

**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. 23 OF 2022

Appeal from the decision in Criminal Case No. 594 of 2019 of the District Court of Ilala at Kinyerezi (Laizer, RM) dated 30th of November, 2020.)

KAMILION RICHARD APPELLANT

VERSUS

THE REPUBLIC..... RESPONDENT

JUDGMENT

16th, & 30th May, 2022

ISMAIL, J.

Kamilioni Richard, the appellant herein, was arraigned in the District Court of Ilala at Kinyerezi on a charge of Grave Sexual Abuse, contrary to section 138 (1) and (2) (a) of the Penal Code, Cap. 16 R.E. 2019. The contention by the prosecution at trial was that the said offence was committed on 20th August, 2019 at Ulongoni "A" in Ilala District, in Dar es Salaam Region. The victim of the alleged acts was C (in pseudonym), a three-year old girl.

The factual setting of the matter that bred this appeal is quite straight forward. On 20th August, 2019, at about 2000 hours, PW3, the victim's

mother, went to Gongo la Mboto to buy French fries (popularly known as “chips”) and left the victim (PW1) with other children playing in the room. It is informed that subsequent to PW3’s departure, the appellant, who lived in the outer room of the compound got into the room armed with a knife. According to the testimony of PW1, the appellant took her to his room and lied her on the bed. He then undressed the victim and inserted his fingers and his penis into her vagina. Fearing for her life, the victim chose not to raise an alarm. She, however, informed her aunt Aisha.

The following morning, PW2 broke news of the last evening’s incident to PW3. The latter checked the victim’s genitalia and found some bruises. She reported the matter to Gongo la Mboto police station from which a Police Form (Exhibit P1) was issued to allow her rush the victim to Amana Hospital. PW6, who carried a medical examination found that the victim was carrying some bruises but her virginity was intact.

The appellant was apprehended and conveyed to Stakishari Police Station where investigation was carried out. The investigation drew the conclusion that the appellant was culpable of the incident he was accused of. He was arraigned in court and pleaded not guilty to the charge. The consistent message in his defence testimony is that these charges were

trumped up following the disagreement between him and PW3 over the payment of his salaries which were in arrears.

After a trial that saw the prosecution parade four witnesses against one for the defence, the trial court concluded that guilt of the appellant had been established. It went ahead and convicted him and imposed a custodial sentence of 20 years.

The conviction and sentence rattled the appellant, hence his decision to institute the instant appeal. Five grounds of appeal have been raised as reproduced hereunder:

1. *That, the trial Court misdirected itself by convicting the appellant based on the evidence of the victim PW1 and PW2 who are minors of tender age contrary to the provisions of section 127 (2) of the Evidence Act, Cap. 6 R.E. 2019 and case laws as:*
 - (i) *It failure to ask and record questions directed to minors to ascertain whether they had knowledge about what is an oath and if they have intelligence to answer question.*
 - (ii) *It failed to record the questions asked to them for the Court to record that they promised to tell the truth and lies.*
2. *That the trial court erred in law and in fact to convict and sentence the appellant based on contradictory evidence.*
3. *That the trial court erred in law and in fact to convict and sentence without warning itself on the fact that sexual offences are usually*

conducted in secrecy and that it would not be committed in the presence of other people.

4. That the trial court erred in law and in fact to convict and sentence without considering the appellant's defence which was to the effect that before the demise of PW3's mother there were no problems and that demand of salary arrears is what triggered the trumped up charges.

5. That the trial court erred in law and in fact to convict and sentence the appellant while the case was not proved beyond reasonable doubt.

Hearing of the appeal saw the appellant fending for himself, unrepresented, while the respondent was represented by Ms. Yasinta Peter, learned Senior State Attorney.

When he rose to address the Court, he began by declaring his position that he was a lay person who has placed his trust in the hands of the Court. He submitted that the victim's mother (PW3) was his employer who had shortchanged him by refusing to pay his salaries. He contended that his relentlessness in pursuit of his right is what landed him into trouble.

While maintaining that the charges were trumped up to settle the scores, he urged the Court to set him free and let him join his family.

Submitting in rebuttal, Ms. Peter supported the conviction and sentence imposed on the appellant. With regards to ground one, the learned

attorney conceded that the manner in which the testimony of PW1 (the victim) and PW2 was procured ignored the imperative requirements of section 127 (2) of Cap. 6, as emphasized in the case of ***Godfrey Wilson v. Republic***, CAT-Criminal Appeal No. 168 of 2018 (unreported). This is because the trial court did not procure a promise to tell the truth and not lies from the said witnesses both of whom were children of tender age.

Ms. Peter was quick to point out, however, that notwithstanding the pointed anomaly, PW1's testimony remained unblemished. She submitted, in the alternative, that in the event the Court finds the said testimony fatally discrepant, the remedy is to order a retrial. She cited the decision of the Court of Appeal of Tanzania in ***Isaya Constantine v. Republic***, CAT-Criminal Appeal No. 78 of 2016 (unreported) to bolster her argument.

Submitting on ground two of the appeal, Ms. Peter agreed that there was a discrepancy on what the appellant did to the victim. She submitted that the variance is between the facts as contained in the charge sheet and the testimony adduced by the witnesses. She argued, however, that such contradictions or discrepancies did not go to the root of the matter and corrode the central story. She urged the Court to take a note of the fact that, in law, the best evidence of the offence of rape is that of the victim. On this,

she cited the decision in ***Selemani Makumba v. Republic*** [2006] TLR 92. She took the view that this ground of appeal is baseless.

Learned attorney took a note, as well, that Exhibit P1 was not read out when the same was tendered and admitted as evidence. Acknowledging that this was a fatal anomaly, she urged the Court to expunge it from the record.

On ground three, the respondent's counsel argued that the fact that the children were alone in the room and that the appellant was armed with a knife was enough to scare them. She discounted the argument that the court ought to have checked the soundness of his mind, terming it as a lame excuse.

The respondent's contention with respect to ground four is that the judgment of the trial court considered the defence testimony and the appellant's mitigation. In the end, learned attorney argued, the trial magistrate was convinced that the said defence did not affect the prosecution's case. Ms. Peter further argued that PW3's testimony was merely corroborative of the testimony of PW1, adding that, in any case, the appellant was given an opportunity to cross examine the witness but he chose to spurn that opportunity. The respondent considered the appellant's contention as a mere afterthought.

With regards to ground five, the respondent's position is that, similar to what she submitted on ground two, there was no variance between the charge, facts in the charge and evidence adduced. The respondent's counsel argued that the discrepancies are quite normal and urged the Court to disregard them. She bolstered her argument by citing the case of ***Mzee Ally Mwinyimkuu @ Baby Seya v. Republic***, CAT-Criminal Appeal No. 499 of 2019 (unreported).

On the failure to call an investigator to testify, the argument is that section 143 of Cap. 6 does not call for a specific number of witnesses to be called to testify in a case.

Regarding age of the victim, the respondent argued that age can be proved by the victim, doctor or relative. She argued that, in this case, there was evidence that the victim was below the age of 10 years.

Overall, the respondent took the view that the appeal is lacking in merit and it calls for dismissal.

The appellant reiterated his call for setting him free.

I have gone through the record of the trial proceedings together with the parties' rival submissions. The issue that comes out for resolution is whether the present appeal is meritorious.

For reasons that will be apparent in the course of this decision, I choose to embark on the disposal by first addressing ground two of the appeal. The appellant's gravamen of consternation in this ground is that testimony that constituted the basis for conviction was laden with pregnant disharmonies and contradictions which render the prosecution's case weak and lacking the basis for grounding a conviction.

Before I delve into the merits or otherwise of the appellant's contention, it is worthwhile to state, here and now, that the trite position is that testimony adduced in court must not only be credible but also coherent and consistent. If the testimony is shrouded in wanton contradictions and inconsistencies then the same must be casted away and disregarded. The condition precedent, however, is that such contradictions must be fundamental and fatal enough to corrode the central story. This has been stated in a litany of court decisions. In ***Luziro s/o Sichone v. Republic***, CAT-Criminal Appeal No. 231 of 2010 (unreported), the Court of Appeal of Tanzania made the following remarkable finding:

*"We shall remain alive to the fact that not every discrepancy or inconsistency in witness's evidence is fatal to the case, minor discrepancies on detail or due to lapses of memory on account of passages of time should always be disregarded. **It is only fundamental discrepancies***

going to discredit the witness which count.”

[Emphasis added]

The upper Bench’s subscription in the quoted excerpt picked from where it left when it pronounced itself in the earlier decision of ***Dickson Elia Nsamba Shapwata & Another v. Republic***, CAT-Criminal Appeal No. 92 of 2007 (unreported). In the latter, the superior Court quoted the commentary in ***Sarkar’s Code of Civil Procedure Code***, in which it was observed and guided as follows:

*"Normal discrepancies in evidence are those which are due to normal errors of observation, normal errors of memory due to lapse of time, due to material disposition such as shock and horror at the time of occurrence and those are always there however honest and truthful a witness may be. **Material discrepancies are those which are normal and not expected of a normal person. Courts have to label the category to which a discrepancy may be categorized. While normal discrepancies do not corrode the credibility of a parties’ case material discrepancies do.**"* [Emphasis provided]

The conclusion made in this respect is that contradictions which do not affect the central story, are considered to be immaterial (See: ***Mukami w/o Wankyo v. Republic*** [1990] TLR 46; and ***Bikolimana s/o Odasi @ Bimelifasi v. Republic***, CAT- Criminal No. 269 of 2012 (unreported).

An unflinching review of the testimony adduced by the prosecution witnesses provides a concerning revelation. It not only paints a varying view between the testimony and what is alleged in the charge sheet, but it is also in serious disharmony with each other. I will attempt to enumerate the striking variances in the said testimony:

1. Whereas the charge sheet accused the appellant of grave sexual abuse which involved touching the vaginal and anal parts of the victim, the testimony PW1, PW2 and PW3 was to the effect that there was a penial insertion into the victim's parts;
2. Whereas PW1 testified that the appellant touched her vagina and wielded his penis, PW2 spoke about insertion of the appellant's penis into the victim's vagina;
3. On her part, PW3 spoke about an attempted sodomy and insertion of penis in the victim's vagina;
4. PW1's version is that the incident occurred in the appellant's room. This is at variance with PW2's testimony which was to the effect that PW1, PW2 and other children were in their room when the appellant came and molested the victim;

5. While PW3 spoke about PW1 contracting an infectious disease as a result of the incident, PW4's version of the story is that there were no infection was contracted by the victim.

The question that follows is, what do we make of these contradictions, in terms of their magnitude and impact? In my unflustered view, these contradictions are neither trifling nor are they immaterial. They are fundamental, fatal and going to the very root of the case. They corrode the central story in a very profound way, rendering the entire testimony lacking in credibility and veracity. It is unworthy of reliance in founding the conviction against the appellant.

Consequently, I find nothing to convince me to hold that guilt of the appellant was established as the basis for founding a conviction. Accordingly, on this ground alone, I allow the appeal, set aside the trial court's conviction and sentence. I also order that the appellant be immediately released from prison unless he is held for other lawful reasons.

It is so ordered.

DATED at **DAR ES SALAAM** this 30th day of May, 2022.



M.K. ISMAIL

JUDGE

