IN THE COURT OF APPEAL OF TANZANIA
AT MWANZA

(CORAM: MBAROUK, J.A., BWANA, J.A., And MASSATI, J.A.)

CRIMINAL APPEAL NO. 259 OF 2010

HAMIS SHABANI @ HAMIS (USTADHI) ....APPELLANT

VERSUS

THE REPUBLIC ....RESPONDENT

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

(Mackanja, J.)

dated the 30th day of June, 2006
in
Criminal Appeal No. 29 of 2005

JUDGMENT OF THE COURT

11th & 15th March, 2013

BWANA, J.A:

Before the District Court of Mwanza at Mwanza, the appellant was charged with and convicted of the offence of Unnatural Offence contrary to section 154 of the Penal Code. He was sentenced to thirty (30) years imprisonment and ordered to pay the victim the sum of sh. 300,000/= (three hundred thousand shillings) as compensation. Aggrieved by that decision of the trial court, he unsuccessfully appealed to the High Court of

Tanzania at Mwanza. His appeal was dismissed and the order for compensation upheld. Undaunted, he preferred this second appeal. He appeared in person, unrepresented, while Mr. Victor Karumuna, learned State Attorney, appeared for the respondent Republic.

This appeal has a backdrop which is out of the usual and normal, as we show here below. When the appeal was first called for hearing on the 6th day of March 2013, it became apparent that two important documents that the appellant wanted to rely upon in the course of arguing his appeal, were missing from the court record. These were the PF3 and a medical report, both tendered as exhibits during trial. We adjourned the hearing and ordered the learned State Attorney in attendance to trace copies of those documents from his offices and if possible, from the police case file. Thereafter, the Court was informed by the said State Attorney that all attempts to trace the exhibits have proved futile. Being a 2003 case, it was impossible to trace even the police case file. Neither did the Registrar of the Court manage to get copies of the said two documents. The immediate issue that arose then was what should the Court do:

: Should it use the incomplete record before it and proceed with the hearing of the appeal?

: Would such a move guarantee the appellant's basic right to a fair hearing as guaranteed under the constitution?

: Or should the Court simply allow the appeal and set free the appellant or else order retrial?

After due consideration and reference to several decided cases on the subject, we eventually decided to proceed with the hearing on the 11th day of March 2013 for the following reasons. **First**, we did adopt with approval, the approach taken by the Court of Appeal of Kenya in similar circumstances in the case of ***Mulewa and Another versus The Republic*** (2002) 2 EA 488 – 492 thus:

> "The courts must in this matter ***try to hold the scales of justice evenly*** between the parties and whilst not wholly satisfactory solution can be expected for such an unsatisfactory state of affairs .... the course followed by the judge was ***on balance, the fairest and most just and is the only solution which offers an opportunity for***

> ***judicial determination on the merits of the case.....*** "(Emphasis provided).

The Court proceeded to caution thus:

> "... indeed, if it were to be known that as soon as the court file and that of the police disappear, that would be the end of the matter, the courts would expect many more disappearances ***and justice would be the loser*** ..." (Emphasis provided).

We totally subscribe to the approach taken and views expressed by the Kenyan Court. Indeed the law is and has always been dynamic. It is not static. Therefore new problems that emerge in society and in the judicial process require corresponding new solutions. In the ***Mulewa*** case (supra) the Court would not rule out the possibility of such disappearance and untraceable files being connected to corruption. We cannot be ***ignoramus*** of that fact either, although proof of the same should be provided.

Further, in the Gambian case of ***Batch Samba Fye versus The State*** (SC Criminal Appeal No. 2 of 2010), (unreported) the Supreme Court agreed with the DPP that the court should make a decision (as to whether or not the use of incomplete record of appeal to prosecute an appeal constitutes a denial or violation of a constitutional right of the appellant to a fair hearing) when it comes to the point that the appellant cannot proceed without the availability of the missing record. Therefore the appeal process must be put in motion, the missing documents, notwithstanding. The Court stated:-

> "... it is only in the process of actual hearing of the appeal that the expediency or not of the actual production of these materials would come into play ... ***this matter is therefore not open to speculation prior to a hearing....*** " (Emphasis provided).

Therefore, while it is a proper approach (as per ***Mulewa's*** case, supra) that courts should not rush to acquit a person or allow an appeal following the disappearance of some material documents or exhibits from the case record, it is strongly advisable that the court should hold the

"scales of justice" evenly by examining and coming to a reasonable and justifiable conclusion as to the circumstances surrounding the vanishing of those documents and the likely consequences. The peculiarities of each case must be borne in mind.

It is equally proper (as per ***Samba Fye's*** case supra) that an appeal or case should not be terminated with the disappearance of documents. A hearing should proceed up to the time when the court is required to determine whether or not it is in the interest of justice to proceed without those documents, and whether, all the missing documents or only some of them may affect the progress of the case. The Court held in the ***Samba Fye*** case (supra) thus:-

> " It is desirable to note that ***not all witnesses' evidence and number of exhibits tendered, on the evaluation of evidence ..... attract equal weight and or attention ...***" (Emphasis provided).

Second, when the hearing of this appeal resumed on the 11th day of March 2013, the appellant made two important decisions concerning his appeal. The first one was that he agreed to proceed with the hearing of the appeal without making reference to the two missing documents. We agreed to proceed as per his decision and discarded any evidence that makes reference to the said exhibits. The second decision was that he abandoned grounds (2) and (3) of his original memorandum of appeal. The two grounds did, we observe, touch on the two missing documents.

With the foregoing being the position before us, the Court was left with three grounds of appeal from the original memorandum and two from the supplementary memorandum of appeal. All these grounds can be condensed into the following:-

- That, the ***voir dire*** was not conducted in accordance with the requirements of the law.
- That, failure to summon as a witness, the police who investigated the case occasioned failure of justice to the appellant.

- The first appellate judge erred in law by invoking the provisions of section 127 (7) of the Tanzania Evidence Act by upholding the conviction against the appellant while he had not established the demeanour and credibility of the witness and alleged victim of crime, PW3.
- That, it was not scientifically proved that it is the appellant who committed the offence. His spermatozoa, red and white blood cells should have been examined.

In addition to the grounds of appeal, the appellant presented a detailed written submission in support of his averments. We are thankful to him for all these efforts.

In so far as the ***voire dire*** is concerned, Mr. Victor Karumuna, learned State Attorney, did concede that it was not conducted in accordance with set down procedure of recording it that is, in a Question and Answer form. The consequences of such irregular recording reduces such evidence to be considered as being unsworn, which in turn requires corroboration. The immediate question that follows is, was there

corroboration of PW3's evidence? We firmly hold in the affirmative. The victim, PW3, narrated to her mother, PW1,on how the appellant lured her into his bed room, took off his trousers and placed his erect penis into PW3's anus, after he had placed it first in her vagina. She suffered some pains and blood was oozing from her private parts. Upon being informed by PW3 of what had happened, PW1, inspected PW3's private parts and discovered that she had been injured around the anus area. That was one area of corroboration of PW3's unsworn evidence.

The other area is the appellant's request to PW1 to help him "cover the shame" and that he would take the victim to a dispensary at Mwaloni where she could receive treatment. This piece of evidence by PW1 was not challenged by the appellant either in cross examination or in defence.

Further corroboration was the evidence of Dr. Ikoko Gaston David (DW 4) a defence witness called by the appellant himself. He testified to the effect that:-

> "... I examined her....there were bruises at Husuna's
>
> (PW3) anal part.."

All the above evidence of PW1 and DW 4 corroborate the victim's evidence.

The other point raised by the appellant is that failure to have the police who investigated the case to come and testify prejudiced his case. However, he did not show how he was prejudiced. The law on the issue is well settled. The prosecution does not have any obligation to produce certain witnesses irrespective of consideration of their number. What matters is the credibility of the said witness and not their total number (See ***Speratus Theonest @ Alex versus Republic***, Criminal Appeal No. 135 of 2003 (unreported). That holding by the Court is in compliance with the provisions of section 143 of the Tanzania Evidence Act. Therefore this ground of appeal has no merit.

The other part of the judgement of the High Court which is allegedly offending to the appellant is its invocation of Section 127 (7) of the Evidence Act. It is his allegation that since the High Court Judge did not assess the demeanour and or credibility of PW3, it was wrong to rely on

that provision and uphold the decision of the trial court. We do not share similar views for the following reasons. That provision of the law essentially deals with two matters. It allows a trial court to ground a conviction on uncorroborated evidence in sexual offences if the said court is satisfied after assessing the victim child's credibility. Secondly it requires the court to record its reasons when relying on such uncorroborated evidence. In other words, it has to be satisfied with the credibility of that witness/victim of tender years that she is telling nothing but the truth. In the instant case, it has been established above that the victim's evidence was corroborated by the evidence of PW1 and DW4. As to the credibility of that evidence, both the trial court and the first appellate court did satisfy themselves that she was a credible witness. We, as a second appellate court, see no reason to fault that finding of fact. Therefore this ground of appeal has no merit as well.

As to the last point of contention, there is no legal requirement that in offences of this kind, "sophisticated scientific evidence" to link the appellant and the offence is required. It is not the requirement, for example, that the assailant's spermatozoa, red and white blood (or even

DNA) should be examined to prove that he is the one who committed the offence. If there is other, independent evidence to implicate the accused with the offence and the court is satisfied to the required standard (that of proof beyond reasonable doubt), that in our view, is sufficient and conclusive. In the instant case, the evidence of PW3 as corroborated by PW1 and DW4 was sufficient proof that the appellant did indeed commit the offence. Again, this ground of appeal therefore has no merit.

In conclusion, it is not insignificant to note that both the courts ***a quo*** did consider the defence case and come to the conclusion however, that the prosecution case was overwhelmingly proved beyond reasonable doubt as against the appellant. Proof beyond reasonable doubt, if we may repeat, does not necessarily depend on the number of witnesses produced but, rather, on the credibility and reliability of the evidence before the court. The best we can say in the circumstances of this appeal and without deference to the appellant, is that he made some visible efforts to show that he did not commit the offence with which he was convicted and sentenced as above stated. However, it is our considered judgement that

the prosecution case proved otherwise. Therefore, this appeal is patently wanting in merit. It is therefore, dismissed in its entirety.

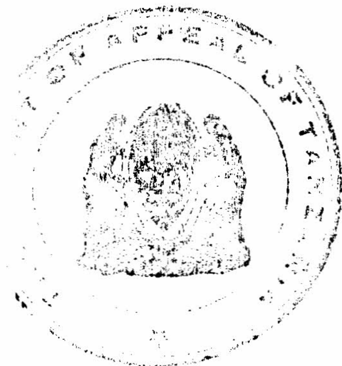
DATED at **MWANZA** this 14th day of March 2013

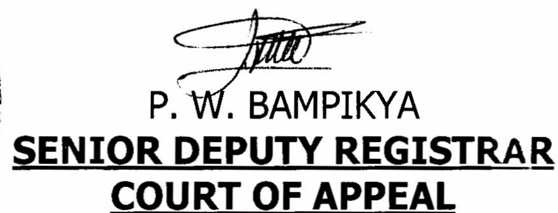
M.S. MBAROUK
JUSTICE OF APPEAL

S.J. BWANA
JUSTICE OF APPEAL

S.A. MASSATI
JUSTICE OF APPEAL

I certify that this is a true copy of the original





P. W. BAMPIKYA
SENIOR DEPUTY REGISTRAR
COURT OF APPEAL