IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

SONGEA DISTRICT REGISTRY

AT SONGEA

(DC) CRIMINAL APPEAL NO. 05 OF 2022

(Originating from Nyasa District Court Criminal Case No. 21 of 2021)

ALFRED PASALIMA MSUMBA .....APPELLANT

VERSUS

THE REPUBLIC..... RESPONDENT

JUDGMENT

Date of last order: *30/03/2022*
Date of Judgement: *31/03/2022*

MLYAMBINA, J.

Alfred Pasalima Msumba aged 43 years [hereinafter referred to as the Appellant] was arraigned and charged before the Nyasa District Court at Nyasa [before Hon. O. N Nsackatu SRM] via *Criminal Case No. 21 of 2021* on two counts, namely; rape of a four years' girl contrary to *Section 130 (1) (2) (e), 131 (1) Cap 16 [R.E. 2019]* and grave sexual abuse contrary to *Section 138C (1) (a) and 2 (b) of the Penal Code [supra]*. Upon trial, on 16th day of November 2021, the Appellant was found guilty on both counts, convicted and sentenced to a life imprisonment for the first count, 30 years imprisonment and twelve strokes of cane for the second count. Being aggrieved on the conviction and sentence, the Appellant preferred this Appeal.

The Appeal on the second count has attracted attention of this Court as it was not resisted by the Respondent through her Senior State Attorney Shose Naimani. According to her, *Section 138 C (1) (a) of Penal Code,*

[supra] requires the victim to state whether she consented or not. It was the view of Senior State Attorney Shose that the victim did not state on whether she consented or not. As such, the second count was not proved. When probed by the Court on the effect of *Section 138C (1) (a) (supra) (if any),* Ms. Shose stated that *Section 138C (1) (a)* does not protect properly female victims of minor age who consents.

It is based on such submission; the Court has navigated the evolution of the law, in particular, the protection of the child (both male and female) on grave sexual abuse.

Going through *the Penal Code Cap 16 (supra),* it is evident that by 2019, the child was not well covered on grave sexual abuse offences. *Section 138C (1) (a) (supra)* provided:

> (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.* [Emphasis applied]

Section 138C (1) (a) (supra) had lacuna as it did not specify the age. The child could consent without knowing the effect of the act but the perpetrator of that act could go unpunished unless one resorted to *Section 4 (2) of the Child Act Cap 13 [R.E. 2019]* read together with *Article 4 of the African Charter on the Rights and Welfare of the Child, 1990* and

Article 3 of the United Nations Convention on the Rights of the Child, 1989 which protects the best of the interest of the Child.

It is the findings of this Court that *Section 138C (1) (a) (supra)* was toothless. *First*, it created loopholes for the sexual offence's offenders to the victims of minor age. *Second*, the law remained helpless without protecting the interests of the child, hence, prejudiced the rights and welfare of the child. *Third*, *subsection 2 (b) of the Penal Code (supra)* punished offenders of grave sexual abuse to the victims who were below 18 years of age without their consent. That provision means that a person of any age, even a girl below the age of 18, could give a consent to the act of grave sexual abuse, which is different from the offence of rape. Under *Section 130 (1) (2) (e) of the Penal Code Cap 16 [R.E. 2019]* consent is immaterial when a girl is under 18 years old when it comes to rape offence.

The evolution of the law on grave sexual abuse to the child victim was brought by the Court of Appeal of Tanzania (Juma CJ, Mughasha J.A and Ndika J.A) through the case of **Andrew Lonjine v. The Republic**, Criminal Appeal No. 50 of 2019, Court of Appeal of Tanzania at Dodoma (unreported). In that case, the Court while confronted with *inter alia* issues involving an offence of grave sexual abuse to the child of five years age, it wondered aloud if, whether the five year old girl had consented to the act of the Appellant to insert his fingers into her private parts to gratify himself. Noting negative repercussion on the interpretation of *Section 138C (1) (a) (b) (c) and (2) of the Penal Code [supra]* as it stood by 12th day of June, 2020; the Court observed:

We think, this provision should be amended at very least to protect children of under the age of 18 who in law, cannot give consent to either grave sexual abuse or any other sexual offence. [Emphasis added]

The Office of the Attorney General picked the point made by the Court of Appeal in the case of **Andrew Lonjine** (*supra*). The evolution of the law can be portrayed through the amendment effected to *the Penal Code* by virtue of *Amendment Act No. 1 of 2020. Section 138C (1) (supra)* was amended by adding *paragraph (d) after paragraph (c)* which created the offence but protected the male child only as it used the phrase "*with or without consent for a male person under the age of eighteen years.*"

Noting the impact of leaving the female child unprotected, in the year 2022 there has been another evolution to the law protecting a child against an offence of grave sexual abuse. The evolution was vide *Amendment Act No. 1 of 2022* which removed the word "male" under *subsection (d) of Section 138C (supra).* With that amendment, the rights of the child both female and male on grave sexual abuse are being fully protected.

From the above cited current provision concerning protection of the child against the offence of grave sexual abuse, there are two essential ingredient of the offence which need to be proved by the victim. *First*, sexual gratification. *Second*, with or without consent of a child below 18 years.

It is the view of this Court that though *the Amendment Act No. 1 of 2020* did not protect the female person, the same provision could be interpreted objectively by applying purposive approach so that the female child

remained protected on equal basis as that of her female counter part. The object should have been to promote ends of justice and not to defeat the intention of the law. As such, it could not be gainsaid that the law aimed at discriminating the female child.

In the year 2021, when the Appellant was arraigned before the trial Court, the essential ingredient of grave sexual abuse offence were two. *First*, sexual gratification. *Second*, without consent. The same position was restated in the case of **Vasco John v. The Republic**, Criminal Appeal No. 494 of 2016 (unreported).

As wondered by the Court of Appeal in the case of **Andrew Lonjine** *(supra),* the four year girl in this case could not consent to be gravely abused by the Appellant. Therefore, lack of consent from the victim cannot be a defence to the Appellant. That observation takes this Court to consider the grounds of appeal.

In his appeal, the Appellant presented five grounds. *One*, the first Doctor who examined the victim from Mbambabay Health Centre did not give his evidence as required by the law. *Two*, the evidence adduced by the Doctor of Ng'ombo Dispensary is immaterial due to fact that he filed the result on a piece of paper while the Doctor from Mbambabay Health Centre had PF3 which was issued by Nyasa Police Station. *Three*, the proceedings are encountered with irregularities or are un-procedural. The reason being that the Court closed the defence case while the Appellant still had two witnesses. *Four*, the trial Court admitted uncorroborated evidence of PW1 and PW7. Thus, the evidence of PW1 (mother of the victim) was a hearsay. She did not witness. PW7 (Clinical Officer) did not investigate

the victim but she adduced evidence. *Five*, the prosecution side failed to prove case beyond reasonable doubt.

The Republic resisted the grounds of appeal for being devoid of merits. As properly replied by the Senior State Attorney Shose Naimani, having gone through the impugned records, it is clear that the Republic proved the charge against the Appellant herein beyond reasonable doubt on the offence of rape through PW6, PW1, PW3 and PW7. For instance, PW6 (the victim) testified that:

> *...Alfred inserted dudu at my vigina... Alfred carnally known me inside the hut to Mama Mkubwa Village. I felt painful at a time of carnal knowledge. Alfred (accused) undressed my underwear inside the hut on the bed. He inserted dudu to my vagina...*

The evidence of PW6 was corroborated by the evidence of PW1 (the aunt of the victim). At page 12, first paragraph PW1 testified that:

> *I examined the first victim...found the whitish material discharged and the bruises at her vagina. The victim was naked except the gown.*

The evidence of PW6 was corroborated by PW3 one Emma Mbele. It is at page 16, third paragraph where PW3 testified that:

> *...I entered inside of it and saw accused person drop a child from the bed. Accused was naked and a child, first victim...did not dress her underwear. The whitish materials were discharged from her vagina.*

The evidence of PW6 was further corroborated by PW4 one Kassim Kassim Maketo. It is at page 18 third paragraph, where PW4 testified:

> *...I entered inside of the hut, I saw PW3, a child, the victim and accused person before closed or zipped of his short. The child was discharging a whitish fluid from the private part.*

The evidence of PW6 was corroborated by PW7 one Mary Charles Lupindo. It is at page 24 third paragraph, where PW7 testified that:

> *...I examined the victim, undressed her clothes on the whitish fluid resembled spermatozoa. That in rabia minora there were bruises. The internal examination was done by entering my finger to the vagina....and there was bleeding.*

There is nowhere in the record which shows that the victim was examined by another Doctor, even the Appellant did not mention her. The Appellant ended saying that the one who testified in Court came from Ng'ombo Dispensary and not Mbambabay Hospital Centre.

If true that the Doctor who testified before the trial Court was not the one who examined the victim, the Appellant had the right to object tendering of PF3 as an exhibit. Unfortunately, PW1 without any objection from the accused person tendered PF3 as an exhibit. It is evident at page 26 of the typed proceedings.

Further, when the Appellant was given an opportunity to cross examine the witness (PW7), he did not raise questions that PW7 was not the one who investigated the victim.

It follows, therefore, correct that the evidence of PW7 and other witnesses proved the case beyond reasonable doubt. The evidence of PW7 was not shacked as the Appellant failed to cross examine her (PW7). That was the position in the cases of **Cyprian A. Kibogoyo v. R** Criminal Appeal No. 88 of 1992, **Paulo Nchia v. National Executive Secretary, Chama Cha Mapinduzi and Another,** Civil Appeal No. 85 of 2005 (both unreported). In the case of **Nyerere Nyague v. Republic,** Criminal Appeal No. 67 of 2010 at page 5, the Court observed that:

> *As a matter of principle, a party who fails to cross examine witness on a certain matter is deemed to have accepted that matter and will be estopped from asking the trial Court to disbelieve what the witness.*

Similarly, in the cited case of **George Maili Kemboge v. The Republic,** Criminal Appeal No. 327 of 2013 Court of Appeal of Tanzania at Mwanza (unreported), p. 4 the Court made reference to its previous decision in the case of **Damian Ruhele** where the Court observed:

> *It is trite law that failure to cross examine a witness on an importance matter ordinarily implies the acceptance of the truth of the witness evidence.*

The position in the case of **George Maili Kemboge** (*supra*) was echoed in the case of **Issa Hassan Uki v. The Republic**, Criminal Appeal No. 129 of 2017 (unreported) Court of Appeal of Tanzania at Mtwara, p. 16 in which the Court observed that:

> *As a matter of principle, a party who fails to cross examine a witness on a certain matter is deemed to have accepted that matter and will be estopped from*

asking the Trial Court to disbelieve what the witness said.

In the instant matter, the Court is of the findings that the Appellant agreed with the evidence of PW7, that is why he did not cross examine her. Therefore, raising an assertion that PW7 was not the one who examined the victim is an afterthought.

Even if it is true that the evidence of PW1 and PW7 was hearsay, still the evidence of the victim was sufficient enough to convict the Appellant as her evidence was the best one. Such position was taken by the Court of Appeal of Tanzania in the daily cited case of **Selemani Makumba v. Republic,** Criminal Appeal No. 94 of 1999 (2006) TLR 285 in which the Court observed:

True evidence of rape has to come from the victim if is an adult, that there was penetration and no consent. And in any case of other women when consent is irrelevant that there was penetration.

I equally agree with the Respondent Senior State Attorney Shose Naimani on the Appellant's allegation that he was denied to bring two witnesses is an afterthought. Page 30 of the typed proceedings of the trial Court shows that the Appellant testified on 29th July, 2021. He prayed for adjournment to bring his witness on 16th August, 2021. He never brought his witness. The case was adjourned to 31st August, 2021. He never brought them. He prayed for another adjournment up to 15th September, 2021 the day which he told the Court that his witness one Edward was at Manyara. He prayed for another adjournment up to 27th September, 2021. On the later date he prayed for last adjournment up to 7th October, 2021. On that date,

the accused told the Court that his witness came at Nyasa and left. He prayed to close his evidence.

It follows, therefore, not true that the Court did not give the Appellant with a chance to bring his two alleged witnesses.

In the final result, the entire appeal is dismissed for lack of merits. The conviction and sentence meted by the trial Court against the Appellant are sustained.

Y.J MLYAMBINA

JUDGE

31/03/2022

Judgement pronounced and dated 31st day of March, 2022 in the presence of the Appellant in person and Learned State Attorney Frank Chonja for the Respondent. Right of Appeal fully explained.

Y.J MLYAMBINA

JUDGE

31/03/2022