IN THE COURT OF APPEAL OF TANZANIA

AT TABORA

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

CRIMINAL APPEAL NO. 401 OF 2007

MASANJA MAGINA ..... APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

(Appeal from the Judgment of the High Court of Tanzania at Tabora)

(Mwita, J.)

Dated the 12th day of June, 2006
in
Criminal Appeal No. 111 of 2003

JUDGMENT OF THE COURT

9 & 14 JUNE, 2010

RUTAKANGWA, J.A.:

The appellant was arraigned before the District Court of Nzega District on a charge of committing an Unnatural Offence contrary to section 154(1) of Penal Code. He was alleged to have committed it on 17th November, 2002 at about 03.00 hrs at Ilagaja village. He denied the charge, but after a "full" trial he was found guilty as

on 17th November, 2002 at about 03.00 hrs at Ilagaja village. He denied the charge, but after a "full" trial he was found guilty as charged and convicted. He was sentenced to life imprisonment and twelve strokes of the cane. His appeal against the conviction and sentences was dismissed by the High Court sitting at Tabora. Hence this second appeal.

At the appellant's trial only two witnesses testified for the prosecution. These were PW1 Jumanne Lucas (8 years), whose evidence was received without an inquiry being made as to whether he was possessed of sufficient intelligence, and his mother PW2 Kulwa Mboje.

PW1 Jumanne generally told the trial court, that the appellant once visited them and occupied one of their house's rooms. While PW1 was sleeping in the living room, he was called by the appellant into his room and requested to join him on the bed. Once there, the appellant touched his buttocks. While threatening him with a knife, the appellant "*inserted his penis*" into his (PW1's) anus. PW1 *"cried a*

little", as he put it, out of fear of the appellant. Following this incident he went to sleep at another house. When asked by his mother as to why he had abandoned his residence, he informed her that the appellant had sodomised him. Thereafter they reported the matter to the police.

On her part, PW2 Kulwa had a different story. Also testifying generally, she told the trial court that PW1 was sleeping in the living room of their house as the appellant slept in the bed room. She then said:-

> *" ... however, I heard him (accused) call the PW1 in the room at night where he sodomized him. Then in the morning I saw the PW1 not feeling well .... I interrogated him (PW1) who said that the accused sodomized him ... We caught the accused and conveyed him to the police station.... "*

Although the appellant had given affirmed evidence denying the accusation, the trial District magistrate, believed PW1 and found his evidence to have been supported by PW2. As already alluded to

above, the High Court upheld the conviction of the appellant as PW1, a child of tender years, was found by the trial District Magistrate to have been a truthful witness in terms of section 127(7) of the Evidence Act. No attempt, however, was made by it to re-evaluate the entire evidence as it had been urged to do by the appellant.

In this appeal the appellant, who is unrepresented, urged us to re-evaluate the evidence and hold that the two prosecution witnesses told the trial court nothing but only lies.

Mr. Jackson Bulashi, learned Senior State Attorney, for the respondent Republic, has urged us to allow this appeal. He gave us two reasons. **One,** the appellant was not given a fair trial, as he was not given opportunity to cross-examine PW1, the only key prosecution witness. **Two,** the prosecution evidence was contradictory and implausible.

We have carefully studied the evidence of the two prosecution witnesses. We are in agreement with Mr. Bulashi that the

prosecution evidence lacks cogency. This is primarily because it is vague and implausible. Although the charge sheet shows that the appellant sodomised PW1 on 17th November, 2002, the prosecution evidence is silent on the date when the appellant committed the offence. It was incumbent upon the prosecution to prove that the appellant carnally knew PW1 against the order of nature either on the said date or on any other date. See, for instance, **RYOBA MARIBA @ MUNGARE v. R** Criminal Appeal No. 74 of 2003, **CHRISTOPHER MAINGU v. R.**, Criminal Appeal No. 222 of 2004 and **ALFEO VALENTINO v. R.**, Criminal Appeal No. 92 of 2006 (all unreported). Testifying generally that the appellant sodomised PW1 without specifying the day or days when he did so raises reasonable doubts on whether the alleged offence was actually committed.

These reasonable doubts are raised to the level of genuine doubts when one considers the inconsistencies in the evidence of PW1 and PW2. While PW1 testified that he cried a little, PW2 had the audacity of telling the trial court that the cries of PW1 were in fact so loud as to arouse them from their slumber. They had to leave

their beds and as PW1 was crying inside the appellant's room, they had to go and ask the appellant what was amiss. To PW2, the appellant told them that it was *"the voice of wizards"* and that they *"believed him."* One wonders why they had to believe that bizarre story when indeed they had heard PW1 crying in that room and was, therefore, not at his usual sleeping place.

There is another discomforting circumstance. PW1 claimed that after being sodomised at night, the following day, even without telling his mother what befell him, abandoned his home and shifted to another place. However, this piece of evidence is in contradiction with the evidence of PW2. PW2 testified that on the morning of the sodomy after realizing that PW1 was unwell, she interrogated him. On learning what had happened, they arrested the appellant immediately, took him and PW1 to Mwangoye police station, where the appellant confessed the offence. They were issued with a PF3 and sent PW1 to Mwangoye dispensary. The said PF3 which was tendered in evidence as exhibit P1 shows that PW1 had sustained bruises in the "anus rectum" some **5-7 days earlier**. Furthermore,

no police officer testified to bear out PW2 on her wild claims that the appellant confessed to them to have committed the alleged offence. To us, all these inconsistencies and embellishments in the evidence of PW1 and PW2 render their evidence highly suspicious and ought not to have been accorded the weight it was given by the two courts below in a case of this nature.

In view of the above observations, we are of the settled opinion that the appellant might have been convicted on the basis of contrived evidence.

We have already shown above that the appellant was denied his right under section 229 of the Criminal Procedure Act, Cap. 20 This was an incurable irregularity which undeniably vitiated the trial. As urged by Mr. Bulashi, we hereby nullify, quash and set aside the entire proceedings in the trial District Court. We equally quash and set aside the appeal proceedings in the High Court. As correctly pressed by Mr. Bulashi, for want of cogent evidence, we shall not order a re-trial.

In fine, we allow this appeal and order the immediate release of the appellant from prison unless he is otherwise lawfully held.

DATE at TABORA this 10th day of June, 2010.

E.M.K. RUTAKANGWA
JUSTICE OF APPEAL

M.S. MBAROUK
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