IN THE COURT OF APPEAL OF TANZANIA

AT IRINGA

(CORAM: MBAROUK, J.A., MMILLA, J.A., And MWARIJA, J.A.)

CRIMINAL APPEAL NO. 100 OF 2015

MANENO KATUMA .....APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

(Appeal from the decision High Court of Tanzania

at Songea)

(Fikirini, J.)

dated the 11th day of March, 2015

in

Criminal Appeal No. 36 of 2014

.....

JUDGMENT OF THE COURT

24th & 27th August, 2015

MBAROUK, J. A.:

In the District Court of Songea at Songea in Criminal Case No. 119 of 2013, the appellant Maneno s/o Katuma was charged with unnatural offence contrary to section 154 (1)(a) of the Penal Code, Cap. 16 R.E. 2002. He was convicted and sentenced to life imprisonment. Aggrieved, the appellant filed his appeal to the High Court of Tanzania at Songea (Fikirini, J.)

which was dismissed in its entirety. Undaunted, he has now preferred this second appeal.

Briefly stated, the fact leading to this appeal were as follows: PW1, Isaya s/o Mgimwa, a boy aged eight (8) years at the time of the commission of the offence on 16th September, 2008 was at their house after fetching water at around morning hours. When he was through with the task of fetching water, he was tired, hence slept outside their house. Thereafter, the appellant who was a tenant in that house came and took PW1 to his rented room. PW1 did not resist hoping that nothing bad would happen as the appellant was well known to him as the labourer of his parents. While in the room, PW1 testified to have been sodomized by the appellant. PW1 further testified that, the appellant inserted his penis into his anus and he felt very painful. He said, by that time, his parents were at their farm and it was a long distance from their house to the farm, thus impossible for some one to hear. PW1 further added that, it was himself who then told his mother (Marry Lulandala, PW2) what transpired after she returned from the

farm. After PW1 reported the incident to PW2 she then informed her husband and later the matter was reported to Henry Paul Kisinde (PW3) who was a pastor. According to the testimony, PW2, on 16th September, 2008 at around morning time, while on her way to her farm, she met the appellant on his way back from the farm heading home. At around 15:00 hrs. after/she returned home she saw PW1 with the appellant but looked so tired and unusual. When PW2 asked PW1 as to whether he was sick, he did not respond, then the appellant went away. As PW2 entered inside, PW1 followed her and told her that he had stomach ache as he was sodomized by the appellant after he inserted his penis in PW1's anus. PW2 promptly informed PW1's father and they examined his anus and found wet sperms. PW2 and her husband then informed PW3 (the pastor) who came and examined PW1's anus and interrogated the appellant. PW2 added that, when the appellant was interrogated by PW3, he admitted to have sodomized PW1. PW2 then said, the pastor (PW3) advised the matter to be

reported to VEO'S office when the appellant was detained and later sent to police.

On his part, PW3 testified that on 16th of September, 2008 at about 18:00 or 19:00 hours he received information from Mr. Fidelis Mgimwa, the father of PW1, that his son was sodomized by the appellant. PW3 said, he examined PW1 and noted that he was sodomized. He found sperms remains on the anus zone. At around 20:00 hours he visited the house of Fidelis Mgimwa and his wife (PW2), PW1 and the appellant were there also. PW3 then asked the appellant as to how was he, the appellant replied that the news are not so good as he has committed a sin as he has sodomized PW1. PW3 further asked the appellant the same question again in "Hehe" language and he gave the same answer. When PW3 asked the appellant as to why he did so, the appellant replied that it was satan. PW3 added that, while doing such interrogation, they were at a free environment and the appellant was at liberty to admit or refuse anything. Thereafter, he said, the matter was reported to the village security chairperson.

In his defence, the appellant categorically denied to have committed the offence. He claimed that, the case was framed and fabricated against him by PW2's husband who owed him some money as a salary for the work he has done as a labourer in their farm. At the end, the trial court convicted and sentenced him as stated above.

In this appeal. The appellant appeared in person and fended for himself. He preferred six grounds of appeal in his memorandum of appeal, but we are of the view that they can safely boil down to four major grounds as follows:-

(1) That, the evidence of PW1 and that of PW5 Was not corroborated in respect of proving penetration.

(2) That, the trial magistrate and the High Court Judge erred in law and fact when they convicted the appellant without taking into account the time when the incident occurred and the day when PW1 (the victim) was examined by the Doctor.

(3) That, the trial magistrate and the High Court Judge erred in law and fact when they relied on a cautioned statement exhibit P2 which was signed by Maneno Katuna who is different from the appellant's name who is Maneno Katuma.

(4) That, the prosecution failed to prove their case beyond reasonable doubt.

At the hearing, the appellant being a lay person had nothing to submit, he just adopted his grounds of complaint and opted to allow the learned State Attorney to respond first and if need arises he will give his re-joinder submission later.

On the other hand, the respondent/Republic was represented by Mr. Shaban Mwegole assisted by Ms. Tulibake Juntwa, learned State Attorneys. From the outset, Mr. Mwegole indicated not to support the appeal. In his reply to the 1st ground of appeal, the learned State Attorney submitted that, there was enough corroboration of the evidence of PW1 in respect of proving penetration. For example, he said, the

evidence adduced by PW2 (PW1's mother) clearly established that PW1 was sodomized after she examined and found wet sperms around his anus. Also PW2 testified that she was initially told by PW1 that the appellant inserted his penis into his anus that is why he was suffering from stomach ache.

Mr. Mwegole added that, even PW3 who was a pastor corroborated the evidence of PW1 when he testified that he observed PW1's anus and saw sperms remains on its zone. Apart from that, Mr. Mwegole contended that, when PW3 visited the house of Mr. Fidelis Mgimwa (PW1's father) he met the appellant and when he interrogated him in the presence of PW2 and her husband and Anthony Mapunda (PW4), the appellant admitted that he sodomized PW1. Even when PW3 asked him in "Hehe" language he repeated the same answer that he sodomized PW1.

The learned State Attorney further submitted that even the evidence of PW5, Dr. Benedict Ngaiza has shown that when he examined PW1 he found male sperms at the outer part of the anus. Whereas in his analysis PW5 came to a

conclusion that there was an attempt of knowing the victim carnally and found that there were no bruises occasioned within the anus. The learned State Attorney added that, even the PF3 tendered as exhibit P1 confirmed what had been said by PW5 in corroborating the evidence of PW1.

Mr. Mwegole added that, even if the evidence of PW1 was not corroborated, according to the provisions of section 127 (7) of the Evidence Act if the trial court has found him credible and that he was telling nothing but the truth, the appellant can be convicted.

Considering all what he has submitted, Mr. Mwegole urged us to find that PW1's evidence was corroborated by PW2, PW3 and PW5 and hence the 1st ground of appeal lacks merit.

In response to the 2nd ground of appeal, the learned State Attorney submitted that, as far as that ground of complaint was not raised and decided by the first appellate court, raising it now is an afterthought. He therefore urged us to find it devoid of merit.

As regards the 3rd ground of appeal concerning the complainant that the cautioned statement was signed by a different person, Mr. Mwegole submitted that at page 95 of the record of appeal the said cautioned statement was expunged by the High Court. Hence, he said, there is no need for the appellant to complain on it, as it was not relied on to sustain his conviction by the High Court. He therefore urged us to find the 3rd ground of appeal devoid of merit too.

Lastly, in his response to the 4th ground of complaint that the prosecution has failed to prove their case beyond reasonable doubt, Mr. Mwegole submitted that the evidence adduced by PW1 (the victim), PW2, PW3 and PW5 sufficiently proved that the appellant committed the offence charged against him, he therefore urged us to find that the prosecution has proved its case beyond reasonable doubt. He finally prayed for the appeal to be dismissed as it lacks merit.

In his re-joinder submission, the appellant had nothing useful to submit and left to Court to use its wisdom and reach to a just decision.

To start with, looking at the 1st ground of complaint, we are of the opinion that, having closely examined the evidence adduced by PW2 and PW3 we think that such evidence corroborated the evidence of PW1, but not to the extent of proving the commission of the offence. This is because, the evidence tendered by those witnesses has favoured the proof of an attempt to commit unnatural offence rather than that of the actual unnatural offence as claimed by PW1. For example, the evidence of PW2 was to the effect that she examined PW1's anus and found that it was wet with sperms. Even PW3 (the Pastor) simply testified that when he examined PW1, he saw sperm remains on PW1's anus. We are of the opinion that the evidence of PW3 corroborated the evidence of PW1 to a certain extent but not in full. This is because, the evidence of PW2 and PW3 has not conclusively established penetration, rather the

evidence established the offence of attempted unnatural offence.

As to the oral admission made by the appellant before PW3 in the presence of PW2, PW4 and Mr. Fidelis Mgimwa (PW1's father) we are of the opinion that extreme care must be taken before taking such admission on its face value (See **Ndalahwa Shilanga & Another v. Republic**, Criminal Appeal No. 247 of 2008 (unreported). For that reason, we will consider the oral admission made by the appellant before PW3 with extreme care before reaching to our conclusion.

We are also of the opinion that the evidence of PW5 who was a medical doctor has explicitly given his opinion after he examined PW1 **that there was an attempt of knowing the victim carnally as there were no bruises occasioned within the anus of PW1 (the victim).** Even in the PF3 exhibit P1, PW5 remarked that there was no injury inflicted on PW1 and that he only saw sperms on the underpant.

For those reasons, we are of the opinion that PW2 and PW3's evidence partly corroborated the evidence of PW1 as their evidence has shown that they examined PW1 just on the outer parts of his anus unlike PW5 who examined PW1 even in the inside parts of his anus.

As regards the 2nd ground of complaint, we fully subscribe with the submissions made by Mr. Mwegole that as the said ground was not raised and decided by the High Court, raising it now is an afterthought. Hence, we find it to be lacking in merit.

Concerning the 3rd ground of complaint, we also agree with the learned State Attorney that as the cautioned statement tendered as exhibit P2 was expunged by the High Court, the complaint is misconceived. For that reason, we find no merit in this ground too.

As on the last ground of appeal concerning the complaint that the case against the appellant was not proved beyond reasonable doubt, we are of the considered opinion that, the facts of the case fovour the offence of attempted unnatural

offence rather than the actual unnatural offence. This is because, as shown earlier herein above, the evidence of PW2 and PW3 relied on by the prosecution has not established sufficiently that the unnatural offence was committed against PW1, rather, the evidence gathered from PW2 an PW3 proved that the offence of attempted unnatural offence was committed. We are of the opinion that the evidence of PW5 as a medical expert witness has sufficiently established the offence of attempted unnatural offence as shown herein above.

All said and done, we are of the view that, there are some doubts as to whether the charge of unnatural offence was proved beyond reasonable doubt in this case, especially considering the evidence adduced by PW2, PW3 and PW4 which has greatly favoured enough evidence on an attempted unnatural offence. For that reason, we give the benefit of such doubt in favour of the appellant and set aside the conviction and sentence of unnatural offence and substitute it with a lesser offence of attempted unnatural offence under section 155 of the Penal Code, [Cap. 16 R.E. 2002]. We also substitute

the sentence of life imprisonment with that of twenty (20) years imprisonment as we hereby do.

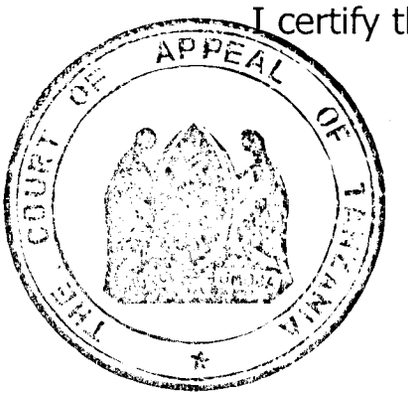
DATED at IRINGA this 26th day of August, 2015.

M.S. MBAROUK
JUSTICE OF APPEAL

B.M.K. MMILLA
JUSTICE OF APPEAL

A.G. MWARIJA
JUSTICE OF APPEAL

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



E.F. FUSSI
DEPUTY REGISTRAR
COURT OF APPEAL