

**IN THE HIGH COURT OF TANZANIA
DAR ES SALAAM DISTRICT REGISTRY
AT DAR ES SALAAM**

CRIMINAL APPEAL NO 84 OF 2008

(Original Criminal Case No 368 of 2004 of Kisutu RM's Court at Kisutu)

ROBERT RICHARD..... APPELLANT

VERSUS

THE REPUBLIC.....RESPONDENT

JUDGMENT

Date of last Order: 12/9/2018

Date of Judgment: 26/9/2018

Munisi,J.

The appellant, Robert Richard stood arraigned before the District Court of Kinondoni for the offence of unnatural offence contrary to section 154(1)(a) & (2) of the Penal Code, Cap 16 RE 2002. Prosecution alleged that on 22/8/2004 at Bunju area, Kinondoni District in Dar es Salaam Region, appellant had carnal knowledge of one Ismail Robert, a child of one year and five months against the order of nature. To prove the allegation, prosecution called five witnesses and the appellant defended himself in person and did not call anybody to support his defence.

At the conclusion of the trial, the court found the appellant guilty as charged and sentenced him to life imprisonment, being the statutory punishment provided for the offence.

Dissatisfied with the trial court's decision, appellant instituted an appeal way back in 2008 however its determination took longer due to reasons beyond the court's control in that the file got misplaced soon after his lordship Justice Makaramba concluded hearing the appeal. The file just got traced recently hence this judgment.

From the records, this appeal was heard by Justice Makaramba on 15/4/2009. The appellant appeared in person and prayed to adopt the substance of his grounds of appeal which essentially challenged the sufficiency of evidence to ground conviction. On the respondent's part, Miss Shinyambala, learned State Attorney appeared for the Republic and supported the appeal on the main ground that the evidence was overwhelming. She thus prayed for the appeal to be dismissed.

I have closely considered the complaints raised by the appellant in his elaborate grounds of appeal all of which boils down to sufficiency of evidence to support the conviction entered by the trial court. The evidence show that appellant is the biological father of the victim who was one year and five months at the time of incident. According to PW1 – the mother of the victim on the fateful day, appellant who lived at a different area close-by took his son for a walk around 1.00pm and returned hm at 4.00pm while crying. When she inspected the child and noted sperms which

were on the nappy and anus, a fact which was corroborated by PW2 and PW3. She just went to report to the police where she was issued with a PF3 and took the child to Mwananyamala Hospital and later Muhimbili Hospital. The magistrate was impressed by the evidence of PW1 and PW3 that they observed sperms on the child's anus and concluded that the appellant who had taken the child must have committed unnatural offence against it. The learned magistrate reasoned:

“PW1 and PW3 in their testimonies they said that the accused person returned back the child and he was crying so much, the fact which the accused person did not dispute. The child had orange juice in his hands. The accused left immediately and said the baby had disturbed him and he could not do his work. The accused person also testified that he did not pass anywhere else with the child and he was with him. With the above evidence adduced, I am fully convinced that the accused person did sodomize the child..... PW5 (Doctor) also said that according to her tests it was an adult male penis that did the unnatural offence because a child's penis could not destroy a fellow child's anus...”

With respect to the learned magistrate, I doubt whether the reasoning above is supported by the testimonies of PW1, PW2 and PW5 she made reference to. It is apparent from the record the case was prosecuted with a lot of emotions. It appears that PW1, PW2 and PW3 were adamant that they observed sperms in the child's anus a fact which was disputed by the appellant.

Unfortunately, the said sperms were not confirmed scientifically as being sperms. PW5 did not say she observed sperms, it was thus unsafe on the part of the magistrate to find with conviction that the child had been sodomized on the basis of the alleged sperms and weeping of the child. PW5 in her testimony told the court:

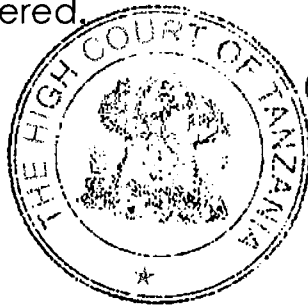
"...I was supposed to find out whether the child had been sodomized. I did tests to his body parts that had been affected and I also did blood tests for HIV AIDS and Syphilis..... I found out that his anus was loose. It seemed like a boy had been sodomized through the anus. It is hard to tell when a young child was defiled if it is brought to hospital after many days and also how after the act is done. If the child is brought at an early stage it is possible to tell how often the child has been defiled. For Ismail Robert it was not easy to tell how often he had been defiled because he was brought to hospital after a week..."

From the above extract of the doctor's evidence I fail to see how the magistrate came to the conclusion she reached. The PF3 which was admitted in court as exhibit P2 show that it was issued on 7/9/2004 while the alleged sodomy was committed on 22/8/2004, a lapse of about 10 days. With respect, I have wondered what was happening to the victim between 22/8/2004 up to 7/9/2004 if indeed he had been sodomized as alleged. In my considered view, since the doctor was not conclusive that the child was sodomized, I see no evidence to support the conviction because the alleged sperms were not proved and nobody

witnessed the claimed sodomy. In addition, the appellant disputed strongly the commission of the alleged sodomy. In that regard, I see no concrete evidence upon which a conviction of sodomy against the appellant could be grounded. At any rate, the evidence appears very suspect and incredible. This being a criminal case, the doubts have to be resolved in favour of the appellant. I thus found the appeal with merit.

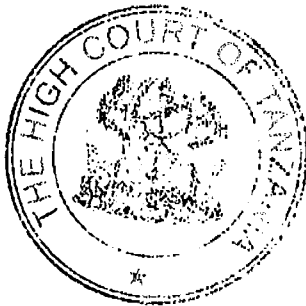
In the event, the appeal is allowed. Accordingly, I quash the conviction, set aside the sentence of life imprisonment meted on the appellant and direct for his immediate release from prison unless otherwise lawfully held.

It is so ordered.



A. Munisi
Judge
26/9/2018

Judgment delivered in Chambers in the presence of the appellants in person and in the presence of Mr. Justus Ndibalema, learned State Attorney for the respondent/Republic, this 26/9/2018.



A. Munisi
Judge
26/9/2018