IN THE HIGH COURT OF TANZANIA

IN THE DISTRICT REGISTRY

AT MWANZA

APPELLATE JURISDICTION

HIGH COURT CRIMINAL CASE NO. 59 OF 2013

(Original Criminal Case No. 492 of 2011 of the District Court of Nyamagana District at Nyamagana)

DEBORA D/O MAIRA .....APPELLANT

VERSUS

THE REPUBLIC.....RESPONDENT

JUDGMENT

BUKUKU, J.:

The appellant, Deborah Maira was convicted of the offence of child stealing contrary to section 169 of the Penal Code by the District Court of Nyamagana, at Mwanza in Criminal Case No. 492 of 2011 and was sentenced to a term of five years imprisonment. Aggrieved by the said decision, she appealed to this court.

The facts of the case are brief and straight forward.

On 18th September, 2011, **PW1** Yunis d/o John was sent by her aunt to go to her grandfather to get some potatoes from the farm. She went there and was given the said potatoes. Since her grandfather told her to

return for some more, she again went back to the farm. At around 11.00am **PW1's** aunt called her father in law to enquire if **PW1** was still at the farm, since she needed her back for some errands. Her grandfather confirmed to be with **PW1** and after he had given her some potatoes, **PW1** left her grandfather's home.

According to **PW1,** on her way back, she passed near the accused house. When accused saw her, she begged **PW1** to sell her the potatoes she had. **PW1** told the accused that she was not selling the potatoes. **PW1** further testified that, the accused then asked her to assist her get a pot inside her house. She did as she was told and immediately when she went inside the house, the accused pushed her into a room inside her house and locked the door. **PW1** further narrated that, while inside the room, she shouted for help but to no avail, until night came. The following day, the accused allegedly brought her some food – sardines and ugali. **PW1** further said that on that second day, she heard the voice of her mother and aunt looking for her outside. She again screamed for help but could not be heard. On the third day, she was taken to a place where she was forced to take a bath, and when she refused, she was beaten by

accused. She then took a bath and was returned to the room where she was confined.

On the following day, she requested the accused to take her for a short call of nature. The accused opened the door for her and showed her the toilet and left her there. When inside the toilet, she managed to peep through, and having seen the coast was clear, she managed to escape although the accused tried to stop her. **PW1** averred that, when her efforts to stop **PW1** to escape failed, the accused offered **PW1** T.shs. 1,000/= so that she should not divulge where she was. **PW1** took the money and then she left for home and on the way, she bought biscuits for T.shs. 500.00. As she was approaching home, her aunt saw her. When asked where she was, **PW1** explained her ordeal and the matter was reported to the police hence the arrest of the accused and finally charged and convicted.

On this appeal, the appellant has fronted six grounds of appeal but during the hearing of the appeal, counsel for the appellant decided to argue only two grounds which are the first and second namely:-

1. That, the learned trial magistrate had erred himself in law and fact after being satisfied that, the victim **(PW1)** possessed sufficient intelligence to give her evidence under oath hence she did not properly administer a legal sound (voire dire test) and a solemn oath to the witness before taking her testimony.
2. That, the learned trial magistrate did highly overlook the law and fact when she held that the appellant guilty (sic) as charged after believing and acting upon a contradictory, un cogent and /or implausible evidence regarding the first felony reported to the police station, offered by **PW2** and **PW4,** on their testimony in court without weighing out their credibility before entering unfair conviction.

When the appeal came up for hearing, the appellant was represented by Mr. Makwega, learned advocate. On his part, Mr. Sarige, learned State Attorney who represented the respondent Republic, from the outset opted to support the appeal. He submitted that, the prosecution's case was built on **PW1's** testimony. He fully agreed with Mr. Makwega that, the legal requirements in admitting **PW1's** testimony were not followed by the trial court. That aside, Mr. Sarige submitted that, there were contradictory

statements by the prosecution witnesses, to wit, that of **PW2** and **PW4.** He also challenged the testimony of **PW2** to the effect that, while **PW2** said they knew where **PW1** was, this piece of evidence was contradicted by that of **PW5** who said they were led by **PW1** to the place where she was. In the circumstances, Mr. Sarige prayed that the appeal be allowed.

Let me now go to the substance of the appeal. The trial court was satisfied that the offence of child stealing was proved beyond reasonable double on the evidence of **PW1, PW2, PW3, PW4,** and **PW5.** In my considered opinion, the most crucial witness in this case is **PW1** (the victim). That said, I can envisage two fundamental problems with the evidence depicted from the record. The first is the non compliance with section 127 (2) of the Evidence Act (Cap 6 R.E. 2002), and second is the contradictory statements of the prosecution witnesses.

With regard to the first ground of appeal, Mr. Makwega learned counsel for the appellant has faulted the trial court for its omission to carry out *"voire dire"* examination before deciding on how the evidence of the complainant would have been received. I must out rightly say that, I am at one with Mr. Makwega, learned advocate for the appellant that, the record

at the trial court is very clear on this omission. Section 127(2) of Cap 6 provides:-

> *"(2) 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."*

It is also provided in subsection (5) that, for the purposes of subsection (2), the expression "Child of tender years" means a child whose apparent age is not more than fourteen years. So, subject to the mandatory provisions of subsection (2) above, a child of tender years can be a competent and compellable witness in criminal proceedings. The bar from testifying from a child of tender years who does not understand the nature of an oath is not in possession of sufficient intelligence, which would enable him to discern the difference between right and wrong, is justified on the same basis as the statutory defense of immaturity under section 15 (1) and (2) of the Penal Code for children of almost similar age.

PW1 (the victim) was 11 years by then. She was therefore a child of tender years. Section 127 (2) above, and case law, require that, after finding that, a child does not understand the nature of an oath, a court has to satisfy itself first that the witness is possessed of sufficient intelligence, and secondly, that the witness understands the duty of telling the truth. (See: **Godi Kasenegala V. R ; Criminal Appeal No. 10 of 2008 (unreported).** In the present case, what happened is this:-

> ***"Court:*** *The witness who is the victim is a child of 11 years old therefore this court have to conduct a voire dire (sic) test under section.(sic)*
>
> *What is your name?*
>
> *My name is Yunis d/o John*
>
> *I am a student at Mkolani Primary School.*
>
> *I am in standard five.*
>
> *My father's name is john my mother's name is Rachel.*
>
> ***Court:*** *Mrs. Anna Ngussa from social welfare, four officers is present (sic) in court according to the law requirement".*

And then the prosecution case opened by Yunis John being sworn and examined. The trial magistrate did not make a specific finding on whether PW1 was possessed of sufficient intelligence, and second that she understood the duty of speaking the truth.

In the case of **Kinyua V. Republic [2002] 1 KLR 256** quoted with approval in the case of **Godi Kasenegela V. Republic, (supra)** it has been explicitly been explained that, the voire dire test has two steps to be taken and is summarized as follows:-

> *"(a) The court shall first ascertain whether the child understands the nature of an oath. An investigation to this effect must be done by the court immediately the child witness appears in court.....*
>
> *(b) If the child does not understand the nature of the oath, he or she is not necessarily disqualified from giving evidence".*

The court may still receive the evidence if it is satisfied, upon investigation, that the young person is possessed of sufficient intelligence and understands the duty of speaking the truth. This investigation must be

done and when done, it must appear on record. Where the court is so satisfied, then the court will proceed to record unsworn evidence from the child witness. Further, in **John Muiruti V. Republic [1983] KLR 445,** the court reemphasize, inter alia that:-

> *"(2) It is important to set out the questions and answers when deciding whether a child of tender years understands the nature of an oath so that the appellate court is able to decide whether this important matter was rightly decided.*
>
> *(a).....The correct procedure for the court to follow is to record the examination of the child witness as to the sufficiency of her intelligence to satisfy the reception of evidence and understanding the duty to tell the truth".*

In this particular case, and as rightly submitted by Mr. Makwega, learned Advocate for the appellant, the steps as summarized in **Kinyua V. Republic (supra)** were not fully complied with. The trial court did not record whether **PW1** was possessed with sufficient intelligence to satisfy the reception of her evidence. That was surely a defect. It is now settled law that evidence taken in contravention of that provision is illegal and

must be discarded. Since the trial court did not address this requirement properly, before receiving the evidence of **PW1,** then such evidence was wrongly received. In the event, I am forced to expunge the evidence of **PW1** because of this irregularity. Also see the decisions in the cases of **Kashan Bayoka V. Republic, Criminal Appeal No. 176 of 2004; Omary Kurwa V. Republic, Criminal Appeal No. 89 of 2007** and **Wilbard Kamangano V. Republic Criminal Appeal No. 235 of 2007 [all CAT and unreported],** just to name but a few.

Now, having expunged the evidence of **PW1,** what remains? Mr. Makwega had argued that, once the evidence of **PW1** is expunged, then the rest of the testimonies remain to be heresay. I fully subscribe to that because, this appeal stands or falls depending on the testimony of **PW1.** The rest of the testimonies are heresay. The other remaining prosecution witnesses were not eye witnesses to the offence allegedly to have been committed by the appellant.

As earlier mentioned, there is also the issue of contradictory testimonies on the part of the prosecution witnesses. I will start with **PW1.** In her testimony, she told the court that she heard her mother and her aunt's voices outside, while looking for her. **PW3,** Rosemary John, the

mother of **PW1** testified that the incident took place on 15th September, 2011 while she was away in Musoma and came back on 18th September, 2011 and found **PW1** was not around. Which means, when the incident occurred, she was not around. If that is the case, how come **PW1** heard her voice from inside? Secondly, according to the particulars of the offence contained in the charge sheet, the incident of child stealing occurred on the 18th September, 2011, and not 15th September, 2011 as testified by **PW3**. Again, at page 14 of the proceedings **PW**2 is recorded to have said that they knew where **PW1** was. If that was the case, how come they said she was taken forcibly if at all they knew where she was. And more so, if they knew where **PW1** was, why then did **PW5** say they were led by **PW1** to the place where she was? Yet still, in her testimony, **PW3** told the court that, the following day after the incident her father reported the matter to the police and was given an RB. But in his testimony, **PW2** never mentioned about the RB.

For the reasons stated herein above, I find that, if the trial magistrate had considered closely the discrepancies this court has shown, she would have come to a different conclusion.

In the event, I allow the appeal, quash the conviction and set aside the sentence of five years imprisonment. The appellant is to be set free forthwith unless otherwise lawfully held.

Ordered accordingly.

.....

A.E. BUKUKU

JUDGE

Delivered at Mwanza

This 26th March, 2014