| | | |
|---|---|---|
| **CRIMINAL APPEAL NO. 92 OF 2006- COURT OF APPEAL OF TANZANIA AT ARUSHA- MROSO, J.A., KAJI, J.A., And RUTAKANGWA, J.A.** | **ALFEO VALENTINO Vs. REPUBLIC- (Appeal from the Judgment of the High Court of Tanzania at Arusha)-HC Criminal Appeal No. 16 of 2001- Msoffe, J.** | Offence of rape contrary to sections 130 (1) and 131 (1) of the Penal Code.<br><br>**Requisite notice of intention to rely on the defence of alibi**- failure by a trial court to fully consider a defence of alibi is a serious error<br><br>**A Child of tender age-Section 127 (2) of the Evidence Act-**<br>"If we are to paraphrase the provisions of section 127 (2), a court may only receive evidence of a child of tender years who does not understand the nature of an oath if in the opinion of the court the child is possessed of sufficient intelligence and understands the duty of speaking the truth. <u>These requirements must be recorded in the proceedings..... It is our considered view that the two</u> |

| | | |
|---|---|---|
| | | requirements are conditions precedent to receipt of evidence from a child of tender years whose evidence has not been received on oath or affirmation.: **see Court of Appeal in Augustino Lyanga v R, Criminal Appeal No. 105 of 1991**<br><br>***Voire Dire*-When evidence of such child should not be received at all-** if a ***voire dire*** is conducted and a child who does not understand the nature of an oath or affirmation is found to be wanting either in possession of sufficient intelligence or in his/her capacity to understand the duty of speaking the truth or in both the evidence of such child should not be received at all. This is a guiding general proposition of law for all trial courts. |

| | | |
|---|---|---|
| | | **Duty of the Court in Second Appeal-** The law on the duty of this Court in an appeal of this nature is well settled. It is now well established that the Court rarely interferes with concurrent findings of fact. An appellate court can only interfere with a finding of fact by a trial court where it is *"satisfied that the trial court has misapprehended the evidence in such a manner as to make it clear that its conclusions are based on incorrect premises"*: See **Salum Bugu** v **Mariam Kibwana,** Civil Appeal No. 29 of 1992 (unreported). On a second appeal this Court will not interfere unless it is shown that there has been a misapprehension of the evidence, a miscarriage of justice or a violation of a principle of law or |

| | | |
|---|---|---|
| | | practice: See **Amratlal D. M. t/a Zanzibar Silk Stores** v **A. H. Jariwara t/a Zanzibar Hotel [1980] TLR 31, CAT, D.P.P.** v **J. M. Kawawa [1981] TLR 143**, **Musa Mwaikunda** v **R, Criminal Appeal No. 174 of 2006 (unreported)**, etc.<br><br>**Demeanour of the witness whilst under examination- Section 212 of the Criminal Procedure Act, 1985-** if a trial magistrate has found a particular witness's demeanour impressive or otherwise and he or she believes that the witness's demeanour will be crucial in the assessment of his/her credibility then section 212 should be followed to the letter. In order to ensure that justice is manifestly seen to been done, such |

| | | |
|---|---|---|
| | | remarks should not remain as a trial magistrate's secret until the day of judgment. They should be made known to the witness and/or parties immediately.- Full compliance with section 212 gains greater significance when the judgment is prepared after a lapse of a reasonable period of time after the testimony.<br><br>**Rejection of evidence on the sole ground of demeanour** without considering the evidence of the other witnesses is extremely unjudicial.<br><br>**Statements or Reports of Medical Witnesses-Section 240 (1) of the Criminal Procedure Act, 1985** sanctions receipt in evidence in a subordinate court of statements or reports by medical witnesses- 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: See Court of Appeal of Tanzania in **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.**<br><br>**Statements or Reports of Medical Witnesses-Section 240 (1) of the Criminal Procedure Act, 1985-**if such medical report, as the PF3 is received in evidence without complying with the mandatory provisions of section 240 (3) of Criminal Procedure Act, 1985 such a report must not be acted upon |

**IN THE COURT OF APPEAL OF TANZANIA**
**AT ARUSHA**

**(CORAM: MROSO, J.A., KAJI, J.A., And RUTAKANGWA, J.A.)**

**CRIMINAL APPEAL NO. 92 OF 2006**

**ALFEO VALENTINO ..... APPELLANT**
**VERSUS**
**THE REPUBLIC ..... RESPONDENT**

**(Appeal from the Judgment of the High Court of Tanzania at Arusha)**

**(Msoffe, J.)**

**dated the 19th day of September, 2001**
**in**
**HC Criminal Appeal No. 16 of 2001**
**----------**
**REASONS FOR JUDGMENT**

**RUTAKANGWA, J.A.**:

The appellant was charged before the District Court of Arusha with the offence of rape contrary to sections 130 (1) and 131 (1) of the Penal Code. The particulars of the charge read as follows:-

> *"That Alfeo s/o Valentino charged on the **8th day of September, 2002** at about 16:00 hours at Sakina area within the Municipality, District and Region of Arusha, did unlawfully*

*have a carnal (sic) knowledge of one Grace d/o John a girl of 9 years old".*

Although he denied the charge, he was convicted as charged and sentenced to thirty years imprisonment. Aggrieved by the conviction and sentence he appealed to the High Court where the conviction and sentence were sustained. Still dissatisfied, he lodged this appeal. When the appeal was called on for hearing, after hearing both sides, we allowed the appeal, quashed the conviction and sentence and ordered his release from custody. We reserved our reasons which we now give.

The prosecution case against the appellant was based on the evidence of four witnesses; these were two mothers and two daughters.

It was Asifiwe Msangi, the mother of Grace d/o John, who testified as PW2 at the trial of the appellant who initiated the steps leading to the arrest and prosecution of the appellant. In her evidence she told the trial court that on the 8th of September, 2000, when Grace, who testified as PW1, returned home from school at

4:00 p.m. she refused to eat. Grace told PW2 that her friend and classmate Irine had been given by her mother Tshs. 5,000/= with which they had used to buy some bites. When PW2 cross-checked with Irine's mother, Sarah Minja (PW4), the latter denied having given Irine (PW3) any money. When PW2 pressed PW1, the latter came up with a different story. This time PW1 told her mother (PW2) that they had been given money by the appellant *"who used to take them to his home and defile them"*. On getting this information, PW2 returned to PW4's home where she learnt that PW4 had already been told the same story. All the same PW2 took no action until ***12th September, 2000*** when she reported the matter to the Police. PW1 was sent to Mount Meru Government Hospital for examination and her PF3 was tendered in evidence as exhibit P1. The appellant was subsequently charged.

In his sworn evidence the appellant denied raping PW1 on 08/09/2000 or at all. He raised a defence of alibi claiming that he had left Arusha for Iringa on 5th September, 2000 where he remained until 23rd September, 2000 when he returned to Arusha. On this he was supported by five witnesses including his employer Yahaya

Mosha (DW5) and Sergeant Francis Mchafe (DW6) of the Tanzania Peoples Defence Force. DW6 told the trial court that he was with the appellant at Iringa between 7th and 13th September, 2000, when he (DW6) returned to Arusha leaving the appellant behind. We cannot resist observing here that although the appellant was ready to back up his defence of alibi with bus fare tickets, his efforts were frustrated by the Public Prosecutor who successfully asked the trial Resident Magistrate not to accept them in evidence as the appellant had not tendered them *"before the hearing"* of the case. This was in spite of the fact that the appellant had given the requisite notice of his intention to rely on the defence of alibi.

Relying on the PF3 (exhibit P1) which showed that PW1 had *"lost her virginity and that her vaginal orifice could allow a tip of a finger"* and the evidence of PW1 and PW3, the trial Resident Magistrate had no difficulties in holding that PW1 had actually been raped by the appellant.

The first appellate court dismissed the appellant's appeal because the prosecution *"witnesses were all positive that the appellant raped the complainant on the fateful day"*.

In this appeal five grounds of appeal were preferred, but they can safely be reduced to three. These are:- **One,** the two courts below erred in believing and acting on the evidence of PW1 and PW3 which was received without conducting a ***voire dire*** examination. **Two,** the two courts below erred in acting on exhibit P1 (the PF3) which was irregularly admitted in evidence without the appellant being informed of his right to have the doctor summoned under section 240 (3) of the Criminal Procedure Act, Cap. 20, R.E. 2002. **Three,** the two courts below erred in law and fact in basing and/or sustaining the conviction for rape on the contradictory, inconsistent and implausible evidence of the four prosecution witnesses which did not prove the charge.

The appellant, who was advocating for himself, found support for his appeal from the respondent Republic. Mr. Boniface, learned Senior State Attorney, represented the Republic in this appeal.

When called upon to elaborate on his grounds of appeal the appellant, a lay person, had nothing to say. He preferred to have Mr. Boniface address the Court first.

Arguing in support of the appeal Mr. Boniface urged us to allow the appeal on the basis of the complaints raised in the memorandum of appeal. He conceded to the complaint that the evidence of both PW1 and PW3 who were children of tender age was received in evidence by the trial court without a ***voire dire*** examination being conducted first.

To him this was necessary, under section 127 (2) of the Evidence Act, Cap. 6 R.E. 2002, for the purpose of determining whether or not the two girls knew the nature of an oath and if not whether they were possessed of sufficient intelligence to justify the reception of their evidence *and* understood the duty of speaking the truth. Their evidence having been taken on oath without complying with this mandatory requirement of the law, he argued, the same should be reduced to the plane of unsworn evidence which would need to be corroborated. He cited the case of **Herman Henjewele**

v **R,** Criminal Appeal No. 164 of 2005 (unreported) in support of his argument.

Mr. Boniface also conceded to the non-compliance by the trial court with the mandatory provisions of section 240 (3) of the Criminal Procedure Act, (the Act). He was of the view that because of this omission the PF3 (exhibit P1) should be expunged from the record.

Coming to the patent contradictions and inconsistencies in the evidence of the four prosecution witnesses, which he took pains to list, Mr. Boniface was unequivocally of the view that they were so fundamental that it was wrong for the two courts below to gloss over them thereby occasioning injustice in the case. To Mr. Boniface the contradictions in the evidence of PW1 and PW2 rendered their evidence unreliable and could not be saved by section 127 (7) of the Evidence Act.

The learned Senior State Attorney also joined the appellant in attacking the biased approach adopted by the trial magistrate in rejecting an otherwise cogent and convincing defence evidence on

the basis that the appellant was unimpressive in the witness box. He maintained that had the appellant been as unimpressive as she portrayed him in the judgment then she ought to have so recorded in the record of proceedings as is mandatorily required under section 212 of the Act. For these reasons he invited us to allow the appeal in its entirety.

We understand that this is a second appeal. The law on the duty of this Court in an appeal of this nature is well settled. It is now well established that the Court rarely interferes with concurrent findings of fact. An appellate court can only interfere with a finding of fact by a trial court where it is *"satisfied that the trial court has misapprehended the evidence in such a manner as to make it clear that its conclusions are based on incorrect premises"* : See **Salum Bugu** v **Mariam Kibwana,** Civil Appeal No. 29 of 1992 (unreported). On a second appeal this Court will not interfere unless it is shown that there has been a misapprehension of the evidence, a miscarriage of justice or a violation of a principle of law or practice: See **Amratlal D. M. t/a Zanzibar Silk Stores** v **A. H. Jariwara t/a Zanzibar Hotel** [1980] TLR 31, CAT, **D.P.P.** v **J. M. Kawawa**

[1981] TLR 143, **Musa Mwaikunda** v **R,** Criminal Appeal No. 174 of 2006 (unreported), etc.

After our objective perusal of the entire evidence on record and judgments of the two courts below we have found a compelling need, in the interests of justice, to interfere with the concurrent findings of fact by the two courts below. The conceded grounds of appeal justify our interference. We shall first deal with the issues of non-compliance with the mandatory statutory provisions.

The points of law raised in this appeal, as conceded by Mr. Boniface, have merits. Section 212 of the Act provides in no uncertain terms that *"when a magistrate has recorded the evidence of a witness he shall also record such remarks, if any, as he thinks material respecting the demeanour of the witness whilst under examination"*. It goes without saying, therefore, that if a trial magistrate has found a particular witness's demeanour impressive or otherwise and he or she believes that the witness's demeanour will be crucial in the assessment of his/her credibility then section 212 should be followed to the letter. In order to ensure that justice is

manifestly seen to been done, such remarks should not remain as a trial magistrate's secret until the day of judgment. They should be made known to the witness and/or parties immediately. Full compliance with section 212 gains greater significance when the judgment is prepared after a lapse of a reasonable period of time.

In this particular case the judgment of the trial court was prepared over a month after the appellant had testified. The good trial magistrate rejected his evidence because he was having a hard time *"facing PW1 and PW3 in Court"*. As this was not the only case she was dealing with in her court, we fail to understand how she could recall this unimpressive demeanour of the appellant without having so recorded in the record of proceedings.

We have also noted that in her judgment the learned trial Magistrate did not make even a fleeting reference to the evidence of the five defence witnesses who supported the appellant's alibi. We are satisfied that the rejection of the appellant's own evidence on the sole ground of demeanour without considering the evidence of the five defence witnesses was extremely unjudicial. The magistrate

substituted her own impressions for real evidence in order to justify the guilty verdict, although she was not a witness. As this Court succinctly stated in **Charles Samson** v **R,** Criminal Appeal No. 29 of 1990, as in many other cases, failure by a trial court to fully consider a defence of alibi, and we may add without fear of being contradicted, the defence case as a whole, is a serious error. We are of the settled mind, therefore, that the trial court fatally erred in not considering the entire defence evidence before finding the appellant guilty. Unfortunately, even the first appellate court did not address itself on this omission.

That the provisions of section 127 (2) of the Evidence Act were flagrantly disregarded by the trial Resident Magistrate is not in dispute. We would like to remind all trial magistrates what this Court stated in the case of **Augustino Lyanga** v **R,** Criminal Appeal No. 105 of 1991. We said:-

> *"If we are to paraphrase the provisions of section 127 (2), a court may only receive evidence of a child of tender years who does not understand the nature of an oath if in the*

> *opinion of the court the child is possessed of sufficient intelligence and understands the duty of speaking the truth. <u>These requirements must be recorded in the proceedings …..</u>*
>
> *<u>It is our considered view that the two requirements are conditions precedent to receipt of evidence from a child of tender years whose evidence has not been received on oath or affirmation</u>.* [Emphasis is ours].

It hardly needs emphasis, therefore, to say that if a ***voire dire*** is conducted and a child who does not understand the nature of an oath or affirmation is found to be wanting either in possession of sufficient intelligence or in his/her capacity to understand the duty of speaking the truth or in both <u>the evidence of such child should not be received at all</u>. This, we say, as a guiding general proposition of law for all trial courts.

All the same, in this particular case the evidence of PW1 and PW3 was taken on oath without conducting any ***voire dire*** at all. This was highly irregular. For the present purpose we shall treat their evidence as unsworn evidence, although in some cases it is

discounted altogether. The same may be acted upon subject to the provisions of section 127 (7) of the Evidence Act. Section 127 (7) provides that a conviction for a sexual offence may be based on such evidence if the court is satisfied that the child has told *"nothing but the truth".* This then leads us to the appellant's complaint on non-compliance with section 240 (3) of the Act.

Section 240 (1) of the Act sanctions receipt in evidence in a subordinate court of statements or reports by medical witnesses. Sub-section (3) thereof provides as follows:-

> *"When a report referred to in this section is received in evidence the court may, if it think fit, and shall, if so requested by the accused or his advocate, summon and examine or make available for cross-examination the person who made the report; and the court shall inform the accused of his right to require the person who made the report to be summoned in accordance with the provisions of this sub-section".* [Emphasis is ours].

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. In the cases of **Sultan s/o Mohamed** and **Rahim Mohamed,** both involving the offence of unnatural offence c/s 154 of the Penal Code, retrials were ordered in the interests of justice, as the trials were found to have been flawed by the omission. In **Buyoka's** case the conviction for rape was quashed and no re-trial was ordered because of the circumstances obtaining in that case.

In this particular case even if the PF3 is not discounted, it is our considered opinion that it carries no weight at all. This is because

PW1 was examined five days after the alleged incident. Furthermore, the only findings going to suggest, very remotely in our view, that PW1 might have been carnally known were a missing hymen and the *"vaginal orifice"* which *"could allow tip of finger".* The medical officer did not even hazard a guess on what could have occasioned this. Furthermore, the PF3 could not prove that it was the appellant who raped PW1 but PW1 herself. This leads us to the final ground of appeal.

That the evidence of the four prosecution witnesses was characterized by contradictions and inconsistencies was even accepted by the learned 1st appellate judge. He, however, dismissed them as follows:-

> *"In my view, I will accept Mr. Maro's view that there were contradictions here and there as clearly argued above. I am not prepared, however, to say that these were material contradictions enough to affect the overall case against the appellant. I say so because as earlier stated, the bottomline in the case was whether or not the appellant committed*

> *the offence. <u>And on this point, the witnesses were all positive that the appellant raped the complainant on the fateful day</u>*. [Emphasis is ours].

The underscored words provide us with a good starting point. We share the learned judge's observation that the bottomline was whether or not the appellant raped PW1. With profound respect, however, we differ with him on his assertion that the prosecution *"witnesses were all positive"* that the appellant raped PW1 on 8th September, 2000. We scanned every available evidence on record but we found no iota of evidence supporting this conclusive assertion.

PW1 in a very incomprehensible manner told the trial court that one day they met the appellant who took them (herself and PW3) to his home, undressed her and then ***"akanifanya matusi"***. Then he gave her Tshs. 5,000/= with which they bought bites. PW1 said she could not recall the day. PW2 who mentioned the said 8th September 2000 as already shown earlier, testified that it was on this day when she learnt from PW1 that the appellant used in the past to

defile PW1 and PW3. On her part PW3 testified that one day as they were coming from school they passed by the appellant's *"place"* who gave ***her*** *"Tshs. 5,000/= and then, as she put it,* ***"tumefanya ujinga"****.* PW4 told the trial court that after being visited by PW2 on 8/9/2000 she was informed by PW3 that at one time the appellant had taken her and PW1 to his home and had raped them. So there is no evidence on record, let one credible evidence, to show that the appellant had sexual intercourse or even made an attempt to do so with PW1 on 8th September 2000 or on any other specific day.

It was important for the prosecution to produce clear evidence to prove that PW1 was raped on 8/9/2000 as the charge particularized. In **Ryoba Mariba @ Mungare** v **R,** Criminal Appeal No. 74 of 2 003 (unreported) this Court held that it was essential for the Republic which had charged **Ryoba** with raping one Sara Marwa on 20/10/2000 to lead evidence showing exactly that Sara was raped on that day, a charge the accused was required to answer. See **Christopher R. Maingu** v **R**, Criminal Appeal No. 222 of 2004 (unreported).

The next crucial question we have to consider is whether or not PW1 and PW3 had told the trial court nothing but the truth. Our own evaluation of the evidence of these key witnesses has led us to the conclusion that they did not. In the **first** instance the prevarications exhibited by PW1 on 8/9/2000 have convinced us that PW1 either did not know the duty of speaking the truth or she was simply a downright liar. **Secondly,** the inconsistencies in their evidence on what had allegedly happened to them while at the home of the appellant lead us to an irresistible conclusion that they were lying.

While PW1 testified that they met the appellant along the way and he led them to his home where he ravished them, PW3 said that they went to the appellant's home on their own being led by one Rose. Although PW1 alleged that after being carnally known by the appellant he gave her Tshs. 5,000/=, PW3 testified that when they went to the appellant's home he first gave her (PW3) Tshs. 5,000/= and then he presumably raped them. However, while under cross-examination PW3 told the trial court that she was given the said money by the appellant's friend and further that PW1 was not given any money. At one time PW3 testified that while the appellant was

raping PW1 she was in the appellant's room witnessing the incident. But she belied herself when she was examined by the court, by asserting that:-

> *"While Grace (PW1) was being done by the accused I was in another room with the other man ….."*

All these were not minor contradictions. To us they were fundamental and went not only to shake their credibility as witnesses but also to create genuine doubts on whether PW1 was carnally known at all and if she was, if that was done by the appellant.

There is also the issue of the implausibility of the entire story. Although PW2 testified that PW1 had told her on 8/9/2000 that the appellant used to *"defile them"*, she never bothered to examine her at all. Although at first PW2 told the trial court that she reported the incident to the police on 9/9/2000, while under cross-examination she back-pedalled and said that she made the report on 12/9/2000 because *"8/9/2000 was a Friday"*. One wonders why PW2, who is supposed to be a responsible mother, had to wait for four clear days

before reporting the abhorrent ***"crime"*** of the appellant, if indeed this ***"rape"*** of PW1 took place. Her unexplained flippancy, in the circumstances, has led us to think that the entire accusation might have been cooked up for reasons best known to themselves.

It is for these critical deficiencies in the prosecution case which the two courts below did not address their minds to, that we found ourselves constrained to hold that the appellant's conviction was bad in law and made the orders stated at the beginning.

DATED at ARUSHA this 25th day of October, 2007.

J. A. MROSO
**JUSTICE OF APPEAL**

S. N. KAJI
**JUSTICE OF APPEAL**

E.M.K. RUTAKANGWA
**JUSTICE OF APPEAL**

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

(I. P. KITUSI)
**DEPUTY REGISTRAR**