IN THE COURT OF APPEAL OF TANZANIA
AT ARUSHA

CORAM: OTHMAN, CJ.,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.)

dated3rd November, 2011
in
DC Criminal Appeal No. 24 of 2010.

....

JUDGMENT OF THE COURT

21st November2014 & 25th April 2016.

MMILLA, J.A.:

The appellant, Kimbute Otiniel instituted Criminal Appeal No. 300 of 2011 in the Court endeavouring to challenge the judgment of the High Court of Tanzania at Arusha which upheld the conviction and sentence of the District Court of Arusha (the trial Court) in Criminal Case No. 665 of 2008 before which he was charged with rape contrary to section 130 (2) (e) and 131 of the Penal Code Cap. 16 of the Revised Edition, 2002. He was sentenced to a term of life imprisonment.

The appeal was slated for hearing before us on 21.11.2013. On that day the appellant appeared in person and fended for himself, while Mr. Innocent Njau, learned State Attorney represented the respondent Republic. We heard the parties and reserved our judgment.

In the course of deliberating the rival submissions of the parties, we comprehended that we were faced with various conflicting authorities of this Court regarding the legal and evidential consequences of the court of first instance in allowing a child of tender years, as in the present case, to give evidence in a criminal trial without first conducting a ***voire dire*** examination as contemplated by section 127 (2) of the Evidence Act Cap. 6 of the Revised Edition, 2002 (the Evidence Act). The concern was whether, as a consequence thereof, such evidence ought to be treated as unsworn evidence, thus requiring corroboration in order to be relied upon, or in the reverse, it was to be treated as worthless evidence which could be discarded or expunged from the record.

In a ruling which was handed down on 25.11.2013, we expressed our view that it was a fit and proper case to be resolved by a full bench of the Court which we proposed to be convened according to law. We similarly proposed that there was need for the full bench of the Court to interpret

and determine the import of section 127 (2) of the Evidence Act, which is in *pari materia* with section 115 (3) of the Child Act, No. 21 of 2009. The proposal was forwarded to the Hon. Chief Justice for necessary action.

Gratefully, the Hon. Chief Justice sanctioned the proposal. He convened a full bench of the Court which on 25.3.2014 heard the parties along the proposed lines. The **"Ruling"**in thatregard was pronounced on 6.6.2014. After deciding on those grounds, in the end the full bench of the Court remitted the matter to the three initial judges of the Court for continuation of the hearing and determination of the appeal; hence the present judgment.

The background facts of the case were briefly that on 23.8.2008 in the morning, PW1 Yunusi d/o Serenak (the complainant) who was then 11 years old was sent by her sisters; Jenifer and Neema Sanare to a person known as Godi to collect tomatoes. On her way she allegedly met the appellant who ordered her to follow him to his home. Afraid, she obeyed and followed him. On arrival there they entered in the house wherein the appellant forcefully undressed her, and ordered her to stretch her legs and he raped her. The complainant did not raise alarm because she was warned to abstain otherwise he was going to cut her with a knife. She was

released after the appellant had donewhat he set to do and she hastily went back home. She related the incident to her sisters. PW3 Neema Sanare inspected her female organ. On being convinced that she was raped, and because the complainant had named the culprit, PW2 Japhet Sanare made a follow-up and succeeded to apprehend the appellant. Both, the latter and the complainant were sent to police. The police prepared a PF3 and directed for the victim to be sent to hospital for medical examination. Also, they prepared charges and charged the appellant in court as it were.

On the other hand, the appellant denied the allegations. He contended that he did not know PW1, and that PW2 invented the story against him because he failed to give himmoney as was instructed by the owner of the farm at which he was employed and lived.

The memorandum of appeal raised four grounds which may conveniently be bridged into three of them as follows:-

1. That the evidence of the complainant was improperly received and relied upon since its recording did not comply with section 127(2) of the Evidence Act.

2. That generally, the prosecution did not prove the case against him beyond reasonable doubt.
3. That the sentence of life imprisonment was excessive in the circumstances of this case.

Mr. Njau argued those grounds generally, and supported the appeal. He submitted in the first place that the evidence of PW1 was wrongly relied upon on the ground that the ***voire dire*** test was badly conducted such that it amounted to non-compliance with the provisions of section 127 (2) of the Evidence Act. He relied on the case of **Mohamed Sainyeye v. Republic**, Criminal Appeal No. 57 of 2010, CAT (unreported) in which he said, the Court gave guidance on how to take the evidence of a child who does not know the nature of the oath, meaning that both clauses (a) and (b) of that section ought to have been complied with, which was not so in the present case. That such non-compliance, he added, went to the competence of the witness. Given such a situation, he pressed the Court to expunge the evidence of PW1.

As a continuation of the above argument, Mr. Njau submitted that once the evidence of PW1 is expunged from the record, then there would

be no other evidence capable of sustaining conviction, which is why, he went on to submit, he supported the appeal. He did not elaborate.

On another point, Mr. Njau submitted that since the complainant was alleged to have been 11 years of age, the sentence of life imprisonment which was imposed on the appellant by the trial court and upheld by the first appellate court was excessive because it was wrongly pegged under section 130 (3) of the Penal Code. Mr. Njau pressed the Court to interfere with the sentence in case it dismisses the appeal.

On his part, the appellant did not have anything to say, save for his request that the Court allows his appeal on the basis of the grounds he raised.

After carefully going through the proceedings and judgments of both courts below, the grounds of appeal and the submission made by Mr. Njau, we think that the first issue calling for decision is whether or not the evidence of PW1 was properly received and relied upon.

Our starting point is the ***voire dire*** examination in respect of PW1 who, becauseshe was then 11 years of age, the reception of her evidence was subject to the conditions obtaining under section 127 (2) of the

Evidence Act.Our immediate concern is the trial court's opening remark before it proceeded to conduct the ***voire dire*** test. That remarkis at page 13 of the court record at whichshe remarked that:-

> *"Since the witness is a girl of 11 years old; the court wants to be satisfied with **the intelligence of the witness**, before starting the hearing."*

In our view, this remark shows a wrong legal footing on the ground that a close reading of section 127(2) of the Evidence Act shows that the **concern** of this provision in governing the competency of a child of tender years is to observe that **foremost**, the court satisfies itself that a child of tender years ***understands the nature of the oath,***a fact which was overlooked by the trial court. That section provides that:-

> *"(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." [Emphasis is provided).

Ipso jure,the other two conditions; that is to consider receiving the evidence of such witness though not given upon oath or affirmation if the said witness is possessed of sufficient intelligence to justify the reception of his/her evidence, and understands the duty of speaking the truth ought to have been considered only after the trial court could have beensatisfied thatthe witness did not understand the nature of the oath.

Worse more, looking at the questions which were put to the child by the court, none of them were leading the trial magistrate to discover if the witness knew the nature of the oath. Of all the questions posed to the child, only onehad bearance to the aspect of oath, that is, **if she knew the meaning of oath,** for which her answer was in the negative. The rest of the questions asked of her had nothing to do with the aspect of testing whether she knew the meaning of an oath. In the circumstances, the finding of the trial court that it was satisfied that the complainant did not know the meaning of oath was baseless, therefore that the purported ***voire dire*** was in effect as good as having not been conducted at all –See the decision of the full bench in **Kimbute Otiniel v. Republic**, Criminal

Appeal No. 300 of 2011 in which at page 76 of the typed judgment the Court observed that:-

> *"Where there is a **complete omission** by the trial court to correctly and properly address itself on sections 127(1) and 127(2) governing the competency of a child of tender years, the resulting testimony is to be discounted."*

Thus, the omission pointed out above destines us to the conclusion that the evidence of PW1 was wrongly received and acted upon and we accordingly discount it.Thus, the first ground is allowed.

The issue to follow is whether or not there was other evidence capable of sustaining the appellant's conviction.

Besides the evidence of PW1, the other evidence came from PW2 Japhet Sanare, PW3 Neema Sanare, PW4 No. E.4521 D/Cpl Hamis and PW5 Dr. Elizabeth Hiza. While the evidence of PW2 was essentially that he was the person who apprehended the appellant upon the information given to him by PW1; that of PW3 was to the effect that she was among the women who physically inspected the complainant's private organ andfound that she was raped. However,she did not give details of what

convinced her that the complainant was raped. Worse more, no other person from the group of "women" who inspected the complainant appeared in court to testify. As such, the evidence of PW2 and PW3 is insufficient.

The other evidence came from PW4. This witness said he interrogated the appellant, but that the latter denied the allegations. The rest of his evidence was a replication of what he alleged to have been told by PW1, which no doubt was anything but hearsay evidence, thus deficient.

Finally is the evidence of PW5. This witness was clear that upon examining the complainant's female organ she found that there were no any bruises or any other kind of discharge. Also, the laboratory tests showed that there was no any proof that the child was raped. Given that PW5 had 17 years experience as a clinical officer, her expert opinion deserves greater weight than that of PW3 who,as already pointed out did not give details of the steps she took in her examination of PW1. In the circumstances, this evidence too did not advance the prosecution case.

The last ground is that the sentence which was imposed by the trial court and upheld by the High Court was excessive in the circumstances of

this case. We hasten to say that this ground too has merit for reasons we are about to assign.

As already stated, the complainant was 11 years old when she was allegedly raped. That being the case,the sentence of life imprisonment was by any standards excessive.

The punishment for the offence of rape is enacted under section 131 (2) and (3) of the Penal Code. That section stipulates that:-

"(1) Any person who commits rape is, except in the cases provided for in the renumbered subsection (2), liable to be punished with imprisonment for life, and in any case for imprisonment of not less than thirty years with corporal punishment, and with a fine, and shall in addition be ordered to pay compensation of an amount determined by the court, to the person in respect of whom the offence was committed for the injuries caused to such person.

(2) Not relevant

(3) Notwithstanding the preceding provisions of this section whoever commits an offence of rape to a girl ***under the age of ten yearsshall on conviction be sentenced to life imprisonment."***

Since the complainant in this case was above the age of 10 years as aforesaid, the appropriate sentence ought to have been 30 years, hence our finding that this ground too has merit and we allow it.

That said and done, we allow the appeal, quash the conviction and set aside the sentence. We order that the appellant should forthwith be released from prison unless he is otherwise being continually held for some other lawful cause.

Dated at **Dar es Salaam** this 11th day of February, 2014.

M. C. OTHMAN
CHIEF JUSTICE

B. M. LUANDA
JUSTICE OF APPEAL

B. M. MMILLA
JUSTICE OF APPEAL

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

J. R. KAHYOZA
REGISTRAR
COURT OF APPEAL