IN THE COURT OF APPEAL OF TANZANIA
AT ARUSHA

(CORAM: MSOFFE, J.A., MJASIRI, J.A., And MASSATI, J.A.)

CRIMINAL APPEAL NO. 30 OF 2008

ELIA WAMI.....APPELLANT

VERSUS

THE REPUBLIC.....RESPONDENT

(Appeal from the decision of the High Court of Tanzania at Arusha)

(Bwana, J.)
dated 2nd day of November, 2007
in
Criminal Appeal No. 78 of 2006

JUDGMENT OF THE COURT

20th & 23rd September, 2011

MASSATI J.A.:

The appellant was charged before the District Court of Kiteto, with the offence of rape. It was alleged that on the 21st day of August, 2004 at about 17 hours at Ndaleta village, he raped one Sawali d/o Eliah, a girl of 3. He pleaded not guilty but after a full trial, he was convicted as charged and sentenced to 30 years imprisonment, 24 strokes of the cane and ordered to pay compensation of shillings 30,000/= to the victim. His appeal to the High Court was not only unsuccessful, but also his sentence was enhanced to that of life imprisonment prescribed under Section 131 (3) of the Penal Code (Cap 16 R.E 2002) as amended. He has now come

to this Court on a second appeal.

The facts of the case are simple. ELIA S/O SHABANI (PW1) was a village Executive Officer (VEO) for Ndatela village in Kiteto District. He lived somewhere near his office with his wife and four children aged between 9 and 2. On 21/8/2004 at 5.00 pm., he was in his office. His wife had gone to a place called Njoro, but the children were at home. While in office, one of his sons, called JAMAL (PW3) came to inform him that his daughter SHAMWALI (PW2), had been raped by the appellant. He rushed home. There, he found the victim (PW3) crying and the appellant was in the kitchen pretending that he was drunk. He arrested the appellant and took him and the victim to the police station. A PF3 was issued for the examination of the victim. He tendered that document as Exh. P1. The appellant was accordingly charged.

In his defence, the appellant claimed that he had gone there to collect his wages amounting to shillings 15,000/= from PW1 for whom he had done some farm work. Instead of paying him, PW1 fabricated the case to put him in trouble.

The two courts below did not buy the appellant's story, hence the conviction.

In this Court, the appellant appeared in person and fended for himself. The Respondent/Republic was represented by Mr. ZAKARIA ELISARIA, learned State Attorney.

The appellant had initially preferred four grounds of appeal, but at the hearing of the appeal, he sought and was granted leave to file additional grounds. He added three more. Altogether the original grounds could conveniently be classified into three major ones. **First,** the PF3 was improperly received in evidence. **Two,** there was no proper *voire dire* examination of PW2 and PW3 to justify reception of their evidence. **Three,** generally the prosecution case was not proved beyond reasonable doubt. In his additional grounds the appellant complained; **first**, the charge sheet was defective for not disclosing the offence in the particulars and the discrepancy in the name of the victim between the one shown in the charge sheet and that in the evidence. **Second**, he criticised the trial court for not complying with Section 210 (3) of the Criminal Procedure Act (Cap 20 R.E 2002) in recording the evidence of the witness. **Thirdly,** he heaped blame on the courts below for their finding that the offence with which he was charged was proved when the evidence of

penetration was wanting. The appellant referred to us a number of decisions of this Court to support his arguments. They are **OMARI MUSSA JUMA V R** Criminal appeal 73 of 2005 (unreported) Ex.B 9690 SSGT **DANIEL MSHAMBLA V R** Criminal Appeal No. 183 of 2004 (unreported) **MATHAYO NGALAYA@MBISE V R** Criminal Appeal No, 312 of 2001 (unreported) He prayed that his appeal be allowed.

But Mr. Elisaria, learned State Attorney was convinced otherwise. He fully supported the conviction and urged us to dismiss the appeal. He grounded his inclination on the reasons that; first although the evidence of PW2 and PW3 was taken contrary to Section 127(2) of the Evidence Act, and although the PF3 was also received contrary to the provisions of Section 240 (3) of the Criminal Procedure Act, there was, otherwise, sufficient evidence from PW1 to support the conviction. Reacting to the additional grounds, Mr. Elisaria submitted that the omissions and misspellings in the charge sheet were mere typographical errors, after comparing to the one in the original record. On non-compliance with Section 210 (3) of the Criminal Procedure Act, he argued that, that may be so, but it did not prejudice the appellant and was curable under Section 388 of the Criminal Procedure Act. Lastly, on lack of evidence of

penetration he summoned courage and submitted that there was strong circumstantial evidence to prove penetration.

We shall deal with all the grounds generally and intend to first deal with the complaints on non compliance with procedural provisions. These are Sections 210 (3) and 240(3) of the Criminal Procedure Act, and Section 127 (2) of the Evidence Act., and the complaint relating to the defect in the charge sheet.

On perusal of the original record we noted that the charge sheet was properly formulated and the name of the victim properly spelled. So, this should not detain us. We dismiss it.

The complaint against violation of Section 210 (3) of the Criminal Procedure Act was not raised in the first appellate court, and normally, this Court would not deal with a matter that was not decided by the lower courts. However in **MARWA MAHENDE V R** (Criminal Appeal No. 133 of 1994 (unreported), this Court noted:-

"The duty of the courts is to apply and interpret the laws of the country. The superior courts have the additional duty of ensuring proper application of the laws by the courts below. In the instant case the law i.e S. 226(2) was not followed, and this should be put right. We think that it was not only proper for this court to adopt such a course, but that the court has a duty to do so, provided that it affords adequate opportunity to both parties or their counsel to be heard on the matter."

Again in **ELIAS KAMAGI V.R** (Criminal Appeal No. 118 of 1992 (unreported), this Court posed and answered a similar question in the following words:-

"The question that arises is whether this Court must turn a blind eye to the improper convictions, on the basis that the appellant gave a notice of appeal only against the sentence. We think we can not do so simply for the sake of formality, because as a Court of law, we are bound to take judicial notice of matters of law; particularly where such matters concern the innocence of a convicted person. Justice may well be blind to personalities but it is certainly not blind to the law."

From the above authorities, we can safely state that a point of law (not facts) may be raised at an appellate level even if it was not raised before the court(s) below, provided that the parties are given opportunity to address the court on the point. On the premises, since there is a complaint on the contravention of section 210 (3) of the Criminal Procedure Act, we cannot turn a blind eye. We think it is not only proper, but also it is our duty, to consider, and investigate this complaint, now that both parties had addressed us on it.

Section 210(3) of the Criminal Procedure Act provides:-

> *"The magistrate shall inform each witness that he is entitled to have his evidence read over to him and if a witness asks that his evidence be read over to*
>
> *him, the magistrate shall record any comments which the witness may make concerning his evidence."*

The complaint is that this was not shown to have been complied with by the trial court. It is true that this was not shown in respect of not only the prosecution witnesses, but also of the defence. This was irregular but Mr. Elisaria thinks that the irregularity is curable, under Section 388 of the Criminal Procedure Act.

This was a procedural irregularity. The law is that for a trial to be vitiated it must be shown that the irregularity was such that it prejudiced

the accused and therefore occassioned a failure of justice (see. **Michael Luhiyo v. R.** 1994 TLR 181). A miscarriage of justice occurs where an accused is denied an opportunity of an acquittal (see **Kenyarithi s/o Mwangi v.R** (1956) 23 EACA 422; **Wilbald Kimangano v. R** Criminal Appeal No. 235 of 2007 (unreported).

Every law is made or enacted for a purpose. The purpose of Section 210 of the Criminal Procedure Act as a whole, is to ensure that the trial court records the testimonies of the witnesses correctly. Section 210 (3) is intended to give witnesses opportunities to put right what was wrongly recorded of their evidence. In order to do so, the court is enjoined to inform the witness of such right. The wording is mandatory. The record shows that this was not done. In order to gauge the effect of such omission, it must be tested if it is curable under Section 388 of the Criminal Procedure Act. (See **BAHATI MAKEJA V R** Criminal Appeal No.118 of 2010 (unreported).

In our view, whether or not the appellant was prejudiced would depend on him pointing out the faults in the evidence of any witness. In this case the appellant has not shown whose witness, including his own, was not recorded correctly. Therefore we find that the appellant was not prejudiced by the omission of the trial court to record to have complied with Section 210 (3) of the Criminal Procedure Act. The omission is therefore curable under section 388 of the Criminal Procedure Act. We therefore dismiss this ground of appeal.

The next complaint that we shall examine is on non compliance with Section 240 (3) of the Criminal Procedure Act. This provision burdens a trial court to inform an accused of his right to call the author of a medical report for cross examination if he so chooses.

This should not detain us because it is agreed by the parties that this was not complied with in this case, and the consequences are also known. And there is no dearth of authority. Suffice it to cite **ALFRED VALENTINO V R** Criminal Appeal No. 92 of 2006 (unreported) that if such report is received in evidence without complying with the provision, it may not be acted upon, and may be expunged. It has also been held that if the report is not prejudicial to the accused it need not be expunged. (**DISMAS KABAYA MILANZI V. R** Criminal Appeal No. 218 of 2005 (unreported)

In the present case section 240 (3) of the Criminal Procedure Act was not complied with in admitting Exh. P1, the PF3. With due respect to the first appellate court, this was fatal. We therefore find merit in this ground of appeal, and accordingly expunge Exh. P1 from the record. But medical evidence is not the only evidence that can be adduced to prove a sexual offence. A conviction could still stick if there is some other evidence to prove it (see **SALU SOSOMA V R** Criminal Appeal No. 31 of 2006 (unreported)

In the present case the next crucial evidence is that of PW2 the victim, and PW3, who sort of eve witnessed the commission of the offence.

But there is a complaint that, being of tender ages, their evidence was received in contravention of Section 127 (2) of the Evidence Act.

Like in the case of the PF3, this should not detain us because Mr. Elisaria has conceded that whatever semblance of *viore dire* test conducted on PW2 and PW3 it was not satisfactory and violated section 127(2) of the Evidence Act.

We agree with the appellant and Mr. Elisaria that in receiving the evidence of PW2 and PW3, Section 127 (2) of the Evidence Act was not fully complied with. We do not, with respect, agree with the first appellate court that the trial court "took necessary steps of *voire dire* and proceeded to believe their evidence". We shall demonstrate below.

The law requires that before recording the evidence of a child of tender years the trial court must invoke a process to ascertain whether the child understands the nature of an oath, is of sufficient intelligence, and understands the meaning of speaking the truth. These are conditions precedent that must be met, before deciding to record the evidence of a child, on oath, unsworn or certify that the child is unfit to give any evidence (see **LYANGA V R** Criminal Appeal No. 105 1991 (unreported). This Court has also held that in conducting a *voire dire* examination test, the questions and answers must form part of the record and failure to do so is also fatal. (see **RAJABU YUSUF V R** Criminal Appeal No 457 of 2005 (unreported).

In recording the evidence of PW2 and PW3, the trial court did not record the questions and answers asked of the witnesses. In the case of PW2 there is on record:-

> "VIORE DIRE QUESTION (sic):- I don't know meaning of oath
> Certificate:- The witness knows nothing of oath (sic)"

It is not clear from the record whether that question was put to the witness. But, worse still, there was no finding by the trial court, whether the witness was possessed of sufficient intelligence to justify the reception of her evidence, and whether she understood the duty of speaking the truth. The only discrepacy in recording the evidence of PW3 is lack of record of the questions and answers asked of and received from him. Like in the case of PW2 it is not clear whether the **"Voidire question"** (sic) was put to the witness, or the trial court's own formulation. On the authorities we cannot but agree that in taking the evidence of PW2 and PW3 Section 127(2) of the Evidence Act and the law as established by case law, was flouted.

And now for the consequences of non compliance with Section 127(2) of the Evidence Act. We have consulted the decisions of this Court cited to us by the parties. We think the bottom line is laid down in the decision of **JUSTINE SOWAKI V R** Criminal Appeal No. 103 of 2009 (unreported) that:-

> *"there was need for strict compliance with the provisions of that section and that non compliance might result in the quashing of a conviction unless there was other sufficient evidence to sustain the conviction"*

We fully associate ourselves with that statement of the law, and intend to apply it in the present case. We therefore also agree with the ground of appeal relating to the non compliance with section 127 (2) of the Evidence Act. This disposes of the last complaint on procedure.

When the evidence of PW2 and PW3 is discounted or treated as unsworn the question what remains, is whether there was any other cogent evidence on record that would sustain the conviction?

Mr. Elisaria, thinks that there is such evidence in the testimony of PW1. His view is also shared by the first appellate court, which, on p. 55 of the judgment, observed:-

> *"It is also in evidence that when PW1 arrived, he found the Appellant in the kitchen with PW2, crying a lot due to the pains she was experiencing."*

With respect, we cannot find such evidence in the testimony of PW1. This is what PW1 said on p. 13 of the record:-

> *"Then I went to arrest him and brought Police (sic) I caught him pretending was drunk to my kitchen pretending drunken (sic). The girl I met crying feeling pain when seen left the girl" (sic).*

Mr. Elisaria also referred to his answers in cross examination by the appellant on p. 14 . It ran thus:-

> *"I met you sleeping to my kitchen, my daughter crying. I confirmed it is you suspected." (sic)*

We cannot read anything in these sentences to suggest that PW1 found the appellant with the girl in the act. In fact PW1 shakes off that suggestion when he responded to a question in re-examination. He said:-

> *"The evidence is true regarding to what I was told by my son that the accused raped my daughter."*

So, it all shows that the only evidence he had, was information from his son PW3. In our view, if he had caught the appellant in *flagrante delicto*, as the lower courts seem to have inferred, he would not have hesitated to say so expressly. But what explodes in the face is the evidence of PW2, the victim (if it is anything to go by). She is recorded to have replied in answer to a question put to her by the trial court that:-

> *"Brother came accused was inside and left me I went and crying.* ***When father came met accused to the kitchen (sic) I was out."***

If we can make any sense out of this sentence, it means that when PW1 arrived PW2 was outside and the appellant was in the kitchen.

We are therefore certain in our minds that, PW1 did not catch the appellant committing the alleged atrocity on PW2. Therefore his evidence as to the alleged rape remains hearsay. In the absence of the discarded Exh. P1 (PF3) which he tendered and the weightless evidence of PW2 and PW3 we cannot accept that this witness could corroborate or provide the other much needed evidence to sustain the conviction of the appellant.

In view of our above findings, we find it unnecessary to go into the discussion on whether or not penetration was proved. The above sufficiently disposes of the appeal.

For all the above reasons, we think that the conviction of the appellant is not safe. We accordingly allow the appeal, quash the conviction, and set aside the sentence and order of compensation. We order his immediate release, unless otherwise lawfully held.

It is so ordered.

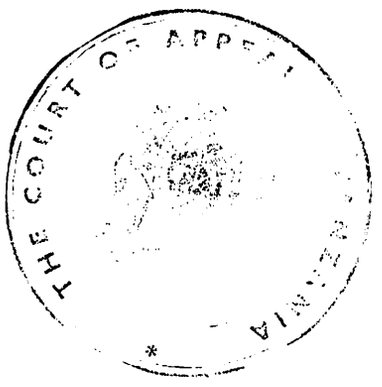
DATED at ARUSHA this 22nd day of September, 2011.

J.H. MSOFFE
JUSTICE OF APPEAL

S. MJASIRI
JUSTICE OF APPEAL

S.A. MASSATI
JUSTICE OF APPEAL

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



E.Y. MKWIZU
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