Citation	Parties	Legal Principles Discussed
CRIMINAL APPEAL NO.200 OF 2007 – COURT OF TANZANIA AT DODOMA. Coram: RUTAKANGWA J.A, KIMARO J.A AND MBAROUK J.A	**JACKSON MLONGA VS THE REPUBLIC** (Appeal from the decision of the High Court of Tanzania at Dodoma) (DC) – **Criminal Appeal No.69 of 2006** (Masanche J)	Proof of a case beyond reasonable doubt.

IN THE COURT OF APPEAL OF TANZANIA
AT DODOMA

(CORAM: RUTAKANGWA, J.A., KIMARO, J.A., And MBAROUK, J.A.)

CRIMINAL APPEAL NO. 200 OF 2007

JACKSON MLONGA ..... APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

(Appeal from the decision of the High Court of Tanzania at Dodoma)

(Masanche, J.)

dated the 14th day of May, 2006
in
(DC) Criminal Appeal No. 69 of 2006

JUDGMENT OF THE COURT

4 & 5 December, 2008

MBAROUK, J.A:

Before the District Court of Mpwapwa at Mpwapwa, the appellant, Jackson s/o Mlonga was charged with and convicted of the offence of unnatural offence contrary to section 154 (1) (a) of the Penal Code Cap. 16 of the Laws. He was sentenced to thirty (30) years imprisonment. His appeal at the High Court (Masanche, J.) was dismissed. Still aggrieved he has filed this second appeal.

The background giving rise to the case may briefly be stated. The appellant was a herdsman of Yohana Palingo (PW3). Isaka Palingo (PW1) and Samwel Palingo (PW2) were the sons of PW3. On 20.4.2000 at about 22.00 hours, the appellant went to knock at the room where PW1 and PW2 slept. He told them that he wanted a "rope". He was let into the house. Thereafter PW1 and PW2 went to their beds and slept. The appellant did not leave the room. He stealthily went to the bed where PW1 was sleeping and slept on his buttocks. The appellant started to sodomise PW1 who was in a deep slumber. When PW2 decided to go for a call of nature, he saw the appellant on top of PW1 (aged 11 years). PW2 woke up PW1 who also wondered as to what had happened. Indeed, semen was seen all over the buttocks of the complainant Isaka (PW1). The appellant ran away. Yohana Palingo (PW3) the father of PW1 and PW2 was called. The appellant could not explain as to why he had done what he was told he had done. He pleaded for mercy. The appellant was then arrested and sent at the police station and accordingly charged.

In his defence, the appellant categorically denied to have committed the offence charged against him.

At the trial court, the appellant was found guilty as charged, convicted and sentenced to thirty (30) years imprisonment. The High Court upheld the trial court's conviction and sentence.

In this appeal, the appellant was unrepresented. The respondent Republic was represented by Mr. Anselm Mwampoma, learned Principal State Attorney.

The appellant has filed a six point memorandum of appeal which we think boil down to the following five grounds:-

1. *That, the trial magistrate and learned 1st appellate judge erred in law and facts after accepting the evidence of PW1, PW2 and PW3 which contained full of doubts.*

2. *That, the case against the appellant was a cooked up case.*

3. *That, the trial magistrate and the learned 1st appellate judge erred in law and fact in convicting the appellant upon the evidence*

of PW1, PW2 and PW3 who were of the same family.

4. *That, the trial magistrate and the learned 1st appellate judge erred in law and facts when accepted PF3 as an exhibit without calling the doctor.*

5. *That, the trial magistrate and the learned 1st appellate judge erred in law and facts for considering the fact that PW3 failed to report the matter to ten cell leader, VEO, WEO or Chairman from the neighbouring village.*

At the hearing, the appellant added as his additional ground of appeal that section 127(2) of the Evidence Act, Cap. 6 R.E. 2002 was not complied with.

On his part, Mr. Mwampoma, learned Principal State Attorney, easily conceded and said that he was not in support of the conviction and sentence imposed to the appellant by the trial court which was later upheld by the High Court.

Firstly, learned Principal State Attorney urged us to discount the evidence contained in the PF3 (exhibit P1) for the trial court's failure to comply with section 240 (3) of the Criminal Procedure Act, Cap. 20. R.E. 2002 (CPA).

On our part, on the issue of non-compliance with section 240 (3) of the CPA, we think that the law was stated with sufficient lucidity by several decisions of this Court. See for instance **Kashana Buyoka V. R,** Criminal Appeal No. 176 of 2004, **Sultan s/o Mohamed V. R.,** Criminal Appeal No. 176 of 2003, **Rahim Mohamed V. R**, Criminal Appeal No. 234 of 2004 and **Alfeo Valentino V. R**, Criminal Appeal No. 92 of 2006 (all unreported) to name a few. For example in the case of **Alfeo Valentino** (supra) the Court stated that:

> *"The Court has consistently held that **once the medical report, as the PF3, is received in evidence, it becomes imperative on the trial court to inform the accused of his right of cross-***

> ***examination.*** *This Court held in these cases that* ***if such a report is received in evidence without complying with the mandatory provisions of sections 240 (3), such a report must not be acted upon.***" *[Emphasis added].*

Surely after the trial magistrate had received the PF3 as exhibit P1 he failed to comply with the mandatory provisions of section 240 (3) of the CPA. Hence, without any hesitation, we agree with the learned Principal State Attorney that the PF3 (Exhibit P1) be discounted, and we accordingly do so.

Mr. Mwampoma proceeded submitting that after the PF3 (Exhibit P1) has been discounted we are left with the evidence of four witnesses. However, he said that, two of those witnesses were children. Isaka Palingo (PW1) was eleven years old and Samwel Palingo (PW2) was thirteen years. Mr. Mwampoma said, this means PW1 and PW2 were children under 14 years, hence, children of tender age. He submitted that section 127 (2) of the Evidence Act, Cap. 6 R.E.2002 covered reception of their evidence and was not

complied with by the trial court. The learned Principal State Attorney conceded to this point raised by the appellant as his additional ground. He prayed for the additional ground of appeal to be sustained.

On our part, we are of the considered opinion that clearly the record has shown that section 127(2) of the Evidence Act was not complied with by the trial court. Section 127 (2) of the Act states as follows:

> " *Where in any Criminal cause or matter a child of tender age called as a witness does not, in the opinion of the court, understand the nature of an oath, his evidence may be received though not given upon oath or affirmation,* ***if in the opinion of the court, which opinion shall be recorded in the proceedings, he is possessed of sufficient intelligence to justify the reception of his evidence, and understands the duty of speaking the truth."***
> *[Emphasis added].*

Clearly, the record does not show anywhere that the trial magistrate has recorded in the proceedings as to what has been directed by section 127 (2) of the Evidence Act that PW1 and PW2 who were children of tender age that he was of the opinion that those children of tender age possessed sufficient intelligence to justify the reception of their evidence and, understood the duty of speaking the truth. We think that that was truly in violation of the mandatory requirement of the provisions of section 127 (2) of the Evidence Act. For that reason, we are forced to sustain the additional ground of appeal of the appellant, and discount the evidence of PW1 and PW2.

Having discounted the evidence contained in PF3 and the evidence of PW1 and PW2, we are now left with the evidence of PW4 and PW5. However both PW4 and PW5 never eye witnessed the alleged act. Hence we find their evidence to be of no value.

Even if the evidence adduced by PW1 had not been discounted in its totality it failed to specifically show how the appellant did the offence charged against him. The record shows that he was told by

PW2 that the appellant sodomized him (PW1). This is what PW1 testified:

> *"Later my elder brother awake me and said look at your buttock. I had slept with my bedsheet I had no "chupi". **He told me that accused had sodomized you** "fira". When I got up the accused had escaped."*
> *[Emphasis added].*

This means, PW1 noticed nothing wrong done by the appellant, but he just heard from PW2 that he was sodomized by the appellant. We think this creates doubts on whether really the appellant was the one who sodomized PW1 or whether he was sodomized at all. Our doubt lies from the fact that the alleged act was committed at around 22.00 hours night time. There was no evidence at all to show that there was light in the room. This makes the purported identification evidence of the offender very doubtful.

In the general, we are of the considered opinion that the prosecution did not prove their case beyond reasonable doubt. In the circumstances, we give the benefit of doubt to the appellant.

In the event, we accordingly allow the appeal, quash the conviction and set aside the sentence. The appellant is to be released from prison forthwith unless otherwise lawfully held.

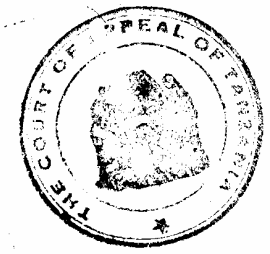
DATED at DODOMA this 4th day of December, 2008.

E. M. K. RUTAKANGWA
JUSTICE OF APPEAL

N.P. KIMARO
JUSTICE OF APPEAL

M. S. MBAROUK
JUSTICE OF APPEAL

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



(S.S. MWANGESI)
SENIOR DEPUTY REGISTRAR