

TANZANIA / JUDGMENT

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~ 1 IN THE COURT OF APPEAL OF TANZANIA AT ARUSHA · (CORAM: NSEKELA, I.A., MJASIRI, J.A., And MASSATIt, I.A~ CRIMINAL APPEAL NO.276 OF 2008 JOHN CHARLES • ■ ■ 111111 • ■ • ■ • ■ 11 ■ ■ ■ 1 ■ •••- 11 II ■ Ii ■ 1 1 1 ■a1 ■ ■ ■ ■ ■ APPELI-ANT • • • • I I • • • • • • II VERSUS TtiE REPUBLICRESPONDENI" (Appeal from the decision of the High Court of Tanzania at Arusha) (Sheikh, J.) dated 6 th clay of August, 2008 in Criminal Appeal No.91 of 2005 JUDGMENT OF THE COURT 28 th Sept. & 5 th October, 2011 NSEK.EtA, J.A.: In the District Court of Arusha at Arusha, the appellant, John s/o Charles, together with one Alex s/o Wilfred were charged with and convicted of the offence of having carnal knowledge against the order of nature contrary to section 154(1) and (2) of the Penal Code as amended by section 16 of Act No. 4 of 1998. Each was sentenced to thirty (30) years imprisonment with twelve (12) strokes of the cane and their respective parents were ordered to pay to the complainant shs.200,000/= 2 as compensation. . They unsuccessfully appealed to the High Court (Sheikh,J.) which however orde~ed each appellant to pay 200,000/= as compensation to the complainant and set aside the sentence of corporal punishment. The appellant filed his notice of appeal on 11/8/2008 but Alex s/o Wilfred has not done so as at the date of hearing the appeal. Surprisingly, they filed a joint memorandum of appeal, which the appellant adopted as his own, The essence of the grounds of appeal revolved around the evaluation of the evidence, particularly that of PW1, Suzana Sumari; and PW2, Michael Nderikwa Kaaya, a ten cell leader. The complaint was to the effect that the evidence of these witnesses contained material discrepancies. It was therefore unreliable. PW1 did not know who had carnal knowledge with her against the order of nature. The facts leading to the appellant being convicted as charged can be stated very briefly. On the 7/9/2004 at about 22.00 hours. PW1, aged seventy three (73) years, was apparently at a pombe shop. Shortly after she had left, four unknown males pounced upon her. They in turn had 3

- - carnal kr:iowledge with_ ber:_ agai_flst t~e _9r9~r_ (_)f nature. She managed to raise an alarm to which PW2 responded and rushed to where the alarm had originated. He had a torch _with him. Apparently near the scene of crime he saw five men who on seeing him fled. He chased them and managed to arrest the appellant. He was naked. PW2 took the appellant to where P\Nl was and there was a trouser on the ground. The appellant took it Then the appellant, and PW1 were taken to Usa Police station where she was given a PF3. In his written submissions which he presented to the court with leave, the appellant pointed

out at" a number of discrepancies in the testimony of PW1 and PW2. Firstly, PW1 neither identified the appellant at the alleged scene of crime nor identified him while she testified during the trial; Secondly, PW1 testified that two people were arrested at the scene whereas PW2 testified that other people were arrested by PW3. Thirdly, PW1 testified that she had carnal knowledge against the order of nature with four men, whereas PW2 testified that the appellant was naked but PW1 did not say so. In addition, the appellant contended that the investigating officer was not summoned to give evidence at the trial. J \ 4 Mr. Ponziano Lukosi, learned State Attorney, at the outset, supported both the conviction and sentence meted out to the appellant. He submitted that the appellant was arrested a short distance away from where PW1, was; PW2 responded to the alarm raised by PW1 and as he was approaching the scene the men he had seen ran away but after a short chase he arrested the appellant. He was taken to the scene where the appellant retrieved the trouser he had left behind. He added that the appellant was given the chance to cross-examine PW2, but he did not ask any questions. This meant that the appellant accepted the truth of PW2's evidence and the court was entitled to believe such evidence. The cornerstone of the appellant's grounds of complaint were the alleged discrepancies in the evidence. PW1 testified that four men were involved in the commission of the offence, whereas PW2 said that he saw five men as he came nearer to the scene. Whether the number involved was five or four men is immaterial to the offence the appellant was charged with. PW2 arrested the appellant as he was fleeing from the scene, he took him to the scene where the appellant retrieved his trouser i- 5 --- -- -- -- r, e- had left -behind. ---What was esse_ ntic:1! _!\Yi!S _h_~~~9 ~- carnal knowledge with PW1 against the order of nature and the identity of the offender. P\N1 testified that she was sodomized and was candid enough to testify that she could not identify any offender. However PW2 stated in his evidence that:-- I found 5 men sodomizing Suzana. They ran away I chased them ... The one I caught is the first accused before this Court ___ when the 1st accused had no trousers when I arrested him." The appellant did not challenge this piece of evidence and so the lower courts were entitled to believe and rely on it. It has often been said that one hardly comes across a witness whose evidence does not contain a 'grain of untruth or exaggeration, embroideries or embellishment. An attempt must be made to separate grain from chaff, truth from falsehood. I (See: Syed Ibrahim v. State of Andhra Pradesh SCR (2006) Supp 4 SCR 105). A court has to identify what are material discrepancies and what are 6 -- --normal discrepancies. Normal discrepancies do_ n_ ot ~orr_ ~de the credibility of a party's case, while material discrepancies do so. The mere fact that PW2 was the only witness who arrested the appellant, that cannot be a ground to discard his evidence. In terms of section 143 of the Evidence Act, no particular number of witnesses are required for proof of any fact. Material evidence and not the number of witnesses have to be taken into account by the court to ascertain the truth of the allegations made. (See: Yohanus Msigwa v. Republic (1990) TLR 148.) With respect, -we have no reason to_ inte~tere _v~i~h !he concurrent findings of fact by the courts below that the appellant had carnal knowledge with PW1 against the order of nature. We have found no misapprehension or a violation of some principle of law or practice. (See: The Director of Public Prosecutions v. Iaffari Mfaume

Kawawa

(1981) TLR 149). In the result, we dismiss the appeal in its entirety. It is so ordered. . 7 -- - - - -
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APPEAL S. MJASIRI JUSTICE OF APPEAL S.A. MASSATI JUSTICE OF APPEAL I certify that
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