

IN THE COURT OF APPEAL OF TANZANIA

AT ARUSHA

(CORAM: OTHMAN, C.J., LUANDA, J.A. And MMILLA, J.A.)

CRIMINAL APPEAL NO. 300 OF 2011

KIMBUTE OTINIEL..... APPELLANT

VERSUS

THE REPUBLIC RESPONDENT

**(Appeal from the Judgment of the High Court of Tanzania
at Arusha)**

(Sambo, J.)

dated the 3rd day of November, 2010

in

Criminal Appeal No. 24 of 2010

JUDGMENT OF THE COURT

21st & 26th November, 2013

OTHMAN, C.J.:

In the course of hearing and determining this appeal involving the evidence of a child of tender age (11 years) the Court has before it, its own decisions, which conflict with each other on the legal and evidential consequences that arise following non-compliance by a trial Court in the conduct of a *voire dire* examination under section 127(2) of the Evidence Act, Cap 6 R.E. 2002. Namely, whether as a consequence thereof, it should be treated as unsworn evidence of a child, which requires corroboration to

sustain a conviction (**Hamisi Shabani V.R.**, Criminal Appeal No. 452 of 2007; See also **Herman Henjewe V.R.**, Criminal Appeal No. 164 of 2005; **Deema Daati and Two others V.R.**, Criminal Appeal No. 80 of 1994; **Nguza Vikings @Babu Seya and Four others V. R.**, Criminal Appeal No. 56 of 2005 (All CAT, unreported) or in the inverse, it is rendered no good as evidence and has to be discarded or discounted or expunged from the record (**Mohamed Sainyeye V.R.**, Criminal Appeal No. 57 of 2010; See also, **Godi Kasenegala V.R.**, Criminal Appeal No. 10 of 2008; **Leonard s/o Ndemu V.R.**, Criminal Appeal No 81 of 2008; **Wilbard Kimangano V. R.**, Criminal Appeal No. 235 of 2007).

Given the conflicting decisions of the Court on the issue and one that is of significant legal importance, we are of the considered view that this is a fit and proper case to be resolved by a full bench of the Court, which we propose be convened according to the law.

Moreover and related to the legal issue to be resolved, the full bench of the Court would also need to interpret and determine the import of section 127(7) of the Evidence Act, which is in *pari materia* with section 115(3) of the Law of the Child Act, No 21 of 2009 read together with section 127(2) of the former Act.

For the above reasons, it is hereby directed that the appeal stands adjourned to a date to be announced by the Registrar and the matter be forward to the Hon. Chief Justice for necessary action.

Ordered accordingly.

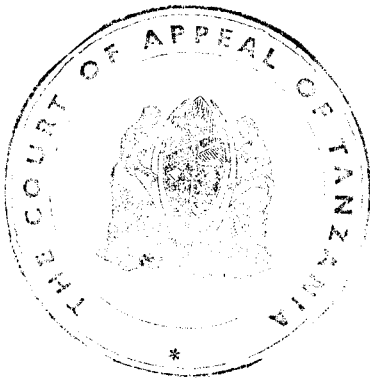
DATED at **ARUSHA** this 25th day of November, 2013.


M. C. OTHMAN
CHIEF JUSTICE

B. M. LUANDA
JUSTICE OF APPEAL

B.M.K. MMILLA
JUSTICE OF APPEAL

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




E. Y. MKWIZU
DEPUTY REGISTRAR
COURT OF APPEAL