IN THE HIGH COURT OF TANZANIA

AT TANGA

DC. CRIMINAL APPEAL NO.28 OF 2008

(Originating from Criminal case No.16/2006 of Tanga District Court)

SIMON PETER.....APPELLANT

VERSUS

THE REPUBLIC.....RESPONDENT

10/11/08 & 13/3/09

JUDGMENT

Mussa, J;

This appeal arises from Criminal Appeal No.16 of 2006 instituted in the District Court of Tanga. The appellant was arraigned there rape, contrary to section 130(1)(2) of the penal code, chapter 16 of the laws. The particulars were that on the 8th day of January, 2006 at Mwamboni area, Tanga city, the appellant had sexual intercourse with one Swabra Yunus, an infant aged three years. The appellant denied the accusation but; upon full enquiry, he was found guilty, convicted and sentrenced to thirty years imprisonment. He now appeals upon a petition comprised of two grounds through the services of Mr. Akaro, learned advocate. The Republic was represented by Mr. Samwel who declined to support the conviction and sentence.

It is, perhaps, well worth mentioning that the proceedings were presided over by two Magistrates in succession. They were begun by

M.W. Shonga, Resident Magistrate, before whom were presented; the entire case for the prosecution and; a portion of the defence case comprised of the appellants' sworn statement. Then, another Resident Magistrate, N.M. Nasson took over to finish up with a defence witness and compile the decision. As to exactly why the initiating Magistrate had to midway abandon presidency; was a mystery, not manifest upon record. Thus, the succession was an exclusive business of the presiding officers; effected, as it were, behind the appellants' back.

That said, I feel I am just as well obliged, to express, at the very outset, that the initiating Magistrate lent himself to a casual, unintelligible and ramshackled record of proceedings. To begin with, at the conclusion of the preliminary hearing, the undisputed matters, as ascertained, were not read over and explained to the appellant; just as the parties involved were not called upon to acknowledge by placing their signatures at the foot of the memorandum. As has been authoratively held, an imperative duty has been imposed on courts by virtue of section 192(3) of the Criminal Procedure Act; to have the memorandum of agreed matters read over to the accused and signed by all parties involved. (**Mt.7479 Sgt. Benjamin Holela V.R. (1992) TLR,121).** That being the situation, in so far as the present proceedings are concerned, the position is as if no preliminary hearing was conducted. Nonetheless, it is to my understanding that the non or improper conduct of a preliminary hearing is not an end in itself. As to whether or not such operates to vitiate the proceedings

differs from case to case and; much will depend on an occasion of a miscarriage of justice **(unreported, Court of Appeal Criminal Appeal No.160 of 2005 – Kyalamali Mathayo V.R)**. Such situation has not arisen in the present appeal and; for that matter, the impropriety is not one of real moment.

Coming now to the factual situation, I could barely constitute one given the scale of scantiness. The appellant, it seems, was a tenant in a house unto which little Swabra's parents were also domiciled. In fact, if one has to cull from the appellants' account, undisputed on this particular detail; Swabra's parents were, actually, the landlords. Then came the dreadful moment and; it was 11:00am or so, on January 8th, 2006. Asha Omari (PW.1), Swabra's mother, had been fetching the infant around and; was told of her being at the appellant's room. Asha traced her daughter there just as the appellant was about to leave for a church sermon. Swabra acknowledged to her mother that she had been at the appellant's showing off a shs.100/= coin, allegedly, given to her by the appellant. As I understood Asha, just a little while later, when Swabra was about to have a piss; she was heard to bitterly complain of pain on her privates. And, in the course thereof, the infant could not spare heap of scorn on the appellant whom the accused of intruding unto her privates. Given the shocking revelation, Asha could not help a prompt police report, whereupon, Swabra had to attend to medical examination at Bombo Hospital.

Against this backdrop, the appellant was securely apprehended and; during the trial, a certain detective sergeant Lazzaro (PW.3), adduced into evidence a PF.3, supposedly, to show the extent to which the infants' privates were intruded upon. But, the document was admitted into evidence upon a process, casual in the extreme and; most reprehensible. The appellant was not required, in the first place, to object or otherwise bless the admittance of the document, let alone, being afforded opportunity to either dispense with or require the attendance of the medical officer. Given the non-compliance, I cannot but discount the PF.3 straight-away.

Reverting to the factual situation and passing on to Swabra's testimony, it is where, I am afraid to say, the inexperience of the presiding officer is, exasperatingly, vivid. Apparently, alive to the provisions tied with the reception of child testimony, the presiding officer approached the witness by pronouncing like he was going into a *voire dire*. Only he did not move an inch towards it, much as, immediately thereafter, this was next:-

> **After knowing that the victim does not know the meaning of oaths this court conducts its court (sic) in camera under voire dire evidence (sic) c/s 12 of (5) of TEA.**

Just after the remarks, little Swabra went straight into testifying. If anything, the foregoing excerpt of the proceeding is extracted, in the first instance, for one to share my predicament of being at a loss to understand whatever was meant therein. For

another, it is to apprise that particulars of the *voire dire,* supposedly, gone to, are neither here nor there. I stand to be pardoned for being hypercritical but; the way it appears, the Magistrate constituted *voire dire* in the wake of the proceedings going into camera. Well settled is the rule that where child testimony is involved, the first duty of the court is to ascertain as to whether or not the child understands the nature of an oath or affirmation and; to swear or affirm him/her only if the ascertainment is in the affirmative. Where the finding is, rather, in the negative; the child would, nevertheless, testify but only if, upon further ascertainment, the desired witness is possessed of sufficient intelligence and understands the duty of speaking the truth. Though concisely stated, that is *voire dire* as per legal parlance and; the one imperative aspect of the entire exercise is that it must be manifest upon record. Where, as here, details of the enquiry are an exclusive affair of the presiding officer; the price tagged unto it is for an appellate court to discharge the entire testimony of the given child witness; of which I, accordingly, do.

To now reflect upon the appellants' defence, his was a complete disassociation from the prosecution accusation. The appellant gave a detailed account of a long standing grudge with his landlords, allegedly, on account of his being regularly involved in prayers. The insinuation was that his landlords were unimpressed, if at all, simply because they belonged to a different faith. Thus, as way back as December, 2005 Asha would require the appellant to vacate the rented premises just as did her husband a few days before the

occurrence. Then came the day when, for no cause at all, he was apprehended and fabricated into the predicament he is presently in. The appellant's lone witness, a Francis Julius (DW.2), was, actually, a complete let-down. According to him, he was like being asked to put the appellants' version unto his pipe and smoke it at the appellants' prodding but; the truth of the matter was that he, actually, knew nothing about the case. Thus, he was pushed into saying that he was present when the appellant was being chased out of the premise on account of noise elicited from his prayers.

On the whole of the evidence and; as hinted upon, the learned convicting Magistrate was impressed by the version as told by the prosecution witnesses hence the decision. The petition, as I said, is upon two points of grievance and; on the first, Mr. Akaro vigorously complained about the statement of offence not being descriptive about the particular mannerism of committing the offence.

To express at once, there is substance in learned counsel submission; more so, in as much as rape is presently constituted upon several descriptions and capacities as enumerated under the provisions of section 130(2) and (3) of the penal code. Thus, one would expect, as indeed, it is incumbent upon the prosecution; to particularly indict the sub-paragraph under which the person accused is arraigned. Where the desired mischief was, say, sexual intercourse with an under-eighteen, the statement of the offence should be as detailed as to disclose that the assumed conduct was contrary to section 130(2)(e) of the penal code. As is obviously clear, the

appellant was simply arraigned for rape contrary to section 130(1)(2) without indicating as to which of the several capacities the prosecution had in mind. But, the particulars were as detailed as to allege that the appellant had sexual intercourse with a three year old and; to further take into account that the appellant had the benefit of a full trial; the misdescription, vigorously sought to be capitalized upon by counsel, is after all, curable.

To me, this appeal turns, rather, on the second ground of appeal that complained on there being insufficient material to found a conviction. With Swabra's testimony drained downstream, the case for the prosecution is devastatingly dealt with. All what remains of is the account by her mother Asha; itself materially derived of Swabra's telling. Without the latter's evidence, the utility of Asha's account effectively depreciates, to a dimension no more than hearsay stuff. And, to rub salt into the wound, upon discounting the PF 3, the entire claim that the infant was sexually assaulted looms in the doldrums.

But, quite apart and; as indicated above, the convicting Magistrate took over when the proceeding was remained of a single defence witness. In the advent of the amendment to section 214 of the Criminal Procedure Act; as comprised in Act No.9 of 2002, it is no longer an imperative requirement for the accused being afforded with an opportunity to express whether or not he/she would wish the prosecution witnesses recalled. It seems, Magistrate to presently it is a matter purely upon the discretion of the succeeding Magistrate to either have the witnesses recalled or otherwise act on the

predecessor's recording. I should be quick to add, however, that in keeping with a fair hearing, the court is obliged upon having the person accused posted with details of the succession.

What is more, sexual offences the likes of which the appellant had to endure with, entail an evidential requirement upon which the trial court has to be satisfied with the truthfulness of the victim to find a conviction in the event of his/her being the lone voice. Such is a requirement that turns wholly on the demeanor of the given witness and; indeed, more often than not, the victim turns out to be the lone voice to an alleged sexual assault. To this end, it is always desirable to have, at least, the victim recalled in order for the succeeding Magistrate to meaningfully meet the requirements of section 127(7) of the Evidence Act. In the matter presently before me, the succeeding Magistrate was not advantaged to see and hear the victim who, incidentally, was the only person versed with the occurrence. It is hard, then, to comprehend the basis upon which her positive impression of Swabra's version was anchored.

No doubt, the accusation laid at the appellants door was just as horrifying as it was enormous and; in fact, the learned convicting Magistrate non – directed herself on the provisions of section 131(3) of the penal code unto which is a requirement to impose a sentence of life imprisonment. Thus, all things being equal, such ought to have been the deserving sentence. I should suppose, such serious crimes as the one the appellant had to endure, are worth the maximum effort right from the level of investigations, presentation and; all the

declined to support the conviction and; indeed, enormous, as it were, the prosecution accusation was hung on too thin a thread to hold. In the result, both the conviction and sentence crumble and; it is further ordered, the appellant be released from custody forthwith unless he be there for some other lawful cause.

K.M. MUSSA, J.
11/03/2009

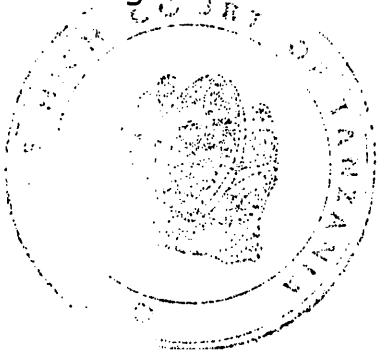
13/03/2009

Coram: Mussa, J;

Appellant: Mr. Akaro

Republic: Miss Joas

Judgment delivered in the presence of the parties.



K.M. MUSSA, J.
13/03/2009