IN THE COURT OF APPEAL OF TANZANIA

AT DODOMA

(CORAM: KILEO, J.A., ORIYO, J.A., JUMA, J.A.)

CRIMINAL APPEAL. NO. 584 OF 2015

RASHID MTEMI..... ..... APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

(Appeal from the decision of the Resident Magistrate's Court of Singida at Singida - Extended Jurisdiction)

(W.E.Lema, PRM Ext, J.)

dated the 27th day of November, 2015

in

PRM Criminal Appeal No. 32 of 2015

JUDGMENT OF THE COURT

27th & 28th April 2016

KILEO JA:

The appellant was charged with and convicted of rape contrary to sections 130 (1) (2) (e) and 131 of the Penal Code Cap 16 R. E. 2002 in the District Court of Mpwapwa at Mpwapwa. Upon conviction he was sentenced to serve 30 years imprisonment. Dissatisfied, he appealed to the

High Court. Pursuant to section 45 (2) of the Magistrates' Courts Act, Cap 11 R. E. 2002 the High Court transferred the appeal to be heard by Hon. Lema, Principal Resident Magistrate with Extended Jurisdiction (PRM EJ). The PRM EJ dismissed his appeal hence this second appeal before us.

The facts leading to the appellant's conviction were to the effect that on the 4th day of April, 2001 at 17:00 hours at Rudi village within District of Mpwapwa in Dodoma Region, PW1, Samehe Magoha a girl aged 12 years was sent to grind maize. On her way while passing on a narrow road she met the appellant who happened to walk towards the opposite direction. As the appellant approached her she stopped paving the way for him to pass. The appellant, instead of passing grabbed her by her neck and pulled her into the bushes, stripped off her clothes and raped her. While raping her they heard voices of people passing by from a distance and it was at that moment when the appellant fled the scene. PW1 got up and ran to the house of PW3 to whom she reported the incident. According to PW3 the victim described her assailant as a person who had dressed red rubber written 'umoja' and a white shirt. Thereafter PW3 and other villagers who did not testify followed footmarks which allegedly led them to the appellant who was arrested accordingly. PW2, a clinical officer at Rudi examined

PW1 and according to him the victim had sustained some 'cut like wound' between the vagina and the anus.

In his sworn testimony the appellant denied to have raped PW1 on the alleged day. His defence was that he was home on that day till 5pm when he decided to go to Chelendu Mission in Rudi village to collect his money for groundnuts from a woman by the name of Elizabeth Magawa.

The appellant filed a five grounds memorandum of appeal which centre on three main issues; namely that the victim's evidence was taken in disregard of the provisions of section 127 (2), secondly; that the evidence of identification was insufficient and thirdly; that the case for the prosecution was riddled with contradictions.

At the hearing of the appeal the appellant appeared in person and unrepresented while the respondent Republic was represented by Ms Beatrice Nsana, learned State Attorney.

When we called upon the appellant to address us on his grounds of appeal he opted for the learned State Attorney to submit first. The learned State Attorney was inclined to support the appeal. She conceded that failure on the part of the trial court to completely ignore the provisions of section 127 (2) in the taking down of the evidence of PW1 who was a child

of tender age was a fatal irregularity. The learned State Attorney also acknowledged that the evidence for the prosecution was so riddled with contradictions which ought to have been resolved in the appellant's favour.

The matter need not detain us. It is apparent on the face of the record that the evidence of PW1 who was at the time of giving her evidence 12 years of age, was taken without conducting the *voire dire test* as per section 127 (2) of the Evidence Act, Cap 6 R. E. 2002. We have had a number of decisions concerning the construction and application of the above provision. On one side, in **Deemay Daati and Two Others v.R.**, Criminal Appeal No. 80 of 1994; **Selemani Mwitu v.R**, Criminal Appeal No. 90 of 2000; **Alfeo Valentino v.R**, Criminal Appeal No. 92 of 2006; **Vernard Costa @ Nsuri v. R**, Criminal Appeal No. 56 of 2005; **Jafason Samwel v.R**, Criminal Appeal No. 105 of 2006; **Sokoine Chelea v.R**, Criminal Appeal No. 253 of 2008; **Herman Henjewele v.R.**, Criminal Appeal No. 164 of 2005; **Nguza Vikings @ Babu Seya and Four Others v.R.**, Criminal Appeal No. 56 of 2005; **Mahona Sele v.R**, Criminal Appeal No. 188 of 2008; **Hamisi Shabani v.R.**, Criminal Appeal No. 452 of 2007;and **Daudi Samwel v.R.**, Criminal Appeal No. 209 of 2009, (CAT, all unreported) the Court took the position that the misapplication of or non-compliance with section 127(2) of the Act in conducting a *voire dire*

brought the child's evidence to the level of unsworn evidence, which required corroboration to sustain a conviction.

On the other hand, in **Mohamed Sainyenye v.R.**, Criminal Appeal No. 57 of 2010; **Godi Kasenegala v.R.**, Criminal Appeal No 10 of 2008; **Simon Mwakalinga v.R**, Criminal Appeal No. 139 of 2010; **Leonard s/o Ndemu v.R.**, Criminal Appeal No. 81 of 2008; **William Kimangano v.R.**, Criminal Appeal No. 235 of 2007; **Justine Sawaki v.R**, Criminal Appeal No. 103 of 2004 and the dissenting opinion in **David Samwel's** case (*supra*), (All CAT, unreported) the Court was of the opposite stand that misapplication of or non-compliance with section 127(2) rendered the child's evidence no good as evidence and it must be discarded, discounted or expunged from the record.

Due to the above conflicting positions the Hon. Chief Justice deemed it fit to compose a full bench in order to resolve the conflict. This was done in Criminal Appeal No. 300 OF 2011, **KIMBUTE OTINIEL v. the REPULIC.** Part of the decision in the above decision was to the following effect:

> *"The commulative effect of our analysis and for the reasons afforded, we are of the considered view that the conflicting decisions of the Court on the consequences of the*

misapplication of or non-direction in the conduct of a voire dire by a trial court under sections 127(1) and/or 127(2) should henceforth be resolved in the following manner:

1. Each case is to be determined on its own set of circumstances and facts.

2. 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.*

3. Where there is a misapplication by a trial court of section 127(1) and/or 127(2) the resulting evidence is to retained on the record. Whether or not any credibility, reliability, weight or probative force is to be accorded to the testimony in whole, in part or not at all is at the discretion of the trial court. The law and practice governing the admissibility of evidence; cross-examination of the child witness, critical analysis of the evidence by the court and the burden of proof beyond reasonable doubt, continue to apply.

4. In these same facts and circumstances (i.e. No.2) where there is other independent evidence sufficient in itself to sustain and guarantee the safe and sound conviction of an accused, the court may proceed to determine the case on its merit, always bearing in mind the basic duties incumbent upon it in a criminal trial and the fundamental rights of the accused.

5. However, in these same facts and circumstances (i.e. No. 2), where the evidence of the child witness is the only, decisive

would seriously prejudice the accused and his or her basic rights or occasion a miscarriage of justice or would result in an unsafe conviction, the evidence should be discounted and cannot form the basis of a conviction."

In the present case there was a complete omission on the part of the trial court to address itself on sections 127 (1) and 127 (2) of the Evidence Act in taking the testimony of PW1, the 12 year old girl. Going by our decision in **Kimbute Otiniel** such evidence is to be discounted. Once the evidence of PW1 is discounted the prosecution case remains with no pillar to hold it. Even if, for the sake of academic argument the evidence was to be taken along, as ably expounded by Ms. Nsana the testimonies were so riddled with contradictions that conviction ought not to have been sustained. For example, whereas PW1 claimed that after she had described her assailant to PW3 she remained at PW3's house with his children while PW3 went in pursuit of the appellant, PW3 himself claimed that PW1 went along with them in the hunt. We think this is such a material contradiction which goes to the root of the case in so far as credibility of witnesses is concerned, which gives us justification to interfere with the findings of fact by the two courts below.

Without having to linger on this matter, suffice it to say that we are settled in our minds that the appeal has been filed with sufficient cause for complaint. In the result we allow it. Conviction entered against Rashid Mtemi is quashed and sentence imposed upon him is set aside. We order his immediate release from prison unless otherwise lawfully held.

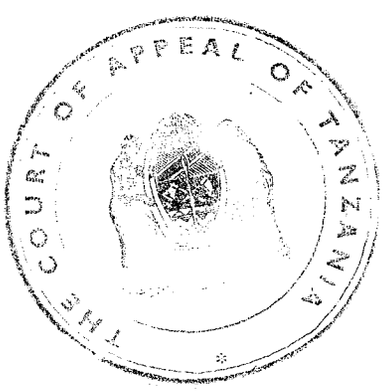
DATED at **DODOMA** this 27th Day of April 2016.

E. A. KILEO
JUSTICE OF APPEAL

K. K. ORIYO
JUSTICE OF APPEAL

I. H. JUMA
JUSTICE OF APPEAL

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



E. F. FUSSI
DEPUTY REGISTRAR
COURT OF APPEAL