IN THE COURT OF APPEAL OF TANZANIA AT MBEYA CRIMINAL APPEAL NO. 89 OF 2002	OMARY KURWA VS THE REPUBLIC (Appeal from the decision of the High Court of Tanzania by MREMA, J	Evidence of a child of tender years should observe: 1. The Court must form opinion on whether or not the child understands the nature of oath 2. The court must form opinion and record this opinion in the proceedings, whether or not the child is possessed of sufficient intelligence to justify the taking of the child's evidence at all. 3. If the Court finds that the child is intelligent enough to testify, whether or not the child understands the duty of speaking the truth. 4. The case of Jonas Raphael Vs. Republic, Criminal Appeal No.42/2003 (unreported)

IN THE COURT OF APPEAL OF TANZANIA
AT MBEYA

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

CRIMINAL APPEAL NO. 89 OF 2007

OMARY KURWA.....APPELLANT
VERSUS
THE REPUBLIC.....RESPONDENT

(Appeal from the decision of the High Court of Tanzania

at Mbeya)

(Mrema, J.)

Dated 18th February, 2006
in
(DC) Criminal Appeal No. 11 of 2005

JUDGMENT OF THE COURT

JULY 13 & 21, 2010

MJASIRI, J.A.:

This is a second appeal. The appeal arises from the decision of the District Court of Mbeya, Tanzania. The appellant Omary Kurwa @ Baharia was charged and convicted of the offence of unnatural offence contrary to section 154 (1) of Penal Code Cap 16 R.E. [2002]. He was sentenced to life imprisonment.

Being aggrieved with the decision of the District Court, the Appellant appealed to the High Court of Tanzania at Mbeya against both conviction and sentence. His appeal to the High Court was also unsuccessful hence the appeal to this Court.

Briefly the facts of this case are as follows: The appellant, who was a petty trader selling French fries (chips) was alleged to have lured a 5 year old boy, PW 1 to pass by his food stall for chips. The five year old, a

nursery school pupil went to the appellant's stall after school. Upon his arrival, he was asked by the appellant to get him something from the toilet. The appellant followed him, locked the door and forced PW 1 to hold on to a bucket while he sodomised him. He locked him inside the toilet and later returned to repeat the act. He then threatened PW 1 to keep quiet about what had transpired. PW 1 immediately reported the incident to his mother, PW 2. He named the appellant as the culprit. PW 2 examined him and found bruises on him. The mother also let PW 3 and PW 5 examine PW 1. They also testified that they observed bruises on PW 1. PW 2 telephoned the boy's father who went to arrest the appellant.

The appellant denied any involvement of the offence.

At the hearing of the appeal the appellant appeared in person and was unrepresented. Mr. Vincent Tangoh, learned State Attorney appeared for the Republic.

The appellant raised one ground of appeal in his memorandum of appeal which is reproduced as under:-

1. That the trial Court erred in law and fact in basing his conviction on the evidence of PW 1 who is a child of tender age without conducting a *voire dire* test.

Mr. Tangoh supported the conviction of the appellant. He conceded that the learned trial magistrate did not conduct a *voire dire* examination. However he argued that failure to do so by the Court was not fatal. According to him the evidence of PW 1 could be treated as unsworn evidence. He made reference to the case of **Rungu Juma v. R.** (1994) TLR 176.

Mr. Tangoh submitted further that the evidence of PW 2, PW 3 and PW 5 and the medical evidence corroborated the evidence of PW 1. Mr. Tangoh therefore urged the Court to dismiss the appeal and to uphold the conviction.

The main issue for determination is whether the evidence of PW 1 was sufficient to sustain the conviction of the appellant.

In a criminal case the prosecution is required to prove the case against the appellant beyond reasonable doubt. The burden never shifts. (Section 3 (2) (a) of the Evidence Act, R.E. 2002).

This is a second appeal. We are fully aware that the Court of Appeal is precluded from questioning the finding of fact of the trial Court, provided that there was evidence to support those findings. It can only interfere where it considers that there was no evidence to support the finding of fact. **See R.V Hassan bin Said** (1942) 9 EACA 62; **RV Gokaldas Kanji Karia and another** (1949) 16 EACA 116 and **Reuben Karari s/o Karanja** v. R. (1950) 17 EACA 146.

In **Peter v. Sunday** Post 1958 E.A 424, it was held as follows:-

> *"Whilst an appellate court has jurisdiction to review the evidence to determine whether the conclusion of the trial Court should stand, this jurisdiction is to be exercised with caution where there is no evidence to support a particular conclusion, or if it is shown that the trial Judge has failed to appreciate the weight or bearing of circumstances admitted or proved, or has plainly gone wrong, the appellate Court will not hesitate to decide."*

See also **Salum Mhando v. Republic** 1993 TLR 170.

The only evidence linking the appellant with the offence is that of PW 1, a child of tender years. His evidence can only be taken into account if section 127 (2) of the Evidence Act, Cap 6 R.E. 2002 is fully complied with.

This Court has set the standards which must be followed before the evidence of a child of tender years is considered. First, the Court must form

an opinion on whether or not the child understands the nature of an oath. Second, the Court must form an opinion, and record this opinion in the proceedings, whether or not the child is possessed of sufficient intelligence to justify the taking of the child's evidence at all, and if the Court finds that the child is intelligent enough to testify, whether or not the child understands the duty of speaking the truth. See **Jonas Raphael v. Republic,** Criminal Appeal No. 42 of 2003 (Unreported). As there was no *voire dire* examination conducted by the trial Court on PW 1, his evidence was improperly received.

It is now settled law that it is improper for a trial Court to accept evidence of a child of tender age without complying strictly with the provisions of section 127 (2) of the Evidence Act. See for instance **Hassani Hatibu v Republic**, Criminal Appeal No. 71 of 2002 (unreported); **Justine Sawaki v Republic,** Criminal Appeal No. 103 of 2004 (unreported) and **Sokoine Chelea v Republic,** Criminal Appeal No. 252 of 2006 (unreported).

It is important to consider at this stage whether there was any other evidence linking the appellant with the offence. The account given by PW 2, PW 3 and PW 5 was what they were told by PW 1. The medical report PF. 3 (Exhibit P1) only establishes the fact that PW 1 was molested but not the person who was responsible. With the evidence of PW 1 discarded, there is no cogent evidence upon which the conviction of the appellant could be sustained.

Another aggravating circumstance in this case is that PW 1 was not cross examined by the defence. This factor was considered as insignificant and of no consequence by the High Court, despite the requirement under section 147 (1) of the Evidence Act. The purpose of conducting cross examination is to elicit favourable facts from the witness, or to impeach the credibility of the testifying witness to lessen the weight of unfavourable testimony. Cross examination frequently produces critical evidence in trials, especially if a witness contradicts previous testimony.

Given the status of the evidence of PW 1, PW 2, PW 3 and PW 5, and the failure to conduct a *voire dire* examination we are satisfied that the evidence against the appellant is not sufficient to support the conviction.

In the event the appeal is hereby allowed. The appellant is to be released from prison forthwith unless otherwise lawfully held.

It is so ordered.

DATED at MBEYA this 19th day of July, 2010.

JUSTICE OF APPEAL

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

I. P. Kitusi
SENIOR DEPUTY REGISTRAR