

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
(IN THE DISTRICT REGISTRY OF KIGOMA)**

AT KIGOMA

(APPELLATE JURISDICTION)

(DC) CRIMINAL APPEAL NO. 17 OF 2021

(Original Criminal Case No. 85/2020 of the Kigoma District Court, before Hon. E.B.
Mushi - RM)

DORA JUMA APPELLANT

VERSUS

THE REPUBLIC RESPONDENT

J U D G M E N T

1st June & 4th June, 2021

I.C. MUGETA, J.

The appellant was charged and convicted of the offence of grave sexual abuse contrary to section 138 C (1) (a) and 2 (b) of the Penal Code [Cap. 16. R.E. 2019]. As a result, he was sentenced to serve a term of twenty years imprisonment. His counsel, Joseph Mathias has filed a petition of appeal with eight grounds of appeal. When the appeal was called up for hearing, he argued the first and second grounds of appeal jointly and the rest were argued separately. I shall consider those grounds of appeal, which I see no reason to reproduce, under one major complaint namely; that the charge was not proved beyond reasonable doubts.

Mgeta

Briefly, the facts of the case are that the appellant is a step father of the victim who according to the charge sheet is aged ten years but in her evidence she said she is aged nine years. On the incident date she was with the appellant at home in absence of her mother. She alleged that the appellant forcefully rubbed his penis on her vagina. She reported to neighbours who arrested the appellant. These include Ismail Nashon (PW4) who went to the appellant's residence after being informed by Wile Laila that *"baba amina yupo anamfanya mwanae"*. Wile Laila did not testify in court and PW4 did not see the appellant abusing the victim. On 12/6/2020 Benadeta Nsanzungwanko (PW3), a Medical Officer, examined the victim. She saw sperms on the external part of the vagina but without bruises inside and the hymen was intact. She tendered the PF3 as exhibit P1. She said she identified the sperms by its smell. On his part the investigator one F.6448 D/CPL Hussein said he issued the PF3 to the victim for medical examination on 16/6/2020.

The defence of the accused person was in one straight sentence. He testified: -

"These are false accusation, I pray for the court mercy".

Mathias Joseph made a lengthy submission on a variety of things raised in the petition of appeal. For the purpose of this judgment, I shall confine myself to two arguments namely; that the evidence of the victim being a child of tender age was recorded in violation of section 127 (2) of the Evidence Act [Cap. 6 R.E. 2019] and that the evidence of the prosecution has contradictions. He submitted without elaboration that the evidence of child was improperly recorded. On contradictions he submitted that while the victim (PW1), her mother (PW2) and the neighbour (PW4) said the incident occurred on 16/6/2020, the medical officer testified that he examined the victim on 12/6/2020. His first argument was supported by Shaban Masanja, learned State Attorney. The learned State Attorney did not address the issue of contradictions. On admission of evidence of a child he submitted that the trial court record shows that the victim being of tender age was made to promise to tell the truth but it is not reflected in the proceedings if the court tested the child to underscore if she did not understand the meaning and nature of oath before she was allowed to give evidence without oath in case she answered the question in the negative. On this account, the learned State Attorney submitted that the evidence of the victim is of no probative value for being illegal. He cited the case of **Issa Salum Nambaluka v. Republic**, Criminal Appeal No. 272/2018, Court of

Appeal – Mtwara (unreported) to buttress his argument. Such evidence, he argued, ought to be expunged from the record, he submitted.

The learned State Attorney further submitted that if the evidence of the victim is expunged from the court record, there remains no evidence to support the charge. The evidence of PW3 and PW4 that the victim had sperms, he argued, is not sufficient to prove the charge of grave sexual abuse where it is required to prove that the perpetrator, for sexual gratification, used his genital or any part of his body or any instrument or any orifice or part of the body of another person to abuse the victim. No witness saw the appellant performing any of the act stipulated under the charged section for sexual gratification, he argued.

I start with the issue of recording evidence of a child of tender age under section 127 of The Evidence Act. The learned trial magistrate went through the usual routine of recording the witness's personal particulars then she stated: -

"PW1: I promise to tell the truth and not lies".

This was not right. Making a witness of tender age to promise to tell the truth and not lies is an exception to the general principle that in criminal cases witnesses ought to testify under oath or affirmation. This is as a

requirement under section 198 of the Criminal Procedure Act [Cap. 20 R.E. 2019]. Therefore, as rightly submitted by the learned State Attorney, the first step is to ascertain if the child understands the nature and meaning of oath. If the answer is in the positive that witness must be sworn regardless of the age. The procedure to make him promise to tell the truth and not lies follows if the answer to the question is in the negative. Even then the witness must be tested if she/he is capable of telling the truth and not lies. Questions leading to that conclusion ought to be reflected on record. This was not done, therefore, the promise made by PW1 in this case is without foundation. Consequently, I agree that this irregularity rendered the evidence of the victim of no probative value. I hereby expunge it from record. Indeed, if this evidence is expunged from record, there remains no evidence upon which it can be said that the charge was proved. The remaining evidence is that of PW3 and PW4. Both of them testified that they saw sperms on parts of the body of the victim. Assuming that this evidence is true the same does not prove the offence of grave sexual abuse on part of the appellant in the absence of the evidence of the victim. In the case of **Mshindo Mrisho @ Sasilo v. Republic**, Criminal Appeal No. 273/2009, Court of Appeal – Tabora (unreported) which was cited by Mr. Masanja, the Court of Appeal considered a similar issue and held: -

"In proving the offence there has to be sufficient evidence that the appellant used his genitals or any other part of his body for sexual gratification. The only evidence on record is the sperms allegedly found on PW1's vagina hips and thighs. The evidence on record is short of the facts as to how the appellant used his genitals or any part of his body resulting to the emission of the alleged sperms found on PW1's vagina, hips and thighs".

I hold that evidence that the appellant used his genitals for sexual gratification is missing.

On the contradictions, I find merits in this complaint too. The apparent, contradictions in the prosecution's case are material and irreconcilable. It is irreconcilable that the offence was committed on 16/6/2020 but the Medical Officer examined the victim on 12/6/2020. Except for the Medical Officer other witnesses said the offence was committed on 16/6/2020. Initially, I thought it was a confusion of dates on part of the medical officer. However, that is not the case. Her testimony is supported by exhibit P1 (the PF3). In Exhibit P1 she showed that she filled it in on 15/6/2020 but at part "IV" paragraph B(1) of the same document it shows the examination was held on 12/6/2020. This eliminates the possibility of a confusion to something else done for a specific purpose which purpose the evidence does not offer the



means to defect. The Medical Officer went out of her way to stating that she identified the sperms by smell. I wonder if detecting sperms by smell is part of her training as a medical practitioner. Interestingly, in the PF3, she recorded the nature of the complaint as "rape by father" and she remarked; "this is sexual assault". By these observations, the medical practitioner turned herself into a court to judge the appellant which is evidence of bias on her part.

According to PW4, the incident occurred in the morning when he was still asleep. According to Medical Officer she attended the victim at 16:00 hours. Yet she was still able to smell and see sperms at the upper part of the vagina and on the thigh while there is no evidence that the victim stayed naked after the incident. If she dressed up after the incident, it is highly improbable that sperms smell could be felt and still be visible on thigh and the vulva after so many hours from the time of the alleged act to the time of the alleged examination.

Further, while in his evidence D/CPL Hussein testified that he issued the PF3 on 16/6/2020, the PF3 at part "I" shows it was issued on 12/6/2020 by WP 10060 PC Happy and not F.6448 D/CPL Hussein (PW5). These contradictions lower the credibility of the prosecution evidence as a whole.

In this case, I hold, the evidence on record falls short of proving the charge.

In the event, I allow the appeal. Conviction is quashed and the sentence is set aside. Appellant to be released from custody unless otherwise held for another lawful cause.



I.C. Mugeta
Judge
4/6/2021

Court: Judgment delivered in chambers in the presence of the appellant and his advocate Joseph Mathias and in the absence of the respondent.

Sgd: I.C. Mugeta

Judge

4/6/2021