

**IN THE COURT OF APPEAL OF TANZANIA
AT ARUSHA**

CRIMINAL APPEAL NO. 211 OF 2009

(CORAM: MUNUO, J.A., KILEO, J.A., And MANDIA, J.A.)

JUMA MANJANO APPELLANT
VERSUS
THE D. P. P. RESPONDENT

**(Appeal from the decision of the High Court of Tanzania
at Arusha)**

(Mmilla, J.)

**dated the 7th day of May, 2009
in
Criminal Appeal No.31 of 2008**

JUDGMENT OF THE COURT

21th February & 2nd March, 2012

MANDIA, J.A:

On 19/11/2000 at 2 a.m PW3 Caroline Akasi heard cries for help from a neighbour's house. She went over with her mother to where the cries were coming from. Another neighbour PW4 Jumanne Shabani also heard the cries and went over to where the cries were coming from. Both PW3 and PW4 heard the complainant PW1 Moshi s/o John say "Nafanyiwa vibaya na Juma ambaye ni baba mdogo." When PW4 drew closer to the door of the house from which the cries for help were coming, he saw three paces away the appellant Juma Manjano, a fellow fisherman, running past

him. The appellant was dressed in boxers (bukta) and was carrying a panga. PW4 went over to the boy Moshi s/o John who was naked, examined his behind and found blood coming out of the boy's anus. He took the boy to the Police Station for a report where PW5 E. 9040 D/C Nyakwanga issued a PF3, Exhibit P1.

The victim PW1 Moshi s/o John is a twelve year old boy who gave evidence on oath after a *voire dire* examination conducted by the trial court. He testified that on a date he did not remember his step father PW2 Daudi Kilango went on night duty as a watchman, leaving him (PW1) asleep inside their house. PW1 slept in the same bed with Desdery Petro and two other children, one a boy and the other one a girl. PW1 testified that during the night the appellant joined them to sleep on the same bed, and that the sleeping pattern on the bed was that PW1 Moshi s/o John and the appellant slept facing one direction while Desdery Petro, the other young boy and the girl slept with their heads facing the opposite direction. PW1 further testified that he went to sleep with his clothes on, and these were a black pair of trousers and a white T-shirt, and that he woke up from sleep to find his trousers down and the appellant had inserted his male organ in his anus, causing him pain. He cried out and the appellant

ran away, and when Caroline PW3 came he told her the appellant had sodomised him.

The trial District Court of Monduli where the appellant was arraigned for a charge Unnatural Offence c/s 154 (1) of the Penal Code found the appellant guilty, convicted him and sentenced him to thirty (30) years imprisonment. Aggrieved, the appellant preferred an appeal to the High Court of Tanzania at Arusha which found the appeal devoid of merit and dismissed it in its entirety. The appellant has filed a second appeal in this Court. The memorandum of appeal filed by the appellant contains six grounds of appeal which can conveniently be summarized into three grounds, i.e. **failure of the trial court to conduct *voire dire* examination on PW1 before receiving his evidence, contradictions and inconsistencies in the evidence of the prosecution witnesses and failure of the court to consider the defence of the appellant.**

During the hearing of the appeal the appellant appeared in person and argued the appeal himself, while the respondent / Republic was represented by Ms. Veritas Mlay, learned Principal State Attorney.

Arguing the appeal, the appellant reiterated the grounds listed in the memorandum of appeal he filed in this court. On her part Ms. Veritas Mlay appraised us of the fact that of the six grounds raised in the memorandum of appeal filed by the appellant, only ground one and six were raised in the High Court, the rest being totally new grounds. **In SAMWELI SAWE vs REPUBLIC**, Criminal Appeal No. 135 of 2004 we said this at P3:

*"As a second appellate court, we cannot adjudicate on a matter which was not raised as a ground of appeal in the second appellate court. The record of appeal at pages 21 to 23, shows that this ground of appeal by the appellant was not among the appellant's ten grounds of appeal which he filed in the High Court. In the case of **Abdul Athuman vs R** (2004) TLR 151 the issue on whether the Court of Appeal may decide on a matter not raised in and decided by the High Court on first appeal was raised. The Court held that the Court of Appeal has no such jurisdiction. This ground of appeal is therefore, struck out."*

We subscribe to the views expressed in the **Samweli Sawe** case (supra).

We therefore strike out grounds two to five of the memorandum of appeal filed by the appellant, leaving us with ground one and six only.

In ground one the appellant rails the trial and first appellate courts for failing to adequately scrutinize the evidence on record and arrive at a fair and impartial decision. Ms Veritas Mlay, learned Principal State Attorney steered us to the evidence of PW3 Caroline Akasi and PW4 Juma Shabani who responded to the cries of the victim crying out "Nafanyiwa vibaya na Juma ambaye ni baba mdogo." PW4 Juma Shabani testified that as he ran to where the cries were coming from in a moonlit night the appellant, who is a fellow fisherman known to him, passed him three paces away running in the opposite direction while dressed in a "bukta" (shorts) and carrying a panga. It was PW4 Juma Shabani who examined the naked victim and found blood coming out of the anus of the latter. Both lower courts found PW3 and PW4 credible witnesses and we have no reason to differ with them in this aspect. Ground one has no merit and is accordingly dismissed.

In ground six, the appellant raises a complaint about failure of the two courts below to consider his defence. In his defence the appellant

committed, at 8 p.m., but left soon thereafter and went to his home where he stayed up to the following morning at 8 a. m. when he was arrested by a mob of people and accused of the crime.

The record shows clearly that the appellant's defence was considered, and the trial court found it as a fact that the appellant slept in the same house and bed with the victim as alleged and corroborated by the evidence of PW3, PW4, the second accused and PW5. The sixth ground therefore lacks merit and is accordingly dismissed. We are satisfied that the appeal lacks merit and is hereby dismissed in its entirety.

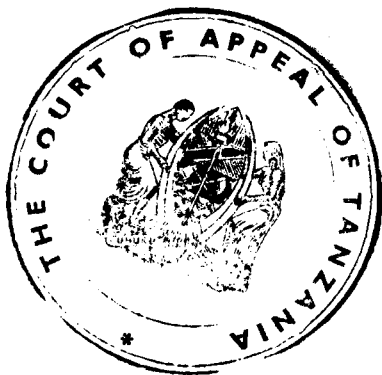
DATED at ARUSHA this 01st day of March, 2012.

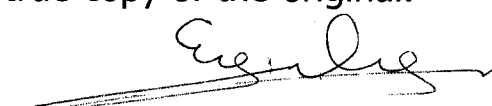
E. N. MUNUO
JUSTICE OF APPEAL

E. A. KILEO
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