IN THE HIGH COURT OF TANZANIA

AT TANGA

CRIMINAL APPEAL NO. 31OF 2012

[Original Criminal Case No. 187 of 2007 at Handeni District Court]

NGOMA MGANGA.....APPELLANT

VERSUS

THE REPUBLIC.....RESPONDENT

JUDGMENT

U. MSUYA, J.

The appellant, Ngoma Mganga was charged with two counts of unnatural offence and stealing contrary to section 154 (1) (2) and section 265 of Penal Code [Cap. 16 R. E. 2002], respectively. It was alleged in the first account that on 10th day of May, 2007 at about 11.00 hours at Kwastemba village within Handeni District in Tanga Region, the appellant against the order of nature carnally knew Bahati s/o Mohamed, a boy under the age of 10 years. It was further alleged in the second count that on 8th day of May, 2007 about 13.00 hours at Kwastemba village within Handeni District in Tanga Region, the appellant stole one bicycle make AVON serial No. CV.

27252 Block in colour valued at 60,000/= Tshs the property of one s/o Omary s/o Rajabu @ Samwengo. After the close of prosecution case, the trial court assessed evidence and ruled that the prosecution failed to establish a Prima facie case in respect of the second count and acquitted the appellant to that effect. As regards the first count, the trial court found the prima facie case being established and called upon the appellant to enter his defence. After full trial, the trial court assessed evidence, found the appellant guilty of the unnatural offence, convicted him and punished the appellant to serve a sentence of 30 years in jail.

Briefly, the evidence which was adduced and recorded in respect of unnatural offence are summarized as follows: On the material day [i.e. 10.5.2007], Halima Salimu [PW2] the mother of the victim – Bahati Mohamed, left her home and went to work in her farm which is nearby to her home. At her home she left Aziza, Bahati Mohamed and other children. Later on, Aziza also went to fetch water while Bahati and other children remained at their home. While in the farm, PW2 heard someone crying for help. She noted that he was her son-Bahati Mohamed. PW2 immediately returned at her home. On arrival, the victim informed her that he was sodomised by the appellant, Juma Ngoma. The witness observed bruises and stool coming from the anus of her son –Bahati. PW2 decided to report the incident to area Chairperson. She also notified her brother one Masudi Salimu [PW1]. This piece of evidence was confirmed by both Masudi Salimu [PW1] and Shabani

Hassani Makumko [PW3], the area Chairperson.PW3, area Chairperson adduced in evidence that he called the appellant and interrogated him. The appellant denied to have committed the offence. PW3 also testified that in the course of interrogation, the appellant escaped. PW3 ordered Hayaha Mhonda and Amrii Omary, militiamen to arrest the appellant. This information was confirmed by Amri Omary [PW4]. According to PW4, they traced and arrested the appellant while he was on the way to Kijungu in Kiteto District. The appellant was later on taken to Songe police station. It is also in record that PW3 advised [PW2] to take the victim to the hospital for treatment. PF3 to that effect was admitted as exhibit P1 Indicating that the victim was taken and treated by Songe health centre within Kilindi District. The appellant was arraigned in court, tried, convicted of . unnatural offence and sentenced accordingly. Dissatisfied with both conviction and sentence, the appellant filed this appeal complaining that the charge against him was not proved beyond reasonable doubt.

At the hearing of this appeal, the appellant appeared in person while Mr. Marandu Learned State Attorney represented the Respondent/Republic.

The appellant adopted the grounds of appeal and urged the court to allow his appeal.

In his reply, Mr. Marandu supported the appeal under the following reasons: In the first place, the Learned State Attorney

argued that there is a contradiction of evidence in regard to the age of the victim. Advancing his point, Mr. Marandu stated that PW2 adduced that the age of victim was 5½ years while PW3 Shabani Hassan said that the victim was 7 years. The Learned State Attorney proceeded to state that the trial magistrate showed in his judgment that the age of victim was 10 years. In that regard and in view of the decision in the **case of Emmanuel Kibone and Others V. Republic [1995] T. L. R 241,** the Learned State Attorney submitted that the evidence of the parents as regards to the age of their child was the best evidence. The Learned State Attorney concluded that the trial magistrate ought to have relied on the evidence of PW2, the mother of the victim who adduced that at the time of the commission of offence, the victim had 5½years. Mr. Marandu however, quickly pointed out that such omission did not occasion any miscarriage of justice to the appellant.

Secondly, addressing the appellant's complaint in respect of his name, Mr. Marandu observed that some parts of the trial court's judgment referred the name of the appellant as Juma Mganga while in other parts referred him as Ngoma Mganga which is the correct name. In the circumstance, Mr. Marandu stated that this is not fatal on account that the name referred in the first paragraph of the trial court's judgment is Ngoma Mganga. The Learned State Attorney also cited the provisions of section 388 of the Criminal Procedure [Cap. 20 R. E. 2002] to the effect that such error of using

two different names did not occasion miscarriage of justice to the appellant.

Another ground which led the State Attorney to support the appeal is in respect of failure to summon key/important witnesses. The Learned State Attorney contended that the evidence of PW2 reveals that she left the victim with another child called Aziza and other kids. The Learned State Attorney observed that none of the mentioned children was called to testify in court. Mr. Marandu submitted that failure to call those witnesses left a loophole to the prosecution case. The Learned Counsel referred this court to the decision in the case of **Aziza Abdallah V. R [1991] T. L. R 71** which insists that key witnesses must be summoned to testify in Court.

Furthermore, Mr. Marandu attacked the exhibit P1, PF3 by stating that it was admitted in evidence without following the laid procedure. Elaborating, the Learned State Attorney argued that the court did not give the appellant his right of calling and cross-examining the doctor who examined the victim. In supporting his stance, the Learned State Attorney referred this court to the decision in **the case of Fadhili Ramadhani @ Tembo V. R, Criminal Appeal No. 304 of 2007, CAT at Arusha (unreported).**Further to that, the Learned State Attorney argued that due to those shortfalls, the prosecution case has loopholes which can be rectified by ordering retrial. In conclusion, the State Attorney urged the court to quash conviction, set aside the sentence and order retrial.

Having considered the evidence on record the ground of appeal and the submissions of the parties I am of the settled view that this case was not proved beyond reasonable doubt against the appellant. In the first place there was no eye witness who saw the appellant sodomizing the victim. In that regard, the whole evidence in record is purely circumstantial evidence. The circumstantial evidence in record does not irresistibly link the appellant with the alleged offence. Secondly, as correctly observed by Mr. Marandu Learned State Attorney the evidence of PW2, the mother of victim reveals that she left the victim with other kids at her home. Those kids including Aziza were not summoned before the trial court to adduce evidence. Even the victim was not summoned to testify in the trial court. This was a grave mistake in the prosecution case. Section 143 of the Law of Evidence Act [Cap 6 R. E. 2002] directs that no number of witnesses is required in proving the case. However, in the circumstance of the present case, the victim, and other kids who were left at home ought to have been summoned to testify on the matter. This is because the best evidence is that of the victim. And such evidence would have been corroborated by the evidence of other kids. Their evidence was important in this case for linking the appellant with the charged offence. The absence of such evidence made a prosecution case weak.

Moreover, exhibit P1, PF3 was admitted wrongly in the trial court's record. As correctly submitted by Mr. Marandu under section 240 (3) the court is duty bound to explain to the appellant his right of calling

the doctor for cross-examining him before the admission of PF3. In the present case, the provisions of section 240 (3) was not complied with by the trial magistrate. In that regard exhibit P1, PF3 is here by expunged from record. Having disregarded exhibit P1, PF3 the remaining evidence is not water tight against the appellant. In that regard, the appellant is hereby given the benefit of doubt.

Before I, Mr. Marandu urged this court to order retrial on the ground that, had the prosecution brought the key witnesses and the trial court taken into consideration the proper procedure of admitting exhibit P1,PF3 including ascertaining the age of the victim, then the chances of grounding conviction against the appellant was possible. Retrial can only be ordered where it is found that the appellant/accused person was not given a fair trial. In the **case of Daikin Air Conditioning E.A. LTD V.Harvard University (1996) T.L.R 1** it was insisted that retrial can only be ordered where there is a serious error made by a trial magistrate or judge. In that case the act of the trial magistrate of not affording the appellant the chance to call evidence was declared a serious error which vitiated the learned resident magistrate's decision. Also in **the case of Sultan S/O Mohamed V.R, Criminal Appeal No 176 of 2003** involving the offence of unnatural offence C/S 154 of the Penal Code the Court of Appeal ordered retrial for the reason that the trial magistrate did not comply with the mandatory provisions of section 240(3) of the Criminal Procedure Act [Cap 20 R.E 2002].Likewise, in the present case the trial magistrate did not comply with the provisions of section 240(3) of

the Criminal Procedure Act Cap 20 R.E 2002 by receiving in evidence PF3 without informing the accused/appellant the right of cross-examining the doctor who made it. This was a serious omission which calls for retrial. In the interest of justice.

However, that was not the only omission in this appeal. Apart from the trial magistrate's failure to comply with the procedure under section 240 (3) of Criminal Procedure Act (supra) key witnesses were not summoned, including the victim himself.

As held in the case of Selemani Makumba vs Republic Criminal Appeal No. 94 of 1999 (unreported) it was stated:-

> ***"True evidence of rape has to come from the victim, if an adult, that there was penetration and consent and in case of anyother women where consent is irrelevant, that there was penetration."***

In this case the victim or the children he was playing with like Aziza who is mentioned by PW2 the mother of the victim were not called.

Where key witnesses like these are not summoned the only evidence before the court is hearsay as to the issue of whether it is the appellant who committed the offence. PW2 says he was informed by the victim that it was the appellant who sodomized him. The evidence of PW2 is hearsay it is not admissible in court.

Furthermore when a key witness is not summoned an adverse inference can be drawn against the prosecution case in favour of the accused:

For those reason it is my finding that this is not a suitable case to order re-trial.

In the circumstance, I find the appeal with merit. The appeal is allowed. Conviction is quashed and sentence is set aside. The appellant should be released forthwith, unless held for other justifiable cause. It is so ordered.

U. MSUYA, J.
17/3/2014

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DATE: 17/3/2014

CORAM: U. MSUYA, J.

APPELLANT: Present

RESPONDENT: Ms Akyoo State Attorney

C/CLERK: Nakijwa

Ms Akyoo State Attorney: The case for Judgment.

Sgd: U. MSUYA, J.
17/3/2014

Order: Judgment is delivered on the 13th day of March, 2014 in the presence of the Appellant and Ms Akyoo State Attorney for the Respondent.

U. MSUYA, J.
17/3/2014