IN THE HIGH COURT OF TANZANIA

AT DODOMA

(DC) CRIMINAL APPEAL NUMBER 63 OF 2010

(ORIGINAL CRIMINAL CASE NUMBER 40 OF 2008 OF THE DISTRICT COURT OF SINGIDA AT SINGIDA)

MUSA GODSON @ ZUNGU ---------- APPELLANT

VERSUS

THE REPUBLIC ---------- RESPONDENT

JUDGMENT

27 – 06 – 2011

&

29 – 08 – 2011

S. S. MWANGESI J.:

At the District Court of Singida, the appellant herein got charged with the offence of unnatural offence contrary to section 154 (1) (a) and (2) of the Penal Code Cap 16 Volume 1 of the Laws Revised ~~Edition of 2002~~. It was the case for the prosecution that on the 21st day of January 2008 at about 2000 hours, at Mwenge area within the Municipality District and Region of Singida, the accused did have carnal knowledge of one Mariam Shabani a girl aged nine (9) years of age, against the order the order of nature.

When the charge was read over to the accused, he did plead not guilty. In order to establish the commission of the offence by the accused, the prosecution did summon five witnesses. And after the prosecution had closed its case, the Court did rule out that the accused had a case to answer, he was thus called upon to enter his defence, a thing which he did do on affirmation without calling any witness. Thereafter, the Court did use its discretion under the provision of section 195 of the Criminal Procedure Act to summon one Doctor Mushi as a Court witness.

The learned trial Resident Magistrate upon evaluating the evidence that was laid before him by all witnesses who appeared to testify in Court was of the view that the offence against the accused person had been sufficiently established. To that effect, he did enter conviction to the accused on the charged offence, and sentenced him to life imprisonment as the victim of the incident was below the age of ten years. This was in compliance with the mandatory requirement under the provision of sub-section 2 of section 154 of the Penal Code.

The decision of the trial Court as well as the sentence that got imposed, did aggrieve the appellant who has decided to challenge it by this appeal. In his memorandum of appeal, although the appellant has listed about six grounds, some of them have been repeated and others are irrelevant and thereby making the relevant ones to basically remain three. The first one is to the effect that, the trial Magistrate did err to rely on the evidence of PW2 one Mariam Shabani who happened to be the victim, because the voire dire examination that got conducted to her by the Honourable trial Magistrate before she gave her evidence, did reveal that she did not understand the meaning of an oath.

The second ground of appeal by the appellant has been that, there was no sufficient evidence that got tendered at the trial Court, which did establish that it was he the appellant who did commit the offence to the victim. This is from the fact that in her testimony, the victim (PW2) did tell the Court that, she did not know the one who carnally knew her against the order of nature.

And in the last ground of appeal, the appellant has complained that the learned trial Magistrate did not consider his defence evidence in determining this case. It had been his contention in his defence evidence that, at the time the offence is alleged to have been committed, he was at the Police Station where he had been detained for another offence. However, the trial Court did not put such defence into consideration.

The foregoing grounds of appeal were maintained by the appellant during the hearing of the appeal when he appeared in person to prosecute it. At the same, the appellant told the Court that he had nothing to add to those grounds. On the other hand, the respondent- Republic was represented by Ms Mbunda Learned State Attorney, who did support the conviction that was entered to the appellant by the trial Court.

Responding to the first ground of appeal, the learned State Attorney was of the view that, the contention by the appellant that the evidence of PW2 was supposed not to be relied upon was baseless. This is from the fact that, the learned trial Magistrate was convinced after conducting the voire dire examination that, the witness did know the importance of telling the truth though not under oath.

As regards the second ground that there was no sufficient evidence to establish the guilt of the appellant, the opinion of Madam Mbunda has been that, PW2 did tell the Court to have sufficiently identified the appellant, and she did further account on how the same did commit the offence against her, the testimony which to a big extent was corroborated by the testimony of PW3.

On the question that during the occurrence of the incident, the appellant was in Police remand which constitutes the third ground of appeal, the learned State Attorney has averred that, the trial Court did through the register from the Police Station satisfy itself that the contention of the appellant was not true. At the material time, the appellant had been bailed out and that is why he managed to commit the offence which he stood charged with. As such, the learned State Attorney has requested this Court to find that the appeal by the appellant is without any founded grounds, and therefore it be dismissed in its entirety.

The task to be resolved by this Court is whether there is any merit in the appeal by the appellant. It has been the contention of the appellant that the testimony of the victim PW2) ought to have not been relied upon by the trial Court because she did not understand the meaning of oath. Indeed, after having conducted a voire dire examination to the witness, the learned trial Magistrate was of the view that, she did not understand the meaning of oath. All the same, the trial Magistrate was of the considered opinion that, the witness was intelligent enough to understand what she was supported to tell the Court.

Regard being put to the age of the witness that is, about ten years old or so, and the observation of the trial Magistrate after the test which conducted to her, this Court has no any sound ground to fault the finding of the trial Magistrate who had the advantage of closely observing the witness. If anything, then should arise from the weight that is to be given to the evidence given by the witness, which

will be considered in the subsequent issue, and not the capability of the witness to give evidence in Court.

The second issue does concern the evidence that was tendered in Court. While the appellant contend that it was weak and therefore, it did not justify his being convicted, the assertion of the learned State Attorney who was at one with the learned trial Magistrate was that, the said evidence did sufficiently establish the commission of the offence by the appellant. The evidence primarily relied upon by the trial Magistrate to found conviction to the appellant was that of PW2. It was stated that the witness did sufficiently identify the appellant as her sodomite.

I have some reservation to the stand taken by the learned trial Magistrate as well as the learned State Attorney. Upon following closely the testimony of PW2, it is noted that, in all her account to PW1 who happened to be her grandmother as well as in Court, she did state that she did not know the person who did abduct her on the morning of the 21st January 2008 and promised to send her to Arusha before taking her to the house of Mama Mariam who was later identified to be Hadija Hassan who testified as PW3. Under such situation, it cannot affirmatively and safely be said that the witness did adequately identify the appellant.

There was yet the testimony of Hadija Hassan who testified as PW3. Her testimony was to the effect that the appellant did go to her place of abode which she also uses as her place of business with the victim. She testified further to the effect that, he remained with her there until late in the evening when he left with her to a place known to himself. And further that on the following morning, the appellant did again go with the victim at her place of business. Such testimony although in one way it can be said to corroborate the fact that the appellant had

been with the victim, it cannot however be said to have corroborated the fact that she got carnally known against the order of nature, which is the offence which the appellant stood charged with.

And with the regard to the offence itself that is, of carnal knowledge against the order of nature, the evidence that tried to establish the commission of such offence is that of the PF3. However, the tendering of such document as exhibit in Court did not comply with the requirement under the provisions of section 240 (3) of the Criminal Procedure Act. And once the procedure of tendering it as exhibit in Court has been flouted, the consequence is for its evidence to get discounted as per the decision of the case of **Shabani Daud Vs Republic** Criminal Appeal No 28 of 2000 (CAT) Dar es salaam Registry (unreported). And with the discount of the content of the PF3, no substantial evidence remains for the case.

The other ground of appeal by the appellant was to the effect that his defence evidence was not considered by the Honourable trial Magistrate. In his defence, the appellant did tell the Court that during the commission of the alleged offence, he was in Police remand where he had been detained since the 21st January 2008 to the 25th January 2008 when he got bailed out, and further told the Court that, he would establish that through the Admission Register of the Police Station where he had been detained. To that effect, he did ask for the production of such Register in Court.

The time taken by the Police to produce such Register in Court did leave much to be desired. The request by the appellant was presented in Court on the 18th August 2008 when the ruling that he had a case to answer was delivered. The said Register was however never produced in Court until on the 10th March 2009. And, this was after an order allegedly made by the learned trial Resident

Magistrate, under the provisions of Order XIV Rule 4 of the Civil Procedure Code and section 176 (2) (a) of the Law of Evidence Act. It is to be noted that, the foregoing provisions that were cited by the learned trial Magistrate under which his orders were issued, have nothing to do with criminal proceedings. Nonetheless, the Admission Register was ultimately produced in Court.

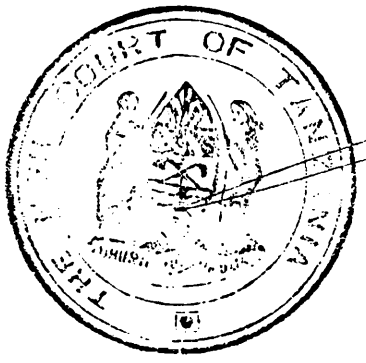
Apart from the fact that the delay to produce the requested Admission Register in Court could tempt one to think that perhaps there was something which was being tempered with, the said Register was incomplete in that just few leafs got tendered. While the contention of the appellant was that he got detained from the 21st January 2008, the leafs that were tendered in Court were those of from 22nd January and also, not in any orderly form that could enable the Court to clearly counter check the claims that had been advanced by the appellant. The first leaf does indicate that, the first inmate was recorded to be the appellant (Musa Godson) who was admitted on the 22nd January and given serial Number 351. He is recorded to have been admitted at about 2355 hours and was released out on the 22nd January 2008 at about 0800 hours. Here, one can pose a question as to whether such recording was factual.

Musa Godson is again recorded to be the first inmate in the second leaf where he was given serial Number 354. He is recorded to have been admitted on the 23rd January 2008 at about 1200 hours. In the same column of the time when he got in, it is as well indicated that he was admitted on the 24th January 2008 at about 1315 hours. While in the first and the second leafs, the serial numbers given to the inmates are in good order, in the third leaf the first inmate bears serial Numbers 378, which means that there were many other leafs in between that got skipped, and in the same, Musa Godson was registered as Number 380, in which it is indicated that, he was admitted on the 24th January 2008 at about 2300 hours and was released out on the 25th January 2008 at about 0730 hours.

What is obvious from what was said to be the Admission Register above, is that it did not serve the purpose it was intended to. What was needed to be produced in Court was the Register indicating all the entries of the inmates from the 21st January 2008 when the appellant alleged to have been admitted for the first time, to the 25th January 2008, when he alleged to have been released out. With the type of information obtained from the above documents, nothing relevant to validate the contention of the appellant can be made. This may be an added explanation as to why there was reluctance and/or delay by the Police in producing the Admission Register in Court after it had been requested by the appellant. Under the circumstances, the contention by the appellant that during the occurrence of the offence at issue he was in remand at the Police Station, appear not to have been disproved.

In the light of all that has been pointed out above, it cannot be said as it was held by the trial Court that, the offence of unnatural offence had been sufficiently established against the appellant. Such findings of the trial Court are thus quashed by this Court and the sentence that had been imposed to the appellant is hereby set aside. It is ordered that the appellant be set liberty forthwith unless lawfully held for any other justifiable cause.

Order accordingly.



(S. S. MWANGESI)

JUDGE

29 – 08 - 2011