THE UNITED REPUBLIC OF TANZANIA

JUDICIARY

IN THE HIGH COURT OF TANZANIA

(DISTRICT REGISTRY OF DAR ES SALAAM)

AT DAR ES SALAAM

CRIMINAL APPEAL NO.2 OF 2021

(Originates from judgement of the District Court of Morogoro in Criminal Case No. 272 of 2019)

KASSIM SALEHE MKULUNGI .....APPELLANT

VERSUS

THE REPUBLIC.....RESPONDENT

JUDGEMENT

Hearing date on: 23/11/2021

Judgement date on: 26/11/2021

NGWEMBE, J:

The trial court upon finding the appellant guilty for the offence of grave sexual abuse, proceeded to convict and sentenced him to twenty (20) years imprisonment. The appellant Kassimu Salehe Mkulungi being dissatisfied with that conviction and sentence, within time issued notice of appeal and finally appealed to this court armed with four (4) grievances. However, for convenient purposes, those grounds may be summarized into one ground that *the prosecution failed to prove the offence beyond reasonable doubt.*

Tracing back to the genesis of this appeal, the event occurred on 27 August, 2019 at Tubuyu area within Morogoro municipality that the appellant had sexual gratification by scratching the private parts of a girl of seven (7) years old (her name is hidden because of her age), by using his fingers and his male genital organ.

According to the facts of the case which was read over during preliminary hearing, at the material date, the appellant was working as watchman of the house of Atuganile Mwasaga the victim's mother. The girl when came back from school, the appellant used that opportunity to commit the alleged offence. Thereafter, the victim complained to her mother when she was taking shower, that her private parts were painful. Hence her mother reported to police and went to hospital for checkup. On the same date the appellant was arrested and later was arraigned in court charged for the offence of Grave sexual abuse contrary to section 138 C (1) (a) and (2) (b) of the Penal Code.

To prove the accusations, the prosecution lined up three witnesses who were the mother's victim, one Atuganile Nelson Mwasaga; the victim; and Mariam Safari Daudi. On defence side, the appellant testified alone. At the end the appellant was found guilty, hence convicted and sentenced to 20 years' imprisonment.

On the hearing of this appeal, the appellant did not procure an assistance from advocates, rather appeared in person and had very limited contribution. He only invited this court to consider his grounds of appeal

and let him free. That he never committed the alleged offence for he had a wife and children.

In turn the learned State Attorney Mr. Edgar Bantulaki disregarded all grounds of appeal preferred by the appellant, instead he raised quite strong points of law that, the whole judgement of the trial court faulted the basic principles of law comprised in sections 311 and 312 of Criminal Procedure Act. That the requirements provided for in these sections are mandatory for the trial court to comply with. Since in the whole judgement of the trial court faulted to comply with those requirements, it means the whole judgement is nullity. In the absence of proper judgement, the only logical order may be to return the whole proceedings to the trial magistrate with instructions to compose a fresh judgement.

Further argued that prior to returning the records to the trial court, this court being the first appellate court, may be pleased to reevaluate the whole evidences adduced during trial and satisfy if were cogent enough to constitute the offence of grave sexual abuse. Referred this court to the case of **Simon Elison Makundi Vs. R, Criminal Appeal No. 5 of 2017 (CAT- Arusha**)

Argued further that, in the whole prosecution witnesses, none of them proved commission of the alleged offence. PW3 went in the house where the alleged offence was committed, immediate upon knocking the door both the victim and the appellant opened the door and she took the victim without noticing anything unusual to the victim.

More so argued that, during trial the prosecution failed to call material witness like a medical doctor and production of PF3 in court, which document was relevant to establish any unusual thing in the victim's private parts. Rested by inviting this court to evaluate the whole prosecution witnesses and find if at all the offence was established.

Based on the summary of arguments advanced by learned State Attorney, I fully subscribe to the sentiments, which are in line with the most cerebrated legal principle, that the first appellate court has a legal duty to treat as a whole and exhaustively, scrutinize the evidences adduced during trial. The purpose of reevaluating such evidences is to satisfy beyond reasonable doubt that the available evidences linked the accused with the alleged offence. This position of law was pronounced by the Court of Appeal in various cases, including in the cases of **Shaban Amiri Vs. R, Criminal Appeal No. 18 of 2007; Prince Charles Junior Vs. R, Criminal Appeal No. 250 of 2014; and D.R. Pandya Vs. R, [1957] E.A. 336.** In all those cases, the court repeated that, the first appellate court must reevaluate the evidences as a whole to a fresh and exhaustively scrutiny. Failure to do so is an error.

The same position was emphasized in the case of **Leonard Mwanashoka Vs. R, Criminal Appeal No. 226 of 2014** (Unreported) where the Court of Appeal held:-

> *"The first appellate court should have treated evidence as a whole to a fresh and exhaustive scrutiny which the appellant was entitled to expect. It was therefore, expected of the first*

appellate court, to not only summarize but also to objectively evaluate the gist and value of the defence evidence, and weigh it against the prosecution case. This is what evaluation is all about"

On strength of those precedents, this court endeavor to reevaluate the evidence of both, the prosecution and the defence case as recorded by the trial court. Out of that evaluation I will link up with the summarized ground of appeal prior to conclusion.

As rightly recorded by the trial court, the first prosecution witness was a mother of the victim who categorically, stated that when she took the victim who is aged seven (7) years to shower, she complained pain on her vagina. With her own words she testified at page 16 of the proceedings:-

"when I wanted to wash her private parts, she started shivering and said I am hurting her. I was shocked. I took her to the bed and looked at her, there was reddish colour in her female organs"

At that particular time, she took right action of reporting to police, then to hospital with PF3. Also, she proved the age of the victim by tendering birth certificate indicating that, she was born on 16th August, 2012.

The evidence of PW2 testified after properly complying with section 127 of the Evidence Act, she clearly explained the ordeal on the fateful date, when she came from school, but prior to being taken by PW3, the appellant undressed her and started touching her private parts by his fingers. In the process she testified that she heard a knock at the gate and they went outside (her and Kassim – appellant) and found Mama Baraka

PW3. Thus, the victim went with Mama Baraka to her home. The victim did not disclose anything to mama Baraka neither to her mother until when she was showering.

The testimonies of Mama Baraka (PW3) was centered on the time she went to take the victim in PW1's house and the child resisted but later she went with her to her house.

The defence case was in support to the testimonies of PW3, that the victim upon arrival from school refused to go to mama Baraka (PW3) instead she opted to stay at home. The communication between PW1 and the appellant was frequent and he tried to disclose where PW2 was. When Mama Baraka came to take her, the victim though she resisted, but she was forced to go with PW3.

Having summarized the parties' testimonies, the question is whether there was any viable evidence on what exactly happened to PW2? Whether PW2's private parts were touched by the appellant? Whether there was any evidence cogent enough to link the appellant with the alleged offence?

From the outset, the prosecution failed to establish anything unusual to the private parts of the victim. None of the witnesses clearly explained if at all the victim's private parts were touched.

It is well established that, the evidence of an expert carries more weight than of an ordinary witness. Due to his expertise, such witness is expected to have higher standards of accuracy and objectivity on the subject matter is required from him. An expert provides an independent assistance to the court by way of an objective and unbiased opinion in relation to the subject

matter within his expertise. 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.

In essence, the trial court and this court are disadvantaged to know what he observed according to his expertise, in the private parts of the victim.

Therefore, in the absence of PF3 and the medical doctor who examined her, any competent trial court properly guided by law could not find the appellant to have a case to answer leave alone, being found guilty.

Repeatedly, this court has stated that in criminal trials, specifically on sexual related offences, like this one, the prosecution must undoubtedly establish and prove a *prima facie* case against the accused by producing cogent evidences, which link the accused/appellant with the offence of grave sexual abuse. This burden has never shifted, but always remain in the shoulders of the prosecution. Justice of Appeal Msoffe J.A. in the case of **Nathaniel Alphonce Mapunda and Benjamini Alphonce Mapunda Vs. R, [2006] T.L.R. 395 held:**

"As is well known, in a criminal trial the burden of proof always lies on the prosecution. Indeed, in the case of Mohamed Said Matula v. R. (2) this Court reiterated the principle by stating that in a criminal charge the burden of proof is always on the prosecution. And the proof has to be beyond reasonable doubt. There must be credible evidence linking the appellants with the offence committed".

There are series of authorities on this issue that prosecution must prove the case beyond all reasonable doubt. In respect to this appeal one may wonder which evidence from the prosecution proved the alleged offence?

Equally important point to note is whether this case was investigated according to the required standards? The answer is obvious same was not investigated and it appears police were not involved at all. That is shown clearly on the nature of evidences adduced during trial. Even the prosecutor failed to bring tangible evidences to establish and prove a *prima facie* case. In any event the case against the appellant was not established and proved to the standard required by law.

Having exhausted the first issue, I find no reason to labour on the second issue as was rightly raised and argued by the learned State Attorney. Failure to prove a criminal case, even if the judgement is rightly composed, yet cannot be capable to convict the accused. Therefore, no need to consider the appropriate of the trial court's judgement.

For the reasons so stated, I find the prosecution failed to establish and prove the offence of grave sexual abuse against the appellant. Therefore, I

proceed to allow this appeal in its entirety. The conviction of the appellant is accordingly quashed and I set aside the sentence of twenty (20) years imprisonment. Consequently, I order for an immediate release from prison, unless otherwise lawfully held.

Dated this 26th day of November, 2021

P.J. NGWEMBE
JUDGE
26/11/2021

Court: Judgement delivered at Dar es Salaam in Chambers on this 26th day of November, 2021 in the presence of the Appellant and Mr. Edgar Bantulaki State Attorney for the Republic/respondent.

Right to appeal to the Court of Appeal explained.

THE HIGH COURT OF TANZANIA

P.J. NGWEMBE
JUDGE
26/11/2021