CRIMINAL APPEAL NO. 105 OF 2006- COURT OF APPEAL OF TANZANIA AT ARUSHA- MROSO, J.A., KAJI, J.A. And RUTAKANGWA, J.A.	**JAFASON SAMWEL Vs. REPUBLIC- (Appeal from the Judgment of the High Court of Tanzania at Arusha)-HC. Criminal Appeal No. 99 of 2002- Sheikh, J.**	**Offence of rape, contrary to section 130 (2) (c) of the Penal Code Cap. 16**, as amended by the Sexual Offences Special Provisions Act No. 4 of 1998. **Section 127 of the Law of Evidence Act-A Child of tender age-**A child aged 8 years is in terms of section 127 (5) of the Evidence Act, a child of tender age. **Law of Evidence Act-A Child of tender age-**Although the law, that is, section 127 (1) of the Evidence Act generally does not prohibit a child from giving evidence in a criminal case, yet there are preconditions which must be complied with before receiving his or her evidence. These preconditions are provided for under section 127 (2) of the Evidence Act.

		Law of Evidence Act-A Child of tender age-Duty of a Judge or Magistrate-Section 127 (2) of the Law of Evidence imposes the duty on the trial magistrate or judge to investigate whether the child witness knows the meaning of an oath so as to give evidence on oath or affirmation. If the child does not know the meaning of an oath, then the trial magistrate or judge must investigate whether he is possessed of sufficient intelligence and understands the duty of speaking the truth. If he is satisfied that the child is possessed of sufficient intelligence and understands the duty of speaking the truth, he may receive his evidence though not given on oath or affirmation.

		Law of Evidence Act-A Child of tender age-Duty of a Judge or Magistrate-Section 127 (2) of the Law of Evidence-Determination of sufficiency of intelligence of a child of tender age-In determining whether the child is possessed of sufficient intelligence and understands the duty of speaking the truth, the trial magistrate or judge must conduct a *voire dire* examination.-He may put some questions to the child and from his answers he may be able to determine whether the child is possessed of sufficient intelligence and understands the duty of speaking the truth. How a *voire dire* test is conducted appears to be a matter of style.

		Determination of sufficiency of intelligence of a child of tender age-Although how *voire dire* is conducted depends on style which a judge or magistrate adopts- But recording questions and answers appears to be a better way because this enables even an appellate court to know whether the questions asked and the answers given were such that any court of law would have come to the conclusion that the child was possessed of sufficient intelligence and understood the duty of speaking the truth.

IN THE COURT OF APPEAL OF TANZANIA
AT ARUSHA

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

CRIMINAL APPEAL NO. 105 OF 2006

JAFASON SAMWEL.....APPELLANT
VERSUS
THE REPUBLIC.....RESPONDENT

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

(Sheikh, J.)

dated the 30th day of November, 2005
in
HC. Criminal Appeal No. 99 of 2002

JUDGMENT OF THE COURT

15 & 29 October, 2007

KAJI, J.A.:

In the District Court of Arusha, in Criminal Case No. 785 of 2001, the appellant, Jafason Samwel, was charged with and convicted of the offence of rape, contrary to section 130 (2) (c) of the Penal Code Cap. 16, as amended by the Sexual Offences Special Provisions Act No. 4 of 1998. He was sentenced to thirty (30) years imprisonment and twelve (12) strokes of the cane. He unsuccessfully appealed to the High court.

At the trial the prosecution had adduced evidence to the effect that, on 28.9.2001, at about 7.30 pm, Elizabeth d/o Shija (PW1) was

sent by her grandmother to fetch Shs. 100/= from her mother, Bralinda d/o Mlay (PW3) for buying paraffin. On the way the appellant grabbed her and dragged her to either near the house of Lesian Charles (according to PW1) or near the Lutheran Church (according to Rosemary John) and raped her. On the following day the matter was reported to Usa River Police Station where PW1 was issued with a PF3. She was later medically examined and found with bruises on the left labia with discharge from her private parts (vagina) and the hymen membrane had been perforated (PF3 Exh. P1). The appellant was arrested and charged as above. The appellant protested his innocence. He was convicted and sentenced as above. In his memorandum of appeal to this Court he preferred five grounds of appeal. At the hearing of the appeal he presented four additional grounds making a total of nine. However almost all of them revolve around the burden of proof, non compliance with Section 127 (2) of the Evidence Act, non compliance with Section 240 (3) of the Criminal Procedure Act and contradictions among the prosecution witnesses. He did not elaborate on them but he opted

the learned State Attorney to respond and thereafter he would give a rejoinder.

The learned State Attorney Mr. Juma Ramadhani who represented the respondent Republic, at first supported the conviction but not the sentence. But on reflection he did not support the conviction, mainly on the ground of non compliance with sections 127 (2) of the Evidence Act and 240 (3) of the Criminal Procedure Act by the learned trial magistrate. However he was of the view that the case should be ordered to be heard afresh under section 388 of the Criminal Procedure Act.

It is common ground that at the material time PW1 was aged 8 years, and therefore in terms of section 127 (5) of the Evidence Act, was a child of tender age. Although the law, that is, section 127 (1) of the Evidence Act generally does not prohibit a child from giving evidence in a criminal case, yet there are preconditions which must be complied with before receiving his or her evidence. These

preconditions are provided for under section 127 (2) of the Evidence Act which reads; -

> *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 intelligency to justify the reception of his evidence, and understands the duty of speaking the truth.*

This provision imposes the duty on the trial magistrate or judge to investigate whether the child witness knows the meaning of an oath so as to give evidence on oath or affirmation. If the child does not know the meaning of an oath, then the trial magistrate or judge must investigate whether he is possessed of sufficient intelligence and understands the duty of speaking the truth. If he is satisfied that the child is possessed of sufficient intelligence and understands the duty of speaking the truth, he may receive his evidence though

not given on oath or affirmation. In determining whether the child is possessed of sufficient intelligence and understands the duty of speaking the truth, the trial magistrate or judge must conduct a *voire dire* examination. He may put some questions to the child and from his answers he may be able to determine whether the child is possessed of sufficient intelligence and understands the duty of speaking the truth. How a *voire dire* test is conducted appears to be a matter of style. But recording questions and answers appears to be a better way because this enables even an appellate court to know whether the questions asked and the answers given were such that any court of law would have come to the conclusion that the child was possessed of sufficient intelligence and understood the duty of speaking the truth.

In the instant case the learned trial magistrate recorded as follows: -

> *PW1 Elizabeth Shija, adult (?), age 8 years,*
> *the girl does not know the meaning of oath.*

Then she started testifying. This in our view, was not sufficient to enable the learned trial magistrate to determine whether PW1 was possessed of sufficient intelligence and understood the duty of speaking the truth. We agree with the learned counsel and the appellant that the *voire dire* test was not properly conducted.

Since her intelligence and understanding of the importance of speaking the truth was not properly tested, it cannot be held with certainty that she was possessed of sufficient intelligence and understood the duty of speaking the truth, and the exception under section 127 (7) of the Evidence Act could not safely be applied.

It is also doubtful whether she was all that truthful as the learned trial magistrate purported to impress upon us on page 16 of the record of appeal. It was recorded at page 7 of the record that she told the court that the appellant raped her near the house of Lesian Charles. But PW2 said she told her she was raped near the Lutheran Church. The record is not clear whether the two places are the same. This contradiction is incompatible with the character of a truthful witness.

In the circumstances of the case, in our view, the unsworn statement of PW1 required corroboration to found the conviction of the appellant. In the instant case there was no corroboration that it was the appellant who raped her. Another problem in this case is the PF3 Exh. P1 which was held by the two courts below to have corroborated PW1 that she was raped, although it did not corroborate her that it was the appellant who raped her. The problem is that, the appellant was not explained his right to have the doctor who examined PW1 to be called for cross examination, as provided under section 240 (3) of the Criminal Procedure Act. As properly observed by the learned State Attorney this prejudiced the appellant who might have expressed his desire for the doctor to be called for cross examination on the PF3, especially in view of PW1's assertion that the appellant washed her private parts.

Another point of some concern is the appellant's identification. The event was alleged to have occurred at about 7.30 pm. Apart from her knowledge of the appellant, PW1 did not clarify whether

there was sufficient light for a proper identification which was free from a possible mistaken identity, especially that the rapist covered her with a coat as asserted by PW2.

Despite all these shortfalls the learned State Attorney urged us to quash the proceedings and order a retrial. We have carefully considered the prayer for a retrial. But in our view, ordering a retrial will amount to affording the prosecution an opportunity to fill the gaps in their case. We say so for the following reasons: -

First, in 2001 when PW1 testified, she was 8 years old. We cannot tell when the retrial will take place. At any rate PW1 will not be the same as in 2001. For example, if the retrial will take place this year, she will be 13 years old. She will still be a child of tender age but she will be more knowledgeable than in 2001 when she was 8, and a *voire dire* examination on her may not reflect her true position in 2001.

Second, in 2001 PW2, although appears to have been adult, was not sworn in. Definitely in a retrial she will be sworn in and her

sworn evidence will have more evidential value/weight than her 2001 unsworn statement.

Thus, in our view, an order for a retrial will not be appropriate in the circumstances of the case.

In conclusion, we are of the considered view that, had the above aspects of the case been brought to the attention of the learned judge on first appeal, she would not have upheld the conviction, and would have allowed the appeal.

Consequently, for the above reasons, we allow the appeal, quash the conviction and set aside the sentence. The appellant is to be released forthwith unless lawfully held.

DATED at ARUSHA this 26th 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