IN THE COURT OF APPEAL OF TANZANIA

AT DODOMA

(CORAM: MSOFFE, J.A., KILEO, J. A. And KIMARO, J. A.)

CRIMINAL APPEAL NO 170 OF 2013

MUSSA YAREDI.....APPELLANT

VERSUS

THE REPUBLIC.....RESPONDENT

(Appeal from the decision of the Resident Magistrates' Court (Extended Jurisdiction) of Dodoma at Dodoma

[Rutatisinibwa, PRM. Ext. Jurisdiction]

dated 24/08/2012 in PRM Criminal Appeal No 1 of 2012)

JUDGMENT OF THE COURT

19th & 20th September, 2013

KILEO, J. A.:

This is a second appeal. The appellant was convicted of rape contrary to section 130 (1) and (2) (e) of the Penal Code and was sentenced to a term of 30 years imprisonment and 10 strokes of the cane. He appealed to the High Court which transferred the appeal to be heard by a Resident Magistrate with Extended Jurisdiction. He lost his appeal before the Principal Resident Magistrate (Rutatisinibwa) with Extended Jurisdiction hence the appeal before us.

Briefly, the case for the prosecution in the trial court is that on 27/6/2003 PW1 Esther John, a child of 12 years was in a routine of selling buns from house to house when she was ambushed by the appellant who dragged her into the bush and raped her. There was no dispute that the victim was raped. There was evidence from her mother, PW2 who saw her bleeding from her vagina and the evidence of the Medical Assistant (PW4) who examined the victim. The appellant himself did not seriously deny that the victim was raped; what he denied however was his involvement in the commission of the crime.

The appellant who appeared in person before us had earlier on filed a memorandum of appeal comprising of three grounds. His major complaint is that when considered in its totality, the evidence against him did not prove the case against him beyond shadow of doubt.

Ms Farhat Seif, the learned State Attorney who represented the Republic did not find it wise to support the conviction. She submitted that in the first place, the *voire dire* examination upon PW1 who was a child of tender age was not properly conducted. In the circumstances she was of the view that

it should be expunged from the record. Secondly, she submitted that conviction was against the weight of the evidence.

Looking at the circumstances of the case as a whole, we think that there is only one major issue in this appeal; which is whether it was proved beyond reasonable doubt that the appellant is the one who raped PW1.

Admittedly, the evidence that it was the appellant who raped PW1 is that of PW1 herself who was a child of tender age. Ms. Seif asked us to expunge from the record the evidence of this child as its reception was not in compliance with the requirement of the law, the *voire dire* test not having been properly conducted. Referring us to section 127 (2) and (5) of the Evidence Act, Cap 6 R. E. 2002, the learned State Attorney submitted that the trial magistrate did not show on the record that he was satisfied that the child was competent to testify.

Section 127 (5) of the Evidence Act defines a child of tender age upon whom a *voire dire* examination has to be conducted, in order to determine its competency to give evidence; as a child whose apparent age is not above 14 years. PW1 was aged 12 years at the time she testified.

Section 127 (2) therefore came into play in receiving her evidence. The said provision states:

> **"(2) 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."**

The learned State Attorney also referred us to Criminal Appeal No 57 of 2010 (unreported) between **Mohamed Sainyenye and the Republic** in which this Court laid down an elaborate procedure of conducting *voire dire* examination. In a nutshell, as was explained in the case cited above, where a child of tender age is called to testify the trial magistrate or judge must first satisfy himself or herself as to competency of the child to testify. In making a determination on the competency of the child to testify, the court has to find out first through inquiry, whether the child understands the

nature and obligations of an oath based upon the child's religious beliefs. Where the court is satisfied that the child understands the nature of an oath the child's evidence can be received after the child is sworn or affirmed. Where the court finds that the child does not understand the nature of an oath the court is obliged to carry on another inquiry to determine first, whether the child is possessed of sufficient intelligence to justify the reception of the child's evidence and secondly, that the child understands the duty of speaking the truth.

The question before us now is whether the procedure as explained above was followed in the present case. In order to answer this question it befits *that we reproduce here what transpired in the trial court:*

> ***"PW1: Esther John age, 12 years, occ. Child Resident Chikola, Religion Xtian***
>
> ***XD Court:***
>
> *I have never attended Church classes, I don't know who God is.*
>
> *I don't know what a lie is*
>
> *I know how to cook. I use three stones in cooking. It is impossible to cook on two stones. A pot will fall down when two supporters are used."*

After having recorded the answers from the child as above, the magistrate made the following statement:

"Court: *The witness does not know the nature of an oath but she is intelligent enough to testify. Her evidence is recorded without taking oath."*

We have to admit straight away that the procedure adopted in the trial court in conducting the *voire dire* examination fell short of the requirement of the law. When the magistrate was interrogating the child she clearly told him that she did not know what a lie is. This should have immediately alerted the trial magistrate that the child did not understand the duty of speaking the truth and he should have refrained from taking down her testimony. It is for this reason that we agree with the learned State Attorney that the evidence of PW1 should be expunged from the record as we hereby do.

Having expunged the evidence of the victim from the record, the prosecution case remains with no leg upon which it could stand. But, even if for the sake of academic argument the evidence of the child was to be taken aboard, the other witnesses' testimonies are so fraught with inconsistencies that necessitate the resolution of the same in favour of the

appellant. For example, PW2 stated in her evidence that the appellant admitted before the VEO to have committed the crime. However, the VEO (PW3) himself testified in court that the appellant denied the accusations leveled against him. With such inconsistencies it was highly unsafe to convict and sustain the conviction as it was done in the lower courts.

It is in the light of the above considerations that we find the appeal to have merit. Consequently, we allow it. We hereby quash the conviction of rape entered against the appellant and set aside the sentence imposed. We order that the appellant be released from custody forthwith unless he is held for some lawful cause.

DATED at **DODOMA** this 19th Day of September 2013.

J. H. MSOFFE
JUSTICE OF APPEAL

E. A. KILEO
JUSTICE OF APPEAL

N. P. KIMARO
JUSTICE OF APPEAL

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

M.A. MALEWO
DEPUTY REGISTRAR
COURT OF APPEAL