IN THE COURT OF APPEAL OF TANZANIA
AT ARUSHA
(CORAM: KAJI, J.A., KILEO, J. A. And KIMARO, J.A.)
CRIMINAL APPEAL NO. 213 OF 2006

GODFREY ROBERT……APPELLANT
VERSUS
THE REPUBLIC …….RESPONDENTY
Appeal from the judgment of the High
of Tanzania
(Mussa, J.)
dated the 1st day of January, 2006
in
criminal Appeal No. 51 of 2003
.....
JUDGMENTY OF THE COURT

21ST & 25TH April, 2008

KIMARO, J.A.

In the District Court of Monduli at Monduli, the appellant Gedfey Robert who was also commonly known as Baboo Maloo was charged and convicted of unnatural

offence contrary to section 154(1)(a) of the Penal Code. He was sentenced to thirty years imprisonment. He was alleged to have carnal knowledge of one Florian Shauri, a boy aged 11 years against the order of the natured. His appeal to the High Court was dismissed. He is now before us with this second appeal.

Ibrahim Naigisa @ Akwi
Mwarusha, PW1, A watchman at Mto wa mbu market was on duty on 1st February, 2002. At 08.00 pm he heard a young boy crying. There were electric lights. He went to the place where the voice was coming from and he saw the appellant committing sodomy on Florian. Both the appellant and the victim of the offence were well known to PW1 as they w ere street children and they used to sleep at the market where PW1 was employed as a watchman. The appellant was not arrested there and then as he ran away upon seeing PW1.

Another eye witness to the crime was Godfrey Alex, (PW2) also a street boy aged 11 years. This witness also knew both the appellant and the victim before. He was also present when the appellant committed the offence. The matter was reported to the police. The victim of the offence had his statement recorded at the police by No. F. 1`069 P.C. Joseph (PW3) but when the case was called on for the hearing, he could not be traced to give evidence. His statement was admitted in court as evidence (exhibit P1) under
section 354 (B)(1) (d) of the Evidence Act [CAP 6 R.E. 2002]. In his statement the victim explained how the appellant attacked him as he found him taking food,

dragged him to a veranda, tore his shorts at the back side and sodomized him against his will. He said it was PW1 who rescued him and stopped the appellant from continuing with his brutal action. The complainant was also issued with a PF3 form for his examination and this was also admitted in court as exhibit.

In short that was the prosecution case. When the rights of defence as provided for under section 231 sub-section 1 (a) (b) of the Criminal Procedure Act were explained to the appellant, he opted to remain silent. Although he had indicated to the trial court that he had a witness to call, after several adjournments he abandoned the idea, the reason being that that the witness could not be traced.

Upon satisfaction by the first appellant court that the trial court properly evaluated the evidence, it upheld the conviction and sentence.

Before us the appellant appeared in person and Mr. ;John Mapinduzi learned State Attorney appeared for the respondent Republic.

In his five grounds of appeal the appellant is faulting the decision of the first appellate court for not finding that the evidence of PW2 was taken without voice dire examination being conducted, the admission of the PF3 form contravened section 240(3) of the Criminal Procedure Act and the sketch plan was wrongly admitted in evidence. The other complaint is that the first appeal court misdirected itself in accepting that the evidence of PW2 who was a child of tender age was properly relied upon, while it required corroboration which was lacking, and also for accepting that, the appellant's right of defence was properly explained to him by the trial court.

During the hearing of the appeal, the appellant opted to rely only on the grounds of appeal as filed. He had no additional grounds. He elaborated on them after the learned State Attorney had given his reply.

On the first ground of appeal that no voire dire examination was conducted, the learned State Attorney said it was conducted. For this ground we need not waste time because the record is very clear that voire dire examination was conducted on PW2 before his evidence was taken. The trail magistrate was through as he recorded both the questions and answers. This ground has no merit. The appellant had also complained that no
voire dire examination was conducted on the victim efore his statement as recorded at the police. The learned State Attorney replied correctly, in our view, that the law does not provide for such a requirement.

Mr. Mapinduzi on the second ground and third grounds of appeal contend fed that the evidence of the PF3 could be safely excluded from the evidence without affecting the
prosecution case. The appellant's conviction, the learned State Attorney argued, was founded on the evidence of PW1 and PW2 who were the eye witnesses to the commission of the offence and their evidenced corroborated the evidence of the victim.

As for the fourth ground the learned State Attorney submitted that the evidence of

PW1 and PW2 corroborated that of the victim and the learned appellate judge was justified to uphold the conviction because the trial magistrate was satisfied with their credibility. Lastly Mr. Mapinduzi said the fifth ground of appeal is not supported by the record as the record shows that the rights of defence available to the appellant were fully explained to him but he opted to remain silent. For this ground too, we fully support the learned State Attorney. The record is very clear that the appellant was explained about his rights and he was recorded to have told the trial court that ''I shall remain quiet.''

As stated before, this is a straight forward case. The evidence shows both PW1 and PW2 were eye witnesses to the commission of the offence. The two witnesses knew both the appellant and the complainant. There were electric lights. The trial magistrate was satisfied with their credibility. The appellant was informed of his right of defence under section 231 sub-section 1(a) (b) of the criminal Procedure Act but he opted to remain silent. For such a grave offence if the appellant had any defence to offer, he should have protested his innocence. By remaining silent, it meant that he had nothing useful to say. Under the circumstances the first appellate court was entitled to uphold the adverse inference made by the trial magistrate.

We support the learned State Attorney that the court had to inform the appellant about his right of having the doctor who conducted the examination on the complainant and then filled the PF3 form to appear in court for cross examination in compliance with section 240(3) of the Criminal Procedure Act, but the omission, does not in this case affect the conviction of the appellant as the evidenced of PW1and PW2 was sufficient to base his conviction. Equally true is the fact sketch plan was not taken as relevant evidence for the conviction of the appellant.

In the event we are satisfied that the first appellate court properly upheld the conviction and the sentence. We dismiss the appeal in its entirety.

DATED at ARUSHA, this 23rd day of April, 2008.

S.N. KAJI
JUSTICE OF APPEAL

E. A. KILEO
JUSTICE OF APPEAL

N.P. KIMARO
JUSTICE OF APPEAL

I certify that this is a true copy of the original

(F.L.K. WAMBALI)
SENIOR DEPUDTY REGISTRAR