IN THE HIGH COURT OF TANZANIA

AT TABORA.

APPELLATE JURISDICTION

(Tabora Registry)

(DC) CRIMINAL APPEAL NO. 85 OF 2007

ORIGINAL CRIMINAL CASE NO. 251 OF 1997

ON THE DISTRICT COURT OF BARIADI

AT BARIADI.

BEFORE: D.D. MALAMSHA,Esq;DISTRICT MAGISTRATE

DAUD S/O NGOLOMA.....APPELLANT
(Original Accused)

VERSUS

THE REPUBLIC.....RESPONDENT
(Original Prosecutor)

JUDGMENT OF THE COURT

Date of last order 7/12/2009

Date of Judgment 12/2/2010

WAMBALI, J.

In the District Court of Bariadi at Bariadi, Shinyanga Region, the accused (appellant) Daud Ngoloma stood charged with two counts; namely robbery with violence contrary to section 285 and 286 of the Penal Code Cap. 16 of the laws and rape contrary to sections 130 and 131 of the Penal Code Cap.16 of the laws. It was stated in the charge

that the accused (appellant) on 19th September, 1997 at 2.00 am at Gasuma village within the District of Bariadi in Shinyanga Region stole various properties worth Tshs. 106,200/=that belonged to one Suzana Paulo and immediately thereafter and before such time of stealing he used violence to the persons who were there in order to obtain the said properties. That was as far as the first count was concerned. With regard to the second count, it was alleged that after stealing, the accused (appellant) did unlawfully had carnal knowledge of one Juliana Leonard without her consent. The accused (appellant) pleaded not guilty to both counts. The prosecution summoned in Court four witnesses to prove the case against the appellant. After the close of the prosecution case and that of the defence, the District Court was satisfied that the case had been proved beyond reasonable doubt and it convicted and sentenced the appellant to thirty years imprisonment and twelve strokes corporal punishment for the first count and twenty years imprisonment for the second count. The trial magistrate ordered that the imprisonment was to run consecutively and that the same had to be confirmed by the High Court. The appellant was not satisfied with conviction and sentence and appealed to the High Court immediately thereafter.

In his lengthy hand written six pages petition of appeal to this court the appellant has lodged about fifteen grounds of appeal which as conceded by the learned State Attorney at the hearing, revolves within similar complaints of identification, contradiction in the evidence, non summoning of some key witnesses and that the evidence of the medical doctor had indicated that it took about 10 days before the victim of rape was examined. The appellant also complains that there was no evidence to link him with the offences he stood charged and alleges that the same has been necessitated because of the quarrel between him and the family of the victims of the crime concerning land dispute that started in 1991. He also complains of consecutive sentence. At the hearing of the appeal the appellant appeared in person and adopted his petition of appeal lodged before in court and replied briefly to the submission by the respondent/republic who was represented by Mr. Mukandara Ildephonce learned State Attorney who supported both conviction and sentence of the appellant.

It is my considered opinion that the matter for decision in this appeal is whether there are sufficient evidence on record to warrant the conviction of the appellant. As stated above four witnesses testified for the prosecution who were believed by the court. These included PW.1 Suzana Paulo

the mother of PW.3 Elikana Leonard and PW.4 Juliana Leonard who are taken as eye witnesses in this case. Indeed PW.4 is the victim of the alleged rape. The second witness (PW.2) was Dr. Ananiah Maduhu who examined PW.4. As state above the appellant contested the evidence of all prosecution witnesses.

I wish to state at this juncture that before going into the merits or otherwise of this appeal by evaluating the evidence, it is important to look at the way the trial was conducted. It is conceded that the issues that will be raised shortly did not attract the eyes of the appellant and the learned State Attorney during the hearing of the appeal and so was the court. However, after going closely through the record of the trial court these issues of law are important for fair administration of justice in criminal trial.

Firstly, during the trial PW.3 Elikana Leonard who was an important witness in this case was aged 15 years. Similarly PW.4 Juliana Leonard the victim of rape was aged 12 years. There is no doubt therefore that their testimony had to be taken after voire dire examination was conducted by the trial court magistrate as required by section 127(2) of the Evidence Act Cap.6 of R.E. 2002 of our laws. The requirement to conduct such procedure is mandatory in

which children of tender years are involved, to establish if they know the duty of speaking the truth and the possession of sufficient knowledge to what has to transpire in court.

At this juncture it is important to look at what transpired in court with regard to these two witnesses.

With regard to PW.3 Elikana Leornard it was recorded as follows;

> *"Tanz, 15 years X'stian a voiredire has been taken and the witness is found to understand the nature of the an oath and he is therefore sworn, and stated as follows..."*

When it was the turn of PW.4 Juliana Leornard, it was recorded thus;

> *"Tanz, 12 years, X'stian A vioredire has been taken and the witness is found to understand the nature of an oath and she is sworn and states."*

From the above quoted paragraphs it is not clear what kind of questions the witnesses were asked to justify the fact that they knew the duty of speaking the truth and possession of sufficient knowledge and intelligence. This is

against the requirement of the law in which the court has to be satisfied before proceeding to take the evidence of such witnesses on oath. Indeed the court has to record what transpired in court during conducting such process. It has been stated several times by the Court of Appeal on the requirement of this process especially in cases like the one before the court. In Rajabu Yusufu V.R. Criminal Appeal No. 457/2005 (unreported) the Court of Appeal of Tanzania sitting at Tabora stated that "where the record is silent on the question the witness was asked and the answers he/she gave it becomes difficult on appeal to ascertain whether the witness was competent to testify, let alone his/ her understanding the duty to speak the truth. It is important for the trial court to comply with the procedure." (See also Marco Gervas V.R. Criminal Appeal No. 54 of 2001 (unreported) Court of Appeal of Tanzania.

In Justine Sawala V.R. Criminal appeal No. 103 of 2004 (Arusha Registry), (unreported) the Court of Appeal of Tanzania stated that: "It is only after being satisfied that the minor witness satisfied the conditions laid down in the provision that the evidence can then be taken either on oath or without oath depending on what the *'voire dire'* examination reveals in respect of the witness."

It is therefore important that the court should satisfy itself on the position of the child before the court.

It follows from what has been disclosed above that the evidence of PW.3 and PW.4 can not be acted upon in the circumstances of this case and the same ha s to be discarded. See for this the case of Nyasan s/o Bichana V.R. (1959) E.A 190 and the case of Sokoine Chella V.R. Criminal Appeal No. 263 of 2006 Court of Appeal of Tanzania At Dodoma (unreported).

Having arrived at this position, the evidenced on record that remains is that of PW.1 Suzana Paulo, who apart from the fact that is the mother of PW.3 and PW.4 her evidence was heresay and most of what happened was communicated to her after her return from where she had gone and the alleged incidence happened on her absence. Her evidence is heresay and can not serve any purpose in this case.

With regard to the evidence of PW.2 Dr. Anama Maduhu of Somand Government Hospital. It is mainly the narration of the examination of the victim of rape (PW.4).

It is important, in my view, to point out that on 7th December, 2009, I had to adjourn the delivery of judgment

of this appeal as the PF.3 was not traced easily in the file of the trial Court. After communication with the District Court and upon going through the record it has been discovered the real PF.3 was not tendered in court. What was tendered in Court and marked as exhibit P.1 was a small piece of paper that was wrote by hand by an official at the police station Nyakabindi on 30/9/97. At the back of the said paper the doctor (PW.2) wrote his short report on the same day (30/9/97). This was an irregularity.

It is surprising that the said piece of paper was not questioned but it was admitted accordingly. Indeed at page 4 of the record of the trial court, it is not shown whether the appellant was given opportunity to say anything concerning the so called "PF.3" before it was admitted. The trial magistrate simply wrote; "Here is the PF. 3 admitted as exhibit P1. That is all." On the other hand, the appellant has complained about the time that was taken before the PW.4 was examined and indeed the Doctor (PW.2) admitted about the delay. The record indicates that the incidence is alleged to have taken place on 19/9/1997 but the examination by the doctor was done on 30/9/1997.

It follows that the evidence of PW.2 and the exhibit P1 can not be of much assistance because of uncertainty of

what really transpired and the way the trial court conducted the procedure of admitting such exhibit.

It is my considered opinion that the above stated irregularity in the procedure adopted by the conduct of the trial leaves much to be desired and this court had no option than to declared the proceedings and the outcome of these proceedings (conviction and sentenced) null and void.

In the circumstances of this case the proper procedure is to order retrial of this case under section on 388 of the Criminal Procedure Act. Cap. 20 R.E. 2002. However the circumstances of this case can not in my view entitle the court to take such step. This is so because this case was completed in 1998. It is evident that by this time PW.3 and PW.4 are adults as more than 11 years have passed.

Ordering retrial therefore will be unjust on the part of the appellant. Indeed the issue of medical examination which is necessary to prove the offence of rape will be difficult as circumstances have charged. On the other hand, the appellant has been in custody from 1997 November todate. He has, in my view, served a great deal in view of the matters surrounding the case.

In the final analysis, it is ordered that the accused be discharged accordingly. The appellant is to be released immediately, unless otherwise held lawfully in connection with other matter not connected to the case that lead to the present appeal. It is accordingly ordered.

F.L.K. WAMBALI

JUDGE

12/2/2010

Judgment delivered today 12/2/2010 in the presence of Daudi Ngoloma, the appellant and Mr. Paul Kimweli learned State Attorney for the Respondent/Republic.

F.L.K. WAMBALI

JUDGE

12/2/2010

Right of appeal explained.

F.L.K. WAMBALI

JUDGE

12/2/2010