**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA**

**(IN THE DISTRICT REGISTRY OF KIGOMA)**

**AT KIGOMA**

**DC. CRIMINAL APPEAL CASE NO. 29/ 2022**

(Arising from Criminal case No. 160 of 2021 at Kigoma District Court before E.B Mushi - RM)

**SAID ATHUMANI ..... ..... APPELLANT**

**VERSUS**

**THE REPUBLIC ... ..... RESPONDENT**

# JUDGMENT

*26/05/2023 & 16/6/2023*

**Mlacha, J.**

At the District Court of Kigoma in criminal case No. 160 of 2021, the appellant Said Athumani stood charged of Grave sexual abuse c/s 138 (c) (1)(a) & (2) (b) of the penal code, cap 16 R.E. 2019. It was alleged that for sexual gratification he did sexual abuse to Ramadhani steven, a boy of 10 years old of 13th day of October, 2021 at Kinkunku area, within the district and region on kigoma. He was found guilty, convicted and sentenced to serve 20 years in jail and to compensate Tsh 500,000/= to the victim. Aggrieved by both sentence and conviction, he has now come to this court by way of appeal.

Before going to the merits of this appeal, a presentation of the background is of utmost importance. The prosecution side paraded a total of three witnesses namely, PW1 Ramadhani Silvester (10), PW2 Sikuzani Ramadhani (35) and PW3 WP8062 Detective Ester Andrew. They tendered a sketch map of the scene of crime as exhibit P1. DW1 Saidi athumani, now the appellant, was the only defence witness. In this appeal the words DW1 and appellant will be used interchangeably to mean the appellant.

The requirements of section 127(1) of Tanzania Evidence Act, cap 6 R.E. 2022 were complied with in respect of the evidence of PW1. Few questions were asked to test his intelligence. He was found to be intelligent enough and understood the nature of an oath. He was sworn and gave evidence on oath. He said that on the particular day he was alone at home. At around 11:00hrs, DW1 came and asked him to go to assist him filling water in bottles. He complied and they left. They went to DW1's house. On arrival, he was given 5 bottles to fill in water. He did the task. Thereafter DW1 told him to enter into his room so as to be taught boxing. He complied. When he entered into the room, he was ordered to sleep on the bed by the appellant something which he obeyed. Thereafter the appellant put his buttocks on his mouth. Later on he was ordered to open his mouth and DW1 put his penis

into the mouth several times till he ejaculated. PW1 described this act saying that he produced something like a porridge or mucus. He was later required to spit it off his mouth. He did so.

PW1 reported the matter to PW2 who is his mother. He narrated what was done by the appellant. PW2 informed her husband on what had happened to PW1. DW1 was arrested by parents of a victim and taken to the police station.

PW2 said that she was at Gungu market on the date and time. She came back home at 10:00 hours. PW1 was absent. She asked her neighbor (Mama Dayana) on the whereabouts of PW1. Her neighbor replied that she saw him moving with DW1. DW1 was known to PW2. He used to visit them at home. Meanwhile PW1 arrived with a nut and told PW2 that he was given by DW1. He narrated to his mother what DW1 had done to him. PW2 did nothing till her husband arrived and passed the story to him. They arrested DW1 who beg them to settle the matter at family level something which they refused. He was taken to the police station. PW1 was given a PF3 for medical purposes.

The investigator of the case was PW3, a police officer at Kigoma central police station. She testified on how she was assigned to investigate the case, the way she received the matter and she interrogated DW1 who admitted to be with PW1 on the material day. He also admitted to give victim pastries to eat and Tsh 500/= as a gift for assisting to fill water in the bottles. He denied to put his penis in his mouth. PW3 drew a sketch map of the scene of crime which was tendered and admitted in court as exhibit P1.

DW1 denied the charge against him. He went on to say that on 13/10/2021 as he was coming from his work place at Gungu health Center,he met five men and three women who claimed that he was a thief of bed sheets. They took him to the chairman and finally to the police station alleged that he had raped PW1.

Based on the above evidence, the appellant was found guilty, convicted and sentenced serve 20 years in jail and pay a compensation of Tshs. 500,000/=. Aggrieved, he has now come on appeal with four grounds namely; **one**, that the trial court erred in law and fact by convicting the appellant 20 years in soul (sick) and fine of 500,000/= while the case against him was not proved to the required standard; **two**, that the trial court wrongly convicted the appellant basing on the evidence of the minor which was not collaborated;

**three**, that the trial court erred in law and fact when it convicted the appellant without the evidence of medical officer who could prove that really the appellant had put his penis into mouth of the victim several times until he ejaculates. No PF 3 form was tendered to prove that there was a sperm of the appellant in the mouth of the victim or rather where the victim spitted and **four**, that the trial court erred in law and facts when it ignored the defense of the appellant that this case was framed the he was arrested for the offence of theft but when he was in remand custody, the offence was changed into that of grave sexual abuse.

During the hearing of this appeal, the appellant was represented by Mr. Daniel Rumenyela advocate, while the respondent was represented by Mr. Raymond Kimbe, State Attorney. The appeal was heard by way of written submission and parties filed their submissions accordingly.

Counsel for the appellant consolidated all grounds of appeal into one ground during submissions saying that the offence was not proved to the required standard. He doubts the credibility of prosecution witnesses. He also said that there were contradictions in the evidence of prosecution witnesses on the place where a victim spat the sperm. PW1 said that he was told to spit out the sperm from his mouth, while PW2 said that PW1 told her that he was

told to spit the sperm in the bucket. Counsel submitted that the bucket used for spitting was not tendered in court as exhibit. That even the sketch map Exhibit P1, drawn by PW3 did not show it.

Counsel submitted that the PF 3 given to PW1 was not tendered in court as exhibit. The doctor did not give evidence and no DNA test was conducted. He added that the appellant stayed in the police lockup for five days under torture to the extent that admitted to commit the offence charged. Making reference to the case of **Elipidius Rwezahula v. The Republic,** (CAT) Criminal case No. 107 of 2020 counsel submitted that the evidence of a minor should not be automatically believed. He finally concluded that the charge against the appellant was not proved to the required standard.

The state attorney had the view that there was evidence proving the case beyond reasonable doubt. Based on section 127(7) of the evidence Act counsel submitted that the law did not require corroboration to the evidence of PW1 who was a child of tender age. He said that a conviction can be entered without corroboration, what matters is credibility of the witness. He referred the court to **Bwanga Rajabu v. Republic,** criminal appeal no. 87/2018 and **Godluck Kyando v. Republic** (2006) TLR 363 on the

principle that every witness is entitled to credence and must be believed unless there are reasons to disbelieve his evidence.

Counsel concluded that there was no need of medical evidence in this case. He argued the court to dismiss the appeal.

While following its decision made in **Siza Patrice v. Republic**, Criminal Appeal No. 19 of 2010 on the duty of the first appellate court, the Court of appeal had this to say in the case of **Michael Msigwa v. The Republic,** (CAT) Criminal Appeal No. 216 of 2019, at Page 11:-

> *"We understand that it is settled law that a first appeal is in the form of rehearing. The first appellate court has a* ***duty to re-evaluate the entire evidence in an objective manner and arrive at its own findings of fact****, if necessary"* (Emphasis added).

I will take this approach in this case.

It was the testimony of PW1 that the appellant put a penis to his mouth. His evidence was supported by that of his mother, PW2 and that of the police officer, PW3. The evidence of PW2 and PW3 was based on what was said by PW1. They did not witness the incident. PW2 perceived the story from her son (victim) on what transpired at the scene of crime, her evidence can be

named as hearsay evidence. The same applied to PW3 who was the investigator. Her evidence starts from when the appellant was arrested and sent to the police station. All what she said, apart from the map which she drew, comes from PW1 and PW3. It is mainly hearsay. Hearsay evidence is useless. It cannot be used as a base of a conviction. The evidence of PW2 and PW3 being hearsay had no evidential value. See **Daimu Daimu Rashid @ Double D v. The Republic,** (CAT), Criminal appeal No.5 of 2018.

We are now left with the evidence of PW1, a child of 10 years old. The issue is whether his evidence can sustain a conviction in the absence of the evidence of the doctor, the PF3 and that of the neighbour who is alleged to have seen the appellant moving across with the child, PW1. It is possible if the court can believe the child but it must be strong enough to show that he was speaking nothing but the truth. But looking through, I could not see the reason as to why the doctor and the other women alleged to have seen the appellant and the child could not be called as witnesses. I think it was important in a serious case like this one to call the neighbour to explain the circumstances under which he saw the appellant with the child and their destination. It was also important to get a medical

opinion and the PF3. Failure to do so has left serious doubts on what was said by PW1.

The consequence of failing to call a key witness during trial are well known. See **Boniface Kundakira Tarimo v. Republic,** Criminal Appeal No. 350 of 2008 (CAT) at page 6 . The court said thus:-

> "*It is thus now settled that, where a witness who is in better position to explain some missing links in the party's case,* ***is not called without sufficient reason being shown by the party, an adverse inference may be drawn against that party,*** *even if such inference is only permissible." (Emphasis added).*

Guided by the above principle, none calling of the neighbor who saw the appellant with PW1 was fatal to the prosecution case. If called, she could explain and assist to fill in some missing links. Her evidence could establish circumstantial evidence material to corroborate the evidence of PW1 and remove the possibilities that he might have been couched by some people as is sometimes done. In the like manner the opinion of a doctor was important. The police could also move to DNA tests. All this was not done and no explanation was given leaving doubts in the prosecution case.

In the case of **Kassim Salehe Mkulungi v. The Republic,** (HC), Criminal Appeal No.2 of 2021, (H/C Ngwembe, J.), the court had this to say at page 7 on the importance of medical reports in sexual offences: -

*"In sexual related offences, including grave sexual abuse,* ***medical expert or medical doctor with his medical report is a crucial witness and document to constitute an offence alleged to have been committed****. Judge Rutakangwa, (as he then was) in the case of* ***R vs. Kerstin Cameron*** *[2003] TLR 84, took pain to expound the requirements of engaging experts on cases of similar nature. Therefore, failure to call the alleged medical doctor who examined the victim and failure to produce results of that examination in a form of PF3 negated the whole prosecution case. What remained for the prosecution were uncorroborated allegations of grave sexual abuse". (Emphasis added)*

But on the other limb, there is the evidence of the victim which is regarded as the best evidence. In the case of **John Mgema @ Sabago v. the republic,** (CAT), Criminal Appeal No. 601 of 2017, at page 9, it was started thus; -

*"We are further abreast with the settled principle that the best evidence in sexual offences is the one which comes from the victim".*

But there is also the position that the evidence of the victim should not always be believed. It must be tested on the test of truthfulness before being acted upon. The court must measure whether the victim was speaking the truth and nothing else. See the case of **Mohamed Said v. The Republic,** (CAT), criminal appeal no. 145 of 2017 page 15 where it was stated thus:-

> *"We think that it was never intended that **the word of the victim of sexual offence should be taken as gospel truth** but that her or his testimony should pass the test of truthfulness." (Emphasis added)*

Being aware of this principle, it was important to subject the evidence of PW1 to the test of truthfulness and see if he was speaking nothing but the truth. That was not done in this case. The trial court took the matter lightly and proceeded to convict.

As a principle of natural justice, the appellant was provided with a chance to make his defence. He told the court that he is a worker at Gungu health center who was merely arrested on the way and called a thief. He was later sent to the police station where he was told that he had committed the crime. He could not bring witnesses to corroborate his story. He could not encounter the evidence given by witnesses in his defence. His defense was weak so to

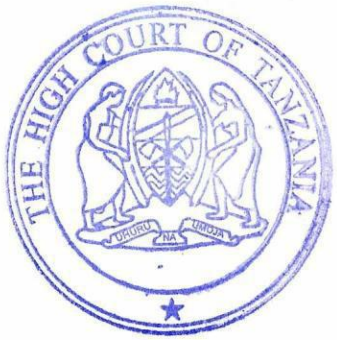
say but conviction case cannot stand based on weaknesses of the defence. See **Twinogone Mwambela v. The Republic,** (CAT), Criminal Appeal No. 388 of 2018, at page 16 it was stated that;

> *"Rather, we are alive to the position of the law that, an accused person in a criminal trial, can only be convicted on the strength of the prosecution case and not on the basis of the weakness of his defence."*

It is on the strength of the prosecution case and not the weakness of the defense case where the conviction must stand. The defense case was weak but the weakness of the defence had no effect in the conviction.

In totality of the re-evaluation of the evidence, I think that the trial court ought to have given the benefits of doubts to the accused and find him not guilty of the offence charged. In view of the finding, I set aside the conviction, sentence and order for compensation imposed by the district court. I direct the immediate release of the appellant from the prison unless otherwise lawfully held. It is so ordered.

Appeal allowed.

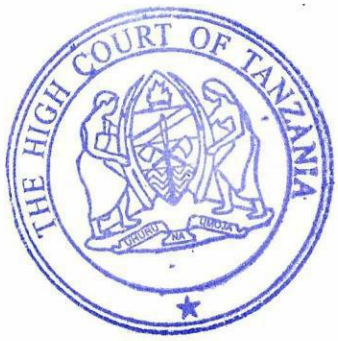



**L.M.Mlacha**

**Judge**

**16/6/2023**

**Court**. Judgment delivered. Right of appeal explained.




**L.M.Mlacha**

**Judge**

**16/6/2023**