IN THE COURT OF APPEAL OF TANZANIA

AT MTWARA

(CORAM: MUNUO, J.A., MBAROUK, J.A., And BWANA, J.A.)

CRIMINAL APPEAL NO. 338 OF 2008

KHAJI MANELO BONYE ..... APPELLANT

VERSUS

THE REPUBLIC .....RESPONDENT

(Appeal from the Judgment of the High Court of

Tanzania at Mtwara)

(Mjemmas, J.)

dated the 3rd day of June, 2008

in

Criminal Appeal No. 80 of 2007

JUDGMENT OF THE COURT

23 & 29 September 2011.

BWANA, J.A.:

The appellant, Khaji Manelo Bonye, was charged with and convicted of the offence of Unnatural Offence contrary to section 154 (1) of the Penal Code Cap 16 (R.E. 2002) in the District Court of Kilwa at Kilwa Masoko. He was sentenced to thirty (30) years imprisonment. His first appeal before the

High Court of Tanzania at Mtwara was unsuccessful, hence this second appeal.

Briefly the facts of the case at hand may be stated as follows. On the material day, that is, on the 10th day of August 2006 the appellant, together with other people, including PW3 and PW4 were playing a local game popularly known as "bao". At about 5.00 p.m. the appellant left the place for an undisclosed destination. A while later his colleagues heard a cry of someone shouting that he was being hurt (naumia). PW3 and PW4 rushed in the direction of the alarm. Upon reaching there, they found the appellant sodomising the complainant, Abdallah Omari Halfan (PW1) then aged 12 years. They saw it. PW1 was naked and the appellant had removed his trousers halfway. His male organ was in PW1's anus.

When the appellant saw PW3 and PW4, he started running away, leaving his bicycle behind. The two witnesses chased and apprehended him. He was taken to the relevant

village authorities and eventually to the police. The victim was later given a PF3 and taken to hospital.

All the three witnesses, PW1, PW3 and PW4 testified that they knew the appellant. He was their villagemate. The incident took place during day light (3.00 p.m.) and so was his arrest.

It should be noted at the outset that the appellant never cross examined those key witnesses during his trial, thus leaving their evidence unchallenged. We will revert to this point shortly.

Before us the appellant was unrepresented by counsel while the respondent Republic was represented by Mr. Prudens Rweyongeza, learned Senior State Attorney, assisted by Mr. Ismail Manjoti, learned State Attorney.

During the hearing of this appeal several points of law were raised, including the following –

- Failure on the part of the appellant, to cross examine witnesses during the trial stage – what are the consequences.
- Failure to conduct the hearing in camera as the case involved a child aged 12 years – what are consequences of that lapse.

- Failure to conduct *voire dire* examination by the trial court – what becomes the evidence of PW1.

- The PF3 having been tendered contrary to procedure laid down by the law, what are the consequences.

- Conduct of the appellant at the scene of crime.

Apart from those points of law raised, the appellant, on his part, raised what may be said to be four grounds of appeal in his memorandum of appeal. However the said grounds may be summarised into two namely –

- Contradictions in the prosecution case.

- PF3 having been tendered without following laid down procedure.

We have now to consider all the above issues. We start by the failure to cross examine the witnesses. From the record it is apparent that the appellant did not at all cross examine PW1, PW2 and PW3. Further, his cross examination of PW4 was, with due respect, on an issue not relevant to the substantive matter before the trial court. It is settled law that failure to cross examine a witness leaves his/her evidence to stand unchallenged (See **Goodluck Kyando v The Republic,** Criminal Appeal No. 118 of 2003 (unreported). That is the situation herein and we see, therefore, no reason to doubt the credence of the said evidence of those witnesses as adduced before the trial court. For purposes of further clarity and stressing the importance of cross examination, we are obliged to quote **Peter Murphy** in **Blackstone's Criminal Practice** at p.1870 (as quoted in the **Goodluck Kyando,** supra) thus –

> "The object of cross examination is –
>
> (i). to elicit from the witness evidence supporting the cross examining party's version of the facts in issue;

(ii). to weaken or cast doubt upon the accuracy of the evidence given by the witness in chief; and

(iii). in appropriate circumstances, to impeach the witness' credibility."

Therefore the appellant's failure to cross-examine the said prosecution witnesses in this case did not in our considered view, help his case, in view of the above three (i-ii) observations.

The respondent Republic did concede that contrary to laid down procedure, this case involving a child of tender age and a victim of sexual assault, was conducted not in camera but in open court contrary to section 3(5) of the Children and Young Person Act, Cap. 13 (R.E.2002) then in force. We are mindful of the fact that the said Act has since been repealed by the Children's Act No.21 of 2009. However, this latter Act has retained those important provisions for the need to conduct such trials in camera (see section 99(1)(b)). That irregularity notwithstanding, the non compliance with that law does not, in our view, lead to illegality leading to nullifying

such proceedings. What is to be considered is whether such conduct in open court did occasion a failure of justice on the part of the appellant. If we think that it did not, as we do so herein, then we should not hesitate to state that such defect is curable under section 388(1) of the Criminal Procedure Act (the CPA) which provides, in part, thus:-

> ".....no finding, sentence or order made or passed by a court of competent jurisdiction shall be **reversed or altered on appeal**.....on account of any error.....irregularity..... **save that** where an appeal.....**the court is satisfied that such error, omission or irregularity has in fact occasioned a failure of justice**.....(emphasis provided).

Proof of occasioning "failure of justice" is, therefore , a "*sine qua non*". That was not, in our view, the situation in this case. Going by the record, what appears to have happened in this case is that the victim, PW1, did testify freely, without

fear. Therefore the irregularity conceded to by the respondent Republic could be corrected by invoking section 388(1) of the CPA, as there was no injustice occasioned.

Failure to conduct a **voire dire** is another issue that the respondent Republic conceded. What are the consequences of such a failure? We are aware of several decisions of this court which all but point to two different destinations. One group of decisions irresistibly point to a position that evidence of a child of tender age adduced without a voire dire procedure being followed, should be discarded, the provisions of section 127(7) of the Evidence Act notwithstanding. The other group of decisions insists on compliance with the said provisions of section 127(7) which in essence, require such evidence to be corroborated. Be it as it may, we think there is yet another middle line to be taken. That is that the circumstances of each case should be borne in mind by the court. We note with particular interest that section 127(7) makes reference to "**the only independent evidence is that of a child of tender years**....." That requires, as a

matter of practice, corroboration. The instant case is different. Whether the evidence of PW1 is expunged or not, PW3 and PW4's evidence which has not been impeached by way of cross-examination, was solid enough to ground a conviction. Upon hearing calls for help, both witnesses rushed to the scene of crime and found the crime in flagrante delicto. The victim was naked. The appellant had his trousers lowered and was sodomising the former. Upon seeing the two people, the appellant ran away, leaving behind his bicycle. Why run away if he was not committing an offence with which he was subsequently charged? The conduct of the appellant would have puzzled any objective mind. It has done so to us. That puzzle only helps to cement the already existing strong evidence implicating him, evidence that was not impeached by way of cross-examination.

Counsel for the respondent Republic did concede as well to the fact that the PF3 was tendered as evidence without following the procedure provided for under section 240(3) of the CPA. We are of the same view. The consequence of such

from the record. There is no dearth of authorities on that point. But our strongly held view, after going through the record, is that the expunge of PF3 does not weaken the already strong evidence against the appellant.

Lastly is an argument raised by the appellant that there are contradictions in the evidence of the prosecution. We have scrutinized the record but failed to register any such contradictions cum discrepancies. And if at all there are some, they are so minor that they will not make the prosecution case to flop. As stated by this Court in **Saidi Ally Ismail** vs **The Republic**, Criminal Appeal No.241 of 2008 (unreported);

> "It is not every discrepancy in the prosecution's witnesses that will cause the prosecution case to flop. **It is only where the gist of the evidence is contradictory then will the prosecution case be dismantled**...." (emphasis provided).

All in all we find that this appeal has no merit. The appellant was convicted as per the strong evidence against him. We see no ground from which to fault the findings of the two courts a quo. The sentence of thirty years imprisonment is the mandatory minimum provided under the law. Therefore this appeal is dismissed in its entirety.

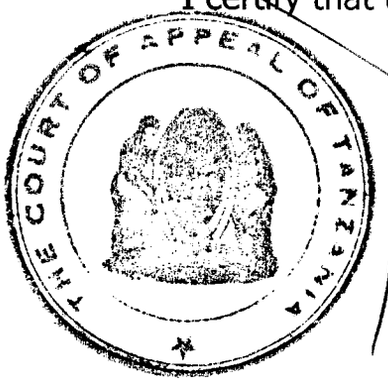
DATED at MTWARA this 23rd day of September, 2011.

E. N. MUNUO
JUSTICE OF APPEAL

M. S. MBAROUK
JUSTICE OF APPEAL

S. J. BWANA
JUSTICE OF APPEAL

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



M. A. Malewo
DEPUTY REGISTRAR