IN THE COURT OF APPEAL OF TANZANIA
AT TABORA

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

CRIMINAL APPEAL NO. 521 OF 2016

SOUD SEIF.....APPELLANT

VERSUS

THE REPUBLIC.....RESPONDENT

(Appeal from the Judgment of the High Court of Tanzania at Tabora)

(Mallaba, J.)

dated the 24th day of October, 2016
in
(DC) Criminal Appeal No. 202 of 2015

JUDGMENT OF THE COURT

08th & 12th May, 2020

KEREFU, J.A.:

In the District Court of Igunga at Igunga, the appellant was charged with four counts. Two counts were on rape and the other two were on unnatural offences contrary to sections 130(1)(2)(e), 131(1) and 154(1)(a) of the Penal Code, [Cap. 16 R.E. 2019] (the Penal Code), respectively. The appellant was convicted on all four counts and sentenced to life imprisonment for each of the counts.

It was alleged that, between April to 16th June, 2014 at about 10:00hrs and 16:00hrs at Igurubi Village within Igunga District in Tabora

Region, the appellant had sexual intercourse and carnal knowledge against the order of nature to a six (6) and nine (9) years old girls, respectively. To disguise the identities, we shall henceforth refer to them as *'ABC'* and *'XYZ'* or simply *'PW1'* and *'PW2',* respectively as accorded to them by the trial court.

The appellant denied the charge laid against him, whereupon the prosecution featured six (6) witnesses and two medical examination reports which were admitted in evidence as exhibits P1 and P2. ABC (PW1) whose evidence was taken after the *voire dire* examination, testified that she knew the appellant as Babu Sudi who used to sell baobab products (ubuyu). PW1 further testified that, the appellant used to call her with her friends to his home to receive and eat ubuyu. One day the appellant undressed her and inserted his penis into her vagina and anus. She added that, the appellant used to give her TZS 500.00 as gifts and warned her not to tell anyone. However, PW1 said, she disclosed the ordeal to her mother.

On her part, XYZ (PW2), whose evidence was also taken after *voire dire* examination, testified that sometimes in April 2014 the appellant had sexual intercourse and a carnal knowledge of her against the order of

nature. PW2 further told the trial court that, the appellant did those wrongful acts five times within two months, though the same were discovered in June 2014. Sharifa Rashid (PW3), the grandmother of PW1 testified that, on 16th June, 2014 she found PW1 at home crying and told her that she was injured by the appellant in her vagina and anus. She added that she inspected PW1's private parts and found sperms in her vagina and anus. Later in the evening, PW3 informed the father of PW1 about the incident. PW1's father reported the matter to the police where the PF3 was issued by F. 5505 D/C Wenzeslaus (PW5) and PW1 was taken to the hospital for medical examination.

Johari Shija (PW4) the mother of PW2 told the trial court that, on 16th June, 2014 at 10:00hrs she heard a child crying. She went to the scene where she found PW1 crying and took her to PW3. PW4 narrated on how PW1 told them that she was sexually assaulted by the appellant. PW3 and PW4 inspected PW1 and found that she was molested. PW4 also testified that, PW1 told them that PW2 was also sexually assaulted by the appellant. PW4 inquired PW2 who admitted that she was sexually assaulted five times on different days. PW4 inspected PW2 and reported the matter to the police and PW2 was also taken to the hospital for examination. At

the Igunga District Hospital, PW1 and PW2 were examined and treated by Dr. Fares Magungambula (PW6) on 18th June, 2014. PW6 recorded his findings in Police Forms Number 3 (PF3) which were admitted in evidence as exhibits P1 and P2, respectively.

In his defense, the appellant testified on his own behalf and called no any witness. He completely denied to have committed the alleged offences. He highly disputed the evidence of PW1 and PW2 that they were fabricated. He as well challenged the testimonies of PW3 and PW4 to be hearsay and contradictory. He complained that, the case was framed up against him due to previous disputes between him and PW3's family which started in 1998.

After a full trial, the trial court accepted the version of prosecution's case and the appellant was convicted and sentenced as indicated above. Aggrieved, the appellant appealed to the High Court where his appeal was partly allowed as his sentence was reduced to 30 years' imprisonment. Still protesting his innocence, the appellant is before this Court on a second appeal. In this Court, the appellant has lodged two separate Memoranda of Appeal raising a total of eleven (11) grounds. However, for reasons to be apparent in due course, we shall not reproduce the said grounds herein.

At the hearing of the appeal, the appellant appeared in person without legal representation while the respondent Republic had the services of Ms. Upendo Malulu, learned Senior State Attorney. When the appellant was given an opportunity to elaborate on his grounds of appeal, he decided to hear first the respondent's reply to his grounds with the option of making a rejoinder if the need to do so would arise.

Responding to the grounds of Appeal, Ms. Malulu, at the outset, declared her stance of supporting the appeal and she intimated that she will only argue the fifth ground of appeal, which according to her, if upheld disposes of the appeal. The said ground can be summarized as follows:-

> *That, the first appellate court erred in law by failure to take into account that the voire dire tests on PW1 and PW2 were conducted contrary to the law.*

Ms. Malulu, conceded to the appellant's contention that the evidence of PW1 and PW2 was taken contrary to the requirement of the law. To verify her position, she referred us to pages 14 and 16 of the record of appeal and argued that, in conducting the *voire dire* to PW1 and PW2, the trial Magistrate only recorded the answers without indicating the questions posed to those witnesses to enable the Court to determine their

competence to testify. She argued that, due to that omission, the testimonies of PW1 and PW2 cannot be relied upon. It was her strong contention that, it was wrong for the trial court to rely on such evidence to convict the appellant. To buttress her position, she cited the case of **Mohamed Sainyeye v. Republic,** Criminal Appeal No. 57 of 2010 and prayed for the testimonies of PW1 and PW2 to be expunged from the record.

She then argued that, if the testimonies of PW1 and PW2 are expunged from the record the remaining evidence cannot sustain the appellant's conviction. She said, the testimonies of PW3 and PW4 are tainted with contradictions which raise doubts that should be determined in favour of the appellant. As for the testimonies of PW5 and PW6, Ms. Malulu said, the same cannot prove the offence against the appellant. In conclusion, she urged us to allow the appeal and set the appellant free.

Upon being probed by the Court as whether the appellant's defence was properly considered by the courts below, Ms. Malulu submitted that the appellant's defence was not properly considered by both courts.

In rejoinder, the appellant welcomed the stance taken by Ms. Malulu to support the appeal. He thus urged us to allow his appeal and order his release from prison.

On our part, having carefully considered the grounds of complaint and the submissions made by the parties, we wish to begin our consideration of the appeal by addressing the point of law raised in the fifth ground of appeal concerning the *voire dire* tests conducted to PW1 and PW2 as raised by the appellant and supported by Ms. Malulu. It is an undisputable fact that at the time of giving their testimonies before the trial court on 22nd September, 2014 and 6th October, 2014 both PW1 and PW2 were children of tender age i.e six and nine years old, respectively. It is also not in dispute that when conducting the *voire dire* tests to them, the trial Magistrate did not record the questions he posed to them, but only indicted their answers. According to Ms. Malulu this was a fatal irregularity which render such evidence invalid.

It is noteworthy that, testimonies of PW1 and PW2 were taken prior to the amendment of section 127 (2) of the Evidence Act, Cap. 6 R.E. 2002 (the Evidence Act) in 2016 vide Act No. 4 of 2016. Section 127 (2) of the Evidence Act, prior to the said amendment, required the trial Judge or

Magistrate who conducts *voire dire* test to indicate whether the child of a tender age understands the nature of oath and the duty of telling the truth; and if he/she possessed of sufficient intelligence to justify the reception of his/her evidence. Section 127 (2) provided that:-

> *"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."*

The above position was reiterated in **Mohamed Sainyeye** (supra) cited to us by Ms. Malulu, where the Court at page 8 cited **Hassan Hatibu v. Republic,** Criminal Appeal No. 71 of 2002 (unreported) where the Court stated that:-

> *"From these provisions, it is important for the trial judge or magistrate when the witness involved is a child of tender age to conduct a voire dire examination. This is done in order for the trial judge or magistrate to satisfy himself that the child understands the nature of oath. If in the opinion of the trial judge or magistrate, to be*

recorded in the proceedings, the child does not understand the nature of an oath but is possessed of sufficient intelligence and the witness understands the duty of speaking the truth, such evidence may be received though not upon oath or affirmation..."

See also the cases of **Nguza Vikings @ Babu Seya and Three Others v. Republic,** Criminal Appeal No. 56 of 2005 and **Khamis Samuel v. Republic,** Criminal Appeal No. 320 of 2010.

Following the above authorities, it is clear that the purpose of conducting a *voire dire* test is to determine the competence of a child of tender age to testify in terms of his intelligence to understand questions put forward to him/her and give rational answers to determine as whether he/she understands the nature of oath. Thus, if he understands the nature of oath and duty of speaking the truth his evidence will be taken under oath, otherwise his evidence can be taken without oath and will require corroboration before it is relied upon to convict the accused. On that account, we agree with Ms. Malulu that, in the case at hand, the trial Magistrate while conducting the *voire dire* was supposed to indicate the nature of questions posed to PW1 and PW2 to appreciate the rational answers given by them.

We are however unable to agree with her that non-compliance with *voire dire* procedures rendered the evidence of PW1 and PW2 invalid and liable to be expunged. The position of the law on the effect of failure to comply with the procedure for conducting *voire dire* examination was considered in the case of **Jafari Mohamed v. Republic,** Criminal Appeal No. 112 of 2006 where the Court stated that:-

> *"...before receiving evidence of a witness of tender age, the trial court must ascertain that the child is possessed of sufficient intelligence to justify the reception of the evidence and whether the witness understands the duty of speaking the truth.* ***This must be done by recording the questions and answers session conducted on the child witness.*** *It is only then the trial court should proceed to determine whether the evidence should be received on oath or without oath. For the failure to comply with the procedure for conducting 'voire dire' examination properly,* ***the issues before us is what would be the effect of the omission?*** *Fortunately, this is an issue which need not detain us. As correctly pointed out by both learned counsel for the appellants and the learned Principal State Attorney,* ***the position of law is settled. The omission brings such evidence to a level of***

> ***unsworn evidence of a child which requires corroboration.*** *See cases of* ***Kisiri Mwita v. R*** *(1981) TLR 218,* ***Dhahiri Ally v. R*** *(1989) TLR 27,* ***Deema Daati and Two Others v. R,*** *CAT Criminal Appeal No. 50 of 1994 and* ***Henjewele*** *(supra). In this respect the learned Judge on first appeal was right to say that noncompliance with the procedure for conducting 'voire dire' does not vitiate the proceedings." [Emphasis added].*

In the case of **Kimbute Otiniel v. Republic,** Criminal Appeal No. 300 of 2011 (unreported) the full bench endorsed the above position by stating that, improper conduct of *voire dire* test only reduces the testimony of the victim to unsworn evidence which requires corroboration before it can be relied upon to convict the appellant. In the event, we decline the invitation extended to us by Ms. Malulu to expunge the testimonies of PW1 and PW2 from the record of appeal. Thus, the next question for our determination is whether there was evidence on record to corroborate the unsworn testimonies of PW1 and PW2 to prove the case against the appellant. To determine the said question, we shall revisit the testimonies of the prosecution witnesses.

PW1 was not consistent in her evidence as she made contradictory versions of her story. **First,** in her examination in chief and cross-examination, PW1 said that, she used to go to the appellant's house with her friends but when the offence was committed she was alone and she also went home alone quietly. **Secondly**, in re-examination, PW1 changed her story by saying that when the offence was committed two people arrived at the appellant's house, though she did not mention the said people. Again, PW2's testimony was silent as she never mentioned anywhere that she used to go to the appellant's house with PW1. PW2 also in her examination-in-chief did not mention the specific date when the offence was committed and she only testified that she was sexually assaulted five times within two months by the appellant though the act was disclosed in June 2014. In re-examination, PW2 said that the appellant had no dispute with her parents. It is therefore our considered opinion that PW1 and PW2 were unreliable witnesses.

The testimonies of PW3 and PW4 are also tainted with inconsistencies and did not corroborate the testimonies of PW1 and PW2. For instance, though PW3 testified that on 16th June, 2014 she found PW1 at home crying and that she examined her alone, PW4 testified to the contrary that,

on the same date she heard a child crying and when she went to the scene of crime she found PW1 crying and took her to PW3 where they (PW3 and PW4) examined her together and found that she was molested. This also contradicted the testimony of PW1 who said that, after the incident she went home alone and disclosed the ordeal to her mother. PW4 also testified that it was PW1 who told them that PW2 was also sexually assaulted by the appellant, though PW1 was silent on this fact.

In our view, the above pointed out contradictions go to the root of the matter and therefore the evidence of PW3 and PW4 cannot be used to corroborate the evidence of PW1 and PW2. Similarly, the evidence of PW5 and PW6 cannot be acted upon as corroborative evidence because the same did not implicate the appellant to have committed the offence charged.

Notwithstanding the above finding, we find that there was another serious omission by the trial court as regards the appellant's defence. We are in agreement with Ms. Malulu that the trial court did not properly consider the appellant's defence evidence. In his defence, among others the appellant complained that this case was framed up by the PW3's family due to the existing family dispute which started since 1989. It is on record

that all other witnesses also testified on this fact denying existence of such grudges prior to the time of filing of the complaint against the appellant. However, in its seven-page judgement, the trial court apart from briefly summarizing the appellant's evidence at page 41 and 42 of the record of appeal, did neither consider nor analyzed that part of evidence; it was simply ignored. The effect of failure to consider the defence case has been emphasized by the Court in numerous decisions including; **Hussein Idd and Another v. Republic** [1986] TLR 166, **Alfeo Valentino v. Republic,** Criminal Appeal No. 92 of 2006 and **Yasin Mwakapala v. Republic,** Criminal Appeal No. 604 of 2015 (both unreported). In all these cases, having held that the lower courts did not consider the appellant's defence, the Court found the convictions unsafe and proceeded to allow the appeal. Specifically, in **Alfeo Velentino** (supra) the Court stated that:-

> *"...failure by a trial court to fully consider a defence...as a whole, is a serious error. We are settled in our mind, therefore, that the trial court fatally erred in not considering the entire defence before finding the appellant guilty."*

In the case at hand, the trial court did not properly consider the defence of the appellant. Moreover, the first appellate court fell into the

same trap of not re-evaluating the whole evidence adduced by the appellant at the trial and make its own conclusion. In **Prince Charles Junior v. Republic,** Criminal Appeal No. 250 of 2014 (unreported) the Court stated that:

> *"With due respect, this is not how, a first appellate court should have dealt with such a complaint. As directed in PANDYA's case (supra) in a first appeal, the first appellate court should have treated the evidence as a whole to a fresh and exhaustive scrutiny which the appellant was entitled to expect.* ***It was therefore expected of the first appellate court, not only to summarize but also to objectively evaluate the gist and value of the defence evidence, and weigh it against the prosecution case. This is what evaluation is all about.*** *(See Leonard Mwanashoka v. Republic, Criminal Appeal No. 226 of 2014 (unreported)." [Emphasis added].*

Likewise, in this case, since the appellant's defence was not properly considered by the courts below, the omission would have sufficed to vitiate the appellant's conviction.

Consequently, we allow the appeal, quash the conviction and set aside the sentence imposed on the appellant. We, accordingly, order that

the appellant be set at liberty forthwith unless he is held for some other lawful cause.

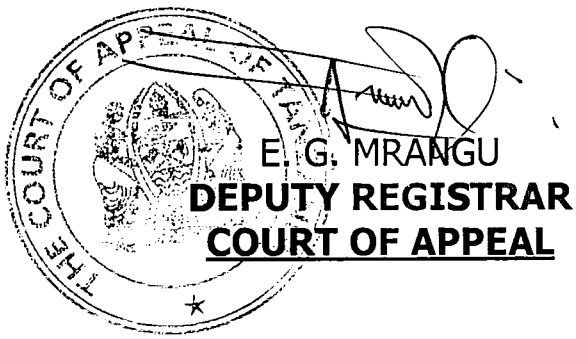
DATED at **TABORA** this 11th day of May, 2020.

A. G. MWARIJA
JUSTICE OF APPEAL

M. A. KWARIKO
JUSTICE OF APPEAL

R. J. KEREFU
JUSTICE OF APPEAL

The Judgment delivered this 12th day of May, 2020 in the presence of the appellant via video conference and Ms. Gladness Senya, learned State Attorney for the respondent/Republic, is hereby certified as a true copy of the original.



E. G. MRANGU
DEPUTY REGISTRAR
COURT OF APPEAL