

TANZANIA / JUDGMENT

20090518 TZCA Dar es Salaam

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IN THE COURT OF APPEAL OF TANZANIA AT DAR ES SALAAM
{CORAM: MSOFFE, J.A., MBAROUK, J.A., And ORIYO, J.A.) I CRIMINAL APPEAL NO. 97 OF 2006~
MGAZA MHINA J..... APPELLANT VERSUS THE
REPUBLIC RESPONDENT I
(Appeal from the decision of the High Court of Tanzania at Dar es Salaam) (Manento, J.K.)
dated the 31 st day of August, 2005; in Criminal Appeal No. 70 of 2005 JUDGMENT OF THE COURT
13 th - 21 st May, 2009 MSOFFE, J.A.: I, . I The District Court of Kinondoni (Ngwawasya, PDM)
found the I appellant guilty, and convicted him, of committing an unnatural . I ' offence contrary
to Section 154 of ,the Penal Code. I It sentenced him I to a term of imprisonment for thirty years.
Aggrieved, the appellant i appealed to the High Court of Tanzania at Dar es ~alaam (Manento,
- I J.K.). He lost ~e appeal and has now come to this court on a second 2 appeal. He filed a
memorandum of appeal with five grounds of complaint. At the hearing of the appeal Ms.
Evelyn ~akala, learned I State Attorney, appeared and resisted the appeal on behalf of the I
respondent Republic. i In the first ground of appeal it is complained that the courts I I
below erred in acting on the PF3 while the appellant was not I informed of his right under
Section 240 (3) of the Criminal I Procedure I Act, 1985 (hereinafter the Act) to require the
doctor summoned for I cross-examination. In the second ground of appeal :the complaint is
that the trial was irregular in that no voir dire ~examination was conducted before recording
the evidence of the complainant, PW2 Ranny Godfrey, a child of tender age. In the third
ground of appeal I I it is, also complained that the trial was irregular because it was not I I
conducted in camera. In the fourth ground of appeal the appellant I I is seeking to fault the
courts below in not according weight to his I I defence of alibi. The final complaint is that
the charge was defective I for indicating that the offence was committed at ~agomeni
Mikumi 3 I while the evidence disclosed that it was committed I at I Mwananyamala. I I
Before we discuss the grounds of appeal we think it is pertinent I I at this juncture to give a
brief account of what led to the appellant being convicted as charged. I On the 14th day of
August 2001 the complainant went to see I I his maternal aunt at Mwananyamala just after
coming out from I school in the afternoon. The aunt told him to go back to his home at I I
Magomeni Mikumi without wasting more time. On the way back at I about 19.00 hours he
met the appellant. He knew the appellant I I quite well before that day. The appellant asked
the complainant to I I accompany him to his home to see the cows h e was ordinarily. I I

attending to. The complainant readily agreed. On the way the appellant pulled the complainant to a bush, ordered him to undress and then carnally knew him against the order of nature. The complainant cried for help but nobody came to his rescue. Once the appellant released him he quickly rushed home and narrated the incident to his father, PW3 Godfrey Stephen. PW1 Tawu Mngala, the complainant's mother, examined him and saw bruises on the anus. At the hearing of the appeal the appellant invited us to determine it in his favour on the basis of the points canvassed in the memorandum of appeal. In the process, he also urged us to take into account the evidence of his witness, DW2 Mwanahamisi Mohamed Mngala, who testified and stated that she too examined the complainant but saw no signs of the alleged sexual abuse. In response to the first ground of appeal Ms. Makala conceded that the appellant was not informed of the right provided for under Section 240(3) of the Act. She contended, however, that the appellant was not prejudiced because the PF3 is self explanatory and that, at any rate, the appellant objected to its admission in evidence. With respect, Section 240 (3) is clear. It reads:-

- (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 he summons and examine orally his advocate, if available for cross-examination the person who made the report; and the court shall inform the accused of his right to re-examine the person who made the report to be summoned in accordance with the provisions of this subsection. Under the above subsection it was mandatory that the appellant be informed of the right to have the doctor summoned for cross-examination. We think, however, that even if the PF3 were to be expunged from the evidence there was enough evidence upon which a conviction could still safely lie against the appellant as we shall demonstrate hereunder. Ms. Makala also conceded that no voir dire examination was conducted before the evidence of PW2 was taken. Even so, she argued that Section 127(7) of the Law of Evidence Act, 1967 as amended by Section 27 of Act No. 4 of 1998 permitted the District Court to receive such evidence and act on it. Section 127 (2) of the Evidence Act, 1967 reads as follows:-
- (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 understand the duty of speaking the truth. The trial District Court accepted that PW2 "talks well" before receiving his evidence. Fine. But it should have proceeded to find out if he was possessed of sufficient intelligence to justify the reception of his evidence and that he understood the duty of speaking the truth when giving his evidence. Section 127(7) As already stated, Ms. Makala opined that Section 127(7) of the Evidence Act, 1967 as amended, legitimized the evidence of PW2. The subsection reads:-

- (7) 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 it may, after assessing the credibility of the evidence of the child of tender years or of a victim of sexual offence on its own merits, 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 sexual offence is telling nothing but the truth. [Emphasis supplied.] In the Oxford Advanced Learner's Dictionary of Current English, 6th Edition, A.S. Hornby, the word "notwithstanding" is defined as: - i ... without being affected by something, in spite of something... The trial Principal District Magistrate was very much alive to the provisions of the above subsection. He stated: - "He gave his evidence unsworn. According to the Sexual Offences Special Provisions Act 1998 Law Amendment suit 127 (sic) of the Evidence Act No. 6 of 1967 has been amended. His evidence (sic) does not necessarily require corroboration. The court may proceed to convict upon such evidence after assessing its credibility and the court is satisfied that the child or victim of the sexual offence is telling nothing but the whole truth. I have carefully watched Renny: give his evidence before me, observed his demeanor and credibility but he has impressed me as nothing but a person who came to tell the truth. I have no ground of disbelieving him that he was carelessly 'knowledge (sic) by the accused against the order of nature. With respect, there is no basis upon which we could fault the Magistrate on the above assessment of the evidence of PW2. As I already mentioned, the Jaji Kiongozi on first appeal also affirmed the above assessment. Likewise, we find no basis in faulting him. We will only add that if corroboration was necessary, it "as to be found in the evidence of PW1 who upon examination saw bruises on the complainant's anus, as stated above. The complaint in the third ground of appeal, has a certain amount of truth but it is not entirely correct. Section 186(3) of the Act as amended by Section 24 of Act No. 4 of 1998 provides as follows: - i
- (3) Notwithstanding the provisions of any other law the evidence of all persons in all trials involving sexual offences shall be received by the court in camera, and the evidence and witnesses involved in these proceedings shall not be published by or in any newspaper or other media, but this subsection shall not prohibit the printing or publishing of any such matter in a bona fide series of law reports or in a newspaper or periodical of a technical character bona fide intended for circulation among members of the legal or medical professions. [Emphasis supplied.] And Section 3(5) of the Children and Young Persons, Ordinance, Cap 13 as amended by Section 28 of Act No. 4 of 1998 reads: - , I
- (5) Where a child of less than eighteen years of age is a witness, a victim, an accused or, a co-accused in a case involving a sexual offence, the child shall be tried in camera and separately from the co-accused or the evidence of the child shall be adduced in proceedings conducted in camera. [Emphasis supplied.] It is apparent from the record before us that the evidence of all the witnesses, except that of PW2, was not received by the

court in camera. This offended the mandatory provisions of Section 186(3) of the Act. But the evidence of PW2 was received, in camera in compliance with Section 3(5) of the Children and Young Persons Ordinance, as amended. The question is whether the trial was a nullity for non-compliance with Section 186(3) of the Act, as amended. With respect, we do not think so. The proceedings in the open court are not a nullity because there is no indication that there was a miscarriage of justice. There is nothing to suggest that the witnesses were inhibited from giving evidence in a forthright manner. What appears to have happened is that both prosecution and defence witnesses gave evidence freely. At any rate, the appellant did not say anywhere that he was prejudiced by the failure to do so. I observe the mandatory requirement under Section 186(3) of the Act, as amended. The fourth ground of appeal has no merit at all. The defence of alibi was never canvassed at the trial. Indeed, it was also not raised on first appeal. As it is, it is being raised for the first time. The appellant's defence at the trial has a general denial of guilt, without more. We are satisfied that PW2 actually knew the appellant prior to the date of incident. The appellant also knew the complainant. He admitted that much in cross-examination. He stated: 'I know Renny. Geoffrey Stephen is the child. The section (sic) was a male person. ...' The incident took place in broad daylight. For persons who knew each other there was no possibility of mistaken identity. In the circumstances, like the courts below, we too think that DW2 was not, a witness of truth. The complaint in the final ground of appeal is of no consequence. From the evidence of the complainant it is apparent that the offence was committed somewhere at Mwananyamala. The indication in the charge sheet that it was committed at Magomeni Mikumi was unfortunate and most likely a typographical error. In the event, for the foregoing reasons, the appellant was rightly convicted by the trial District Court. The decision was justifiably upheld by the High Court. The appeal is dismissed. DATED at DAR ES SALAAM this 18th day of May 2009. I J.H. MSOFFE JUSTICE OF APPEAL I I I M.S. MBAROUK I I JUSTICE OF APPEAL " K.K. ORIYO JUSTICE OF APPEAL 14 I certify that this is a true copy of the original. P.B. (fAJ)AY DEPUTY REGISTRAR COURT OF APPEAL I

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