IN THE COURT OF APPEAL OF TANZANIA

AT DODOMA

(CORAM: KILEO, J.A., ORIYO, J.A., And JUMA, J.A.)

CRIMINAL APPEAL NO. 585 OF 2015

ALAWIA HALIFA.....APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

(Appeal from the decision of the Resident Magistrate's Court of Dodoma at Dodoma- Extended Jurisdiction

W. E. Lema PRM, Ext. Jurisdiction

dated the 26th day of November, 2015

in

PRM Criminal Appeal No. 585 of 2015

.....

JUDGMENT OF THE COURT

27th & 29th April 2016

KILEO, J. A.:

In the District Court of Kondoa at Kondoa in Criminal Case No. 44 of 2012, the appellant Alawia Halifa was charged with attempt to commit unnatural offence contrary to section 155 of the Penal Code, Cap. 16 R.E. 2002. He was convicted and sentenced to fifteen (15) years imprisonment. Aggrieved, the appellant filed his first appeal against the decision of the trial court to the High Court. Pursuant to section 45 (2) of the Magistrate's Courts Act, Cap 11 R. E. 2002, his appeal was transferred to be heard by W. E. Lema, Principal Resident

Magistrate upon whom Extended Jurisdiction had been conferred. On 26th November, 2015, the learned PRM with Extended Jurisdiction (PRM, EJ) dismissed his appeal in its entirety. Undaunted, he has now preferred this second appeal.

The appellant appeared in person at the hearing with no legal representation. The respondent Republic was represented by Ms. Lina Magoma, learned State Attorney.

Briefly stated, the facts leading to this appeal were as follows: PW1, Adrian s/o Said, who was aged 15 years at the time he gave his testimony, was at home with Mussa Turika and the appellant on 2nd March, 2012. On this day the appellant gave PW1 1,000/= to buy tobacco for him and told PW1 to take the same to the appellant's home. It was PW1's story that when he took the tobacco to the appellant who was then armed with a panga the appellant grabbed him, dropped him on the bed, stripped off his pair of trousers and also removed his (appellant's) trousers allegedly in an attempt to sodomize the young man. PW1 resisted while being strangled by the appellant. It was PW1's evidence that the appellant's sister (PW3) heard what was happening and came to rescue PW1. When PW3 came the

appellant chased her while wielding the panga he had. PW3 raised an alarm, people came and PW1 was sent to hospital as he was bleeding from his mouth and nose.

According to PW2, while he was at a neighbour's house conversing with fellow villagers they heard someone saying **"Alawia usiue mtoto wa watu",** (Alawia don't kill someone's child) and then later on, one Zelfina Halifa who testified as PW3 came and told PW2 and his fellows that Alawia is killing a certain child. PW2 continued to state that they went to the room where the sound came from; they pushed open the door and met PW1 without a trouser crying. PW2 and his fellows saw the appellant 'dressing his trouser', and then the accused came out and chased his sister (PW3).

PW3 who is the appellant's sister, on the other hand testified to the effect that on the material date as she was cooking, she saw the appellant and PW1 entering the appellant's room, then after a moments she heard PW1 crying for help. When she went to find out what was amiss she saw PW1 coming out while bleeding from his nose and mouth. She raised an alarm which prompted fellow villagers to gather at the scene. Essentially she thought the appellant had been strangling PW1.

The appellant was arrested and PW4 who was the Acting VEO was informed of what had happened. When he asked what the matter was the victim's father informed him that his son was beaten by the appellant. Eventually the matter was reported to the police where PW5 was assigned to carry on investigations. PW5 stated that upon examination he noted that PW1 had bruises and blood on the nose and the appellant had bruises on his arm.

In his defence, the appellant categorically denied to have committed the offence. He claimed that, the case was fabricated against him. He said on that date i.e 02/03/2012 at 21:00 hrs he was at the bar. Some people called him out and one of the people stabbed him with a knife and took him to VEO. The appellant stated that at VEO's office, he met Adrian (PW1). He revealed to the VEO that it was a merely an assault case but they changed the case to be an attempt to commit unnatural offence.

The appellant preferred five grounds of appeal in his memorandum, however, the second ground which relates to improper admission of the evidence of PW1 without conducting the *voire dire* test can disposed of right away. PW1 was not a child of tender age at the time he testified as he was 15 years of age. A child of tender age

upon whom a *voire dire* test has to be applied in accordance with the provisions of section 127 (2) of the Evidence Act, Cap 6 R. R. 2002, is defined under subsection (5) of the same section to mean a child whose apparent age is not more than fourteen years. Ms. Magoma was right to submit that PW1 was not bound by section 127 (2) of the Evidence Act. The above takes care of the second ground of appeal which we find to have no merit.

The remaining grounds centre on insufficiency of evidence for the proof of attempt to commit unnatural offence, and contradictions in the testimonies of the prosecution witnesses.

When called upon to address us on his grounds the appellant merely asked us to adopt them and opted to have the respondent respond to his grounds first. Ms. Magoma supported the appeal mainly for the reason that the case for the prosecution was so wrought with contradictions such that conviction could not be sustained. She also submitted that the circumstances of the case were more suggestive of an assault than attempt to commit unnatural offence.

This is a second appeal. We are aware that the principle has always been that an appellate court will not interfere with findings of fact by the court(s) below unless they are manifestly unreasonable,

were misdirections or non-directions on the evidence, etc." This Court has pronounced itself that much in its numerous decisions – See, for example, **DPP v Jaffari Mfaume Kawawa** [1981] TLR 149 to the more recent decisions in **Issa Said Kumbukeni v Republic** [2006] TLR 277, **Benjamini Nziku v Republic**, Criminal Appeal No. 151 of 2010, **Eriot Ezekiel Diombe v Republic**, Criminal Appeal No. 248 of 2013, and **Maneno Daudi v Republic**, Criminal Appeal No. 165 of 2013 (all unreported). In **Ludovide Sebastian v Republic**, Criminal Appeal No. 318 of 2009 (unreported) we specifically stated:-

> *On a second appeal, we are only supposed to deal with questions of law. But this approach rests on the premise that the findings of fact are based on correct appreciation of the evidence. If both courts* ***completely*** *misapprehended the substance, nature and quality of evidence, resulting in an unfair conviction, this Court must in the interest of justice intervene.* (Emphasis supplied.)

The assertion in **Ludovide Sebastian** (*supra*) that **generally** in a second appeal we are supposed to deal with questions of law only

is a borne out of the provisions of section 6 (7) (a) of the Appellate Jurisdiction Act, CAP. 141 R. E. 2002 which states:

"6 (7) Either party–

(a) to proceedings under Part X of the Criminal Procedure Act may appeal to the Court of Appeal on a matter of law (not including severity of sentence) but not on a matter of fact;"

The question is whether or not there is basis for us to disturb the respective findings of fact by the courts below that the appellant committed the offence in question.

It is true as claimed by the appellant, a claim which is supported by the learned State Attorney, that there are serious contradictions which go to the root of the matter and which ought to have been resolved in favour of the appellant. To begin with, PW2 stated that it was PW3 who came to them and informed them that the appellant was killing a certain child. Receiving that information, they went to the scene. The wording of PW2 connotes that together with his fellows and PW3, they went to the scene of the crime. In arriving, they pushed the door open; they met the child (PW1) crying with no trouser on. PW3 however, narrated a different story which contradicted that of PW2.

At page 13 of the record PW3 is recorded to have stated that when she heard Adrian (PW1) crying, she went and entered into the room, that she saw PW1 coming out while bleeding from his nose and mouth. She cried and many people came. During cross- examination by the appellant at page 14 she said that she did not enter the appellant's room. If at all PW3 cried and many people came, how then can PW2 be heard to say that it was the same PW3 who went to inform them that the appellant was killing a certain child? These contradictions in our considered view, cast doubt on the credibility of PW2 and PW3 on whether they were really present at the scene. Further, PW3 stated, during examination in chief that she entered the appellant's room, however, she changed the story when she was cross-examined saying that she did not enter the said room.

The question is what exactly did PW3 see? PW2 said that when they went to the appellant's room they found the victim crying with no trouser on. He also said that the appellant was 'dressing' his pair of trousers then he came out with a panga and chased his sister, PW3. PW3 herself did not mention anything about being chased with a panga. If indeed such a terrible thing had happened PW3 would not have failed to mention it. The two courts below did not address these

contradictions as they ought to have done, and because they did not there was no resolution. A trial court has a duty to address and resolve contradictions which appear in the evidence before it as held in the case of **Mohamed Said Matula v R (1995) T.L.R. 3.** The Court there held:

> *"Where the testimony by witnesses contain inconsistencies and contradictions, the court has a duty to address the inconsistencies and try to resolve them where possible, else the court has to decide whether the inconsistencies and contradictions are only minor or whether they go to the root of the matter."*

It is unfortunate that the PRM, EJ instead of resolving the contradictions imported into her judgment facts that were not borne out of the evidence. In assessing the evidence of PW1 at page 68 and 71 of the record the first appellate court added its own words to the effect that:

> *"the appellant undressed Adrian Said (PW1) his trouser and forced him on bed on his stomach. The appellant tried to sodomize the victim trying to insert the penis into his anus after he had undressed his trouser".*

At page 71 the PRM further stated:

"PW1 did testify the appellant did order him to lie on the bed on his stomach."

It is not reflected in PW1's evidence that the appellant forced or ordered PW1 to sleep on the bed by his stomach, neither that the appellant tried to insert his penis into the anus of the victim (PW1). In the case of **Said Salum and 2 others v Republic, Criminal Appeal No. 228 of 2011 (unreported)** the Court observed that adding words to a judgment which are not reflected on the evidence is fatal. Adding, in a judgment, words or statements that were not made by witnesses in their testimonies denotes that there was no rational or balanced reasoning on the part of the trial magistrate or judge.

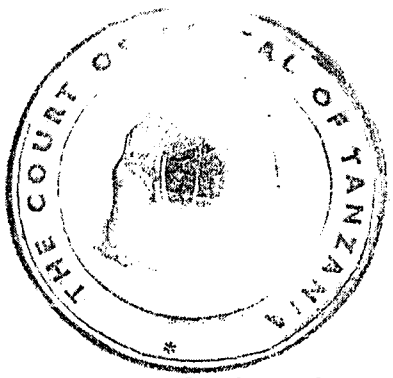
In his fourth ground of appeal the appellant complained that the courts below failed to properly determine the source of the problem. Ms Magoma went along with this ground, submitting that the crime might have been assault rather than attempt to commit unnatural offence. Even the victim's father was heard to say that his son was beaten. PW3 said that it was as if the appellant was strangling the victim.

We are settled in our minds that there was a haunting doubt as to whether the crime committed was actually attempt to commit unnatural offence or mere assault.

that were apparent in the prosecution case we are convinced that we are entitled to interfere with the finding of facts by the courts below. The appellant ought to have been given the benefit of doubt, which we hereby give.

In an upshot, we agree with both the appellant and the learned State Attorney that the case against the appellant left lingering doubts to which the appellant was entitled the benefits thereof. In the circumstances we allow the appeal, quash conviction and set aside the sentence imposed. We order the immediate release of the appellant from prison unless otherwise lawfully held.

DATED at **DODOMA** this 28th day of April, 2015.



E.A KILEO
JUSTICE OF APPEAL

K.K. ORIYO
JUSTICE OF APPEAL

I.H.JUMA
JUSTICE OF APPEAL

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

E.F. FUSSI
DEPUTY REGISTRAR
COURT OF APPEAL