IN THE HIGH COURT OF TANZANIA

AT DAR ES SALAAM

CRIMINAL APPEAL NO. 81 OF 2005

(Originating from Bagamoyo District Magistrate

Cr. Case No. 178 of 2004)

JUMA MOHAMED ..... APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

Date of last Order: 03/04/2006
Date of Judgment : 12/06/2006.

JUDGMENT.

Mlay, J

The appellant was charged with and convicted of one count of committing an Unnatural Offence c/s 154 of the Penal Code, Cap 16 of the Laws and was sentenced to 30 years imprisonment of corporal punishment of (12) twelve strokes.

Being aggrieved the appellant has appealed to this court on the following grounds:

1) *That the trial magistrate erred to convict the appellant relying on the PF3 without calling the medical doctor.*

2) *That the trial magistrate erred in law in not conducting a vore dire as required by the mandatory provisions of section 127 (a) the evidence Act 1967.*

3) *That the trial magistrate erred in law in sentencing the appellant being of the age of 17 years to imprisonment are without regard to the provisions of section 22 (2) of the Children and Young Persons Act, Cap 13 RE 2002.*

4) *The trial magistrate erred in not holding the trial in CAMERA as required under section 3 (5) of Cap 13.*

5) *That the trial magistrate erred in not evaluating the evidence of PW1 clesely and in not considering that no information of the alleged incident was given to the village authorities and failure to call other witnesses who respondent to the alarm raise by PW1.*

At the hearing of the appeal the appellant adopted the contents of his memorandum of appeal. Miss Itemba the learned State Attorney who appeared for the Republic supported the conviction. On the first ground Ms Itemba submitted that the PF3 being challenged was admitted under section 240 (3) of the Criminal Procedure Act, which does not make it mandatory to call the medical Doctor, unless there is a conflict in the medical evidence or the accused asked for the medical doctor to be called. On the second ground that the trial magistrate failed to conduct a ***vore dire,*** Ms. Itemba submitted that section 127 (1) allows the court to receive the

evidence of a child of tender years, if it can be believed. She submitted that the evidence of the child PW2 was believed and it was also corroborated by the evidence of PW1. As regard ground No. 3, the learned State Attorney submitted that as the appellant was aged 17 years at the time of trial, the provisions of Cap. 13 did not apply to this case in sentencing.

As for ground 4, Ms. Itemba submitted the appellant was 17 years old so the proceedings did not need to be conducted ***in camera*** pursuant to Cap. 13. For the 5th ground in which the appellant has complained that no other witnesses was called other than PW1 and PW2, Ms. Itemba submitted that in law, there is no specific number of witnesses required to adduce evidence. She referred to the case of YOHANNES MSINGWA (1990) TLR 150.

In reply, the appellant submitted that he wanted to ask the doctor questions but the trial magistrate did not call the medical witness.

The record of the proceedings and the judgment of the trial court show that the prosecution called three witnesses to make their case against the appellant. PW1 was ASHA RAMADHANI, the grandmother of the victim of the alleged sodomy ASHA SAID, who was aged 5 years and who testified as PW2.

The proceedings show that although PW2 ASHA RAMADHANI was 5 years old, the trial magistrate received her unsworn evidence, without first conducting a ***vore dire***. This is the subject of the second ground of appeal. Section 127 of the Envidence Act states in substance (1) as follows:

> *"(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 ..... or any similar cause".*

Subsection (2) of the same section provides:

> *(2) Where in any criminal cause or matter a child of tender age is called as 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 of the court which opinion shall be recorded in the proceeding, he is possessed of sufficient intelligence to justify the reception of his evidence, and understands the duty to speak the truth".*

Reading of the provisions of subsections (1) and (2) of section 127 of the Evidence Act together, it is clear to me that before receivig the evidence of a child of tender years, ***vore dire*** must be conducted to establish if the child of tender years understand the nature of an oath and if the witness does not, the court must satisfy itself that the witness is possessed of sufficient intelligence to justify the reception of the evidence not on oath and the opinion of the court must be recorded.

In the present case, the trial magistrate proceeded straight to receive the evidence of PW2 who is a child of tender years, without conducting a ***vore dire*** and also without recording the opinion of the court as to whether the witness was or was not possessed of sufficient intelligence to justify the reception of the evidence of the witness. The learned State Attorney has argued that the evidence of child of tender years is otherwise admissible under subsection 5 of section 127 which provides:

> *"(7) Notwithstanding the preceeding provisions of this section, when in criminal proceedings involving sexual offence the only independent evidence is that of a child of tender years or of a victim of the sexual offence, the court shall receive the evidence and may after assessing*

the credibility of the evidence of the child of tender years or as the case may be, the victim of the sexual offence in its own merits, not withstand that the evidence is not corroborated, proceed to convict if for reasons to be recorded in the proceedings the court is satisfied that the child of tender years or the victim of the sexual offence is telling nothing but the truth".

The provisions of subsection (7) allows the court to receive on the evidence of a child of tender years or of the victim of a sexual offence and after assessing it credibility, notwithstanding that such enduce is not corroborated, may proceed the convict on it if the court is satisfied that the child of tender years or the victim of sexual offence is telling nothing but the truth. I do not think that the provisions of subsection (7) dispense with the need to conduct a ***vore dire*** under subsection (2) of section 127 of the Evidence Act. To say otherwise, is to render meaningless the qualification contained in subsection (7) itself, that conviction can only proceeded upon if for reasons to be recorded in the proceedings, the court is satisfied that a child of tender years is telling nothing but the truth. This qualification emphasizes the need for, rather than being the reason for dispensing with, the requirement of conducting a ***vore dire.*** In the present case, the evidence of the child of tender years was not the only evidence. The was the evidence of PW1 who came upon the

scene and found the accused in the act of sodomy upon the victim PW2. PW1 is the grandmother of both PW2 and the appellant and there is no reason why she should victimize the appellant. PW1 testified that when she found the appellant in the act, the appellant ran away and because she was old, (The record shows that PW1 was 70 years old), she was unable to arrest the appellant at the sport. The evidence of PW1 was corroborated by the PF3 in which the practitioner who examined PW2, confirmed that she had *"**anal bruize**"* which as seen *"**below the orifice.***

The appellant has challenged the admission of the PF3 on grounds that the medical doctor was not called to give evidence. The learned State Attorney has submitted that such 240 of the Criminal Procedure Act Cap 20 does not make mandatory provisions to call the medical practitioner.

The section provides:

> *"240- (1) In any trial before a subordinate Court, any document purporting to be a report signed by a medical witness up0on purely medical or surgical matter shall be receivable in evidence..".*

Subsection (3) however, provides as follows:

> *"(3) where a report referred to in this section is received in evidence the court may if it thinks fit, and shall, if so required by the accused or his advocate, summon and examine or make available for cross examination the person who made the report, and the court shall in for the accused of his right to require the person who made the report to be summonsed in accordance with the provisions of this section".*

Although it is not mandatory for a medical practitioner to be called unless the accused or his advocate requires the practitioner be called for cross examination, it is mandatory for the court to inform the accused of his ought to have the medical practitioner to be called for cross examination. The proceedings show that the trial magistrate did not comply with this mandatory provisions.

In the circumstances of this case and considering the evidence of PW1, I do not think that these irregulaties issuing from failure to conduct a ***vore dire*** and also the failure to inform the accused of his right to have the medical doctor to be summoned, can be cured under section 388 of the Criminal Procedure Act 1984. I would therefore

allow the appeal on the 1st and 2nd grounds and quash the conviction and set aside the sentence, on account of the above irregularities.

As for the remaining grounds, I do not think they have any merit. The appellant was 17 years of age as conceded by himself in the memorandum of appeal and as stated in the proceeding.

The provisions of Cap. 13 did not therefore apply to him. He could therefore properly be convicted and sentenced to imprisonment without regard to the provisions of Cap 13. As for sentencing, Section 154 (2) provides that, ***"where the offence under Sub section (1) of this section is committed to a child of under the age of ten years the offender shall be sentenced to life imprisonment".***

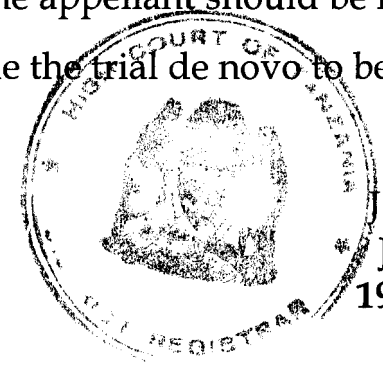
Section 160A of the Penal Code as amended by Act 4 of 1998, provides that, where a person a convicted of any sexual offence specified under Chapter XV, as amended by the Sexual offences Act (Special Provisions) Act, the Court shall sentenced such person to imprisonment for a term prescribed under the chapter.

The offence of ***"Unnatural offence"*** under section 154 (1) is under Chapter XV of the Penal Code as so amended, and the prescribed sentence for that offence in the circumstances of this case, is life imprisonment, because the victim was a child under the age of ten years.

The appellant was therefore properly sentenced to imprisonment, but the sentence of 30 years was unlawful, because the victim was aged 5 years, However, as this court has set a side the sentenced for reasons of the other irregularities, nothing more needs to be said about the matter.

In the final analysis and for reasons given above, this appeal is allowed and the conviction is quashed and the sentence set aside. It is ordered that the trial be conducted de novo before another magistrate.

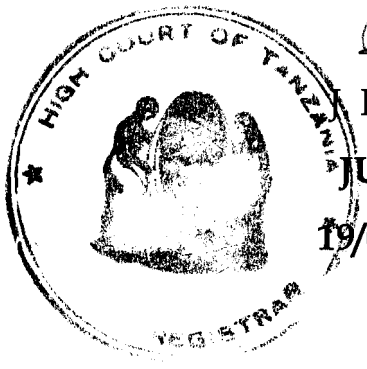
The appellant should be released in to the custody of the police to enable the trial de novo to be conducted.



J. I. Mlay,
JUDGE,
19/06/2006.

Delivered in the presence of the accused and Mr. Njole state Attorney this 19th day of June 2006.

Rights of Appeal is explained.



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