IN THE COURT OF APPEAL OF TANZANIA
AT TANGA

(CORAM: MSOFFE, J.A., LUANDA, J.A., And MANDIA, J.A.)

CRIMINAL APPEAL NO. 323 "A" OF 2009

ALLY JUMA ..... APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

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

(Teemba, J.)

dated the 30th day of June, 2009
in
Criminal Appeal No. 61 of 2008

JUDGMENT OF THE COURT

6 & 8 April, 2011

LUANDA, J.A.:

The above named appellant was charged in the District Court of Handeni with an unnatural offence contrary to section 154 (1) and (2) of the Penal Code, Cap. 16. He was convicted and sentenced to thirty (30) years imprisonment.

Aggrieved by the conviction and sentence, the appellant appealed to the High Court where he was not successful. However, the High Court set aside the sentence of (30) years and substituted thereof the sentence of life imprisonment. Still aggrieved, the appellant has come to this Court on second appeal.

The evidence on the prosecution which led to the appellant's conviction was to this effect: - On 22/5/2006 at around noon hours, Juma Selemani (PW3) the victim of the unnatural offence was at his home place playing with his colleague children. Also present was his mother Sophia Hemedi (PW2). His father had gone to a shamba.

Some few minutes before PW3 was carnally known against the order of the nature, PW2 went to a farm nearby to pick green maize for the family. It was at that juncture the appellant, who was PW3's uncle and therefore familiar face, arrived and asked the children the whereabouts of PW3's parents. He was told that they were not around. He then took PW3 and led him to a nearby bush; he undressed him and inserted his penis into the anus of PW3. While inserting his penis, the appellant told PW3 not

to raise any alarm or cry lest he would be stabbed with a knife. The appellant then gave PW3 TSh 20. The two then proceeded towards the homestead of PW3. PW3 was crying. Meanwhile, PW2 was coming back from the farm, she saw the two, the appellant and PW3 emerging from the nearby bush while PW3 was crying. But upon seeing PW2, the appellant changed direction and disappeared. PW3 told his mother the ordeal he encountered and mentioned the appellant as the person who did it. PW2 called her relative one Mwajuma Ally (PW5) and explained to her the saga. PW5 inspected PW2 and found his anus was reddish and it had bruises. PW2 was sent to hospital. The appellant disappeared from the village. He was arrested almost three months after the incident.

In his defence, the appellant denied to commit the offence. He said on the fateful day he was at his shamba.

In his memorandum of appeal, the appellant has raised six grounds. **One,** the age of the victim was not ascertained. **Two**, the trial court did not warn itself on the dangers of relying on the evidence of the victim. **Three**, the PF3 was not properly tendered. **Four**, the cautioned statement

was not taken voluntarily. **Five**, the trial court was wrong to take into account his absence from the village as corroborative evidence that he committed the offence. **Six**, the evidence of all prosecution witnesses was hearsay.

In this appeal, the appellant appeared in person and unrepresented; whereas Mr. Faraja Nchimbi learned State Attorney represented the respondent/Republic. Mr. Nchimbi supported the conviction and the sentence of life imprisonment.

Mr. Nchimbi categorized the six grounds into two clusters. Grounds 1, 2, 5 and 6 which deal with credibility of witnesses were argued together; whereas grounds 3 and 4 which deal with documentary evidence in one group. We prefer to deal with grounds 3 and 4. Mr. Nchimbi submitted, and correctly in our view, that the first appellate court had already dealt with those documents and the same were expunged from the record for procedural irregularities. So, these grounds ought not to have been raised.

Turning to the other cluster, Mr. Nchimbi submitted that the evidence on record, minus the PF3 and cautioned statement, is strong enough to support the conviction.

He said the incident occurred around noon hours. PW2 knew the appellant very well – his uncle. It was Mr. Nchimbi's contention that the question of mistaken identity did not arise. Further, PW2 saw the appellant coming with PW3 to the house and he later disappeared. PW3 informed his mother whereby she called PW5 who inspected him and found his anus reddish and had bruises. It was Mr. Nchimbi's submission that, taking the totality of the evidence on the record, the appellant was the one who did it.

Both lower courts were satisfied that the appellant was the one who committed the offence. PW3 who was a child of the tender years testified, after the conduct of the *voire dire* test, said that while he was playing with his collegue children, the appellant arrived and took him to a nearby bush and sodomized him. That was direct evidence and not hearsay as suggested by the appellant which both lower courts found credible and

need not warn itself to convict. The evidence of PW5 corroborated the evidence of PW3 that he was sodomized. On the other hand the conduct of the appellant of changing direction and disappearing when he saw PW2 added weight to the prosecution case. What these two witnesses had testified was not hearsay. They did not only testify on what PW3 told them, they went further and in the process they corroborated his story.

The appellant also complained about the age of the victim that it was not ascertained. With respect, the record is loud and clear. The record shows that the victim was 7 years of age. That was the evidence of Sgt Juma (PW6). So, this ground has no merit.

For all that we have said above, we are of the settled mind that the appeal has no merit. We agree with Mr. Nchimbi in his submission in opposition to the appeal. We dismiss the appeal in its entirety.

DATED at TANGA this 7th day of April, 2011

J. H. MSOFFE
JUSTICE OF APPEAL

B. M. LUANDA
JUSTICE OF APPEAL

W. S. MANDIA
JUSTICE OF APPEAL

I certify that this is a true copy of the original.

E. Y. MKWIZU
DEPUTY REGISTRAR
COURT OF APPEAL