IN THE COURT OF APPEAL OF TANZANIA AT MBEYA CRIMINAL APPEAL NO. 166 OF 2009 MUNUO,J.A	ZUBERI MTONO VS THE REPUBLIC (Appeal from the decision of High Court of Tanzania) at Mbeya by LUKELELWA, J.	Voire Dire as per s.127 (2) of the evidence Act – "where any criminal cause or matter a child of tender age is 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 understands the duty of speaking the truth.

IN THE COURT OF APPEAL OF TANZANIA
AT MBEYA

(CORAM: MUNUO, J.A., LUANDA, J.A. And MJASIRI, J.A.

CRIMINAL APPEAL NO. 166 OF 2009

ZUBERI MTONO.....APPELLANT
VERSUS
THE REPUBLIC.....RESPONDENT

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

(Lukelelwa, J.)

Dated 23rd day of September, 2008
In
DC Criminal Appeal No. 117/2007 C/F 108 of 2007

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JUDGMENT OF THE COURT

22nd & 23rd July, 2010

MUNUO, J.A.:

In Kyela District Court Criminal Case No. 33 of 2007, the present appellant, Zuberi Mtono and 3 others were charged with various criminal counts ranging from conspiracy to commit an offence c/s 384 of the Penal Code, Cap. 16 in count 1 to three separate counts of unnatural offences c/s 154 (1) of the Penal Code, 16 in counts 1, 3, 4, 5, 6, 7, 8; and in counts 9, 10, 11 and 12, enabling the commission of offences c/s 22 (1) (b) (c) of the Penal Code, Cap. 16 R.E. 2002. The other co-accused were acquitted in the courts below. The appellant was convicted by the trial court in counts 2, 3, and 4 to wit, unnatural offences c/s 154 (1) of the Penal Code for unnaturally sexually assaulting P.W. 1, Pascal Robert, then aged 12. The trial magistrate sentenced the appellant to:-

(a) Thirty years imprisonment sentence in count 2;

(b) Thirty years imprisonment sentence in count 3;

and

(c) Thirty years imprisonment sentence in count 4;

the sentences to run concurrently. Aggrieved by the conviction and sentence, the appellant lodged (DC) Criminal Appeal No. 117 of 2007 in the High Court of Tanzania at Mbeya. Lukelelwa, J. dismissed the appeal in its entirety. Dissatisfied with the decision of the High Court, the appellant filed this second appeal.

The facts of the case are disgusting. The complainant, Paschal Robert, then aged 12 years, and two of his colleagues by the names of Yohana William, aged 14 years and John Kayamba, also aged 14 years at the material time, were lured by the appellant and his co-suspects to go to Four Ways Bar to eat bacon commonly known as "kitimoto" and also enjoy

offers of soft drinks. After treating the boys with such offers, the appellant and co-suspects directed them to go to Makete Hall London Guest House. There, the waiter would open a room for the pair. It was the evidence of P.W. 1 Paschal Robert that the appellant took him to Makete Hall London Guest House and sodomized him several times after which he paid him money, totalling sh 26,000/=. He, however, did not report the matter to his parents or to any other authority.

When P.W. 1's grandmother was washing his trousers, she was suprized to find sh 20,000/= in the trouser pocket. She relayed information to her husband, the grandfather of the complainant. The grandfather beat P.W. 1 and to avoid further beating, P.W. 1 disclosed that he got the sh 20,000/= from the appellant who had been sodomizing him on different occasions after bacon and soda offers at Four Ways Bar in Kyela within Mbeya Region. The grandfather informed the father of P.W. 1, who deposed as P.W. 2, Robert Burton Mwaseba. The latter reported the matter to the police. The appellants and his co-suspects were subsequently arrested and charged with the respective counts in the charge sheet.

The appellant filed six grounds of appeal faulting the trial court for finding P.W. 1's evidence credible, for failing to conduct a *voire dire* examination, for not calling the waiter who ushered them into the material guest house and for relying on the PF 3 of the victim to ground a conviction despite the fact that the appellant had not been identified by the victim in an identification parade.

Mr. Vincent Tangoh, learned Senior State Attorney supported the appeal on all the six grounds. With regard to *voire dire* examination, the learned Senior State Attorney criticized the trial court for not complying with the mandatory provisions of section 127 (2) of the Evidence Act, 1967, Cap. 6 R.E. 2002.

Section 127 (2) of the Evidence Act provides, inter – alia:-

> 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 understands the duty of speaking the truth.

In this case, the trial magistrate simply recorded:-

> "Court – *Voire dire* is conducted and found that the witness has sufficient knowledge as to qualify as a competent witness."

The trial magistrate, however, omitted to record the proceedings of the *voire dire* examination to demonstrate that the complainant was indeed a competent witness. Hence, the trial magistrate failed to comply with the mandatory provisions of section 127 (2) of the Evidence. In that regard, the evidence of P.W. 1 would be reduced to unsworn evidence which requires corroboration. In the case of **Deemay Daati and 2 others versus Republic,** Criminal Appeal No. 80 of 1994, (CA) Arusha Registry, (unreported) the Court held that:-

> "It is settled law that omission to conduct *voire dire* examination of a child of tender years brings such evidence to the level of unsworn evidence of a child which requires corroboration."

We are satisfied that the PF 3, Exhibit, P1, shows that P.W. 1 had been habitually sodomized but it does not identify the culprit. PW 2 Robert Burton Mwaseba, learnt about the unnatural sexual assault of his son by accident when his mother, the grandmother of the victim, found shillings 20,000/= in the boy's trouser pocket. It appears the dirty transaction had

been taking place for sometime but the victim was lured by money and food so he did not complain to anyone. As it is, there is no evidence on record to corroborate the unsworn evidence of the complainant, P.W. 1 Paschal Robert Mwaseba.

In view of the above, we agree with the learned Senior State Attorney that there is no cogent evidence to sustain the conviction. That ground is sufficient to dispose of the appeal.

Under the circumstances, we quash the conviction and set aside the sentences imposed on the appellant in counts 2, 3 and 4. The appellant, Zuberi Mtono, to be released from prison forthwith if he is not detained for other lawful cause.

It is so ordered.

DATED at MBEYA, this 22nd day of July, 2010.

E. N. MUNUO
JUSTICE OF APPEAL

B. M. LUANDA
JUSTICE OF APPEAL

S. MJASIRI
JUSTICE OF APPEAL

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

I. P. Kitusi
SENIOR DEPUTY REGISTRAR