IN THE COURT OF APPEAL OF TANZANIA
AT IRINGA

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

CRIMINAL APPEAL NO. 1 OF 2012

MANENO KATUMA .....APPELLANT

VERSUS

THE REPUBLIC.....RESPONDENT

(Appeal from the Decision of the Court of Resident Magistrate at Songea)

(Dyansobera, P.R.M., E.J.)

Dated 16th day of November, 2011
in
Criminal Appeal No. 4 OF 2011
.....

JUDGMENT OF THE COURT

23rd & 24th July, 2013

RUTAKANGWA, J.A.:

The appellant was convicted as charged by the District court of Songea (the trial court) of committing an unnatural offence. He was sentenced to serve a prison term of thirty (30) years. His appeal against the conviction and sentence was dismissed by Dyansobera, Principal Resident Magistrate, Extended Jurisdiction, hence this appeal.

In his memorandum of appeal, the appellant has listed seven (7) grounds of complaint against the judgment of the first appellate court. Briefly, these grounds are:-

(1) The learned Principal Resident Magistrate, E. J., erred in relying on the contradictory evidence of the prosecution.

(2) The learned Principal Resident Magistrate, E. J., erred in predicating the conviction on an alleged confession which he had repudiated and no "trial within a trial" was conducted.

(3) There was no DNA carried out to prove that the sperms found in the anus of the complainant were his.

(4) Two witnesses who testified for the prosecution at his trial, had not been listed at the preliminary hearing.

(5) The defence case was not considered at all.

(6) The prosecution case was not proved beyond reasonable doubt.

At the trial of the appellant, five witnesses testified for the prosecution. We have found out that excepting the alleged victim of the sodomy, (PW1 Isaya Mgwima), none of these witnesses eyewitnessed the act. Of course, PW4 Dr. Benard Ngaiza, examined PW1 Isaya on 17/9/2008

and found sperms in his anus. Of significance also was the evidence of PW5 No. C 9526 D/Sgt. Karim who allegedly recorded the appellant's cautioned statement (Exh.P2) on 17/9/2008, in which the appellant is shown to have confessed sodomising PW1 Isaya. However, the record of proceedings shows that before exh. P2 was tendered in evidence, the appellant unequivocally told the trial magistrate that he was forced to make the statement, hence the second grievance listed above. All the same, both courts below essentially relied on the evidence of PW1 Isaya and PW5 D/Sgt. Karim, in holding that the appellant committed the offence preferred against him.

At the hearing of the appeal, Mr. Maurice S. Mwamwenda, Senior State Attorney, appeared for the respondent Republic. He supported the appeal on the basis that on the whole the prosecution failed to prove its case. This stance was based on the obvious fact that the evidence of PW1 Isaya and the confessional statement (exh. P2) were irregularly received and he accordingly urged us to expunge them. We are in agreement with him. These are our reasons.

One, as allued to above, the appellant retracted Exh. P2. This fact notwithstanding, the learned trial Resident Magistrate admitted it in evidence without determining whether it was made voluntarily or not. In his judgment he thus observed:-

> *"He simply objected, the court not to admit exhibit P2 as was made by force.... because there is no trial within trial in subordinate court, it is upon a court to scrutinize whether the confession was voluntary or not ...."*

We have found no such scrutiny on record carried out to determine whether or not exh. P2 was voluntarily made. Furthermore, we are not aware of any statutory law which either unequivocally sanctions the holding of a trial within a trial in any trial court, or bars, be it expressly or implicitly, the holding of a trial within a trial or an inquiry in a subordinate court before admitting a contested confessional statement. These are carried out in East Africa as a matter of practice in order to meet the mandatory requirements of section 27 (2) of the Evidence Act, Cap 6 R. E. 2002 which mandatorily requires the prosecution to prove the voluntariness of any confession. Failure to determine such voluntariness more often than not, vitiates the trial. See, for instance:-

(a) **Lakhan v R.** [1962] E. A. 44,

(b) **Uganda v. Lwasa** [1968] E. A. 363,

(c) **Bakran v R.** [1972] E. A. 92,

(d) **Twaha Ali and Five Others v R.,** [CAT] Criminal Appeal No. 78 of 2004,

(e) **Paul Maduka & Four Others v R.,** [CAT] Criminal Appeal No. 110 of 2007,

(f) **Annes Allen v D. P. P.,** [CAT] Criminal Appeal No. 173 of 2007,

(g) **Selemani Abdalla & Two Others v. R.,** [CAT] Criminal Appeal No. 384 of 2008, and

(h) **Michael John @ Mtei v. R.,** [CAT] Criminal Appeal No. 202 of 2010 (all unreported).

In **Annes Allen** (supra), the Court held:-

> *"... it was stated with sufficient lucidity by the Court of Appeal for Eastern Africa in the case of **Mwagi s/o Nyange v. Reg.** (1954) 21 EACA 377, that a trial within a trial should be held to determine not only the voluntariness or otherwise of an alleged*

confessional statement but also whether or not it was made at all".

In **Paulo Maduka** (supra), the Court said:-

> *"Omission to inform the accused of this right (to say if he had any objection), and/or to conduct an inquiry or a trial within a trial in case there is an objection raised, results in a fundamental and incurable irregularity."*

More significantly, in relation to trials before subordinate courts, it was held in **Bakran's** (supra) case that:-

> *"The second advantage of holding a trial within a trial is to avoid prejudice being caused to an accused person if the court subsequently holds, in coming to its decision, that the statement was improperly admitted ..."*

We shall go further and hold that such prejudice could be caused to the prosecution also. Placing sole reliance on the statement, the prosecution, as is always the case, may refrain from tendering other material evidence taking the confession as proving the case beyond reasonable doubt, much to its prejudice in the event the trial court or

appellate court in its decision rules that the statement was after all improperly admitted and proceed to discount it. The procedure to be followed, therefore, by trial subordinate Courts whenever the confession is repudiated or retracted was clearly outlined by this court in **Selemani Abdalla** (supra). It must be strictly observed. It does not matter whether or not it is entitled a "trial within a trial" or an "inquiry".

In our present case, there is no gainsaying that exh. P2 was clearly retracted by the appellant. The learned trial Resident Magistrate made no attempt to determine its voluntariness before it was admitted in evidence. This was a fatal error in law. On the strength of the above cited authorities, we sustain the appellant's ground of complaint questioning the soundness of his conviction based on exh.P2. We accordingly expunge it from the record.

Our second reason for agreeing with Mr. Mwamwenda, does not arise from the grounds of appeal. It is based on s. 127 (2) of the Evidence Act. This provision reads thus:-

> *"Where in any criminal cause or matter a child of tender age 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.".

It is settled law that before any trial court receives the evidence of a child witness, it must first conduct a *voire dire* examination. The purpose of this examination is to satisfy the court on whether or not the intended child witness is competent to testify either on affirmation/oath or not in terms of s. 127 (2) of the Evidence Act: see, **Augustino Lyanga v. R.,** (CAT) Criminal Appeal No. 105 of 1995, **Omary Kurwa v. R,** (CAT) Criminal Appeal No. 89 of 2007, **Godi Kasenegela v. R,** (CAT) Criminal Appeal No. 10 of 2008 (all unreported), **Yusufu Sabwani Opicho** (CAK) (2009) eKLR, etc.

In this case, when PW1 Isaya testified, he was only ten years old. The learned trial Resident Magistrate, with due respect, conducted a partial ***voire dire*** examination as Mr. Mwamwenda rightly pointed out. After

holding that PW1 Isaya did not understand the nature of an oath, he proceeded to receive his unsworn evidence without first determining if he was "possessed of sufficient intelligence to justify the reception of his evidence." This was a fatal irregularity. Yet, in his judgment, the learned Resident Magistrate held:-

> *"And according to voire dire accused (sic) showed is intelligent and know to speak (sic) though is a child".*

This was not the case as we have shown immediately above. It goes without saying, therefore, that the evidence of PW1 Isaya was improperly received and we expunge it from the record.

Having discounted or expunged the evidence of PW1 Isaya and PW5 D/Sgt. Karim and his exh. P2, we are left with the evidence of PW2 Mary Lulandala, PW3 Herry Paulo Kisinda and PW4 Dr. Ngaiza. The trial court, very correctly in our view, found the evidence of PW2 Mary and PW3 Herry of little probative value as it was purely hearsay evidence. Although the two courts below relied on the evidence of PW4 Dr. Ngaiza as it tended to corroborate the evidence of PW1 Isaya, without the evidence of PWI Isaya,

PW5 Dr. Ngaiza's evidence standing alone does not help the prosecution at all. So we are left with no material evidence to support the charge, and this is all because of the fault of the trial court and not of the prosecution. It is unfortunate that the first appellate court did not discern these fatal irregularities.

From the above discussion, it is crystal clear that the two articulated irregularities committed by the trial court vitiated the entire trial as they prejudiced both sides in the case. It cannot, therefore, be held with any degree of certitude that there was a fair trial. The only remedy available to us, is to nullify the trial which we hereby do. The proceedings in the High Court are also nullified. Given the serious nature of the charge and the fact that the appellant has been in prison for only two and a half years, after quashing and setting aside his conviction and sentence, we remit the matter to the trial court for a re-trial before another magistrate of competent jurisdiction, so that justice is seen to be done in the case. We are making this because we are convinced that in so doing we shall not be giving the prosecution the opportunity to fill in gaps in its case. In the

meantime we order the immediate release from prison of the appellant unless he is otherwise lawfully held.

DATED at **IRINGA** this 23rd 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