IN THE UNITED REPUBLIC OF TANZANIA

JUDICIARY

IN THE HIGH COURT OF TANZANIA

(DISTRICT REGISTRY OF MBEYA)

AT MBEYA

CRIMINAL APPEAL NO. 25 OF 2022

(From the decision of the Resident Magistrates' Court of Mbeya at Mbeya (Hon. J. C. Msafiri, SRM) in Criminal Case No. 74 of 2020)

DAVID JOSEPH MWAMLIMA.....APPELLANT

VERSUS

THE REPUBLIC.....RESPONDENT

JUDGMENT

Date of Hearing : 01/06/2022
Date of Judgement: 28/06/2022

MONGELLA, J.

The appellant, Joseph David Mwamlima, was arraigned in the Resident Magistrate's Court for Mbeya (the trial court, hereinafter) for the offence of grave sexual abuse contrary to section 138C (1) (a) and (2) (b) of the Penal Code, Cap 16 R.E. 2019. He was alleged to have committed the offence on 05th March 2020 at Ndanyela-Nzovwe area, within the City and Region of Mbeya by inserting his fingers into the anus of the victim for sexual gratification. The offence was alleged to have been committed against a boy aged 6 years, his own biological son.

During trial, the prosecution witnesses narrated that the incident was discovered after consistent cries from the child during night hours. PW1

and PW2, who are neighbours to the appellant, testified that on the night of 5th March 2020 they heard the cry of the victim. They reported the matter to the police who arrived at the scene and apprehended the appellant. On arrival they found the appellant bathing the victim. When the victim was questioned as to why he was crying, he was afraid to speak, but when separated from the appellant, the victim informed the police that the appellant, who is his own father, used to insert his fingers into his anus. The appellant was therefore arrested and the victim placed in the care of PW4, his aunty.

The appellant denied the charges saying that there was no any witness who saw him abusing the child. He claimed that the child was forced to testify against him. The trial court found the prosecution to have proved the offence beyond reasonable doubt against the appellant. It therefore convicted and sentenced him to serve 20 years in prison. Aggrieved by the decision, he filed the appeal at hand on 7 grounds as hereunder:-

1. *That the trial Magistrate gross erred in law point and fact by convicting and sentencing the appellant to serve 20 years term imprisonment despite the fact that the prosecution side failed completely to prove their against the appellant beyond all reasonable doubt as the mandatory requirement of the law.* (sic)

2. *That the trial Magistrate gross erred in law point and fact when he convicted the appellant by believing the evidence of PW1, PW2, PW4, PW5 and PW6 that corroborating the testimony of the PW3 (Victim) regard that the evidence of PW1, PW2, PW4, PW5 and PW6*

was testified only against appellant that PW3 (Victim) told them not otherwise. (sic)

3. *That the trial Magistrate gross erred in law point and fact when he convicted the appellant by believing the evidence of PW3 (victim) that the appellant did grave sexual abuse to her without any corroboration from an independent witness that he/she saw when the appellant was committing the said offence of grave sexual abuse to PW3.* (sic)

4. *That the trial Magistrate gross erred in law point and fact when he convicted the appellant by believing the evidence of PW1, PW2, PW4, PW5 and PW6 that the appellant committed the said offence of grave sexual abuse to PW3 while there was neither a qualified doctor nor a PF3 the same. Before the trial court.* (sic)

5. *That the trial Magistrate gross erred in law point and fact when he convicted the appellant relying on the weakness of his defence evidence. Please hon judge as ruled out in the case of LONGNUS KOMBA V. R (1973) LRT NO. 39 it was hard that "the accused person convicted on the strength of the prosecution and not on the weakness of defence"* (sic)

6. *That the trial Magistrate gross erred in law point and fact (sic) by relying and believing the evidence of PW3 which was contradictory and not trustworthy.*

7. *That my lord the appellant do except that the honourable court will do justice and rule according to the law by regarding evidence produced by the prosecution versus evidence produced by the appellant.* (sic)

During hearing, the appellant fended for himself. He prayed to hear first from the learned state attorney representing the respondent. It was Mr. Baraka Mgaya, learned state attorney, who represented the respondent. Mr. Mgaya opposed the appeal.

He started with the 2nd ground whereby he submitted that PW1 and PW2 are neighbours to the appellant and they explained that on the date of the incident and before that date they used to hear the victim crying every night. When they saw it was becoming too much they decided to inform the police whereby PW5 and PW6, police officers, arrived at the appellant's house. Referring to the testimony of PW5 and PW6 he submitted that PW5 and PW6 found the appellant bathing the victim. They asked the victim as to why he was crying, but he failed to speak in front of the appellant. Then PW1, PW2 and PW6 decided to take the appellant out so that they question the victim. After that the victim explained to them that it was the habit of the appellant to insert his fingers in his anus every day and that made him cry.

Mr. Mgaya contended that the evidence of PW1, PW2, PW4, PW5 and PW6 corroborated the testimony of PW3, the victim, who testified that the appellant used to insert his fingers into his anus every day. In the premises

he had the stance that the trial court committed no error in considering the evidence of PW1, PW2, PW4, PW5, and PW6.

Addressing the 3rd ground, Mr. Mgaya first conceded that there was no eye witness to the incident. However, he submitted that the offence charged is a sexual offence and it is not expected to be committed openly. He said that in circumstances, the only witnesses were the victim and the offender. Referring the case of ***Selemani Makumba vs. Republic*** [2006] TLR 379, in which it was ruled that the best evidence comes from the victim, he argued that the victim who is the biological child of the appellant explained clearly that the appellant inserted his fingers in his anus for so many times, but was afraid to speak on fear of his father.

He added that even during cross examination the conduct of the child victim showed that he was afraid of his father as he could not answer well the questions and even look the appellant in the eye. He was of the view that even if the evidence of PW1, PW2, PW4, PW5, and PW6 is found to be weak, that of PW3 sufficed to prove the offence. He prayed for the ground to be dismissed.

Replying to the 4th ground, he argued that though no medical doctor was presented to testify, it does not render the offence unproved. He had two reasons for his argument. **First**, he said that the offence being a sexual offence, the evidence of the victim alone suffices to prove the offence.

Second, he argued that the doctor only provides expert evidence whose aim is only to corroborate the evidence of the victim. In the premises he

contended that even if the doctor's evidence was not presented, the victim's evidence sufficed. He added that the victim is the appellant's biological child, so there was no reason for a child of 6 years to fabricate stories about his father.

Mr. Mgaya prayed for the Court to be guided by the settled principle that every witness is entitled to credence unless where there are cogent reasons. He referred the case of ***Goodluck Kyando vs. Republic*** [2006] TLR 363 in support of his point. He further referred the case of ***Wambura Kiginga vs. The Republic***, Criminal Appeal No. 301 of 2018 (CAT at Mwanza, reported at Tanzlii) which provides for directions for not believing a witness, being: where the witness has given improbable or implausible evidence, or where there are material contradictions. He was of the view that the conditions set in ***Wambura Kiginga*** (supra) are not present in the case at hand rendering PW3 a credible witness.

Reverting to the evidence of medical officer, he referred the case of ***Edward Nzabuga vs. Republic***, Criminal Appeal No. 136 of 2008 (CAT at Mbeya, unreported) arguing that the evidence of a medical doctor was unnecessary in the matter at hand because the victim is the one who experienced what was done by the appellant. He argued further that the child used to cry to the extent of the neighbours noticing, which showed that what was done to the child was unusual. He prayed for the ground to be dismissed.

With regard to the 5th ground, he contended that the ground lacks merit because there is nowhere stated that the conviction was entered

because of the weakness of the defence case. Referring to page 7 of the trial court judgment he argued that the Hon. Magistrate well evaluated and examined the evidence whereby he found the victim's evidence trustworthy and credible. He had a stance that the conviction was based on the strength of the prosecution case.

On the 6th ground, Mr. Mgaya disputed the claim that the evidence of PW3 was contradictory and unreliable. He argued that what PW3 told PW1, PW2, PW4, PW5 and PW6 was the same he stated in the trial court during trial. He maintained his stance that there was no any contradiction. On the other hand, he argued that, should the court find that there are contradictions, it should consider if the contradictions go to the root of the matter.

Addressing the 1st ground he reiterated his earlier submission saying that his earlier submission proves that the case was proved beyond reasonable doubt. On the 7th ground, he found the same not being a ground of appeal, but a prayer that the Court does justice, thus no need of replying. He prayed for the appeal to be dismissed.

In rejoinder, the appellant, while addressing the 2nd and 3rd grounds maintained his stance that the trial court erred in relying on the evidence of PW1, PW2, PW4, PW5 and PW6. He called the evidence hearsay. He challenged further the testimony of PW1 saying that on cross examination, he asked PW1 on how he recognised the voice of the victim among the children he had.

He added that PW1 failed to provide answers saying that she sensed the cry was coming from his room and followed up at his room but could not see anything. He argued that PW1 doubted by feelings and reported to the police. He said that what was witnessed was him bathing the child when the police arrived. He insisted that the prosecution evidence was hearsay.

Regarding the evidence of PW3, he claimed that PW3 was convinced and taught to say what he said. He faulted PW1's evidence on the ground that in all the days PW1 failed to ask the victim as to why he was crying until they remained with the child. He was of the view that that showed that the child was forced and taught by PW2 to say what he said.

Addressing the 4th ground he contended that the prosecution witnesses failed to prove the offence saying that the doctor would prove the offence. He added that PW2 never corroborated the testimony of the victim. He prayed for the testimony of all prosecution witnesses to be expunged from the record for not being corroborated by that of a medical doctor.

On the 5th ground he reiterated his point that the prosecution evidence was hearsay and the trial court relied on the weakness of the defence evidence. On the 6th ground he argued that the evidence of PW3 was contradictory.

I have given the grounds of appeal and the arguments by both parties due consideration. I have as well thoroughly gone through the trial court

record. I shall deliberate collectively on the 1st, 2nd, 3rd, and 4th grounds of appeal. In these grounds, the appellant finds the prosecution case not proved beyond reasonable doubt as the testimony of PW1, PW2, PW4, PW5 and PW6 was hearsay. He as well challenged the testimony of the victim, PW3, as being untrustworthy whereby he claimed that PW3 was taught what to say in court.

It is clear from the record, as testified by PW1 and PW2, that the appellant was reported to the police following constant cries from the victim. It is also clear that the victim could not speak in front of the appellant until he was separated from him. As argued by the appellant, none of the prosecution witnesses who happened to corroborate the victim's testimony eye witnessed the offence. During trial the record shows that the victim testified that the appellant who is his biological father used to insert his fingers in his anal canal which made him cry. I am aware of the legal position that in sexual offences the victim is regarded the best witness and a conviction can be entered by solely relying on his/her testimony if found credible by the court. See: ***Selemani Makumba vs. Republic*** (supra).

On the other hand however, the record clearly shows that during cross examination, the victim never answered questions from the appellant. On the situation, the trial court remarked that:

> *"The child was quite (sic). He didn't like to answer any question imposed to him by his father. He was completely mood less and quite afraid seeing his father."*

It should be noted that the appellant's defence against the victim's testimony is that the victim was couched on what to say by the rest of the prosecution witnesses. Considering the circumstances that the victim was questioned by PW1, PW2, PW4, PW5 and PW6 in the absence of the appellant, I find his defence posing serious doubts on the prosecution evidence. In the circumstances, the victim's testimony had to pass credibility test through cross examination, but did not as the victim declined from answering questions on cross examination. It is also unfortunate that the trial court in its remark never stated the questions posed by the appellant to the victim to enable this Court to assess whether the questions raised doubts or not on the prosecution evidence.

PW6 testified that the victim was taken to Meta Hospital for medical examination. The record shows that no medical officer or medical report was presented to support the charge against the appellant. As much as I am alive at the legal position that expert opinions, including medical evidence, are not binding to the court and do not prove the offence against the accused person, I am of the view that in the pertaining circumstances, in the case at hand, the medical report would have worked as an independent evidence to corroborate the testimony of the victim in the absence of his response to questions put to him on cross examination.

In consideration of my observation as hereinabove, I am of the finding that the charge against the appellant was not proved beyond reasonable doubt. In the premises, the conviction and sentence by the

trial court are hereby quashed. The appellant should be released from prison custody forthwith unless held for some other lawful cause.

Appeal allowed.

Dated at Mbeya on this 28th day of June 2022.

L. M. MONGELLA

JUDGE

Court: Judgment delivered at Mbeya in chambers on this 28th day of June 2022 in the presence of the appellant and Ms. Zena James, learned state attorney for the respondent.

L. M. MONGELLA

JUDGE