CRIMINAL APPEAL NO. 229 OF 2007-COURT OF APPEAL OF TANZANIA AT ARUSHA- MROSO, J.A., KAJI, J.A. And RUTAKANGWA, J.A.	**VERNARD COSTA @ NSURI Vs. REPUBLIC-(Appeal from Decision of the High Court of Tanzania at Moshi)- Criminal Appeal No. 136 of 2001-Munuo, J.**	Offence of rape contrary to sections 130 (2) and 131 (3) of the Penal Code Cap. 16, as amended by the Sexual Offences Special Provisions Act No. 4 of 1998. Sentenced of 30 years imprisonment-High Court enhanced the sentence to life imprisonment. **-Section 127 of the Law of Evidence Act-A Child of tender age-Witness Aged 8** is in terms of section 127 (5) of the Evidence Act, 1967 a child of tender age. **A Child of tender age-How a court can know that this child is possessed of sufficient intelligence and understands the duty of speaking the truth-** a judge or magistrate must

		conduct a *voire dire* test to determine whether the child witness is possessed of sufficient intelligence and understands the duty of speaking the truth.-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. **A Child of tender age- 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 importance of speaking the truth. **A Child of tender age-Court must** record any reason which satisfied it that a child of tender age said nothing but 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. 229 OF 2007

VERNARD COSTA @ NSURI.....APPELLANT
VERSUS
THE REPUBLIC.....RESPONDENT

(Appeal from Decision of the High Court of Tanzania at Moshi)

(Munuo, J.)

dated the 10th day of June, 2002

in
Criminal Appeal No. 136 of 2001

JUDGMENT OF THE COURT

17 & 29 October, 2007

KAJI, J.A.:

In the District Court of Hai, in Criminal Case No. 69 of 2001, the appellant, Vernard Costa @ Nsuri, was charged with and convicted of the offence of rape contrary to sections 130 (2) and 131 (3) of the Penal Code Cap. 16, as amended by the Sexual Offences Special Provisions Act No. 4 of 1998. He was sentenced to 30 years imprisonment.

He unsuccessfully appealed to the High Court which enhanced the sentence to life imprisonment.

The facts which led to this appeal are simple. On 19.2.2001, at about 4 pm, when Septimu Telesphory (PW3) arrived at home from work he found his eight year old daughter Beatrice d/o Septimu (PW1) crying. He asked her why she was crying. She replied she had been raped by Vernard, the appellant. PW3 reported the matter to the Kitongoji Chairman and later to the Ten Cell Leader. On

20.2.2001 PW3 reported the event to Bomang'ombe Police Station and later took PW1 to Mawenzi Hospital where she was medically examined and found with multiple bruises on the labia majora and introitus and her hymen had been "torn" (PF3 Exh. P1). The appellant was arrested and charged as above.

The appellant protested his innocence. However at the end of the day he was convicted and sentenced as above.

In his memorandum of appeal the appellant has preferred 9 grounds of appeal. But the relevant ones can properly be rephrased as follows: -

1. The prosecution did not prove the offence beyond all reasonable doubts.
2. The trial magistrate erred in law and fact in failing to conduct a preliminary hearing as required by law.
3. That the trial magistrate erred in law and fact in failing to conduct a *voire dire* test in view of the tender age of PW1.

4. The trial court and the court on first appeal erred in relying on the uncorroborated evidence of a child of tender age.

The appellant did not wish to elaborate on them. He opted the learned State Attorney to reply first thereafter he would decide whether to make a rejoinder.

Responding to the appellant's grounds of appeal Mr. A. E. Mzikila, learned State Attorney, who represented the respondent-Republic did not oppose the appeal. He concurred with the appellant that the prosecution did not prove the guilt of the appellant beyond all reasonable doubt. The learned State Attorney pointed out that, the prosecution key witness PW1, aged 8, was not examined by the learned trial magistrate to determine whether she was possessed of sufficient intelligence and understood the importance of speaking the truth as required by Section 127 (2) of the Evidence Act, 1967. The learned counsel contended that, since no *voire dire* examination was conducted to determine the intelligence of PW1, it was not clear whether she was intelligent enough and whether she understood the

duty of speaking the truth. In that respect her evidence required corroboration to be relied upon, and that there was no such corroboration, observed the learned State Attorney. Mr. Mzikila responded further that, had the learned trial magistrate recorded a *voire dire* examination in a form of questions and answers that would have enabled this Court to determine her intelligence. The learned counsel also pointed out that there were some contradictions between PW1 and PW3 on how PW1 got into the appellant's room. He said, whereas PW1 said she was called by the appellant to bring him a match box to light his cigarette, Pw3 said she told him she was raped when she went out to draw water. Those were the main grounds why the Republic did not oppose the appeal.

There is no doubt that the principle prosecution witness in this case was Pw1, by then aged 8 years. In terms of section 127 (5) of the Evidence Act, 1967 she was a child of tender age. Generally speaking, every person shall be competent to testify unless the court considers that he is incapable of understanding the questions put to him or of 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 as provided under Section 127 (1) of the Evidence Act, 1967. But 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 on 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, as provided for under Section 127 (2) of the Evidence Act, 1967. Here we may pose and ask: How can a court know that this child is possessed of sufficient intelligence and understands the duty of speaking the truth? It is at this stage when a judge or magistrate must conduct a *voire dire* test to determine whether the child witness is possessed of sufficient intelligence and understands the duty of speaking the truth. 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 importance of speaking the truth.

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

> PW1: "*Beatrice Septimu, Minor who doesn't know her age, resident of Narumu Village, student at Narumu Primary School (STD I), knows the truthness of the matter ought to be adduced before the Court, states as follows:-*"

This, in our view, was not sufficient to determine whether PW1 was possessed of sufficient intelligence and understood the duty of speaking the truth. We agree with the learned State Attorney and the appellant that the *voire dire* examination was improperly conducted.

Since her intelligence and understanding 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 Act could not safely be applied, especially that the learned trial magistrate did not record any reason which satisfied him that PW1 said nothing but the truth;

Section 127 (7) provides as follows; -

> *Notwithstanding the preceding provisions of this section, where in criminal proceedings involving Sexual offence the only independent evidence is that of a child of tender years or of a victim of the Sexual offence, the court shall receive the evidence, and may, after assessing the credibility of the evidence of the child of tender years or of the victim of sexual offence, as the case may be, notwithstanding that such evidence is not corroborated,*

> *proceed to convict, if for reasons to be recorded in the proceedings, the Court is satisfied that the child of tender years or the victim of the Sexual offence is telling nothing but the truth. (emphasis supplied)*

In the circumstances of the case, in our view, the unsworn statement of PW1 required corroboration to found a conviction of the appellant. Going through the record we could not find any evidence which corroborated her evidence that it was the appellant who raped her. Lastly, in his defence the appellant had raised a defence of *alibi* which, in our view, was supported by Revocatus Camiri Mbowe (DW2) and Peter Ismail (DW3).

Since no *voire dire* test was conducted on PW1 to determine her intelligence and understanding of the duty of speaking the truth; and since the learned trial magistrate did not record any reason why he believed PW1 said nothing but the truth, together with the absence of corroboration and the appellant's defence of *alibi* which was not sufficiently shaken by the prosecution, we are of the firm view that there was not sufficient evidence to found conviction of the

appellant. We are satisfied that, had the learned judge on first appeal carefully considered all these she would have allowed the appeal.

As indicated above, the learned State Attorney did not oppose the appeal, and in our view, rightly so.

In the event, and for the reasons stated above, 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