IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
IN THE SUB-REGISTRY OF MANYARA
AT BABATI
CRIMINAL APPEAL NO. 109 OF 2023

(Arising from Criminal Case No. 10 of 2023 Babati District Court)

PETRO AMSI..... APPELLANT
VERSUS
THE DPP .....RESPONDENT

JUDGMENT

11th December, 2023 & 7th February, 2024

Kahyoza, J.:

Petro Amsi, the appellant, was charged and convicted with the offence of grave sexual abuse. Aggrieved, he appealed to this Court contending that the prosecution did not prove the offence beyond all reasonable doubt, the judgment was bad in law for lack of points for determination, that the magistrate turned himself to prosecute and that the trial court did not consider his defence.

The basic issue is whether the prosecution proved that the appellant's guilty beyond all reasonable doubt.

A brief background according to the prosecution's case is that; on 09.12.2022, the appellant called the victim (**Pw1**) to house (room). The victim responded. He gave her what she called "chululu", the victim refused. The victim described "chululu" as "dudu" or penis. She testified that the appellant inserted his finger into her vagina, what she described as the

urinating organ. The victim is said to be 4 years old when the offence was committed. After she refused to play with the appellant's "chululu", she went outside the house and joined her friends to play.

The victim added that later she told her mother (**Pw2**) and her grandmother (**Pw4**) that Mzee Petro, the appellant, had inserted his finger into her vagina.

The victim's mother (**Pw2**) deposed that while bathing the victim, the victim complained that she was feeling pains on her private parts. She inquired what had happened. The victim disclosed that Mzee Petro, the appellant, had inserted his finger to her private parts. As she had left the victim with her grandmother, she asked her if the victim had told her what had be fallen her. The victim's grandmother refuted. The victim's mother asked the victim what happened, she narrated in the presence of her grandmother that Mzee Petro inserted his finger in her private part and also that he took out his "chululu" (penis) and asked her to play with it. She refused.

The victim's grandmother (**Pw4**) deposed that he went with the victim to Rose's house to wash her clothes. Rose's house was very close to the appellant's home. She started washing clothes 30 minutes later she decided to look for her grandchild. She called her and saw emerging from the

appellant's house. She contended that the victim was normal or in good condition. She stayed with her. After the victim's mother finished washing Rose's clothes, she went home with her granddaughter. She prepared lunch, which they ate and the victim took a siesta. She woke up at 17:00 hrs and went to play. At 20:00 hrs the victim's mother arrived from her daily duties and washed the victim. While bathing the victim, the victim complained that she was feeling pains in her private parts. The victim's grandmother (**Pw4**) confirmed that the victim told them that the appellant inserted his finger to her private parts.

Dr. Dinnah L. Tomito (**Pw5)** examined the victim on the 10.12.2022, that is a day following the commission of the alleged offence. She deposed that the victim had no bruises on the outer part of her private parts and that she was still a virgin and free from any infection.

On 10.12.2022, the victim's mother confronted the appellant who was attending morning prayers and asked him why he had inserted his finger to the victim's vagina. The victim's mother deposed that the appellant told her not to speak louder. She reported the matter to police who later arrested the appellant. G. 539 D/CPL Tumaini arrested the appellant on 10.12.2022 and drew a sketch map.

Elibariki (**Pw5**) narrated what the victim's mother told him. The

appellant denied to commit the offence and summoned his wife Katarina Lulu (**Dw2**). She denied seeing any child in her house. During cross-examination, she stated that she knew the victim. Unlike the appellant who deposed that there was no dispute between him and the victim's family, Katarina Lulu (**Dw2**), the appellant's wife deposed that the two families were not at peace with each other. She did not explain what the quarrels or the dispute was all about. It is against the above evidence the trial court found the appellant guilty and convicted him.

Did the prosecution prove the appellant guilty beyond reasonable doubts?

At the hearing, the appellant was represented by Ms. Fauzia advocate and Ms. Blandina, state attorney appeared for the respondent. Ms. Fauzia learned advocate took the floor that the appellant was wrongly charged. She argued that the offence of grave sexual abuse was required to be grounded under section 138C (1) (a), (2) (b) of the Penal Code. She argued that the prosecution preferred the charge against the appellant under section 138C (1) (d) and 2 (b) of the Penal Code omitting subsection (1) (a) of section 138C which creates the elements of the offence of grave sexual abuse which are; **one,** the use of any part of human body for sexual gratification, and **two,** lack of consent of the other person to whom the act is done. She

contended the irregularity was fatal and that it cannot be cured. She cited the case of **Vaseo John V. R**. Criminal Appeal No. 499 of 2016 (CAT unreported) and **Abdallah Ally V. R**, Criminal Appeal No. 253 of 2013.

Ms. Blandina learned state attorney replied that the prosecution proved the elements of the offence of grave sexual abuse. To support her contention, she cited the case of **Hando Davido V. R**, Criminal Appeal No. 107 of 2018. She however, conceded that subsection (1) (a) of section 138C of the Penal Code was omitted. She was quick to react that the omission was curable under section 388 of the CPA. She contended that the appellant was not prejudiced as the appellant was informed of the ingredients of the offence. She added that the appellant had an opportunity to defend himself and call witness. She added that the case of **Vasco John**, cited by the appellant's advocate was distinguishable.

Having heard the rival submissions, I find it is beyond dispute that, the charge did not make a reference to subsection (1) (a) of section 138C. It referred to subsection (1) (d) and (2) (b) of section 138C of the Penal Code. Framing of charges is regulated by law, that is section 135 of the Criminal Procedure Act, [Cap. 20 R. E. 2022] (the **CPA**). Once the charge is framed in compliance with the provisions of section 135 of the CPA, it cannot be objected to. The provisions of section 135 of the CPA, states-

"a) a count of charge or information shall commence with a statement of the offence charged, called the statement of offence"
b) the statement shall describe the offence shortly in ordinary language ... and if the offence charged is one, created by enactment, shall contain a reference to the section of the enactment creating the offence"

The offence the appellant stood charged is created by enactment, it was therefore mandatory to refer to the section of the enactment creating the offence. The offence grave sexual abuse is created under section 138C (1) with different conditions specified under paragraphs (a) to (d) of the Penal Code. The situation or conduction under review where the victim of sexual abuse is below the age of 18 years was covered under paragraph (d). I see nothing with wrong the charge. Even if, that there was such an irregularity, would not by itself led to the charges to collapse. The Court of Appeal has held in cases without number including the case of **Vasco John**, (Supra) that in determining as to the fatality or otherwise of a misdescription of the charged offence the bottom line is whether or not the person accused was prejudiced by the anomaly.

In the present case, even if, the provision creating the offence was omitted, the fact that the elements creating the offence were properly explained in the charge, there was no miscarriage of justice. It is now settled

that if the charge omits to refer to provision creating the offence, but the particulars of offence clear and sufficiently specify the elements of the offence to inform the person accused on the nature of the offence he was facing, then the defect is not fatal. See the case of **Vasco John**, (Supra) **Khamis Abderehamani V. R**, Criminal Appeal No. 21 of 2017 (CAT Unreported), and **Jamal Ally @ Salum V. R**, Criminal Appeal No. 52 of 2017.

I take a position that the charge in the present case was not defective and if there was any defect, it is not fatal. It is curable as the particulars of the offence, disclosed clearly elements of the offence of grave sexual abuse. I decline the invitation that the charge was defective.

The appellant's advocate contended that there was contradictory evidence as to how the offence was committed. The victim deposed that after the appellant abused her, she went outside and played with her friend. The victim's grandmother (**Pw4**) deposed that she went with the victim to wash Rose's clothes. She realized that the victim was missing, while looking for her, she saw emerging from the accused's room. She added that the investigating police officer gave an account different from the rest of the witnesses as to the date the offence was committed. She cited the case of **Vumi Liapenda Mushi V. R,** Criminal Appeal No. 377 of 2016.

She contended that the evidence shows that there was no offence committed. Dr. Dinnah (**Pw5**) deposed that there was no indication that the offence was committed. The victim's grandmother (**Pw4**) deposed that the victim was in a normal condition.

The respondent's state attorney replied that the contradictions were minor and therefore of no effect. She emphatically submitted that in sexual offences, it is the evidence of the victim which matters. She added that the trial court relied on the evidence of the victim to convict. The trial court considered the evidence of the victim and found it credible.

It a settled principle of law that in sexual offences the best evidence comes from the victim. See the case of **Selemani Mkumba v. R**. [2006] T.L.R. 23 and **Daudi Shilla V. R**, Cr. Appeal No. 117 of 2007 (unreported) the Court observed in that latter case that-

> "*The evidence of the complainant on what the appellant did to her is detailed and she missed no word. All the ingredients of the offence were given in her evidence. By then she was fourteen years. The Court in* ***Seleman Makumba Vs R*** *... said: -*
> *"The evidence of rape has to come from the victim, if an adult, that there was penetration and no consent, and in case of any other woman, consent is irrelevant that there was penetration'...."*

The victim gave evidence that the appellant inserted his finger in her

private parts (alinichokonoa). He also took out his private parts and directed her to play with it. The victim refused. The appellant released her and she went outside to play with her friends. I have no reason to doubt the evidence of the victim. Like the trial court, I find her a credible witness. The victim, who was 4 years old, had no reason to lie. She gave an account how the offence was committed. I ruled out the possibility that she was coached as there was no reason from the appellant why would the victim's family do so.

The appellant denied to commit the offence and deposed that there was no bad blood between him and the victim's family. Katarina Lulu (**Dw2**), the appellant's wife deposed that there was a dispute between their family and the victim's family but she did not shed light on the nature of the conflict or misunderstanding. It is considered opinion that defence was an afterthought.

Admittedly, looking at the whole evidence, there are contradictions on what happened after the victim left the appellant's house. The victim's grandmother (**Pw4**) deposed that she saw the victim leaving the appellant's room while she in a normal condition. She was not even suspicious of what happened. She took the victim and stayed with her until she finished washing Rose's clothes and went home.

The victim gave evidence that, after she left the appellant's house she

went to play with her friends. The victim's mother deposed that while she was bathing the victim, the victim informed her that she was feeling pains in her private parts. The victim was examined by Dr Annah (**Pw5)** a day after the alleged incident and found that the victim's hymen intact and the outer part of her vagina with no bruises. In her opinion, Dr Annah (**Pw5)** stated that there was no evidence that the child's private part was touched. She deposed as recorded-

"*There is no evidence that the child touched his [her] vagina."*

I am alive of the fact that Dr Annah (**Pw5**)'s testimony was an expert opinion which did not bind the Court. That notwithstanding, in situation like the current one where the evidence of the minor is not sufficient, the evidence of the expert would have corroborated the victim's evidence. In addition, the Dr Annah (**Pw5)** deposed that depending on the body, a person suffering from bruises would take two weeks or less or more to recover.

Considering the whole evidence, I am of the view that something may have happened between the appellant and the victim but there is no evidence apart from the victim's evidence to corroborate the allegations that appellant inserted his figure in the victim's private parts. I was not convinced by the evidence that the victim's grandmother saw the victim leaving the

appellant's house. If it was true that that the victim's grandmother saw the victim leaving the appellant's room why did she not take action even of asking her why she had gone missing and emerged from the appellant's room. No doubt seeing the victim leaving the appellant's room was not an offence but it would have corroborated the victim's evidence.

I considered the evidence from Dr Annah (**Pw5)** that, she did not see bruises on the outer part of the victim's private parts and that the victim's hymen was intact as the evidence to negate the victim's evidence that she was sexually abused. The victim's evidence in Kiswahili language was that "*Babu Petro alinichokonoa*" literally meaning the grandfather Petro pricked. The victim was consistent and steady. The accused person's cross-examination did not shake her. She explained why they had gone close to the victim's house. Like her grandmother, she testified that she went to that area with her grandmother who had gone to wash Rose's clothes. I could not find the reason to disbelieve the victim. I am of the firm view that the appellant touched or inserted his finger in the victim's private parts but it did not go the extent of causing bruises.

Indeed, there are contradictions as the appellant's advocate pointed out but they do not go to the root of the matter. The fact that Dr. Annah (**Pw5)** did not find bruises and found that hymen intact does not negate the

victim's evidence that she was abused because even touching another person's private parts with sexual gravitation amounts to sexual abuse. In addition, the fact that there is contradiction between the victim's evidence and her grandmother as to what happened after she left the appellant's house, does not affect the victim's evidence, or weaken her credibility. The victim testified that she left the appellant's home and went to play with her friends whereas her grandmother deposed that after the victim left the appellant's home, she took her and stayed with her until they left Rose's place and returned home for lunch.

The law is well settled that not every contradiction will make a prosecution's case to flop. The Court of Appeal in **Bakari Hamisi ling'ambe v. Republic**, Criminal Appeal No. 161 of 201 recapitulated its position in **Said Ally Ismail v. Republic**, Criminal Appeal No. 214 of 2008, thus-

> *"...however, it is not every discrepancy in prosecution witness that will cause the prosecution case to flop. It is only where the gist of the evidence is contradictory then the prosecutions will be dismantled ..."*

The contradictions pointed out by the appellant's advocate are not crucial and did not go to the root of the matter to discredit the victim's evidence or weaken the prosecution evidence. The contradictions in the

prosecution's evidence weaken the already weak evidence of the victim's grandmother and the investigator as their evidence was weak because it was all hearsay or based on hearsay evidence. It is the evidence of the victim which is essential and since it is clear from inconsistences or contradictions, it is credible.

Like, the trial court, I find the victim's evidence credible. I refute the appellant's submission that there are contradictions which weaken the evidence.

The appellant's advocate complained that the trial court did not comply with section 127 (2) of the **Evidence Act**, [Cap. 6 R.E. 2019]. She contended that the victim did not promise to tell truth as the law requires. She argued the promise was not direct and complete. To support her contention, she cited the case of **John Mkorongo James v R.**, Cr. Appeal No. 498/2020 CAT and **Godfrey Wilson v. R.**, Cr. Appeal No. 168/2018.

The respondent submitted through Ms. Blandina, the state attorney that, section 127 (2) of the **Evidence Act**, was duly complied with as the victim promised to tell the truth and the truth only. She referred the Court to the case of **Wambura Kisinga v. R.**, Cr. Appeal No. 301/2018.

It is settled that section 127 (2) of the **Evidence Act**, [Cap. 6 R.E. 2019] requires the evidence of a child of tender age to be recorded after

that a child has made a promise to tell the truth. It provides that-

> *"127.-(1) Every person shall be competent to testify unless the court considers that he is incapable of understanding the questions put to him or of giving rational answers to those questions by reason of tender age, extreme old age, disease (whether of body or mind) or any other similar cause.*
> *(2) A child of tender age may give evidence without taking an oath or making an affirmation but shall, before giving evidence, promise to tell the truth to the court and not to tell any lies".*

The law does not provide for the format on how to a child of tender age should promise. It simply states that a *child of tender age may give evidence without taking an oath or making an affirmation but shall, before giving evidence,* ***promise to tell the truth to the court and not to tell any lies***. The victim promised to tell the truth. She stated-

> *"God want[s] to speak the truth. I will speak the truth, nothing but the truth..."*

The Court of Appeal had the occasion to address this situation in the cases **Msiba Leonard Mchere Kumwaga v. Republic,** Criminal Appeal No. 550 of 2015, **Godfrey Wilson v. Republic**, Criminal Appeal No. 168 of 2018, **Selemani Bakari Makota @ Mpale v. Republic,** Criminal Appeal No. 269 of 2018 and **Yusuph Molo v. Republic**, Criminal Appeal No. 343 of 2017 (all unreported). It was expounded in **Yusuph Molo** (supra) at page

12 that-

> *"It is mandatory that such a promise must be reflected in the record of the trial court. If such a promise is not reflected in the record, then it is a big blow in the prosecution's case . . . if there was no such undertaking, obviously the provisions of section 127 (2) of the Evidence Act (as amended) were flouted. This procedural irregularity in our view, occasioned a miscarriage of justice. It was fatal and incurable irregularity. The effect is to render the evidence of Pw1 with no evidentiary value, it is as if she never testified to the rape allegation against her (sic: the appellant), It was wrong for the evidence of Pw1 to form the basis of conviction."*

Unlike in the cases cited above, the victim did make a promise to tell the truth and nothing but the truth. I am, therefore, not convinced that the victim's evidence was valueless for her failure to promise to tell the truth.

The appellant's advocate complained further that there was no offence committed as there was no evidence that the appellant inserted his finger to the victim's vagina. The appellant's advocate sought to rely on the victim's grandmother's evidence that the victim was normal at the scene of the crime to establish that she was not sexually abused. I will not dwell on this complaint as I have already demonstrated how the victim proved to that the appellant inserted his finger or touched her private parts.

The appellant's advocate submitted that the trial court did not write a

judgment as per section 312(4) of the Penal Code, as the trial court summarized the evidence but did not analyze it. She cited the case of **Seleman Rashid @ Masele and another V. R**., Cr. Appeal No. 164/2019. It is true, the judgment must contain facts of the case, points for determination, the decision, and reasons for determination. The judgment under review was short of concrete analysis. The error is not fatal as this being the first appellate court may step into the shoes and analyze the evidence on record. To say the least is the duty of the first appellate court to re-evaluate the evidence on record and if necessary reach a conclusion different from the trial court.

The appellant's advocate complained further that the trial court was biased as it considered matters not part of the evidence when it stated that the victim, (**Pw1**) "*a child of four year cannot remember everything that happened.*"

The respondent submitted that the trial court was not biased and that it said those words in course of analyzing the evidence.

I considered the evidence and the trial court's opinion and concluded that evidence supported the trial court's remarks that the victim was young. As to the contention that the victim was too young to remember what transpired, the trial magistrate did not disclose the basis. Thus, the

magistrate's opinion was partly intra and extraneous. However, I am not persuaded that the trial magistrate was biased by simply having made the statement that the victim was too young to remember everything that took place. I find no merit in the complaint. I expunge the trial court's conclusion that the victim could not remember everything due to her age.

In the end, I find no merit in the appellant's appeal, dismiss it in its entirety and uphold the conviction and sentence.

It is ordered accordingly.

DATED at **Babati** this day 7th day of **February**, 2024.

John Kahyoza.
Judge

Court: Judgment delivered in the presence of the appellant on person and Ms. Blandina, State attorney for the Respondent. B/C Ms. Fatina present.

John Kahyoza.
Judge

Court: The right of appeal explained. The appellant may lodge a notice of appeal within 30 days.

John Kahyoza.
Judge.
07/02/2024