IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(IN THE DISTRICT REGISTRY OF DAR ES SALAAM)

AT DAR ES SALAAM

CRIMINAL APPEAL NO. 66 OF 2022

Appeal from the decision in Criminal Case No. 103 of 2020 of the District Court of Kibaha at Kibaha (Ally, PRM) dated 5th of July, 2021.)

WILLYBARD JOHN TESHA ..... APPELLANT

VERSUS

THE REPUBLIC..... RESPONDENT

JUDGMENT

27th June, & 25th July, 2022

ISMAIL, J.

The appellant herein was arraigned in the District Court of Kibaha at Kibaha, facing the charges of grave sexual abuse, in contravention of section 138C (1) (a) and (2) of the Penal Code, Cap. 16 R.E. 2019. The offence was allegedly committed in the morning of 2nd April, 2020. The facts have it that, on the fateful day, PW2, the victim, was in their house, preparing tea. Then a stranger came in, opened PW2's skirt and inserted her fingers into her private parts. Feeling the pain, PW2 screamed, an act that alerted her aunt, Aisha Fidelis @ Mama Nassoro (PW1). The latter moved quickly to prevent

the tormentor from running away. That tormentor happened to be the appellant.

PW1 sent her son to a ten cell leader who, together with a hamlet chair, rushed to the scene of the crime. They then referred the matter to a police station at which a Police Form No. 3 - PF3 (Exhibit P1) was issued to enable PW2 to get a medical attention. PW6, a medical doctor at Mlandizi Health Centre, observed that the victim had bruises on her labia minora but the hymen was intact. No semen was found.

After an investigation into the matter, the appellant was arraigned. Proceedings saw the prosecution parade six witnesses against one for the defence. On his part, the appellant protested his innocence, attributing his tribulations to the sum of TZS. 130,000/- that PW1 owed the appellant after processing her cashewnuts. Unhappy with the way the appellant pressed his demand for payment, PW1 vowed to teach him a lesson. He denied any wrong doing, insisting that PW1 taught PW2 to frame up a complaint to settle scores.

At the conclusion of the trial, the trial magistrate took the view that a case had been made out against the appellant. He convicted him of grave sexual abuse and sentenced him to imprisonment for 20 years.

The conviction and sentence did not sit well with the appellant. He has taken an appeal through a petition of appeal, and six grounds of appeal have been raised, as follows:

1. *That, the trial court erred in law fact when it determined this matter and convicted the appellant while the alleged interrogation was not made on the material date of arrest, but there was an elapse of time from the date of arrest and date on which the cautioned stated.*

2. *That, the trial court erred in law and in fact when it decided its matter contrary to the law.*

3. *That, the trial court erred in law and in fact when it convicted the appellant without credible witnesses who saw the incident when the alleged offence was committed.*

4. *That, the trial court erred in law and in fact when it based on hearsay evidence and convicted the appellant.*

5. *That, the trial court erred in law and in fact when it convicted the appellant based on weak evidence of the victim, PW2.*

6. *That, the trial court erred in law and in fact when it failed to evaluate the evidence presented before it during the hearing of the matter.*

When the matter came up for hearing, Mr. Bugeza Mutalemwa, learned counsel represented the appellant, while the respondent was represented by

Ms. Laura Kimario, learned State Attorney. To expedite disposal of the matter, it was resolved that the appeal be disposed of by way of written submissions. The said submissions were filed consistent with the filing schedule.

In his submission, Mr. Mutalemwa chose to abandon grounds 1, 3 and 4, while retaining grounds 2, 5 and 6. With respect to ground two, the argument by learned counsel is that two key ingredients constituting the offence were not proved by PW2, the victim, as she failed to disclose where the finger was inserted. On private parts, the appellant's advocate adopted the definition found in Britannica Dictionary and www.wordhippo.com to contend that private parts would include breasts, inner thigh of buttocks, vagina or bosom. Mr. Mutalemwa took that as failure, by the prosecution, to prove its case. On this, he referred the Court to the cases of ***Salum Mhando v. Republic*** [1993] TLR 170; and ***Hando Dawindo v. Republic***, CAT-Criminal Appeal No. 107 of 2018 (unreported).

Mr. Mutalemwa raised the question of identification of the appellant as the perpetrator of the act complained about. The view held by learned counsel is that an identification parade ought to have been conducted in order to ensure proper identification. Fortifying his contention, learned

counsel cited the cases of ***Nyamakinana & George Msama Machange v. Republic***, CAT-Criminal Appeal No. 133 of 2011 (unreported); and ***Simon Musoke v. Republic*** [1958] EA 715. In the latter, guidance was given on how an identification parade should be conducted. He took that failure to conduct the parade was a failure that raised doubts about the appellant's identity.

On ground five, the contention by the appellant is that the provisions of sections 110 (1) and (2) and 112 of the Evidence Act, Cap. 6 R.E. 2019, which deal with burden of proof. In this case, Mr. Mutalemwa's argument is that PW6 ought to have gone further and examined what it meant by "opened my skin". The learned advocate argued that serious question marks exist on the veracity of the evidence that was used in convicting the appellant. Mr. Mutalemwa argued that bruises spotted on the labia minora might have been caused by infection in the urinary system and not otherwise. He maintained that private parts could mean any of the defined parts.

With regards to ground 6, the argument by the appellant is that the case against him was not proved beyond reasonable doubt. This is in view

of the fact that the testimony of PW failed to mention other sexual organs such as vagina.

He prayed that the appeal be allowed and he be set free.

In rebuttal, Ms. Kimario expressed his support to the decision of the trial court. With respect to ground two, her argument is that the testimony of PW2 clearly showed that the private part in which fingers were inserted was her vagina. Learned attorney contended that this testimony was corroborated by the evidence of PW6 who, at page 24 of the proceedings, testified that he found bruises on PW2's labia minora, an inner part of the vagina. Ms. Kimario argued that lack of consent of PW2 constituted another ingredient of the offence.

Regarding identification, the argument by the respondent is that, the fact that PW2 named the appellant to PW1 at the earliest possible time increased PW2's credibility. Learned counsel argued that, in this case, the appellant was found at the scene of the crime by PW1 before and after the incident and, since the incident occurred during the day time, possibilities of mistaken identity did not arise. Ms. Kimario held the view that, after all, the legal position is to the effect that a party who fails to cross-examine on a certain matter is deemed to have accepted that the matter will be estopped

from asking the court to disbelieve the witness. He cited the case of ***Issa Hassan Uki v. Republic***, CAT-Criminal Appeal No. 129 of 2017 (unreported). Ms. Kimario argued that, in any case, the appellant did not dispute that he was known to PW1.

Submitting on the last ground, Ms. Kimario held the view that conviction of the appellant was based on the totality of the evidence and not solely on the testimony of PW2. In this case, she argued, the decision was based on Exhibit P1, along with other testimony.

She argued that the appeal is devoid of any merit and that the same should be dismissed.

The rejoinder submission by Mr. Mutalemwa was mainly a reiteration of what was stated in his submission in chief. He maintained that, on account of lack of clarity of what private parts are, the case against the appellant was not proved. He argued that lack of specificity raised doubts. Learned counsel cited the English case of ***Miller v. Minister of Pensions*** [1947] 2 All ER 372, in which the degree of proof and cogency in criminal cases was stated.

Revisiting the ingredients of the charge under section 138C (1) (a) and (b) of the Penal Code, learned counsel maintained that none of these

ingredients was proved. He contended that, while every witness is entitled to his credence, in this case, PW2's testimony left a lot to be desired.

He urged the Court to grant the appeal.

The singular question with respect to this matter is whether this appeal is meritorious.

I choose to dispose of these grounds of appeal in a combined fashion. All of these grounds question the trial court's decision to convict the appellant while no evidence had been adduced to prove the charge. This is mainly because of what the appellant contends as lack of specificity of the private parts in which a finger was inserted. Generally speaking, the appellant's argument is that a case was not made out against him, to warrant the conviction.

As stated earlier on, the appellant was charged under the provisions of section 138C (1) (a) and (2) (b) of the Penal Code (supra) which reads as follows:

> *"(1) Any person who, **for sexual gratification**, does any act, by the use of his genital or any other part of the human body or any instrument or any orifice or part of the body of another person, being an act which does not amount to rape under section 130, commits the offence of grave sexual*

abuse if he does so in circumstances falling under any of the following descriptions, that is to say–

(a) ***without the consent of the other person;***

(b) N/A

(c) N/A

(2) Any person who–

(a) N/A

(b) commits grave sexual abuse on any person under fifteen years of age, is liable on conviction to imprisonment for a term of not less than twenty years and not exceeding thirty years, and shall also be ordered to pay compensation of an amount determined by the court to any person in respect of whom the offence was committed for injuries caused to that person."

While the words used by PW2 are "the accused inserted his fingers into my private parts", it is the words the preceded this statement that qualify and explain what the appellant did. PW2 began by stating that the appellant came, opened her skin tight and inserted his fingers into her private parts. As I agree that there was no mention of vagina as the organ into which the appellant's finger was inserted, it is clear that vagina is the only part of what

is considered to be private parts which can allow an insertion. The victim has also testified that she experienced some pain and she groaned.

There is also PW6 whose testimony showed that the examination, done a few moments after the matter had been reported, revealed some bruises into the victim's vagina. This suggests that the insertion of the finger into the private parts was actually an insertion into PW2's private part called vagina. It is legitimate for the trial court to conclude that the affected part under the skin tight was the vagina and that the testimony of PW6 has fortified this view.

Mr. Mutalemwa has attempted to provide a definition of what private parts of a human being are. While I find nothing wrong with the definition given, what strikes me is his reliance on the generality of the said definition while there are other definitions which are more precise and pinpointing. According to the Cambridge English Dictionary, private parts are defined as ***"a person's genitals and female nipples"***, while Merriam-Webster Dictionary (www.merriam-webster.com) defines private parts as a ***"polite word for sexual organs without having to say their names"***. Genitals are defined to mean ***"sexual or reproductive organs"***. It is my contention that use of the words private parts could not mean anything than a reference

to PW2's sexual organ, and I take the view that the indirectness in the naming of the said organ cannot be and should not be used to blur the potency of the prosecution's testimony in this respect. It is also clear that, as he did that, the appellant did not obtain the victim's consent.

The appellant has also contended that the evidence adduced during the case was not evaluated to his liking. On this, my hastened position is that nothing could be further from the truth. The trial court was quite elaborate in the evaluation of the testimony and the impact that it had on the charges. In the end, it was convinced that the prosecution had done enough in establishing guilt of the appellant. I find nothing blemished in that respect.

It is my considered view that these grounds are destitute of merits and I dismiss them.

Consequently, I dismiss the appeal and uphold the conviction and sentence imposed on the appellant.

It is so ordered.

DATED at **DAR ES SALAAM** this 25th day of July, 2022.

M.K. ISMAIL

JUDGE

25.07.2022