IN THE COURT OF APPEAL OF TANZANIA
AT DAR ES SALAAM

(CORAM: MROSO, J.A., MUNUO, J.A., And KAJI, J.A.)

CRIMINAL APPEAL NO. 72 OF 2002

SHABANI MADEBE..... APPELLANT
VERSUS
THE REPUBLIC..... RESPONDENT

(Appeal from the decision of the High Court of Tanzania at Dar es Salaam)

(Muro, J.)

dated the 15th day of May, 2001
in
H/Court Criminal Appeal No. 3 of 2001

JUDGMENT OF THE COURT

MUNUO, J.A.:

In Criminal Case No. 1243 of 2000 in the District Court at Ilala within Dar-es-Salaam Region, the appellant was convicted of rape c/s 130 (2) (c) 131 (3) of the Penal Code as amended by the Sexual Offences Special Provisions Act No. 4 of 1998 in that on the 29th August, 2000 at about 2100 hours at Kijitonyama in Kinondoni District, the appellant raped a child, GG, then below the age of ten. The trial court erroneously sentenced the appellant to 30 years and 20 strokes. The charged crime being a scheduled offence, the trial court ought to have sentenced the appellant to the mandatory minimum sentence of life imprisonment because the victim of rape was a small girl, aged three years at that time, i.e. she was under the age of ten years.

Aggrieved by the conviction, the appellant unsuccessfully preferred Criminal Appeal No. 3 of 2000 in the High Court of Tanzania at Dar-es-Salaam. The appellant lodged this second appeal. He abandoned the first memorandum of appeal he filed on the 10th July, 2002 and adopted the Memo of Appeal he filed on the 16th March, 2004. In his four grounds of appeal, the appellant reiterated his innocence and criticized the trial court for grounding the conviction on the testimony of the small girl without complying with the provisions of Section 127 (3) of the Evidence Act, 1967 and Section 240 of the CPA, 1985. Hence, he prayed that the appeal be allowed.

Mrs. Mutaki, learned State Attorney, supported the conviction. She conceded that the provisions of Section 127 (3) were not complied with. She all the same urged us to dismiss the appeal for lack of merit.

Indeed the record shows that the learned trial Resident Magistrate did not comply with the provisions of Sections 127 (2) and (3) of the Evidence Act, 1967.

Section 127 (1) of the Evidence Act, 1967 defines who can testify by stating *inter-alia:*

> 127 (1) Every person shall be competent to testify unless the court considers that he is incapable

> of understanding the questions put to him or giving rational answers to those questions by reason of tender age, extreme old age, disease (whether of body or mind) or any other similar cause.

In the present case, the victim of rape was a small girl of tender age so she would only have qualified to testify if the learned trial Resident Magistrate had complied with the provisions of Section 127 (2) and (3) of the Law of Evidence Act, 1967 which state:

> 127 (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 understand the duty of speaking the truth.
>
> (3) Notwithstanding any rule of law or practice to the contrary, but subject to the provisions of subsection (7), where

> evidence received by virtue of subsection (2) is given on behalf of the prosecution and is not corroborated by any other material evidence in support of it implicating the accused the court may, after warning itself of the danger of doing so, act on that evidence to convict the accused if it is fully satisfied that the child is telling the truth.

It appears to us that although the learned trial magistrate purported to conduct a *voire dire* examination at page ten of the record of appeal, she lost track and ended up prosecuting the case. This, she did, without making a finding on whether the child knew the meaning of an oath, and, or the duty to tell the truth and furthermore, whether the said child was possessed of sufficient intelligence to justify the reception of her evidence. In that regard the trial magistrate failed to comply with the mandatory provisions of Section 127 (2) of the Evidence Act, 1967. This, in our considered view, was a fundamental irregularity which occasioned a failure of justice. The question is whether we could redress the injustice by ordering a retrial.

In **Rex versus Kija Sagida and 2 Others** Vol. 14 EACA 118, the then Court of Appeal of Eastern Africa ordered a retrial where the learned trial Judge advised the accused to opt to remain silent after the prosecution closed its case. In the said case, the Court held that –

> The dual role of the Judge and defending counsel, caused him to commit a grave incurable error in procedure. The Judge's advice to the accused rendered the trial a nullity. ----------

The Court further observed:

> --- As there was little, if any, evidence against the appellants' statements, the matter becomes one of crucial importance, and it is impossible for us to say that a failure of justice may not have been occasioned by the Judge's action. We therefore feel compelled to declare the trial a nullity which of course, has the direct effect of having the appellants in custody committed for trial in the High Court on a charge of murder. We direct that any further trial of these three accused persons or any of them shall take place before another Judge.

In the present case, the trial magistrate played the dual role of magistrate and prosecutor while conducting the purported *voire dire* examination, a fatal irregularity by any standard.

In another case, **Rex versus Dinu d/o Sombi and 2 Others**

Vol.14 EACA 136 the Court of Appeal of Eastern Africa nullified the trial and ordered a retrial in a murder case because the learned trial Judge had not complied with the provisions of Sections 279 to 283 of the Criminal Procedure Code, Tanganyika, which omission might have affected the opinion of the assessors and therefore occasioned a failure of justice.

We also perused the case of **Rex versus Vashanjee Liladhar Dossani** Vol. 13 EACA 150.

In that case the appellant was convicted and sentenced for offences against Defence (Price of Goods) Regulations, 1943. On appeal to the High Court of Nyasaland (now Malawi), the learned Chief Justice found that although the evidence on record supported the conviction, “there were certain unsatisfactory features prejudicial to the appellant connected with the trial resulting in his not having had a satisfactory trial and he ordered a retrial”. The appellant appealed against the order for a retrial. The Court of Appeal for Eastern Africa held:

> An order for a retrial is the proper order to make when accused has not had a satisfactory trial.

We also had the advantage of perusing the case of **Merali and Others versus Republic** (1971) HCD n. 145. In the said case, the Court of Appeal for East Africa made the following observation on retrial orders:

> It is clear that the original trial was neither illegal nor defective. It is well settled that an order for a retrial is not justified unless the original trial was defective or illegal.

Furthermore, the principles for ordering a retrial also featured in the case of **Ahamed Ali Dharamsi Sumar versus R** (1964) E.A. 481 in which the appellant challenged a retrial order issued by the High Court. The Court of Appeal of East Africa held:

> Whether an order for retrial should be made depends on the particular facts and circumstances of each case but should only be made when the interests of justice require it and where it is likely not to cause injustice to an accused.

The same reasoning was reflected in the case of **Fatehali Manji versus The Republic** (1966) E.A. 343 in which the Court of Appeal of East Africa held;

> In general a retrial will be ordered only when the original trial was illegal or defective; it will not be ordered where the conviction is set aside because of insufficiency of evidence or for the purposes of enabling the prosecution to fill gaps in its evidence

> at the first trial --- each case must depend on its own facts and circumstances and an order for retrial should only be made where the interests of justice require it.

Under the circumstances, and in view of the above, we are clear in our minds that in this case the trial was fundamentally defective because the trial magistrate did not comply with the mandatory provisions of Section 127 (2) (3) of the Evidence Act, 1967, and Section 240 (3) of the Criminal Procedure Act, 1985.

We accordingly nullify the trial and order a retrial before another magistrate of competent jurisdiction.

DATED at DAR-ES-SALAAM this 25th day of August, 2005.

J.A. MROSO
USTICE OF APPEAL

E.N. MUNUO
JUSTICE OF APPEAL

S.N. KAJI
JUSTICE OF APPEAL

I certify that this is a true copy of the original.

(S.M. RUMANYIKA)
DEPUTY REGISTR

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CRIMINAL APPEAL NO. 72 OF 2002

SHABANI MADEBE..... APPELLANT
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THE REPUBLIC..... RESPONDENT

(Appeal from the decision of the High Court of Tanzania at Dar es Salaam)

(Muro, J.)

dated the 15th day of May, 2001
in
H/Court Criminal Appeal No. 3 of 2001

Between

The Republic..... Prosecutor
Versus
Shabani Madebe..... Accused

In Court this 25th day of August, 2005

Before: The Honourable Mr. Justice J.A. Mroso, Justice of Appeal
The Honourable Madame Justice E.N. Munuo, Justice of Appeal
And The Honourable Mr. Justice S.N. Kaji, Justice of Appeal

THIS APPEAL coming for hearing on 10th day of August, 2005 in the presence of the appellant AND UPON HEARING the appellant in person and Mrs. Mutaki, State Attorney for the Respondent/Republic when it was ordered that the appeal do stand for judgment;

AND UPON the same coming for judgment this day;

IT IS ORDERED that the trial is a nullity and a retrial before another magistrate of competent jurisdiction is ordered.

GIVEN under my hand and the Seal of the Court this 25th day of August, 2005.

(S.M. RUMANYIKA)

DEPUTY REGISTRAR