IN THE COURT OF APPEAL OF TANZANIA

AT MTWARA

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

CRIMINAL APPEAL NO. 240 OF 2008

YUSUPH SIMON .... APPELLANT

VERSUS

THE REPUBLIC .... RESPONDENT

(Appeal from the judgment of the RM's Court (Ext. Juris) at Mtwara)

(Kinemela, SRM – Ext. Juris)

dated the 3rd day of October, 2006
in
Criminal Appeal No. 25 of 2006

JUDGMENT OF THE COURT

7 & 12 OCTOBER, 2010

BWANA, J.A.:

Yusuph Simon, the appellant herein, was charged with and convicted of the offence of Unnatural Offence contrary to section 154(1) of the Penal Code, Cap. 16, as amended by the Sexual Offences (Special Provisions) Act No. 4 of 1998 (the SOSPA). The trial court, the Masasi District Court, convicted and sentenced him to

a prison term of thirty (30) years. Aggrieved by the said conviction and sentence, he appealed to the High Court where, he was unsuccessful. Undaunted, he lodged this appeal.

It was the prosecution case that on the 16th day of October, 2005, around 13.00hrs. at TRM area within Masasi District, the appellant did have carnal knowledge to one Bakari Hamisi against the order of nature. Four prosecution witnesses, including Bakari Hamisi, the victim, testified in support of the prosecution case. The appellant gave his defence on oath.

The appellant and his victim were found by Salum Abdallah, PW1 and Salehe Amini, PW2 in the appellant's house at that time of the day. The two witnesses had been alerted by the screeming, crying for help, coming from that house. They rushed to the said house to find out what was going on. Upon entering the house, they found both men (the appellant and his victim) naked. Both PW1 and PW2 saw blood oozing from Bakari Hamisi's anus. Some bruises were noticed around his neck as well. The two prosecution witnesses

took the appellant's shirt, tied it around Bakari Hamisi's buttocks so as to contain the blood. Subsequently both the appellant and his victim were taken to the police station where they had their statements recorded.

According to Bakari Hamisi, PW3, the appellant had called him to his house for a drink of a local brew called "*mnazi*".

After consuming the "*mnazi*", suddenly the appellant held PW3 by the neck, stripped off his trouser and sodomised him. PW3 is said to have struggled in order to free himself but in vain, until the appellant managed to ejaculate. During the struggle, PW3 raised an alarm, shouting for help. That led to PW1 and PW2 coming to the scene of the incident. The police were also alerted and rushed to the scene. According to D/C Victus, PW4, on his arrival at the scene, he found both the appellant and PW3 still naked.

At the police station, PW3 was issued with a PF3 and taken to hospital for examination and treatment.

In his brief defence, the appellant denied to have committed the offence. His detailed Memorandum of Appeal, taken in its totality, touches on three main areas namely –

- Irregularities in presentation and tendering of the medical report.
- Lack of credibility on the part of the prosecution evidence.
- Contradictions in the evidence of the prosecution witnesses.

It is not in dispute that the medical report, the PF3, was tendered in court during trial contrary to laid down procedures. The mandatory requirements of section 240(3) of the Criminal Procedure Act, Cap. 20 (the CPA) were not complied with. That provision states:-

> *"S. 240 (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 to be summoned*** *in accordance with the provisions of this subsection*" [Emphasis added].

This important requirement of the law touching on the fundamental right of an accused person was not complied with during trial. Failure to do so was a fatal omission, which may lead to the said document being expunged from the record. Mr. Peter Ndjike, learned State Attorney, conceded to that irregularity and its consequences. We therefore, expunge the said PF3 from the record.

Mr. Ndjike argued and in our considered view rightly so, that the rest of the evidence on record is still strong enough to prove the case against the appellant. We do agree because of the evidence of

all the three witnesses which irresistibly point to the criminal liability of the appellant. The two courts below were definite on this point. We find no reason to fault them. The case could still be proved beyond reasonable doubt, the absence of the PF3 notwithstanding.

The other two grounds of appeal may be considered together. That is, credibility of and contradictions in the prosecution evidence. We do note two aspects of the law governing such claims. One, is the role of a second appellate court when dealing with factual issues. The second one is the issue of misdirections or non directions which seem either to be or not fatal to the case.

In the instant case we have subjected such evidence to a very objective scrutiny and came to the conclusion that what the prosecution witnesses said must be given credence. Their character or some other ill motive has not been assailed.

We must however, note in passing, that it is important for a trial court to state, in its judgment or ruling why it believes in the

credibility or the demeanor of a given witness. We think it is not sufficiently stated when a trial court merely states that it believes in the credibility of a witness or that it has examined the demeanor of a witness and satisfied itself, and the like. For the advantage of an appellate court and also in the interest of justice, we believe some more information should be availed as to why the court has come to such a conclusion.

With regards to contradictions or discrepancies in the testimony of witnesses, it is settled law that the same does not necessarily make that evidence lose credence or become unacceptable. In a recent case, this Court held (See **Said Ally Ismail vs Republic,** Criminal Appeal No. 241 of 2008) (unreported) thus:-

> *"....it is not every discrepancy in the prosecution's witness that will cause the prosecution case to flop.* ***It is only where the gist of the evidence is contradictory***

***then the prosecution case will be dismantled ...*"** (Emphasis added).

In the present case, we see no such contradictions that go to the basics of the case. What are claimed to be discrepancies in the evidence of the prosecution case are or appear to be a storm in a tea cup. Therefore, they do not, in our considered view, touch on the merits of the case. After all, as a further observation, different witnesses testifying over a given issue may present it slightly different. No one would expect them to give stereotype evidence. The witnesses are human beings, with different backgrounds, and the like. So long as their evidence does not differ or contradict in material particulars, then a trial court may ignore such minor discrepancies. That is what transpired in this case.

In conclusion we would like to make this unavoidable observation. The appellant made some visible efforts to bring his appeal that far thus exercising his constitutional right. Unfortunately he has not succeeded as was the situation before the two courts "*a*

cannot make us hold otherwise, than dismiss it in its entirety. We do so.

DATED at MTWARA, this 11th day of October, 2010.

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.

M.A. MALEWO
DEPUTY REGISTRAR
COURT OF APPEAL