IN THE COURT OF APPEAL OF TANZANIA
AT IRINGA

CORAM: MSOFFE, J.A., KAIJAGE, J.A., And MMILLA, J.A.

CRIMINAL APPEAL NO.78 OF 2014

LEZIRE GEORGE .....APPELLANT

VERSUS

THE REPUBLIC.....RESPONDENT

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

(Manento, J.)

dated 28th January, 2004

in

Criminal Sessions Case No. 15 of 2003

.....

JUDGMENT OF THE COURT

17th & 19th June, 2014

MMILLA, JA.:

On 30.6.2002 in the evening, "PW2 Happy Godfrey" **(the complainant)** who was then 11 years old, went to watch TV at a centre called Bondeni in Mfaranyaki area not very far from her family home. On her way back and while alone, she allegedly met the appellant who held her hand and asked her to

follow him. She was led to a dark corner at which her assailant allegedly had carnal knowledge of her. In her words, the complainant said that ***"Then akachukua dudu lake akaliweka. He put it at my private parts."*** She also said that the appellant covered her mouth with his hand in order to prevent her from raising alarm. In the process, the complainant sustained injuries which were responsible to make her walk with difficulties. At the end of it all, while he promised to give her T.shs 20/=, he nevertheless warned her not to tell anyone of what happened.

On arrival home, the complainant did not divulge the ordeal she went through to her mother Rose Mujojo who testified as PW1. The latter however, discovered that her daughter was not walking properly and examined her private parts and discovered that she had bruises thereat. On asking her what happened, the complainant declined to tell her anything. It was only after her mother sought the assistance of PW3 Scola Andrea to talk to her that the complainant disclosed that she was sexually molested the previous night by a person she knew by face only. Upon getting a feedback from PW3, PW1 reported the matter to police. The appellant was traced, arrested and subsequently charged with the offence of rape before the District Court of Songea. At the conclusion of trial, he was found guilty, convicted and sentenced to serve a term

of 30 years in prison. His first appeal to the High Court at Songea was summarily rejected in an order which was to the effect that the prosecution proved its case against the appellant beyond reasonable doubt, and that he was properly identified. This appeal is against that order.

Before us, the appellant appeared in person, undefended, while the respondent Republic was represented by Mr. Wilbroad Ndunguru who was assisted by Mr. Hamim Nkoleye, learned State Attorneys. They supported the appeal.

The memorandum of appeal in this regard raised 9 grounds. However, as correctly submitted by Mr. Ndunguru, three issues are important for the purpose of a just determination of this appeal; **firstly,** whether the first appellate court ought to have considered if the appellant was indeed sufficiently identified by the complainant; **secondly,** whether the PF3 constituted in exhibit P1 was correctly relied upon in founding appellant's conviction; and **thirdly**, whether in conducting a ***voire dire*** test in respect of the complainant who was then 11 years of age, the provisions of section 127 (2) of the Evidence Act were complied with.

Upon appellant's election for the Republic to begin after having expressed that he was adopting his grounds of appeal for our consideration, Mr. Ndunguru submitted in the first place that the issue whether the appellant was properly identified by the complainant ought to have been considered by the first appellate court on account that the incident occurred at night, but that the District Court did not adequately address the point whether the conditions at the scene of crime were favourable for correct identification. He also submitted that the other two issues relating to admissibility of the PF3 and the aspect of ***voire dire*** test were not properly addressed by the trial court. In elaboration, Mr. Ndunguru submitted that the PF3 was admitted in flagrant violation of section 240 (3) of the Criminal Procedure Act Cap 20 of the Revised Edition, 2002 **(the CPA),** while the ***voire dire*** test did not strictly comply with the provisions of section 127 (2) of the Evidence Act. In view of that, Mr. Ndunguru pressed us to remit the case to the High Court for determination of the appeal on merit.

Although the first appellate judge did not indicate the provisions he invoked in making the order which is the subject of appeal, it is certain that he

exercised that power under section 364 of the CPA which empowers the High Court to summarily reject the appeal if it considers that the evidence before the lower court left no reasonable doubt as to the accused's guilt and that the appeal is frivolous or is without substance and that there is no material in the judgment for which the sentence ought to be reduced. See also the case of **Issa Saidi Kumbukeni v. Republic,** Criminal Appeal No. 147 of 2002, CAT (unreported).

We take note that, in our present case the question of sufficiency or not of evidence of identification was raised before the High Court in ground No. 3 as reflected on page 15 of the court record. We agree with Mr. Ndunguru that that being the case, that court could have dispensed real justice in the case had it endeavored to determine that point on merit. To have not done so, in our opinion, entailed that justice was not seen to have been done.

We are also concerned that though they were not raised as grounds of appeal before that court, the other two issues relating to admissibility of the PF3 and the aspect of ***voire dire*** test could also have been considered by that court in the process had it heard the appeal on merit. This is on the ground that though the PF3 was received in contravention of section 240 (3) of the CPA, it

was heavily relied upon by the District Court in founding appellant's conviction as shown on page 13 of the court record. On that page, the trial court said that **"... There was no detection of semen because a long time has passed since the incident took place, but the PF3 issued here in court as Exhibit P1 showed that the vagina of Happy d/o God, the victim of rape, had been inflicted and the nature of injury was bruises. It follows therefore that the child of the complainant was raped..."** Also, the ***voire dire*** test did not strictly comply with the provisions of section 127 (2) of the Evidence Act. This again, could have been looked into for purposes of satisfying itself as to reliability of the complaint's evidence.

In view of the above, we are satisfied that since the first appellate court did not take into account these factors, it cannot be said it correctly found that the appeal was not lodged without any sufficient grounds, hence that the first appellate judge erred in rejecting the appeal summarily.

The remaining question however becomes; what next?

After carefully weighing the scales, we have found it proper to invoke the provisions of section 4 (2) of the Appellate Jurisdiction Act Cap 141 of the

Revised Edition, 2002 the result of which we nullify the order of the High Court that summarily rejected the appeal with a direction that the record is remitted to that court to admit the hearing of the appeal on merits.

DATED at IRINGA this 18th day of June, 2014.

J. H. MSOFFE
JUSTICE OF APPEAL

S. S. KAIJAGE
JUSTICE OF APPEAL

B. M. MMILLA
JUSTICE OF APPEAL

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

Z. A. MARUMA
DEPUTY REGISTRAR
COURT OF APPEAL