IN THE HIGH COURT ZANZIBAR

HOLDEN AT VUGA

CRIMINAL APPEAL NO.2 OF 2011

FROM ORIGINAL CRIMINAL CASE NO.129 OF 2009 OF REGIONAL COURT VUGA ZANZIBAR

AHMED TAHIR ALI **APPELLANT**

VERSUS,

D.P.P **RESPONDENT**

JUDGMENT

MAKUNGU,CJ.

The appellant charged before RM'S Court with the offence of unnatural offence contrary to section 150 (a) of Penal Act,. No.6 of 2004 of the Laws of Zanzibar. He was convicted as charged and was sentenced to seven years imprisonment. Dissatisfied, he now appeals against his conviction and sentence.

The Prosecution's evidence was that during the night of 23rd July 2009 at Mwanakwerekwe Meli 4 in the West District within the Urban Region of Unguja committed unnatural offence to one Khamis Bakari Khamis 13 years of age.

The learned trial magistrate believed the prosecution witnesses as truthful, and after carefully considering the circumstances in which PW3 saw the

appellant, the learned magistrate was satisfied that PW3 had correctly identified the appellant. He accordingly convicted the appellant as charged.

It is now well settled that where the evidence against an accused person is solely that of identification such evidence must be absolutely watertight to justify a conviction. (see R.V. Evia Sebwato, {1960] E.A 174); and where the evidence of identification is that of a single witness, there is need to test such evidence with the greatest care; what is needed is other evidence, direct or circumstantial, pointing to the accused guilty from which a court can reasonably conclude that the evidence of identification, although based on the testimony of a single witness, can safety be accepted as free from the possibility of error. In the words of the Tanzania Courts of Appeal of Tanzania in the case of Waziri Ameir v. Republic [1980] T.L.R 250 at pages 251-252:

"… evidence of visual identification as court of in East Africa and England have warned in a number of cases, is of the weakest kind and most unreliable. It follows, therefore that no court should act on evidence of visual identification unless all possibilities of mistaken identity eliminated and the court is fully satisfied that the evidence before it is absolutely watertight."

In the case before me the trial magistrate stated emphatically that he believed PW1 and PW3. I think however, that there were factors which, on a proper consideration, raise doubt as of the credibility of the two witnesses. First of all, PW3 testified that she saw the appellant at about 20.45 pm with PW4 in a narrow street where young boys watch TV and then she found them

in unusual situation. This piece of evidence of PW3 was doubtful simple because PW4 in his evidence said clearly that at the scene he saw that the area is dark and people do not pass by. The witnesses contradicted each other. The court would therefore be bound to approach such evidence with reservations. Secondly PW1 and PW3 are family related there are all possibilities to fix the evidence against the appellant. Undoubtly, she had an interest of her own to serve and, unlike the learned trial magistrate, I cannot consider her to have been free of partiality. There was reason to doubt her as well. Thirdly, PW1 said he did the act with the appellant three different days but he did not report that matter to PW2 or PW3 and all three times he said he was under threat of the accused something is very hard to believe. Fourthly, the alleged event was happened on 23/7/2009 but it was reported to the Police on 27/7/2009 five days after the event. The question here is why it took that long.

I think that having regard to those doubts and contradictions and the other factors stated in this connection, it was unsafe to hold that the two witnesses were credible in their purported identification of the appellant. It is therefore difficult to uphold the finding of the trial magistrate.

It was confirmed by DW2 and DW4 that indeed the appellant was at madrassa that day up to 21.00 pm or 22.00 pm. The trial magistrate disbelieved those witnesses for his own reasons. In law the accused has no obligation to prove an alibi. The burden always remains on the prosecution to prove their case beyond reasonable doubt. The accused, if he elects to

testify, is only expected to adduce such evidence as would suggest to the court that his story could possibly be true. As held by the court on Appeal in Mwakawanga V.R [1963] E.A.C

" *an accused putting forward an alibi as an answer to a charge made against him does not in Law thereby assume any burden of proving that answer. It suffices to secure acquittal that the accused by such evidence as he may chose to adduce introduces into the mind of the court a doubt that is not unreasonable".*

It was similarly held by the High Court of Uganda in Sarafoleko V. Uganda [1967]E.A,531 and I agree that:

It is a wrong statement of the law that the burden of proving an alibi lied on the prisoner. It is the duty of a Criminal Court to direct its mind properly to any alibi set up by a prisoner; and, it is only when the court comes to the conclusion that the alibi is unsound that it would be entitled to reject it. As a general rule of law, the burden of proving the guilty of a prisoner beyond reasonable doubt never shifts whether the defence set up is an alibi or something else. That burden always rests on the prosecution."

Without belabouring the point further. I think that a reasonable doubt had been raised for the alibi could possibly have been true. This doubt was immensely fortified by the fact that it took the complaint and PW2 and PW3 five days to report the matter to the Police. Had the trial magistrate directed

himself in the manner/here attempted to I cannot say that he would nevertheless have found the appellant guilty of any offence.

I am therefore of the view that the change had not been proved beyond reasonable doubt and I allowed the appeal. I order the appellant immediate release from custody unless otherwise lawfully held.

Sgd: Omar O. Makungu,CJ,

3/1/2012

Ct: This Judgment is had before Mr. Moh'd Khamis (S/A) for DPP and appellant.

Sgd: Omar O. Makungu,CJ,

3/1/2012

The right of appeal is hereby expressed.

Sgd: Omar O. Makungu,CJ,

3/1/2012

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

Sgd: GEORGE.J.KAZI

REGISTRAR HIGH COURT,

ZANZIBAR