

TANZANIA / JUDGMENT

20170517 TZHC Dar es Salaam

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J IN THE HIGH COURT OF TANZANIA AT DAR ES SALAAM CRIMINAL APPEAL NO. 198 OF 2016
(Originating from the District Court of Mkuranga, Criminal Case No. 59/2014) JUMA SAID
MOHAMED ----- APPELLANT VERSUS THE REPUBLIC

----- RESPONDENT "JUDGMENT MUTUNGI, J. The appellant has
instituted this appeal challenging the conviction and sentence of the District Court of Mkurongo
at Mkurongo in Criminal Case No. 59 of 2014. He has raised seven grounds of appeal as
hereunder:

- (1) That the learned trial Resident Magistrate grossly erred in law and fact by convicting the appellant relying on incurably defective charge as he was arraigned in court under section 154 of the Penal Code Cap. 16 R.E 2002 which does not feature or exist anywhere in the Penal Code.
- (2) That the learned Resident Magistrate erred in law and fact by convicting the appellant relying on un-procedural identification parade which was conducted by PW2's family at their homestead and allegedly PW2 identified the appellant, and further PW2 (victim) claimed to be familiar to the appellant prior to the crime.
- (3) That the learned trial Resident Magistrate grossly erred in law and fact by convicting the appellant relying on the evidence of PW2 (victim) without exhaustively assessing his credibility as he alleged that it was the first time for him to have carnal knowledge but did not show any sign when he went back home from the appellant's house as explained by PW1.
- (4) That the learned trial Resident Magistrate erred in law and fact by convicting the appellant relying on the Exhibit P1 (PF3) of the victim which was unprocedurally 2 tendered and admitted into evidence as it was tendered by an incompetent witness (PW1) and further its contents were not read over to the appellant before its admission contrary to the procedures of law.
- (5) That the learned Resident Magistrate grossly erred in law and fact by convicting the appellant embracing the un-affirmed evidence of PW3 one Yusuph Omary Kigungula contrary to the mandatory provisions of law.

- (6) That the learned trial Resident Magistrate erred in law and fact by convicting the appellant relying on mere assertion from the prosecution side that he confessed to have committed the offence while no caution statement was taken from the appellant and tendered in trial so as to substantiate their claim.
- (7) That the learned trial Resident Magistrate erred in law and fact by convicting the appellant without taking into cognizance of his defence of alibi which raised reasonable doubts against the prosecution case. 3 At the hearing of the appeal, the appellant prayed to the court to consider his grounds of appeal and he be set free. On the other side of the coin, Miss Imelda Mushi learned State Attorney went at length to submit against the filed grounds of appeal. In so far as the first ground of appeal is concerned the learned Attorney stated that, the charging section was proper only that it did not mention the sub-section. The omission in her settled opinion is curable under section 388 of the Criminal Procedure Act Cap. 20 R.E 2002. This is so as the appellant knew the offence and the evidence of PW 1, PW3 and the PF3 did reveal that he was charged with the unnatural offence. In regards to the second ground on identification the learned counsel submitted that this lacks merits. The victim was able to name the appellant three times after the commission of the offence. As though this not being enough the victim did identify the appellant's family. The victim was able to identify the culprit at the earliest possible time. In view of the case of Marwa Wangili & Another V.R. 4 Criminal Appeal No. 6/1995 (unreported), the appellant's identification had no doubt at all. In so far as the credibility of the victim is concerned (3rd ground) the Attorney urged that the court was satisfied that the same knew the meaning of the truth hence was found credible. To hammer her point home the State Attorney cited the case of Omari Ahmed V.R. [1983] TLR 52. Further, the victim's evidence was corroborated by that of the PF3. Responding to the fourth ground of appeal, the State Counsel explained that this was properly tendered by PW 1 (the victim's mother) since the same was in her custody as per section 49 (2) of the Evidence Act Cap. 6 R.E 2002. Reacting to the evidence of PW3, the learned State Attorney stated that even if this piece of evidence is expunged from the record, there is still ample evidence to prove the offence. The learned counsel prayed the court to find the sixth and seventh grounds an afterthought since the prosecution had already closed their case. These were never mentioned earlier in the case. In conclusion the 5 learned State Counsel summed up that all the filed grounds had no merits and are to be dismissed. Before venturing into the filed grounds of appeal the following is a brief history of what did happen which ultimately landed the appellant to 30 years in jail for the Unnatural Offence c/s 154 of the Penal Code Cap. 16 R.E
2002. It is on record that on the material day PW2 (the victim) went missing for a while from their home. His mother became restless and started looking for him but in vain. After some time PW2 (victim) came back home but looked worn out and his body full of dirt. He held his short by the shoulders. PW 1 (his mother) smelt a bad smell and suspected it was stool. She ordered PW 1's sister to wash him and it is when they noticed stool, the anus was wide open and there was a discharge coming out. PW1 could not stand the sight as she had low blood pressure. PW2's sister cleaned him and let him rest. On the following day PW2

could not get out of bed and was in total pain. PW1 tried to check on him and found the anus still wide open. She phoned the helmet chairman (PW3) for assistance. After PW3's arrival in the company of other leaders, PW2 was 6 interrogated and he mentioned the appellant who was residing in a nearby mud house to be the culprit. All the youths in the said family were arraigned and PW2 identified the appellant more than twice. PW1 had also been told prior that it was a short guy by the name of Maige by PW2. PW2 repeated the same name at the said identification unofficial parade. The appellant begged for forgiveness but PW2's father who was away by then refused to forgive the appellant and ordered that he be reported to the Police Station. PW 4 the investigator did take up the matter and took PW2 for examination where it was found by PW5 (medical doctor) that indeed the victim had been sodomized and issued a PF3 which was duly tendered by PW 1 in court (Exhibit P1). At the trial the appellant did totally deny to have committed the offence on the material day. He went on to deny having ever been in the said area on the said day or even before in his life time. He brought DW2 to support his allegations who admitted to have been working with the appellant but did not know where the appellant was on the material day. Further he admitted to know many people 7 that reside in PW2's area of residence and they would normally visit the said area. Let me now turn to the merits or otherwise of the filed grounds of appeal. Starting with the first ground of appeal, I have had an opportunity of glancing through the charge sheet and I find it is true the statement of offence reads. Unnatural Offence contrary to section 154 of the Penal Code, Cap. 16 of the laws [R.E 2002]. Reading through the Act itself the said section has two subsections as follows: (1) Any person who

- (a) has carnal knowledge of any person against the order of nature, or
- (b) has carnal knowledge of an animal, or
- (c) permits a male person to have carnal knowledge of him or her against the order of nature commits an offence, and is liable to imprisonment for life and in any case to imprisonment not less than thirty years. 8 (2). Where the offence under subsection (1) of this section is committed to a child under the age of ten years the offender shall be sentenced to life imprisonment. Considering the above, it is not that the section does not exist but as properly argued by the State Counsel the proper subsection was not mentioned. The court is mindful of the fact that a charge sheet is specifically made to inform and properly make the accused aware of the offence he/she was being charged with so as could adequately address the charge laid against him/her. This very objection of the law is a mandatory requirement that a charge sheet should describe the offence and should make reference to the section of the law creating the offence. Coming back to the charge sheet at hand the particulars stated; "That JUMA s/o SAID @ MOHAMED MAIGE charged on 3rd day of August, 2014 at about 14:00 hrs at KIDETE VILLAGE within Mkuranga District in Coast Region did have carnal knowledge against the nature with one KASEMA s/o /SMAIL aged 5 years old. 9 In my settled view the charge did disclose the ingredients in the particulars. This is why I find the appellant intact understood the nature of the offence he was charged with and he was able

to defend himself. In his own words he said; " PW1 came and alleges that I sodomized her children my defence is that I did not commit the charged offence. I cannot do such a thing to a child". I am settled that an error of eliminating subsection (1) in section 154 did not prejudice the appellant in anyway. The error is curable under section 388 of the Criminal Procedure Act. Therefore this ground fails. Coming to the second ground where the appellant is challenging the un-procedural identification parade conducted at the home of the victim. In my view this was one of the means of identifying the culprit. PW2 had mentioned the appellant's name and description to his mother (PW 1), he repeated this and identified him among 10 the family members while PW1 and PW4 were present. It can not be said this was un-procedural as it had to be ascertained beyond doubt that PW2 was actually mentioning the appellant and no other. As regards the third ground on the credibility of the victim, this left no doubt at all. PW2 was subjected to the credibility test (voire dire) in understanding the questions put to him by the court. The court came to the conclusion and was satisfied that the victim understood the importance of speaking the truth. PW2 was thorough in his evidence and narrated of how he was approached by the appellant who took him to a mud house, undressed his shorts and then he removed his own trouser and ordered him to lie on the mattress. He put through his penis in his anus and he felt a lot of pain. With this kind of narration the court had all the reasons to justify its conviction. The ground fails. In the fourth ground the appellant is challenging the procedure in which the PF3 (Exhibit P1) was admitted. His concern was such that it was tendered by an incompetent person (PW1). The court is well conversant that tendering of 11 a document by a person other than the maker is not fatal but it should be done so in accordance with the law. Section 240 (3) of the Criminal Procedure Act, Cap. 20 R.E 2002 provides; "(3) when a report referred to in this section is received in evidence the court may if it thinks fit, and shall, if so requested by the accused or his advocate, summon and examine or make available for cross-examination the person who made the report and the court shall inform the accused of his right to require the person who made the report be summoned in accordance with the provisions of this subsection". The record reveals PW1 (the victim's mother) was in the custody of the PF3, more so the medical doctor did come to the court for cross-examination. The requirements of law were followed to the letter, hence this ground is to fail. In ground five, the court has taken note that PW3 was never sworn or affirmed in giving his evidence contrary to the legal procedures. Be as it may even if his testimony is expunged 12 of which I hereby do, still I find there is overwhelming evidence from PW 1, PW2 (the victim) PW 4 the investigator and the corroborating evidence of PWS (the medical doctor) to prove the offence beyond reasonable doubt against the appellant. In the sixth ground of appeal, the court finds that there was no need of the caution statement as the appellant having been arrested by the civilians did denie before the police to have committed the offence. In this regard this ground is irrelevant. Lastly on the alleged alibi. This was raised by the appellant in his defence contrary to the dictates of the law. Even if it taken that the appellant was a layman but still this defence left a lot to be desired. He brought a witness DW2 who intact did not know the whereabouts of the appellant on the material day. He further contradicted the appellant's evidence in that he admitted to know the appellant's relatives at PW2's place of

domicile and confirmed that the appellant knew all these relatives very well including the area itself. DW2 confirmed also that he was the appellant's relative. All in all the alibi was intact incriminating the 13

- appellant in the offence charged hence collaborating the prosecution case. In the upshot the appeal is found to be lacking merits and is accordingly dismissed . .p J B. R. Mutungi JUDGE 17/5/2017 Read this day of 17/5/2017 in presence of · Miss. Lillian Rwetabula for respondent and appellant in person. f -S" B. R. Mutungi JUDGE 17/5/2017 14

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