IN THE COURT OF APPEAL OF TANZANIA

AT SHINYANGA

(CORAM: MWARIJA, J.A., MWAMBEGELE, J.A., And KEREFU, J.A.)

CRIMINAL APPEAL NO. 226 OF 2017

SAMSON TWALA ..... APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

(Appeal from the Judgment of the High Court of Tanzania, at Shinyanga)

(Ruhangisa, J.)

dated the 17th day of February, 2017
in
DC. Criminal Appeal No. 49 of 2016

.....

JUDGMENT OF THE COURT

24th & 28th August, 2020

MWARIJA, J.A.:

In the District Court of Maswa, the appellant, Samson Twala was charged with the offence of incest by male contrary to s. 158 (a) of the Penal Code [Cap. 16 R.E. 2002]. It was alleged that on 29/9/2011 at about 20:00 hrs at Mwafumbuka Village within Maswa District in Shinyanga Region, the appellant had unlawful sexual intercourse with her daughter, a girl child aged 14 years who, for the purpose of disguising his identity shall be referred to as "NS" or simply "the child."

The appellant denied the charge and thus the case had to proceed to trial whereby three witnesses were called by the prosecution. As for the appellant, he relied on his own evidence in defence. Having heard the evidence from both parties, the learned Senior District Magistrate found that the prosecution had proved its case beyond reasonable doubt. He thus convicted and sentenced the appellant to an imprisonment term of thirty years. Aggrieved by the decision of the District Court, the appellant appealed to the High Court. His appeal was unsuccessful hence this second appeal.

The background facts of the case are not complicated. The appellant was, until the material time of the incident leading to his arraignment, living with his daughter, NS and his other children. He had, at that time, separated with his wife Sado Dwese (PW2). On 1/10/2011 at about 10:30 a.m. while at her mother's home where he resided after separating with the appellant, PW2 was visited by her daughter, NS. and complained that during the night time on that date, the appellant called her into his room and raped her. PW2 decided to inform his uncle about the complaint. She was advised to take the child to a Dispensary known as Zebeya for medical examination. She heeded to the advice and after the child had been examined, PW2 reported the incident to the Village Executive Officer,

Mwabadimi who instructed the members of peoples' militia (Sungusungu) to arrest and send the appellant to Maswa police station. He was later charged as stated above.

In her evidence, PW2 testified that after the incident had been reported to the police, the child was issued with a PF3 so as to be taken to Maswa Government Hospital for further medical examination. She testified further that the result of the examination showed that the child was raped.

The prosecution relied also on the evidence of the child who testified as PW1 and No. E 9187 D/C Enock Robert Mogela (PW3). However, with regard to PW1, the trial court took her evidence on affirmation without having first, conducted a *voire dire* test on her. On his part, PW3 testified on the events which took place after the appellant had been taken to the police station. According to his evidence, he interrogated the appellant and later on, recorded PW1's statement.

In his defence, the appellant who testified as DW1, told the trial court that on 1/10/2011 he was summoned before the Sungusungu Commander of his village. When he appeared before him on that date at about 2:00 p.m., one Malyeta Mungo was called to inform the appellant of the offence which he was being suspected to have committed. He was told

that he raped PW1, the allegation which he denied. His denial notwithstanding, he said, he was taken to police station where the charge against him was preferred.

In its decision, the trial court acted on the testimony of PW1 and found that the charge against the appellant was sufficiently proved. The learned Senior District Magistrate found the evidence of PW1 to be creditworthy. He was satisfied that her evidence as supported by the PF3 which was tendered by her and admitted in evidence as exhibit P1, proved that she was carnally known by the appellant.

On appeal, the learned first appellate Judge re-evaluated the evidence and came to the conclusion that PW1 was a credible witness whose evidence established that she was carnally known by the appellant. He also found that the appellant's defence did not raise any reasonable doubt against the evidence of the three prosecution witnesses.

In this appeal, the appellant has raised five grounds of his dissatisfaction with the decision of the first appellate court. The grounds as paraphrased, are as follows:-

1. That, the trial of the appellant on the offence charged was defective for want of the consent of the DPP.

2. That, the first appellate Judge erred in law in upholding the decision of the trial court based on the evidence of PW1 which is invalid for having been taken without a *voire dire* test.

3. That, the first appellate Judge erred in law and fact in relying on the evidence of a medical report while the appellant was not informed of his right to require that the person who made it be summoned for cross-examination.

4. That, the learned first appellate Judge erred in law in upholding the decision of the trial court which was based on contradictory evidence, which evidence was at variance with the charge.

5. That, the learned first appellate Judge erred in law and fact in failing to find that the appellant's defence raised reasonable doubt against the prosecution case.

On 24/8/2020 when the appeal was called on for hearing, the appellant appeared in person, unrepresented, through video conferencing linked to Shinyanga District Prison. On its part, the respondent Republic was represented by Mr. Tumaini Kweka, learned Principal State Attorney assisted by Ms. Caroline Mushi, learned State Attorney.

When he was called upon to argue his appeal, the appellant preferred to let the respondent submit in reply to his grounds of appeal and thereafter make a rejoinder if necessary.

Responding to the appellant's grounds of appeal, at the outset, Ms. Mushi expressed the respondent's stance that it was conceding to the appeal, basically, on the second and third grounds of appeal.

With regard to the second ground, the learned State Attorney submitted that, since PW1 was aged fourteen years hence a child of tender age, her evidence ought to have been taken after the trial court had conducted a *voire dire* on her as required under s. 127 (1) and (2) of the Evidence Act [Cap. 6 R.E. 2002] (the Evidence Act) before it was amended by the Written Laws (Miscellaneous Amendments) (No. 2) Act, No. 4 of 2016. The learned State Attorney argued further that because there was a complete omission to conduct *voire dire,* test, that evidence should be discounted. She cited the case of **Kimbute Otiniel v. Republic**, Criminal Appeal No. 300 of 2011 (unreported) to bolster her submission. When the evidence of PW1 is discounted, Ms. Mushi argued, what remains to be considered is the evidence of PW2 and PW3. According to her submission

however, that evidence is not sufficient to prove the case against the appellant. In the circumstances, she prayed that the appeal be allowed.

In his rejoinder, the appellant did not have much to state other than supporting the submission made by the learned State Attorney. He urged us to allow his appeal and release him from prison where, he said, had been for about eleven years.

Having considered the submissions by the parties, we agree with the learned State Attorney that the second ground of appeal raised by the appellant has merit. According to the record at page 6, the evidence of PW1 was taken on affirmation. However, the trial magistrate did not conduct *voire dire* test to ascertain that the witness understood the nature of oath. The legal requirement of conducting *voire dire* test before the evidence of a child of tender age is received by the court was aptly stated in the case of **Jonas Raphael v. Republic**, Criminal Appeal No. 42 of 2003. In that case, the Court stated as follows:-

> *"This provision of the law [s. 127 (2) of the Evidence Act] imposes on the presiding magistrate or judge, when confronted with a child of tender years as a witness a duty to investigate in order to satisfy himself whether that child understands the*

nature of an oath. If his investigation reveals that he does not understand the nature of an oath, then he must investigate to ascertain himself whether, in his opinion, (a) the said child is possessed of sufficient intelligence to justify the reception of his evidence and (b) understands the duty of speaking the truth. If his finding is in the positive, he can then receive his evidence."

As submitted by the learned State Attorney, the effect of a complete omission to comply with s. 27 (1) and (2) of the Evidence Act is to render the evidence of a child of tender age invalid. In the case of **Kimbute Otiniel** (supra) cited by Ms. Mushi, the Court stated as follows as regard the omission:-

"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."

Given the above stated reasons, both the trial court and the High Court erred in acting on the evidence of PW1 to found the appellant's conviction. The evidence ought to have been discounted.

In the circumstances, what remains of the prosecution evidence is the testimony of PW2 and PW3. Whereas PW2 testified on what she was told by PW1, PW3 gave evidence on the events which took place after the complaint which led to the appellant's arrest. Obviously, the evidence of the said two witnesses cannot sustain the appellant's conviction.

It is noteworthy that in his judgment at page 34 of the record, the learned first appellate Judge expressed that, in her evidence, PW2 testified that she inspected PW1's private parts before being taken to a nearby Dispensary for medical examination. With due respect however, nowhere in her evidence, which is at page 8 of the record, did PW2 state so. In the absence of such evidence or that of a medical report, the charge remained unproved. The PF3, which both the trial court and the High Court relied upon in finding that PW1 was carnally known, was tendered by PW1 whose evidence has been discounted.

The above being the position, there is no gainsaying that the prosecution evidence was deficient to support the charge levelled against the appellant. Having so found and since that finding on the second ground of appeal suffices to dispose of the appeal, the need for us to consider the other grounds does not arise.

On the basis of the foregoing reasons, we agree with the learned State Attorney that the appeal has merit. In the event, we allow it. The appellant's conviction is quashed and the sentence imposed on him by the trial court and upheld by the High Court, is set aside. He should be released from prison forthwith unless he is otherwise lawfully held.

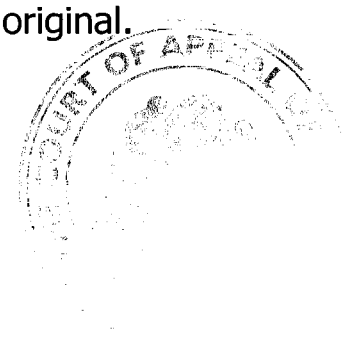
DATED at **SHINYANGA** this 28th day of August, 2020.

A. G. MWARIJA
JUSTICE OF APPEAL

J. C. M. MWAMBEGELE
JUSTICE OF APPEAL

R. J. KEREFU
JUSTICE OF APPEAL

The judgment delivered this 28th day of August 2020, in the Presence of the Appellant in person via video link and Mr. Jukael Reuben Jairo, learned State Attorney for the Respondent, is hereby certified as a true copy of the original.



E. G. MRANGU
DEPUTY REGISTRAR
COURT OF APPEAL