IN THE HIGH COURT OF TANZANIA

AT TABORA

APPELLATE JURISDICTION

(Tabora Registry)

(DC) CRIMINAL APPEAL NO. 109 OF 2006

ORIGINAL CRIMINAL CASE NO.496 OF 1999

OF THE DISTRICT COURT OF TABORA DISTRICT

AT TABORA

BEFORE; R.M. MLAWA – Esq; PRINCIPAL DISTRICT MAGISTRATE

SAID S/O HAMISI..... .....APPELLANT

(Original Accused)

Versus

THE REPUBLIC.....RESPONDENT

(Original Prosecutor)

JUDGEMENT

2nd May, 07 & 6th June, 07

MZIRAY, J

The appellant was convicted and sentenced to thirty years imprisonment by the District Court of Tabora in

unnatural offence contrary to section 154 (1) of the Penal Code. In addition there was an order of ten strokes of the corporal punishment and a compensation of one hundred thousand shillings to the victim of the offence. His appeal is against conviction and sentence.

The evidence that convicted the appellant was of two children of tender ages, one being the victim of the offence, and the medical evidence of the Clinical officer who examined the victim. The two children who testified were of 12 and 14 years respectively so a voir dire examination was conducted by the trial court to ascertain whether they possessed sufficient intelligence to justify reception of their evidence. The trial court found that the two children witnesses possessed sufficient intelligence to warrant it to receive their evidence as they proved to the satisfaction of the court that they knew the duty to speak the truth though they did not know the meaning of an oath.

Briefly the evidence in this case was as follows. On 19.11.1999 at Rwanzari Village in Tabora, PW2 Miraji Seif, aged 14, who is the victim of the offence was sleeping in a house of their grand mother who was absent at the material time. He was in the company of PW1 Ramadhani Seif, aged 12 years, who is his young brother. PW1 and PW2 were

lonely in the house. At that time, the appellant who is a friend of their father knocked the door of the house posing to be a policeman who had come to search the house. The boys innocently opened the door. The appellant who was half naked entered the house. He was armed with a stick. The appellant then forced PW2 to pull down his shorts. He took the boy side ways, his face on down ward direction, then had full penetration of his penis on the anus of the boy. At this time the other boy (PW1) was hiding underneath the bed watching what the appellant was doing to his brother. The appellant threatened the boys with a knife and warned them to keep quiet or else he kills them. After finishing this barbaric act the appellant stole some chicken and went away. PW2 said that it was his first time to be sodomised. He said his anus swelled.

It was PW3 who is a Clinical officer at the Kitete Regional Hospital who examined PW2 on 20.11.1999 on the alleged sexual abuse. According to him there were white substances of superficial nature on the anus of the boy. Laboratory tests were conducted but did not reveal presence of spermatozoa but there were pus cells seen on the anus of the boy. He opined that presence of pus cells could be as a result of scratches or presence of worms in the anus. He

concluded by stating that it would seem the act was done but it failed. He tendered a PF.3 to that effect.

In his affirmed statement before the trial court the appellant denied to have committed the offence.

The trial court in its decision believed PW1 and PW2 to be credible witnesses. On the medical evidence, the trial court was of the view that presence of spermatozoa was not the necessary ingredient of the offence and what was of paramount importance was whether there was penetration. The trial court came to the conclusion that there was penetration. It then proceeded to convict the appellant relying on the evidence of PW1, PW2 and the medical evidence.

In the memorandum of appeal filed the appellant stated that the evidence of PW1 and PW2 required corroboration before being acted upon. He went on to say that the trial court failed to accord weight to the medical evidence which exonerated him with the offence.

In dealing with this appeal I will start with the charge sheet. It is defective. I say so because it did not incorporate the amendments of section 154 of the Penal

Code made by the Sexual Offences Special Provisions Act, 1998. In that amendment the punishment for un-natural offence was enhanced to life imprisonment as the maximum and a sentence of not less than thirty years as the minimum. However, this defect did not occasion to a failure of justice because when it came to sentence, the trial court inflicted the punishment which is prescribed by the law.

The appellant has challenge the evidence of PW1 and PW2 that it was not corroborated. According to the decision of the trial court after it had evaluated the evidence of PW1 and PW2 was impressed that though the two witnesses were children of tender years gave impressive and credible evidence. Under the Sexual Offences Special Provisions Act which amended section 127 of the Tanzania Evidence Act, 1967, the court can act on uncorroborated evidence of a child of tender years if it finds that evidence to be credible. This is exactly what the trial court did. The position of the law is that this being an appellate court, matters of credibility of witnesses are the domain of the trial court which had the advantage of assessing the demeanour of the witnesses and evaluating the credibility of such evidence. This court will not readily interfere with the decision of the trial court on such an issue.

In his other ground of appeal the appellant is stating that the offence is not proved because the medical evidence has exonerated him with the offence. When dealing with the medical evidence, the trial court stated that PW3 did not know the ingredients of un- natural offence that is why he arrived to that opinion. The trial court went on to state that the doctor failed to understand that a slight penetration of the penis into PW1's anus amounted to the commission of un – natural offence. I quite agree with the finding of the trial court. If I am to add, for the purpose of proving un – natural offence, penetration however slight is sufficient to constitute the sexual intercourse against the order of nature necessary to the offence. Presence of spermatozoa is not an ingredient of this offence. The trial court was therefore justified to ignore the medical evidence. After all, the court is not bound to accept medical testimony if there is good reason for not doing so. At the end of the day, it remains the duty of the trial court to make a finding and in so doing, it is incumbent upon it to look at, and assess the totality of the evidence before it and arrive at its conclusion.

As a whole, considering the totality of the evidence on record, and the circumstances of the case it is my view that the guilty of the appellant has been proved beyond all reasonable doubt.

I dismiss this appeal.

R.E.S. MZIRAY

JUDGE

6/6/2007

Right of appeal fully explained.

R.E.S. MZIRAY

JUDGE

6/6/2007