that the trial court did not conduct a **voire dire** examination before receiving the evidence of PW2. And as correctly submitted by the learned State Attorney, her evidence ought to be discarded in the circumstances. As the Court stated in **Sainyenye's** case(supra):-

> *"It is crystal clear that the trial court did not comply with the procedure of conducting **voire dire** test. In the absence of an inquiry and a finding that the child understands the nature of an Oath or he is possessed of sufficient intelligence and understands the duty of speaking the truth, it cannot be said that the child was a competent witness. The evidence of PW2 is of no evidential value . Since the trial court did not comply with the mandatory provision of section 127 (2) of the Evidence Act, the evidence of PW2 was wrongly admitted and acted upon. The same is expunged form the record."*

The situation obtaining in this case is similar to the one in **Sainyenye's** case (supra), where the trial court flouted the procedure of taking the evidence of a child of tender age. In view of what the court said in **Sainyenye**, we accordingly expunge from the record the evidence of PW2.

The crucial issue that arises here now is that, once the evidence of the prosecutrix is expunged, what other evidence remains on record to sustain the conviction of rape?

Section 130(4) of the Penal Code states:-

> *"For the purposes of proving the offence of rape-*
>
> *a)* ***penetration however slight is sufficient to constitute the sexual intercourse necessary to the offence;*** *and*
>
> *b) evidence of resistance such as physical injuries to the body is not necessary to prove that sexual intercourse took place without consent." (emphasis ours).*

Subsection (4) of section 130 of the Penal Code lays down a specific requirement of law that for there to be rape, there must be evidence of **penetration**,(however slight). As it was stated by the Court in the case of **Selemani Makumba Vs. Rupublic**, Criminal Appeal No. 94 of 1999, that:-

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

See also **Godi Kasenegala Vs. Republic** Criminal Appeal No. 10 of 2008, (unreported).

Upon expunging from the record, the evidence of PW2, the victim, what remains on record are the testimonies of PW1 (the victim's father), PW3 and PW4. The evidence of PW1 was hearsay as he was told so by the victim. Shabani Ally's (PW3) testimony was hearsay as well from PW2. As for PW4, Juma Tungu, WEO of Magugu at the material time, his evidence was primarily on the letter of introduction he authored at the appellant's request to the relevant authorities in Kondoa where the appellant was going allegedly in search of PW2, a daughter of his friend who had

disappeared from her parents' home. PW5, E.6632 D/C Erasto, investigated the case. His evidence was limited to the investigatory duties, the evidence he gathered from PW3 and PW4 which led to the return of PW2 to her parents. He testified to have issued PW2 with a PF3 but the evidence of PF3 was not part of the evidence admitted in court.

In view of this state of affairs, it is not disputed that none of the four remaining prosecution witnesses testified to have eye-witnessed the rape and the **penetration** of the appellant's penis into the vagina of PW2. It was all hearsay. This leads us to the conclusion that once the evidence of PW2 is expunged, no other evidence remains on record to prove that the appellant raped PW2. There is no other evidence upon which a conviction of rape can safely be sustained. In other words, the guilt of the appellant was not proved beyond reasonable doubt in the circumstances of the case.

In the event, the appeal has merit. Since the prosecution failed to prove the case beyond reasonable doubt, we accordingly quash the conviction of Hamisi Masanja and set aside the sentence of thirty (30) years imprisonment. Further, we order that he be released from prison forthwith unless he is otherwise lawfully held.

DATED at **ARUSHA** this 17th day of June, 2013.

J. H. MSOFFE
JUSTICE OF APPEAL

K. K. ORIYO
JUSTICE OF APPEAL

S. S. KAIJAGE
JUSTICE OF APPEAL

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

MALEWO, M. A.
DEPUTY REGISTRAR
COURT OF APPEAL