IN THE COURT OF APPEAL OF TANZANIA
AT ARUSHA

(CORAM: NSEKELA, J.A., MSOFFE, J.A., And MJASIRI, J.A.)

CRIMINAL APPEAL NO. 293 OF 2008

SIFAEL FRANCIS MBWAMBO.....APPELLANT
VERSUS
THE REPUBLIC.....RESPONDENT

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

(Sheikh, J .)

Dated the 6th day of August, 2008
i n
Criminal Appeal No. 11 of 2006

JUDGMENT OF THE COURT

6th & 10th October, 2011

MJASIRI, J.A.:

In the District Court of Arusha the appellant, Sifael Mbwambo was charged and convicted of unnatural offence contrary to section 154 of the Penal Code Cap 16, R.E. 2002 as amended by the Sexual Offences Special Provisions Act (Act No. 4 of 1998) and was sentenced to 30 years imprisonment. His first appeal to the High Court (Sheikh, J.) at Arusha was dismissed, hence this second appeal.

The evidence linking the appellant with the offence was that of the complainant, Livingstone Leonard (PW2). PW2, a twelve year old boy at the material time lived with his family at Njiro, Arusha. PW1's father was a Pastor at a local Pentecostal Church. The appellant professed the same faith as PW1's family. He used to work at the printing press in the Pastor's office. The good Pastor opened his home to the appellant and regarded him as a member of his family. It was the prosecution's case that while the appellant was living with the said family, he began abusing and molesting PW2 by having sexual intercourse with him against the order of nature. This went on continuously and on a daily basis for a prolonged period of one year. The appellant would send PW2 at the back of the house where the dog kernels were, removed his trousers and performed the unnatural act. He covered PW2's mouth with a handkerchief, muffling his voice so that his screams would not be heard. PW2 was too scared to open up to his siblings and/or to his mother PW1 Lilian Leonard Daffa about his ordeal. He was suffering in silence. He was badly injured and was unable to control his bowel movement. His mother did not know what caused that, until when his aunt, (his mother's sister) PW3 Jemina Alex came to visit them. She suspected that he had been molested and upon

being interrogated by PW1 and PW3, PW2 narrated the harrowing details to his mother and aunt and named the appellant as the culprit. This led to the arrest and subsequent charge and conviction of the appellant. The appellant denied committing the offence and complained that he was framed by PW1.

The appellant preferred five (5) grounds of appeal and also sought leave to present additional grounds. However, no new grounds were presented. What the appellant did was to submit on the grounds of appeal already filed in Court. His grounds of appeal can be summarized as under:-

1. *The lower courts wrongly relied on Section 127 (7) of the Evidence Act by accepting the uncorroborated evidence of PW2.*
2. *The lower courts erred in law and fact in concluding that PW2 was a credible witness.*
3. *The conviction of the appellant was against the evidence on record.*
4. *Failure to consider the appellant's defence.*

At the hearing of the appeal the appellant was unrepresented and the respondent Republic was advocated for by Mr. Ponsiano Lukosi,

learned Senior State Attorney. Mr. Lukosi supported the conviction. In relation to ground No. 1, he stated that the court rightly invoked Section 127(7) of the Evidence Act Cap.6, R.E.2002.

On ground No. 2 Mr Lukosi submitted that the Court was satisfied that PW2 was a credible witness. A proper *voire dire* examination was conducted by the trial Magistrate in full compliance with the requirements under section 127 (2) of the Evidence Act.

With regards to ground No. 3 that an offence against the order of nature was committed by the appellant, Mr. Lukosi argued that there was sufficient evidence to prove that PW1 was molested by the appellant. He conceded that the PF. 3 report could not be acted upon as the trial Court did not comply with Section 240(3) of the Evidence Act. The doctor who prepared the PF.3 report was not called as a witness, and the appellant was not informed of his right to have the doctor called in order for the appellant to have an opportunity to cross-examine him.

On ground No. 4, that is, failure by the prosecution to call the police investigation officer, Mr. Lukosi stated that there is no law which compels the prosecution to call the investigation officer.

In relation to the complaint that the defence case was not considered by the trial Court, Mr Lukosi submitted that the trial magistrate duly evaluated the evidence presented in court and the case against the appellant was proved beyond reasonable doubt.

We on our part, entirely agree with the submissions made by the learned Senior State Attorney. In relation to ground No.1 we are satisfied that the trial Court was justified in invoking section 127 (7) of the Evidence Act, having complied with section 127(2) thereof. The provision reads:-

> *"(7) Notwithstanding the preceding provisions of this section, where in criminal proceedings involving sexual offence the only independent evidence is that of a child of tender years or a victim of sexual offence, the court shall receive the evidence, and may, after assessing the credibility of the evidence of the child of tender years as the case may be the victim of sexual offence on its own merits;*

notwithstanding that such evidence is not corroborated, proceed to convict, if for reasons to be recorded in the proceedings, the court is satisfied that the child of tender years or the victim of sexual offence is telling nothing but the truth."

In this case the trial magistrate was satisfied that PW2 was telling nothing but the truth. After the testimony of PW2, the trial magistrate recorded the following observations in the proceedings (page 18) which is reproduced as under:-

"Court :- *Witness testified steadily and with a clear mind. He impressed me as an honest and truthful witness".*

In relation to the complaint raised in the second ground of appeal, that the lower courts erred in considering PW2 a credible witness, we would like to state as follows:- This is a second appeal which originated from the District Court, Arusha. Under such circumstances, this Court rarely interferes with concurrent findings of fact by the courts below. In the case of **Director of Public Prosecutions v Jaffari Mfaume Kawawa** (1981) TLR 149 at page 153 this Court stated thus:-

"The next important point for consideration and decision in this case is whether it is proper for this Court to evaluate the evidence afresh and come to its own conclusions on matters of facts. This is a second appeal brought under the provisions of section 5(7) of the Appellate Jurisdiction Act, 1979. The appeal therefore lies to this Court only on a point or points of law. Obviously this position applies only where there are no misdirections or non-directions on the evidence by the first appellate Court. In cases where there are misdirections or non-directions on the evidence a court is entitled to look at the relevant evidence and make its own findings of fact".

The trial District Court accepted the evidence of PW1 and found him to be a credible witness, a finding which was upheld by the High Court on first appeal. In order to reject the findings of fact by the trial Court there must be strong and compelling reasons to do so, particularly when the High Court on such appeal, accepted such findings. We find no such reasons in this appeal.

We now come to the fourth ground of appeal. The complaint is to the effect that the police officer who conducted the investigation was not summoned to give evidence. As this is a criminal case the burden lies on the prosecution to establish the guilt of the appellant beyond all reasonable doubt. This is not dependent upon the number of witnesses called upon to testify. Section 143 of the Evidence Act does not provide for a specific number of witnesses to prove a case. What is important is the credibility and reliability of the evidence and not the number of witnesses called on to testify.

With regards to the fifth ground of appeal the complaint is that the trial court failed to consider the appellant's defence. This complaint has no basis. The trial magistrate properly evaluated all the evidence on record and came to the conclusion that the case against the appellant was not fabricated. It was not disputed that someone had sexual intercourse with PW2 against the order of nature at various times over a long period of time. PW2 knew the appellant well as the appellant was a part of his family. The appellant was therefore, not mistaken for the true culprit.

Finally we come to the third ground of appeal. The complaint is to the effect that the conviction of the appellant was against weight of the

the evidence on record. After reviewing the evidence on record and the submissions by the learned Senior State Attorney and the appellant, we believe there is sufficient evidence to establish the fact that it was the appellant who had been having sexual intercourse with PW2 against the order of nature.

For the foregoing reasons, we are satisfied that there was sufficient evidence to establish the guilt of the appellant beyond reasonable doubt. We find that the appellant was rightly convicted and sentenced, and we therefore dismiss his appeal.

DATED at Arusha this 7th day of October, 2011.

H.R. NSEKELA
JUSTICE OF APPEAL

J.H. MSOFFE
JUSTICE OF APPEAL

S. MJASIRI
JUSTICE OF APPEAL

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

E.Y. MKWIZU
DEPUTY REGISTRAR
COURT OF APPEAL