IN THE HIGH COURT OF TANZANIA
AT SUMBAWANGA

APPELLATE JURISDICTION

DC CRIMINAL APPEAL NO. 16 OF 2012
(From Original Criminal Case No. 65 of 2010 in the District Court of Sumbawanga)

RUDI ANDREW @ KASONSO ..... APPELLA
Versus
THE REPUBLIC ..... RESPONDENT

10th September & 20th November, 2014

JUDGMENT

MWAMBEGELE, J.:

In the District Court of Sumbawanga at Sumbawanga, the appellant Rudi Andrew @ Kasonso was charged with the offence of rape contrary to sections 130 (1) and (2) (e) and 131 of the Penal Code, Cap.16 of the Revised Edition, 2002. He was found guilty and sentenced to thirty years imprisonment. He was aggrieved with the decision of the trial court hence this appeal. The memorandum of appeal has six grounds of complaint but the last one summarizes them all – that the case against the appellant was not proved beyond reasonable doubts.

At the hearing of the appeal on 10.09.2014, the appellant appeared in person and unrepresented. He therefore argued the appeal by himself. Mr. Mwandoloma, learned State Attorney appeared for the respondent

Republic. Arguing for the appeal, the appellant chose to adopt and rely on his grounds of appeal earlier filed as his submissions. In response, Mr. Mwandoloma, learned State Attorney, supporting the appellant's appeal, submitted that the evidence of Gaudensia Fuaka PW1 was taken after the trial court conducted a *voire dire* examination but that the trial court did not direct the *voire dire* to the aspect of whether or not the witness understood the duty of speaking the truth. He submitted that in the light of ***Said Khamis V. R*** Criminal Appeal No. 175 of 2012 (unreported), the purpose of conducting *a voire dire* examination is threefold; that is, first, whether the child understand the nature of an oath; secondly, whether the child is sufficiently intelligent to justify the reception of evidence; and thirdly, whether the child understands the duty of speaking the truth. The third aspect was not complied with in the present instance, he submitted. In the premises, the evidence of the victim should be discarded, he charged.

Regarding the PF3 tendered by WP 3116 D/Cpl Mary PW3, he submitted that the same was tendered and admitted in evidence without telling the appellant his right to have the medical personnel who prepared it to be called to testify. The accused person objected to its being tendered but the Court overruled the objection. He submitted that the course taken in admitting the PF3 in evidence was contrary to the provisions of section 240 (3) of the Criminal Procedure Act, Cap. 20 of the Revised Edition, 2002. He thus requested this court to expunge the same.

Another irregularity the learned State Attorney alerted this court is in respect of the cautioned statement. The learned State Attorney submitted that the cautioned statement was tendered after the appellant objected to its being tendered but the court overruled the objection and admitted it anyway. He submitted that, in the circumstances, the court ought to have conducted an Inquiry to look into the admissibility or inadmissibility of the document. He cited ***Morris Agunda & 2 Ors Vs R*** [2003] TLR 449 as an authority for this proposition.

Mr. Mwandoloma, unveiled yet another ailment: that the appellant was not convicted before being sentenced. This, he submitted, was contrary to the dictates of section 235 (1) of the CPA. Failure to comply with the stated section renders the judgment a nullity. He referred this court to the case of ***George Mhando Vs R*** [1983] TLR 118 and ***Charles Kasoni Vs R***, Criminal Appeal No. 42 of 2013, (Sumbawanga District Registry unreported), both decisions of this court.

I have gone through this Court record and the respective submissions by both parties at the hearing of this appeal. The learned State Attorney is right in his submissions that the case is marred with procedural irregularities. I start with the victim's evidence. It is no gainsaying that the victim PW1 was a child of tender years at the time she testified. However, her age was not a bar to testify. As was held by this court (Katiti, J.) in ***Elias Joakim Vs R*** [1992] TLR 220, competency in giving evidence in so far as the child of tender years is concerned, is not a matter of age, but of understanding. The trial court, it seems, was aware of this

position of the law and thus made efforts to comply with the requirements of the provisions of section 127 (2) of the Evidence Act, Cap. 6 of the Revised Edition, 2002. The learned State Attorney has attacked the *voire dire* examination conducted by the trial court that it did not address the question whether or not the witness understood the duty of speaking the truth. In order to appreciate the contention of the learned State Attorney, I take the liberty to reproduce the *voire dire* hereunder:

"**VOIRE DIRE EXAMINATION**

(1) **Question**: Do you go to school?

Answer: Yes, I am a STD IV

(2) **Question**: Do you go to the church?

Answer: Yes, I worship at the Roman Catholic Church.

(3) **Question**: Do you know what an oath is

Answer: No I don't

(4) **Question**: Do you know what the truth is?

Answer: Yes, I know

(5) **Question**: Do you know the essence of telling the truth?

Answer: Yes, I do

(6) **Question**: What is the opposite of truth?

Answer: is to tell lies.

(7) **Question**: Is bad or good to tell the truth.

Answer: it is good to tell the truth"

Court: From the intended PW1 replies, I am satisfied that she do (sic) understand the meaning of oath and possesses enough intelligence for his (sic) evidence to be taken without oath."

The learned State Attorney is of the view that the third test of whether the child understood the duty of speaking the truth was not adhered to. With due respect to the learned State Attorney, I am not ready to go along with him on this assertion. Reading in context the *voire dire* conducted by the trial court, it becomes obvious that the third test was also addressed. As can be gleaned from the above *voire dire* examination which the trial court conducted, the court addressed the issues whether the child witness understood the nature of an oath and whether she possessed sufficient intelligence to justify the reception of her evidence as well as the duty to speak the truth. This can be deciphered from question 5 in the *voire dire* and its respective answer. The witness was asked whether she knew the essence of speaking the truth and she answered in the affirmative. It seems to me that that was sufficient enough to learn from the witness that she understood the duty to speak the truth. The learned State Attorney's complaint to this effect is therefore without basis and is consequently rejected.

Regarding the PF3, as rightly submitted by Mr. Mwandoloma, state attorney, the document was tendered by PW3 and admitted in evidence

despite the fact that the appellant objected to its being tendered. I agree with Mr. Mwandoloma that this was inappropriate; it was in flagrant disregard of the provisions of section 240 (3) of the CPA. This court and the Court of Appeal have time without number insisted on compliance with this mandatory provision of the law to the letter; that is, it is imperative upon the court to tell the accused person of his right to have the expert who filled the medical document to be called to testify, failure of which makes the PF3 (or any medical document) expunged on appeal – see ***Alfeo Valentino Vs R,*** Criminal Appeal No. 92 of 2006, ***Arabi Abdu Hassan Vs R*** Criminal Appeal No 187 of 2005, ***Burundi s/o Deo Vs R,*** Criminal Appeal No. 33 of 2010, ***Parasidi Michael Makulla Vs R,*** Criminal Appeal No. 27 of 2008, ***Arabi Abdu Hassan Vs R,*** Criminal Appeal No 187 of 2005, ***Shabani Ally Vs R,*** Criminal Appeal No. 50 of 2001, ***Prosper Mnjoera Kisa Vs R,*** Criminal Appeal No. 73 of 2003 and ***Meston Mtulinga Vs R,*** Criminal Appeal No. 426 of 2006, all are unreported decisions of Court of Appeal. For the avoidance of doubt, the same is the position in respect of its sister provision of section 291 (3) of the CPA respecting trial in the High Court – see ***Dawido Qumunga Vs R*** [1993] TLR 120] and ***Elias Mtati @ Ibichi Vs R*** Criminal Appeal No. 65 of 2014 an unreported decision of the Court of Appeal which judgment was handed down on 14.08.2014.

In ***Alfeo Valentino,*** for instance, the Court of Appeal, speaking through Rutakangwa, J.A, provided the following guidance:

"We think that the law on this issue was stated with sufficient lucidity by this Court in the cases of **Kashana Buyoka** v **R,** Criminal Appeal No. 176 of 2004, **Sultan s/o Mohamed** v **R,** Criminal Appeal No. 176 of 2003, **Rahim Mohamed** v **R,** Criminal Appeal No. 234 of 2004, (all unreported) among many others. The Court has consistently held that once the medical report, as the PF3, is received in evidence, it becomes imperative on the trial court to inform the accused of his right of cross-examination. This Court held in these cases that **if such a report is received in evidence without complying with the mandatory provisions of section 240 (3), such a report must not be acted upon.**"
[Emphasis mine].

And in respect of section 191 of the CPA, in ***Elias Mtati @ Ibichi*** tl Court of Appeal, referring to the ***Qumunga*** case (supra), had this to say:

"Often times it is forgotten that just as is the case with section 240 (3) of the CPA, its kith, section 291(3) of CPA, also carries with it the requirement under which the court is imperatively enjoined to

inform the accused of his/her right to have the medical officer summoned for examination."

The foregoing aptly summarizes the position of the law and what course to take in eventualities when such provisions are overlooked. On the basis of the foregoing binding authorities, the PF3 tendered and received in evidence is hereby expunged from evidence.

I now turn to the cautioned statement. Mr. Mwandoloma, learned State Attorney submitted that it was improperly admitted in evidence. As the learned State Attorney submitted, the cautioned statement was admitted in evidence after the court overruled the appellant's objection. No inquiry was conducted after the objection to determine it admissibility or otherwise. This was an error. What the court ought to have done after the appellant objected to the statement being tendered in evidence was to conduct an Inquiry with a view to determining whether or not the same was admissible. That this is the law was articulated by the erstwhile Court of Appeal for East Africa in ***Rashidi and another Vs R*** [1969] 1 EA 138; an appeal originating from Tanzania, referring to its earlier decision of ***Kinyori s/o Karuditu Vs Reginam*** (1956) 23 EACA 480 in which, quoting from the headnote, it was held:

"The correct procedure when a statement is challenged is for the prosecution to call its witnesses and then for the accused to give

evidence or make a statement from the dock and call his witnesses, if any".

The foregoing position of the law was restated in ***Ezekia Vs R*** [1972] 1 EA 427; also reported as ***Ezekia s/o Simbamkali & Another Vs R*** [1972] HCD n. 192, in which the Court of Appeal for East Africa, again, in a case emanating from Tanzania had this to say in respect of the trial within a trial :

> "It may be desirable to set out again the procedure to be followed at these trials within trials. Immediately it is known that the admissibility of a statement is to be challenged, the assessors should be asked to retire. This should whenever possible, happen before any mention of a statement has been made, the usual procedure being for defence counsel to inform the court that question of law needs to be considered. **The prosecution then calls all the witnesses available to prove that the statement was made voluntarily and according to law, including the person to whom the statement was made, the interpreter, if any, and any other persons who can give relevant evidence. The defence has the right to cross-examine**

> **these witnesses in the usual way. The accused then has the right to give evidence or to make a statement from the dock, and to call witnesses, whose evidence will be limited to the issue of the admissibility of the statement. On this issue, the burden of proof is wholly on the prosecution** the judge gives his ruling in the absence of the assessors, who then return to court. If the statement has been held to be admissible, the prosecution evidence regarding it is given again and the witnesses are again cross-examined, because, although the issue of admissibility has been decided, the circumstances in which the statement was taken may affect the weight to be attached to it and for this reason the assessors are concerned with them."
>
> [Bold supplied].

In the foregoing excerpt, the Court of Appeal for East Africa was dealing with a situation pertaining to a trial within a trial in the High Court. The quotation must be read *mutatis mutanidis* respecting an Inquiry in the subordinate court. The bold part of the excerpt is what seems to be relevant for Inquiries conducted in the subordinate court.

The headnote in the ***Rashidi*** Case (supra) was applied by the Court of Appeal of Tanzania in an unreported decision of ***Seleman Abdallah & 2 Others Vs R***, Criminal Appeal No. 384 of 2008. In that case, the Court of Appeal also restated the law as stated in its earlier unreported decision of ***Twaha Ali & 5 Others Vs R***, Criminal Appeal No. 78 of 2004 on what should be done when an accused person objects to the statement being tendered in evidence. It held:

> "If that objection is made after the trial court has informed the accused of his right to say something in connection with the alleged confession, **the trial court must stop everything and proceed to conduct an inquiry (or trial within a trial)** into **the voluntariness or not of the alleged confession. Such an inquiry should be conducted before the confession is admitted in evidence**"
> [Bold supplied]"

And in a fairly recent decision of ***Makumbi Ramadhani Makumbi & 4 Others Vs R*** Criminal Appeal No. 199 of 2010 (unreported), the Court of Appeal in its judgment handed down on 27.11.2013, speaking through Rutakangwa, J.A, had this to say:

> "**Failure to conduct a trial within a trial is, in our settled view, a fundamental and incurable irregularity and inevitably leads to the admitted confessional statement being expunged from the record** and/or vitiating the trial either wholly or partially depending on the facts of each case. ..."
> [Emphasis supplied].

On authority of the foregoing decisions of the Court of Appeal, the cautioned statement admitted in the present case as Exh. PE1 after it was objected by the accused person and without conducting an Inquiry to determine its admissibility or inadmissibility, is hereby expunged from evidence.

There is yet another ailment which the learned State Attorney did not unveil; the appellant was found guilty of the offence he was charged with but was never convicted before sentencing. This was in flagrant disregard of the provisions of section 235 (1) of the CPA. This subsection reads:

> "The court, having heard both the complainant and the accused person and their witnesses and the evidence, **shall convict the accused and pass sentence upon** or make an order against him according to law ..."
> (Emphasis supplied).

The subsection is couched in imperative terms. This court as well as the court of appeal has on several occasions insisted on the compliance to the letter with this mandatory provision. There is a line of court of appeal cases which hold that failure to convict an accused person before sentencing is a fatal ailment – see ***Shaban Iddi Jololo and 3 others Vs R,*** Criminal Appeal No. 200 of 2006, ***Paul Emmanuel @ Ntorogo & another Vs R,*** Criminal Appeal No 19 of 2008, ***Jonathan Mluguani Vs R,*** Criminal Appeal No. 15 of 2011, ***Amani Fungabikasi Vs R,*** Criminal Appeal No. 270 of 2008, ***Khamis Rashad Shaban Vs Director of Public Prosecutions Zanzibar,*** Criminal Appeal No, 184 of 2012, ***Omari Hassan Kipara Vs R*** Criminal Appeal No. 80 Of 2012 and ***Karoli Mathias Jackson & 2 Ors Vs R*** Criminal Appeal No. 59 Of 2013; all are unreported decisions of the court of appeal. For the avoidance of doubt, in the ***Khamis Rashad Shaban*** Case the court of appeal was grappling with the provisions of section 187K of as the Criminal Procedure (Amendment) Act, No. 7 of 2004 [also cited as section 220 the Criminal Procedure Act, No. 7 of 2004] of the Laws of Zanzibar which is *in pari materia* with our section 235 (1) of the Criminal Procedure Act. In all these decisions, among many others, the court of appeal did not mince words: failure to record a conviction was a fatal and incurable irregularity.

In ***Shaban Iddi Jololo*** the Court of Appeal went an extra mile to observe that the absence of a conviction connoted that one of the perquisites of a judgment in terms of section 312 (2) of the CPA would be missing. The provisions of this subsection provide:

> "In the case of conviction the judgment shall specify the offence of which, and the section of the Penal Code or other law under which, the accused person is convicted and the punishment to which he is sentenced."

The court of appeal went on:

> "Hence, in the absence of a conviction entered in terms of section 235 (1) of the Act, there was no valid judgment upon which the High Court could uphold or dismiss. ..."

In the instant case, that the appellant was not convicted is no gainsaying. The last part of the last paragraph of the judgment of the trial court simply reads:

> "it is in the final analysis for the reasons I have stated above I find [the accused] person guilty of the offence as charged"

And after that finding, the court proceeded to ask the prosecution for the accused person's previous criminal record, asked the appellant to mitigate and thereafter sentenced him to thirty years imprisonment. That was, as

aforesaid, against the dictates of the mandatory provisions of section 235 (1) of the CPA and the omission was a fatal irregularity which vitiated the judgment of the trial court.

I feel pressed to state at this juncture by way of postscript that I encountered a technical problem when researching the equivalent of our section 235 (1) of the CPA in the Laws Zanzibar. There are two legislation applied on the same subject and bearing the same number of enactment. There is the Criminal Procedure (Amendment) Act, No. 7 of 2004 of the Laws of Zanzibar and the Criminal Procedure Act, No. 7 of 2004 of the Laws of Zanzibar. Section 187K of the Criminal Procedure (Amendment) Act, No. 7 of 2004 reads:

> "(1) After hearing arguments and points of law (if any), the Judge shall pronounce a judgement in the case.
> (2) If the accused is convicted, the Judge shall hear the accused on the question of sentence, and then pass sentence on him or her according to law."

And section 220 of the Criminal Procedure Act, No. 7 of 2004 reads:

> "The court having heard both the complainant and the accused person and their witnesses and evidence shall either convict the accused and

> pass sentence upon or make an order against him according to law, or shall dismiss the case."

These ate the provision in the Laws of Zanzibar which are in *pari materia* with our section 235 (1) of the Criminal Procedure Act. Both legislation are used. The former legislation amended the Criminal Procedure Decree, Cap. 14 of the Laws of Zanzibar. The amending Act has the following statement in section 2 (3):

> "The provisions of the Decree which are not amended by this Act are hereby re-enacted as part of this Act and shall accordingly be incorporated in this Act in such order of numbering as may be appropriate."

What the latter legislation did or purported to do was to consolidate all the amendments which were brought about by the former legislation including the provisions which were not amended but were applicable in view of section 2 (3). The latter legislation, in section 399, repeals the Criminal Procedure Decree. But what is obtaining on the ground is that in Zanzibar both legislation are applied. The Court of Appeal of Tanzania may wish to put the position in order when an opportune moment arises.

In the discussion above, the PF3 and the cautioned have been expunged. The judgment of the trial court was a nullity for noncompliance with the mandatory provisions of section of CPA. The sum total of it all is that this

appeal has no legs on which to stand in this court. It is hereby struck out. Because of these glaring ailments, it will be in all fairness that no retrial is ordered, for taking that course will be allowing the prosecution to fill the gaps in its case which course will leave justice crying. I order that the appellant Rudi Andrew @ Kasonso should forthwith be released from prison unless detained there for some other lawful cause. Order accordingly.

DATED at SUMBAWANGA this 20th day of November, 2014.

J. C. M. MWAMBEGELE
JUDGE