

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

(CORAM: MBAROUK, J.A., LUANDA, J.A., And MUSSA, J.A.)

CRIMINAL APPEAL NO. 44 OF 2015

**ALEX WILFRED.....APPELLANT
VERSUS
THE REPUBLIC.....RESPONDENT**

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

(Sheikh, J.)

**Dated 6th day of August, 2008
in**

Criminal Appeal No. 91 of 2005

JUDGMENT OF THE COURT

18th & 22nd February, 2016.

MBAROUK, J.A.:

The appellant, Alex s/o Wilfred and another were convicted of unnatural offence contrary to section 154 (a) of the Penal Code as amended by section 16 (1) (a) and (2) of the Sexual Offences Special Provisions Act No. 4 of 1998 by the District Court of Arusha at Arusha in Criminal Case No. 954 of 2004. They were sentenced to thirty (30) years imprisonment each and their parents to pay compensation of T.shs. 200,000/= each for the physical and

psychological injury suffered by the victim. Dissatisfied, the appellant and another (not subject to this appeal) appealed to the High Court (Sheikh, J.) where their appeal was dismissed. As to the order of compensation, the High Court revised and replaced it with the order that each appellant to pay the victim (PW1) the sum of shs. 200,000/= as compensation. Aggrieved, the appellant alone has preferred this appeal.

Before going any further, we have found it prudent to briefly explore the facts of the prosecution's case giving rise to the conviction of the appellant. Suzana Omari (PW1) told the trial court that on 7-9-2004 at about 22:30 hrs. at Patandi village, Arumeru District in Arusha Region, she was drinking at a local club. When she was leaving, four men grabbed her and sodomised her. PW1 cried for help and a ten cell leader came and arrested two of them. Michael Ndekirwa (PW2) a ten cell leader testified that, after having heard someone crying that she was being sodomised, he took a torch and club and followed up where he found five men sodomising PW1. They tried to escape but after chasing them he managed to

catch one of them not subject to this appeal. He added that, the appellant was arrested by Mussa and Khalidi, but he saw him with his flies open and had blood on his penis. Mussa Sood (PW3) testified that on the fateful night, on his way back home from the local Patandi bar he responded to the complainant's cry for help. He said, on his way, he found the appellant coming from the direction of the scene of crime while he was naked and blood stained. He arrested him and when went at the scene of crime and found PW1 crying while she was naked and blood stained all over. The appellant was then sent to Usa River Police Station.

At the trial, the appellant categorically denied the charges against him. He said, on 7-9-2004 he was coming from a video show with his brother who went to buy fish in a nearby shop. While waiting for his brother, two militiamen came and arrested him. He was then sent at Usa River Police Station. He insisted that he was arrested away from where the victim was sodomised and added that the victim was drunk and did not know him.

In this appeal, the appellant appeared in person unrepresented, while the respondent/Republic was represented by Ms. Sabina Silayo, learned Senior State Attorney assisted by Ms. Tarsila Asenga, learned State Attorney.

Three grounds of appeal were preferred by the appellant in this appeal, namely:-

1. That, the prosecution did not prove their case against the appellant beyond reasonable doubt.
2. That, the first appellate Judge erred in law and in fact when she failed to note the contradiction between the evidence of PW1 (the victim) and PW3.
3. That, the sentence imposed against the appellant was excessive.

At the hearing, the appellant opted to allow the learned State Attorney to respond to his grounds of complaint first and if the need arises, he will respond later in his rejoinder.

On her part, Ms. Asenga from the outset indicated not to support the appeal. Starting with 2nd ground of appeal that the two courts below failed to note the contradictions between the evidence of PW1 and PW3, the learned State Attorney contended that, there was no contradiction between the evidence of PW1 and PW3. After all, she said, the evidence of PW1 and PW3 was not challenged by the appellant when the appellant was given a chance to cross-examine them. In support of her argument, she cited the case of **Cyprian Kibogoyo v. Republic**, Criminal Appeal No. 88 of 1992 (unreported). She therefore urged us to find the 2nd ground of complaint devoid of merit.

On our part, looking at the record of appeal, we have not found any contradiction. We just assume that if there was any, it may be on the issue of the place where the appellant was arrested. PW1 testified that the appellant was arrested at the scene of crime while PW3 testified that he arrested the appellant when he was trying to escape and took him to the scene of crime. We are of view that, such a contradiction was minor and has not gone to the root

of the subject matter. See, **Mohamed Said Matula v. Republic**, [1995] TLR 3. In addition to that, as pointed out by the learned State Attorney, the appellant failed to cross examine PW1 and PW3 on that issue when they testified and that makes the facts not cross examined as having been admitted by the appellant. See **Cyprian Kibogoyo** (*supra*). For that reason, we agree with the learned State Attorney that the 2nd ground of complain is devoid of merit.

As to the 3rd ground of appeal, on the issue that the sentence was excessive, Ms. Asenga submitted that, according to section 154 (1) (a) of the Penal Code, the sentence imposed on a person found guilty to unnatural offence is not less than thirty (30) years imprisonment. She said the appellant was sentenced to thirty years by the trial court as stipulated by the law. Hence, she said, the sentence imposed on the appellant is not excessive. She therefore urged us to find the 3rd ground of complaint with no merit too.

We on our part, fully agree with the learned State Attorney that the 3rd ground of appeal has no merit. This is for a simple

reason that the provisions of section 154 (1) (a) of the Penal Code are very much clear that, a person convicted of unnatural offence is liable to imprisonment to a sentence of not less than thirty (30) years. In the instant case the appellant was found guilty and convicted of the unnatural offence, hence, we are of the view that the appellant was correctly sentenced to thirty (30) years and the sentence was not excessive. We find, the sentence was not excessive, hence we find the 3rd ground of appeal devoid of merit.

Responding on the 1st ground of appeal on the issue that the case was not proved beyond reasonable doubt, the learned State Attorney submitted that, the evidence adduced by PW1, PW2 and PW3 has proved the case against the appellant on circumstantial evidence. She said, the trial court found the evidence of those witnesses credible. She added that, the appellant was found at the scene of crime by PW2 naked with blood stains on his penis and his flies open after being arrested by PW3. She further added that, as PW1 testified that she was sodomised and both PW2 and PW3

testified to have seen her bleeding all over her private parts, hence that proves the offence against the appellant.

On our part, we fully agree with the learned State Attorney that the case against the appellant was proved beyond reasonable doubt. As we have noted the circumstantial evidence relied upon by the trial court irresistibly led to find the appellant guilty and accordingly convicted and sentenced him. The two courts below found the prosecution witnesses credible. We have no reason to fault the two courts below on their findings of fact. According to the case of **Omari Ahmed v. Republic** [1983] TLR 52, this Court held as follows:-

"the trial court's finding as to credibility of witnesses is usually binding on an appeal court unless there are circumstances on an appeal court on the record which call for a reassessment of their credibility."

We have found no circumstances in this case to fault the two court below. For that reason, we find even the 1st ground of appeal is devoid of merit too.

In the event, we dismiss the appeal in its entirety.

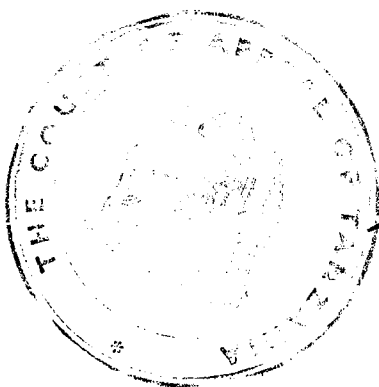

DATED at **ARUSHA** this 19th day of February, 2016.

M. S. MBAROUK
JUSTICE OF APPEAL

B. M. LUANDA
JUSTICE OF APPEAL

K. M. MUSSA
JUSTICE OF APPEAL

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

A circular stamp of the Court of Appeal of Tanzania, featuring a central emblem and the text "THE COURT OF APPEAL OF TANZANIA" around the perimeter.
A handwritten signature in black ink, appearing to read "E. Y. Mkwizu".
E. Y. MKWIZU
DEPUTY REGISTRAR
COURT OF APPEAL