

**IN THE HIGH COURT OF TANZANIA
(DAR ES SALAAM DISTRICT REGISTRY)**

AT DAR ES SALAAM

CRIMINAL APPEAL NO. 233 OF 2021

*(Originating from Criminal Case No. 80 of 2020 of Kibaha Resident
Magistrate Court)*

BARIKI S/O BARNABAS @ KIDEVU.....APPELLANT

VS

REPUBLIC.....RESPONDENT

*Date of last Order: 3/10/2022
Date of Judgement: 17/10/2022*

J U D G M E N T

MGONYA, J.

The above named Appellant being charged with the offence of **GRAVE SEXUAL ABUSE C/S 138 C (1)(a) and 2(b) of the Penal Code Cap. 16 [R. E. 2019]**, before the Kibaha Resident Magistrate Court whereby he was found guilty, duly convicted and sentenced to serve **twenty (20) years' imprisonment** and ordered to pay **Tshs. 500,000/-** as compensation to the victim. Appellant therefore preferred the instant Appeal against conviction, order and sentence on the following grounds of Appeal, namely:

1. *That, the learned trial PRM erred in law and fact by convicting the appellant relied on un procedural testimony of PW2 [the victim] a child of tender age five (5) years old girl at page 8 line 18-19 while the trial court erroneously failure to conduct a voire dire test to ascertain whether PW2 possesses sufficient intelligence to understand the nature of an oath and the duty of speaking the truth which was non-compliance of **Section 127 (2) of the Evidence Act Cap. 6 [R. E 2002] as amended by Act No. 2 of 2016** required to promise to tell court the truth and not to tell lies contrary to the procedure of law;*
2. *That, the learned trial PRM erred in law and fact by convicting the appellant relied on the discredited testimonies of PW1, PW2, PW3, and PW4 at page 7-8, page 8-9 page 9-10 and page 11-12 while the trial court deprived off an opportunity to the accused/appellant to cross examined PW1, PW2, PW3 and PW4 as it failed to re-summon these witnesses for the balance of justice after the appellant arrest contrary to the procedure of law;*
3. *That, the learned trial PRM erred in law and fact by convicting the appellant relied on exhibit P.2 [retracted and repudiated statement] at page 30 last 4 lines while the trial court*

procedurally admitted exhibit P. 2 as exhibit in evidence without conducting a trial with trial to determine its voluntariness before admissibility at page 26-30 though PW6 did not state expressly in his evidence that after the accused had recorded his statement he asked the accused to read it or he read himself to him or caused it to be read to the accused as required by section 58 of the criminal procedure act Cap. 20 R.E - 2019 contrary to the procedure of law;

- 4. That, the learned trial PRM erred in law and fact by convicting the appellant relied on exhibit P.2 [retracted and repudiated statement] at page 30 last 4 lines which was procedurally recorded by PW6 E. 4656 D/CPL WENA after the lapse of the prescribed period of law of four hours as the appellant was arrested on 01/02/2020 while exhibit P.2 was recorded on 2/2/2020, though PW7 G. 3952 D/C FARU [investigator] was present, that he don't remember the date when he recorded the statement; contrary to the procedure of law;*
- 5. That, the learned trial PRM erred in law and fact by convicting the appellant relied on the merely implication assertions of PW2 [The victim] and PW3 which where full of contradictions as PW2;*

6. *That, the learned trial PRM erred law and fact by convicting the appellant relied on the untenable, discredited and merely assertions of PW4 [doctor] stated that, there was no penetration but found semen spread on the victim's thug.*
7. *That, the learned trial PRM erred in law and fact by convicting the appellant relied on the incredible and untenable evidence of PW1, PW2, PW3, PW4, PW5 and PW6 in the lack of cogent evidence which linked the appellant with the charging offence;*
8. *That, the learned trial PRM failure to give a clear proof that the victim [PW2] is within the age set out in the law in question. alleged grave sexual abuse contrary to the procedure of law;*
9. *That, the learned trial PRM erred in law and fact by convicting he appellant while failure to address the accused/appellant properly in terms of law in the ruling of a prima facie case c/s 231 (1), (a) and (b) of the Criminal Procedure Act Cap. 20 R.E. - 2019 to enable the appellant to prepare his defence after the prosecution case marked closed;*
10. *That, the learned trial PRM erred in law and fact by convicting the appellant while failure to read over the charge to the accused/appellant to enter a plea of not guilty when*

the defence case marked opens contrary to the Procedure of law.

From the above grounds of Appeal, the Appellant humbly prayed this Honourable Court to allow his appeal, quash the conviction, order and set aside the sentence and set him at liberty.

When the matter was tabled for hearing, the Appellant briefly prayed the court to consider his grounds of appeal and allow the same.

Through the Respondent's written submission, the Appellant's conviction and sentence was supported. To begin with the **first ground** that the trial court error by relying on unprocedural testimony of PW2 (Victim), the Respondent submitted that the Appellant is complaining about **Section 127 (2) of the Evidence Act as amended in 2016**, that the trial court violated the law by not conducting *voire dire* test. It is the learned State Attorney for Respondent view that the victim was under fourteen (14) years, thus was a child of tender age and that the provisions of **Section 127 (2) of Evidence Act** was to be adhered to.

It was further submitted that, the requirement of conducting *voire dire* test was amended by Act No. 4 of 2016 where the current position is that the child of tender age is to promise the court to

tell the truth. The case of ***GODFREY WILSON VS THE REPUBLIC Criminal Appeal No. 168 of 2018 at page 11*** was cited to support the said legal position. In that case it was held that:

"Two, before giving evidence, such child is mandatorily required to promise to tell the truth to the court and to tell lies"

With regard to the evidence available in the file at page 8 of the proceedings, it was the Respondent's Counsel view that the same was compiled thus no any error was done by the Magistrate relying on PW2's evidence.

On the **2nd ground** that the Magistrate erred in relying on contradictory evidence of PW1, PW2, PW3 and PW4. The Respondent's Counsel stated the fact to be untrue as there was no tangible contradiction that went to the root of the prosecution case and collapse the same.

On the **third and fourth grounds** that court error in relying on retracted and repudiated caution statement. The learned State Attorney stated that, there is no speculation on the way conviction attained and that valid grounds were used for determination. That

it is not true that Cautioned Statement was recorded out of time as required by **Section 50 (1) of the Criminal Procedure Act.**

On the **8th ground**, on the age of the victim, the learned State Attorney submitted that the same is not an issue as it is a trite law that, evidence relating to the age of the victim supposed to come from any or either of the following: the victim, both parent or at least one of them, a guardian, as well as the birth certificate etc. That the said age was confirmed by the victim's mother (PW1).

In consequence, the Respondent's Counsel submitted that, despite the fact that the victim's age was established in this case, the same is not subject to proof as regard to the offence that accused was charged with being grave sexual abuse, age is not an essential ingredient in proving it.

Winding up the Respondent's submission, the learned State attorney was of the view that during trial, Prosecution managed to prove the case to the required standard. Thus, they still support the conviction and sentence imposed by the trial court. The learned State Attorney thus prayed this honourable court as the first court of appeal not to interfere with the finding of the trial court decision and dismiss the entire appeal for the same is meritless.

That was the end of the Respondent's submission, whereas I have to confess for the rest of the grounds, I was not able to grasp what was submitted to oppose the Appellant's remaining grounds. However, in determining this appeal, I will determine all the grounds of appeal as they have been presented by the Appellant.

Starting with the **1st ground** that the victim before testifying did not promise to say the truth contrary to **Section 127 (2) and 127 (6) of Evidence Act**. I have to state in the first place that I had an ample time to go through the trial court's record. In its page 8, just before the testimony of PW2 that being the victim in this case, appears the following record:

"PW2: Nadia Bakari Ngozi Child of tender age promises to tell the truth and states as follows:"

Looking at the above wording by the learned trial Magistrate, I have to state that it was not mandatory for the Magistrate to reproduce what exactly the test set to the victim and her answer to assure that she promise to tell the truth. What happened is that the latter examined the witness and came out with the finding that she has promised to tell the truth. Therefore, it is my firm conviction that the witness who is of the tender age, did promise

to tell the truth and that is the reason as to why the learned Magistrate wrote the above phrase.

This position was also observed in the recent case of the Court of Appeal decided on 13th May 2022 in ***WAMBURA KIGINGA V. REP. CRIMINAL APPEAL NO. 301 OF 2018 AT MWANZA*** where the said position was upheld and Section **127 (2) and 127 (6) of Evidence Act** was discussed extensively. It was held that:

".....we are full convinced, that although the child did not promise to tell the truth what she narrated was original true and authentic...."

What is important here is the victim's evidential truth of which is imperative important. It is also added in this case that, the core function of Court is to ensure that Justice is done by whatever means in every case that comes before it, not only to the accused but also to the victim of the crime.

Having said the above, **the first ground is therefore declared meritless.**

The **2nd and 5th grounds** all rests on the point that testimonies of the Prosecution witnesses were contradicting. As I have declared above, I had an opportunity of going through the entire record. In the upshot, I haven't observed any contradictions

from the Prosecution's witnesses. Every witness testified to the extent of his or her knowledge to the offence in issue. How was it done, where, who saw the appellant and the victim, who examined the victim and so forth. Moreover, the Appellant has failed to detail the so called contradictions to convince this honourable court that indeed essential contradictions occurred. Short of that, **these two grounds too are failure.**

On the **3rd ground**, the Appellant claims that the statement that was taken from him was not read to over to him as the law requires. **This ground too is meritless** as from the record, the statement was recorded by PW6. In the cause of trial, Appellant objected its tendering whereas submissions for and against the same was presented before the court whereby the Appellant's objection was overruled and the statement was admitted for evidence.

I had also an opportunity of seeing the said statement. The same is also signed by the Appellant and also against the signature he wrote his name. Had it been that he was not willing to recognise the said statement and its contents, his signature could not have been in the said statement. To me, **this ground is an afterthought and thus declared baseless.**

On the same line, **the 4th ground** the appellant is still challenging the conviction via his statement of which was written by PW6 in the presence of PW7 who later came to handle the case as the case Investigator. As I have said above, this ground too is an afterthought. The fact that the case Investigator was around, does not invalidate everything that had happened. This is because, it was yet to be known as who will handle the said case as Investigator. PW7 testified sincerely that he was around when the Appellant's statement was procured. The Appellant has also to understand that the Tanzania Police Force infrastructures does not allow enough space for every officer to have his own office. This is the reality on the ground. Otherwise, if such grounds are to be allowed, Justice on the other hand will be infringed due to the circumstances and not on merits. This fact cannot annul all the evidence and facts related to the offence charged. Furthermore, it is my firm conviction that, the evidence before the court from the Prosecution, in exclusion of the Appellant's statement, was enough to convict the Appellant at the trial court. Likewise, **this ground equally like others above, fails.**

Turning to the **6th and 7th grounds**, the same will be determined collectively as they both relate to the Prosecution witnesses and proof thereto. On the **6th ground**, indeed, it was

the Doctor's evidence which was taken into account for the establishment of the offence of grave sexual abuse. According to Doctor's testimony, it was established and later testified that there was no penetration to the victim. However, some semen were found on the victim's thighs. From the said situation, it is obvious that the victim was undeniably abused. This evidence goes hand in hand with that of the victim's grandmother and that of the Chairman who both saw the victim in that situation.

On the **7th ground**, likewise, it is the Prosecution witnesses' testimony that proved the offence charged to the Appellant which led to his conviction. In my firm view, the said testimonies undeniably commanded the conviction. In the event therefore, **these two grounds likewise fails.**

The **8th ground** is about the victim's age whether the same was proved or not. There is a basketful of precedents and the law that recognises persons who can prove the victim's age. That is by herself, her parents/guardian, a doctor or by birth certificate. In this case, PW1 who is the victim's mother, clearly in her testimony confirmed that the victim at the time of offence commission was **six years of age**. This testimony was supported by her grandmother PW3 and the doctor (PW4) respectively. **This ground too is meritless.**

The **9th and 10th grounds** will be determined collectively as they both relate with the Appellant's rights to defend himself. On **9th ground**, it is claimed that, the Appellant was not properly addressed that there was a *prima facie* case against him so as he can defend himself. This ground is hopelessly presented as the records of the trial court's proceedings reveals that the Appellant was granted those rights by the trial Magistrate after the ruling for case to answer was delivered. Records in page 36 reads:

***"Court:** The accused is addressed in terms of section 231 (1) of the Criminal Procedure Act, Cap. 20 [R. E. 2019] for a case to answer and informed his rights.*

Signed. H. S. Ally - PRM 27/01/2021

***Accused:** I will state my case on oath. I have two witnesses to call during the hearing of my evidence.*

Signed. H. S. Ally - PRM - 27/01/2021"

Likewise, the **10th ground** allegations that the charge was not read over to him before commencement of his defence is baseless, an afterthought and it is a trial to this appeal. Consequently, **the 9th and 10th grounds like all the above fails.**

As observed above, all ten grounds as presented by the Appellant have been declared **meritless**.

However, going through the offence of **GRAVE SEXUAL ABUSE C/S 138 C (1) (a) and 2(b) of the Penal Code, Cap. 16 [R. E. 2019]**, charged against the Appellant; it came to my knowledge that the penalty to the offence upon conviction is **15 years'** imprisonment and not **20 years'** imprisonment as the case to the Appellant's sentence.

From the above therefore, **the instant Appeal is hereby DISMISSED in its entirety for the same is meritless.** However, the sentence of **20 years' imprisonment is hereby set aside and substituted with the 15 years' imprisonment.**

Ordered accordingly.

Right of Appeal Explained.



L. E. MGONYA

JUDGE

17/10/2022

ORIGINAL