IN THE COURT OF APPEAL OF TANZANIA
AT ARUSHA

(CORAM: MUSSA, J.A., MKUYE, J.A., And KITUSI, J.A.)

CRIMINAL APPEAL NO. 538 OF 2016

GADIEL EMMANUEL URIO .... APPELLANT

VERSUS

THE REPUBLIC .... RESPONDENT

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

(Massengi, J.)

dated 10th day of August, 2016
in
(Criminal Appeal No. 34 of 2016)

JUDGMENT OF THE COURT

6th & 13th December, 2019

MUSSA, J.A.:

In the Resident Magistrate's Court of Arusha, the appellant was arraigned for incest by males, contrary to section 158 (1) (a) of the Penal Code, Chapter 16 of the Laws (hereinafter referred to as "the Code").

The particulars of the offence were that on the 30th October 2014, at Nkoakirika area, within Arumeru District in Arusha Region, the appellant had prohibited carnal knowledge of her biological daughter aged 9. We have purposely disguised the name of the alleged victim whom we shall

henceforth identify by the acronym "PW1" which was adopted and used during the trial.

When the charge was read over and explained to the appellant at the commencement of the trial, he refuted the accusation, whereupon the prosecution lined up six (6) witnesses and a medical examination report (PF3) to establish its case. On his part, the appellant featured himself as a sole defence witness and, thereafter, he rested his case. We propose to briefly explore what was adduced in support of either cases.

To begin with, as soon as PW1 was introduced to the witness box, she held herself up as a 9 year old Christian and a pupil of St. Mary's school in Moshi. The trial court then made the following observation:-

> *"This court has interrogated the witness hereinabove and detected that she is capable of telling the truth of her questioning her of the effect of telling lies (sic) and replies to be on sin under the 10 commandments (sic) which she mentioned according to her belief as Christian so she shall deliver her evidence on unsworn manner (sic)."*

Unfortunately, details of the interrogation of the witness which was allegedly done by the presiding learned Resident Magistrate are not

posted upon the record of proceedings. We shall address this aspect of the proceedings at a later stage of our judgment.

Resuming our recapitulation of the prosecution version, in her unsworn evidence, PW1 re-affirmed the detail about being a pupil at St. Mary's School, Moshi. She further told the court that she is a second born daughter of the appellant and, speaking of the fateful occurrence, it is best if we should tape from her own words:-

> *"On that material day, he came home in the night and ordered me to lay boxes on the coach of three seats which has no cushioned (sic) and undressed my clothes and put oil at my vagina and inserted his penis at it and got pains injuries but he continued until in the morning when he heard cock crows he released me and told me to go to sleep at my bedroom with my young brother and threatened me not to tell others otherwise* ***ITAKULA KWANGU."***

The little girl disclosed that she experienced untold pains to the extent that, in the aftermath of the occurrence, she absconded from attending school for three days. She went to school on the fourth day

without wearing her underpants on account of the persisting pains. Her teacher, namely, Ancila Salim Palangyo (PW4) was apprehensive and promptly subjected her to a genital inspection. Upon inspection, PW4 noticed that PW1 had injuries on her vagina which also had a bad smell. When she was asked as to what happened, PW1 disclosed that she was ravished by her own father.

The disclosure was relayed to a ten-cell leader, namely, Noel Marko Sarakikya (PW5), Rose Robert (PW2), who is the victim's mother, and a woman police No. 2413 detective Corporal Stella (PW3) who initiated a police investigative report on the 6th November, 2014.

In her testimony, PW3 further informed the trial court that the appellant was arrested by civilians on the 7th November, 2014 and that upon being interrogated at the police station, he allegedly agreed to have raped his daughter due to drunkenness. We are, however, constrained to remark at once that despite this blank allegation by PW3, the prosecution did not, at all, adduce any written confession to that effect.

Upon PW3's initiation of a police report, PW1 was taken to Arumeru District Hospital where she was examined by Dr. Kaanael Joseph Ayo (PW6) and given treatment. In the upshot, PW6 adduced into evidence a PF3 (exhibit P1) into which he had allegedly posted the results of his

medical examination. The PF3 was admitted into evidence without demur from the appellant but it is noteworthy that the record does not indicate that its contents were read over in court upon admission. On account of the shortcoming, we are left with no viable option than to expunge the PF3 from the record of the evidence. The foregoing remark concludes the prosecution version which was told during the trial.

In response and, as we have hinted upon, the appellant featured himself as a sole witness, whereof he refuted each and every prosecution accusation. More particularly, the appellant told the trial court that he was arrested and implicated for rape on the 5th November, 2014 following which he was incarcerated in police and prison custodies for several days till when the accusation was dismissed for lack of evidence on the 13th April, 2015. Thereafter, the case resumed on the 28th April, 2015 when the charge giving rise to the appeal at hand was read over and explained to the appellant.

In a nutshell, the appellant completely disassociated himself from the prosecution accusation which, he said, was a sheer concoction of his wife (PW2) who had an intimate relationship with the chairperson of the village, presumably, of their locality.

On the whole of the evidence, the learned trial Resident Magistrate found credence as well as consistency in the version told by prosecution witnesses. The appellant's defence was considered but rejected for irrelevancy and, in the upshot, he was found guilty, convicted and sentenced to a prison term of thirty (30) years. His appeal to the High Court was dismissed in its entirety (Massengi, J.), hence the present second appeal which comprises three points of grievance, namely:-

"1. That, the trial court and the first appellate court erred in law and in fact in believing and acting on the evidence of PW1 which was received/taken without conducting a voire dire examination.

2. That, the first appellate court erred in law and in fact when it failed to evaluate and scrutinize the evidence of PW1, PW2, PW3, PW4, PW5 and PW6 and hence it arrived on an erroneous decision.

3. That the first appellate court erred in law and in fact when it failed to re-evaluate the evidence of PW1 (the victim) and hence arrived on an erroneous decision."

When the appeal was placed before us for hearing, the appellant was fending for himself, unrepresented, whereas the respondent Republic

had the services of Ms. Janeth Sekule, learned Senior State Attorney who was being assisted by Ms. Grace Madikenya, learned State Attorney.

Upon being asked to address the Court, the appellant fully adopted the memorandum of appeal as well as his list of authorities in which he sought reliance of the Code, the CPA Chapter 20 of the Laws, the Law of Evidence Act, Chapter 6 of the Laws (henceforth referred by the acronym "the TEA"), as well as the unreported Criminal Appeal No. 99 of 2002 – **Jafason Samwel v. The Republic.** In elaboration, the appellant submitted that the trial Magistrate's observation ahead of the reception of the testimony of PW1 fell short of a proper *voire dire* test, much as it is not indicated as to how the Magistrate was drawn into the finding he made. Consequently, the appellant urged us to discount the evidence of PW1 and, in the final event, he requested the Court to quash the conviction and set aside the sentence by allowing his appeal.

On her part, Ms. Sekule commenced her submission by resisting the appeal and fully supporting the conviction and the sentence meted out against the appellant. The learned Senior State Attorney, however, changed her stance after a brief dialogue with us pertaining to whether or not PW1's detail about the sexual intercourse with the appellant was materially corroborated. Ms. Sekule conceded that there was no

corroboration and, for that reason, she made a turnabout and fully supported the appeal.

Having heard the submissions from either side, we propose to approach the grounds of appeal generally. As we do so, we are constrained to preface our consideration of the appeal with the exposition of the law relating to the reception of the evidence of a child of tender age as it stood at the time of the appellant's trial. For a start, we, deem it opportune to reproduce the provisions of section 127 (1), (2) and (3) of the TEA as they then stood:-

> *"127. (1) Every person shall be competent to testify unless the court considers that he is incapable of understanding the questions put to him or of giving rational answers to those questions by reason of tender age, extreme old age, disease (whether or body or mind) or any other similar cause.*
>
> *(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.

(3) Notwithstanding any rule of law or practice to the contrary, but subject to the provisions of subsection (7), where evidence received by virtue of subsection (2) is given on behalf of the prosecution and is not corroborated by any other material evidence in support of it implicating the accused the court may, after warning itself of the danger of doing so, act on that evidence to convict the accused if it is fully satisfied that the child is telling the truth.

Over the years, this Court has persistently held that by virtue of the foregoing provisions, a duty is imposed on trial Magistrates or Judges to investigate whether or not a child witness knows the meaning of an oath so as to give evidence on oath or affirmation. If the child does not know the meaning of an oath or affirmation, then the presiding officer must investigate whether or not the child witness is possessed of sufficient intelligence and understands the duty of speaking the truth. If the finding

of the latter instance is in the affirmative, the child witness may give evidence though not on oath or affirmation (see, for instance, the decisions in **Dhahiri Ally v. R** [1989] TLR 27; **Sakila v. R** [1967] EA 403; **Kisiri Mwita Kisiri v. R** [1981] TLR 218 and; **Kibangeny v. R** [1959] EA 94).

Such investigation process was dubbed *voire dire examination* and, in the unreported Criminal Appeal No. 57 of 2010 – **Mohamed Sainyeye v. The Republic,** the Court laid down in detail the procedure for a *voire dire* examination test:-

"A. ON OATH

1. The magistrate Judge questions the child to ascertain.

(a) The age of the child.

(b) The religious belief of the child.

(c) Whether the child understands the nature of oath and its obligations, based upon his religious beliefs.

2. Magistrate makes a definite finding on these points on the case record, including an indication of the question asked and answers received.

3. If the court is satisfied from the investigation that the child understands the nature and obligations of an oath,

the child may then be sworn or affirmed and allowed to give evidence on oath.

4. *If the court is not satisfied that the child of tender age understands the nature and obligations of an oath he will not allow the child to be sworn or affirmed and will note this on the case record:*

(B) UNSWORN

1. *If the court finds that the child does not understand the nature of an oath, it must before allowing the child to give evidence determine through questioning the child* ***two things:***

   (a) *That the child is possessed of sufficient intelligence to justify the reception of the evidence,* ***AND***

   (b) *That the child understands the duty of speaking the truth. Again the findings of each point must be recorded on the record.*

C. IN CASE THE CHILD IS INCAPABLE TO MEET THE ABOVE TWO POINTS (A&B)

Court should indicate on the record and the child should not give evidence."

In determining whether or not the child witness understands the nature of an oath or affirmation and, conversely, whether or not he/she is possessed of sufficient intelligence, the presiding officer may put some questions to the child. As to whether or not the questions which were put and the answers given should form part of the record, the Court in **Jafason Samwel** (supra) observed thus:-

> *"How a voire dire test is conducted appears to be a matter of style. But recording questions and answers appears to be a better way because this enables even an appellate Court to know whether the questions asked and the answers given were such that an court of law would have come to the conclusion that the child understood the nature of an oath or was possessed of sufficient intelligence and understood the duty of speaking the truth."*

In the case at hand this was not done and, for that matter, we accept the appellant's criticism that the procedure adopted by the presiding Magistrate fell short of a proper *voire dire* test. Nevertheless, as was stated by the full bench of the Court in the landmark case of

Kimbute Otiniel v. The Republic, Criminal Appeal No. 300 of 2011 (CAT at Dar es Salaam) (unreported):-

> *"Where there is a misapplication by a trial court of section 127 (1) and/or 127 (2) the resulting evidence is to be 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 the burden of proof beyond reasonable doubt, continue to apply."*

But the Court additionally observed:-

> *"We readily agree with Mr. Pande and Professor Rutinwa that section 127 (7) only obviates the need for corroboration, direct or circumstantial where the evidence taken under section 127 (2) emanates from a properly conducted voire dire there under; however, it does not dispense with or remove the requirement of*

corroboration where the evidence taken originates from a misapplication or non-direction of section 127 (2)."

Thus, in the matter under consideration, we are minded to retain the testimony of PW1 but, much as she gave unsworn testimony, there was need for corroboration which, as conceded by the learned Senior State Attorney, is notoriously amiss. To this end, on account of that shortcoming alone, this appeal succeeds with a consequential order that the appellant's conviction and sentence are, respectively, quashed and set aside. The appellant is to be released from prison custody forthwith unless if he is held for some other lawful cause.

Order accordingly.

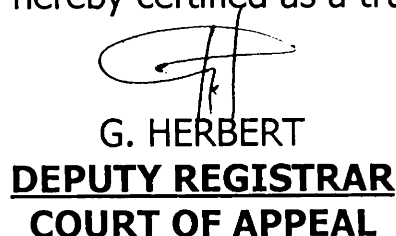
DATED at **ARUSHA** this 11th day of December, 2019.

K. M. MUSSA
JUSTICE OF APPEAL

R. K. MKUYE
JUSTICE OF APPEAL

I. P. KITUSI
JUSTICE OF APPEAL

The Ruling delivered this 13th day of December, 2019 in the presence of the Appellant in person and Mr. Felix Kwetukia, State Attorney for the Respondents/Republic is hereby certified as a true copy of the original.



G. HERBERT
DEPUTY REGISTRAR
COURT OF APPEAL