IN THE HGH COURT OF THE UNITED REPUBLIC OF TANZANIA

[ARUSHA DISTRICT REGISTRY]

AT ARUSHA

CRIMINAL APPEAL No. 89 OF 2022

{Originating from the judgment of the District Court of Simanjiro at Orkesumet in criminal case No. 64 of 2018)

LOWEMA THADEI _____ **1ST APPELLANT**

THADEUS POROKWA _____ **2ND APPELLANT**

VERSUS

REPUBLIC _____ **RESPONDENT**

JUDGMENT

13/03/2023 & 02/06/2023

BADE, J.

The Appellant herein appealed the decision of the District Court of Simanjiro in Criminal Case No. 64 of 2018 delivered on the 14th of August 2019. The District Court of Simanjiro had convicted the accused of cruelty to children, c/s 169A (1), (2) of the Penal Code, [Cap 16 RE 2002] and sentenced them to serve 5 years in prison or pay a fine of TZS 300,000 and a compensation of TZS 3,000,000 to each victim totaling TZS 9,000,000. Dissatisfied with the said decision, the Appellant raised several grounds of appeal as follows;

i. That, the trial Court erred in law and fact for convicting and sentencing the Appellants basing on flimsy evidence.

ii. That, the trial court erred in law and in fact for convicting the Appellants with defective charge.

iii. That, the trial Court erred in law and in fact as the proceedings, judgment and sentence are not correspondent to each other.

iv. That, trial Court erred in law and fact in that it convicted and sentenced the Appellants, while the Prosecution side failed to prove their case beyond reasonable doubt.

There were additional grounds of appeal as follows

v. That, the trial Court erred in law and in fact by changing the Magistrate in that case without giving reasons thereto.

vi. That, the trial Court erred in law and in fact by hearing, determining and convicting the Appellants while there was violation of the law during the trial of the case.

vii. That, the trial Court erred in law and in facts by convicting the Appellants without considering the defense evidence.

viii. That, the Court erred in law and in fact deciding the case basing on the evidence adduced by some of the witnesses who have interest to serve in that case.

The essence of this matter lies in the facts that, Lowema Thadei and Thadeus Porokwa stood charged with three counts of cruelty to children, c/s 169A (1), (2) OF Penal Code, [Cap 16 R.E 2002]. The accused persons are alleged that on the 6th of December 2016, at Emboreti in Simanjiro District in the Region of Manyara, they conducted female genital mutilation to girls who are under 18 years of age, the act that had caused health complications to the said girls. Charges were read over and explained to the accused persons in their words and entered the plea of not guilty to the charge.

The Accused person continued to deny the fact to the case during the Preliminary hearing.

During the hearing, the Prosecution had a total of eight witnesses while on the defense side, the Accused persons stood as defense witness number 1 and 2 together with 2 other witnesses. It is stated that on the 6th of December 2016 the 1st and the 2nd accused persons were both at the house of their Father Thadeus Porokwa, with their several other siblings including Naomi, Monica and Thomas, while they left their mother at Narakauo where the other home of their father is

located. They further averred that Thadeus Porokwa was there with their stepmother Lowema (the 1st accused), they heard her saying that genital mutilation has to be conducted, and by 6:00 in the morning it will be done. It is stated that the said genital mutilation was conducted, Thadeus Porokwa held PW3 who is the 1st victim aged 13 years' old on her shoulders and the grandmother held her legs while Lowema Thadei cut her clitoris using a small knife. It is also stated that it is their father Thadeus Porokwa who sent them to their Grandmother's house for the said genital mutilation, which took place at their Grandmother's house which is nearby the house of their Father. After the completion of the said genital mutilation they had taken Lowema and their Father Thadeus Porokwa to the home of Lowema's relative at Arusha, and later on to Toima's home at Arusha, then to Emboreet, and thereafter to the hospital at Orkesmet. They further averred that PW3 was the 1st one to undergo the genital mutilation process then her other siblings followed, they also stated that the moment they went to the house of Toima their aunt who is the wife of Toima was not present, and the incident was done during the morning therefore it was not dark, they were able to identify the accused persons properly.

This appeal was argued by way of written submissions having obtained the leave of the court to so do, the Prosecution was represented by learned State Attorney Alice Mtenga, and the defense was represented by the learned Counsel Lecktony L. Ngeseyan. The Respondent was supposed to file their written submissions by the 10th of April 2023, unfortunately, they did not abide by the court orders; nor was there any attempt to vary the filing schedule; hence this Court does not have the benefit of the Respondent's arguments. In law silence under circumstances like this would imply concession on what the other party has submitted. Be as it may, this court proceeded with the deliberation of a one-sided submission on behalf of the Appellants.

The Appellant had the ball rolling submitting in support of additional grounds of appeal, with regards to the fifth ground that there was a change of Trial Magistrate while the trial is ongoing without assigning reasons as to why they have reassigned the case, previously the matter was presided over by one E.E. Sanga, RM who attended the matter from 12th April 2018 up to 13th April 2018 and from 9th May 2018 onward another Magistrate one L. R. Kasebele SRM took over the matter and continued without stating the reasons as to why, page 1 up to page 4 of the which is contrary to the law

such as section 214(1) of the Criminal Procedure Act [Cap 20 RE 2022] which requires reasons to be stated when there is a change of Magistrates, and failure to state the reason amounts to violation of the law.

Among others, he relied on the authority in the case of **Waziri Amani vs Republic** [1980] TLR 250, **Issa Sufiani Malua**, **Peter Pascali** and **Godfrey Mtauma Goma vs Republic**, Criminal Appeal No. 494 of 2015 (unreported), as well as **Abdi Masoud and 3 Others vs Republic,** Criminal Appeal No.116 of 2015 (unreported)

In support of the second additional ground of appeal, that the trial court erred in law and in fact by hearing, determining and convicting the Appellants in disregard of section 127(2) of the Evidence Act during the trial. It is their averment that, the trial court received evidence of PW3, PW4 and PW5 contrary to **section 127(2)** of the Evidence Act [Cap 6 RE 2022], the PW4 at page 29 of the typed proceedings, stated that "I promise I will speak the truth" while PW5 at page 33, of the typed proceedings she stated that "I promise I will speak the only truth". Several decided cases provide that, where there is the said violation of the said provision the said evidence have to be discarded, he substantiated this position by referring to the case of **Rammson Peter Ondile vs The Republic,** Criminal Appeal No. 84 of 2021

and **Salum Nambaluka vs Republic,** Criminal Appeal No. 272 of 2018. (unreported)

In support of the 3rd ground of appeal, that the Trial Court erred in law and in fact by convicting the Appellants without considering the defense evidence. In their defense, the Appellants have both denied having committed the said offences, secondly, in defense, the Appellants denied having been at the crime scene, thirdly that there was a conflict between the 1st Appellant and PW6 because she married the 2nd Appellant; and there was another conflict between PW6 and the 2nd Appellant, hence what caused the case are those conflicts between PW6 and the two Appellants.

In support of the 1st and the 4th additional grounds of appeal, that the trial Court erred in law and fact for convicting and sentencing the Appellants based on flimsy evidence, and that the Prosecution failed to prove the matter beyond reasonable doubt. That there is a misunderstanding between PW6 and the accused persons Thadei and Lowema since she stated that "if Thadei will divorce Lowema I will return home and stay with him because Lowema is the one who removed me from Thadei" at page 44 of the typed proceedings, and further that, "before the coming of Lowema life between

me and Thadei was very happy and children were very happy, cruelty to children started after Lowema came....."

The Appellants cited the case of **Hamis Hussein & Others vs Republic**, Criminal Appeal No. 86 of 2009(unreported) where the Court of Appeal held that;

> *"We wish to stress that even in recognition cases when such evidence be more reliable identification of a stranger, clear evidence on source of light and intensity is of paramount importance. This is because, as occasionally held even when the witness is purporting to recognize someone who he knows, as was the case here, mistake in recognition of close relatives and friend are often made"*

They further submitted that, the material witnesses were not summoned including the watchman taking care of the house of Toima at Arusha where it is said that the victims were sent and the same place is also alleged that PW6 met her children i.e. the victims. Also, Mr. Juma Mbungu is said to be the essential witness since he is the divisional Police to whom the matter was first reported as stated by PW2 at page 21 of the typed proceedings of the trial court.

Having gone through the lower court records and read the Appellant's submission, It is now proper to consider whether the appeal has merit, and in essence, whether the case was proven beyond reasonable doubt.

I propose to also start addressing myself to ground number V which is the first ground of appeal in the list of the additional grounds of appeal that, the trial Court erred in law and in fact by changing the Magistrate in this case without giving reasons thereto. The nature of this ground made it worth being the first in line to undergo this Court's deliberation, as it touches matters of legal procedure which indeed if answered in the affirmative, will preempt the entire deliberation of the remaining grounds of appeal.

The Appellants averred that there was a change of Magistrate in the trial, and such change was not accompanied by reasons for the said reassignment. **Section 214(1)** of the Criminal Procedure Act, [Cap 20 RE 2022] provides there should be reasons for the change of Magistrate in the trial:

> *214.(1) Where any Magistrate, after having heard and recorded the whole or any part of the evidence in any trial or conducted in whole or part any committal proceedings is for any reason unable to complete the trial or the committal proceedings within a reasonable time,*

another magistrate who has and who exercises jurisdiction may take over and continue the trial or committal proceedings, as the case may be, and the magistrate so taking over may act on the evidence or proceeding recorded by his predecessor and may, in the case of a trial and if he considers it necessary, resummons the witnesses and recommence the trial or the committal proceedings.

I have passed through the said proceedings on the dates stated in the Appellants' submissions, specifically on the 12th of April 2018 it is my finding that the said Magistrate E.E. Sanga acted as a Justice of Peace in the case presided over by Hon. Kasebele. E.E. Sanga was the Primary Court Magistrate who appeared before the said Court for reading the charge to the Accused Persons and bail consideration since the presiding Magistrate was absent. The said proceedings on pp 1,2 and 3 show clearly that the Justice of Peace read over the charge to the Accused and asked them not to plead therefore since he was not the trial Magistrate. The records also show that the said Justice of Peace granted bail to both accused persons. **Section 56** of the Magistrates Courts Act, [Cap 11 RE 2022] stipulates the powers of the Justice of Peace, thus:

56. A Justice of the peace may, if there is no Magistrate in attendance at a courthouse to which he is assigned, exercise at the courthouse any of the following powers of a magistrate exercising jurisdiction at such courthouse

(a) to admit any person arrested, with or without warrant, for any offense, other than murder or treason, to bail either with or without surety or release him in his own bond, and to issue a warrant of arrest for any person in breach of a bond for his appearance

That said, what was done by the Justice of Peace is justifiable by the law and it was not a hearing. The advancing reasons for reassignment is only instructive when the case is at the trial stage and one magistrate has heard partly the evidence. This was not the case on this matter. I thus hold that this ground lacks merit.

Regarding the 6th ground of appeal that there was a violation of law during the trial is a matter of law, and thus it too deserves consideration before the other grounds of appeal. It really appears as a matter of misconception, since **section 127(2)** of The Evidence Act, [Cap 6 RE 2022] provides that a child of a tender age has to promise to speak the truth and not to tell lies, logically when one promises to speak the truth impliedly also mean that they

will not lie. The fact that PW3 and PW4 did not utter the phrase **"I will not tell lies"** does not, in my considered view, mean that their promise to speak the truth is invalid, which vitiates the fact that the court complied with section 127 (2)(supra). In the case of **Mbaraka Elieneza Msangi vs R,** Criminal Appeal No 23 of 2020, High Court Moshi [2023] TZHC 15791 my sister Masabo, J. held while dismissing a similar complaint on the compliance with section 127(2)

> "I similarly dismiss the argument that she did not undertake not to tell lies as the undertaking not to tell lies is implicit in her undertaking to tell the truth."

I shall consider the remaining grounds generally as challenging matters of evidence, and for clarity I would mention the said evidential challenges raised by the Appellants before deliberating on them jointly. Ground 1, that the Court based its decision on flimsy evidence, ground 2, that the charge sheet was defective, ground 3, that proceedings, judgment and sentence do not correspond, ground 4 that the Prosecution failed to prove the case beyond a reasonable doubt, and the other additional grounds of appeal including the 6th that the trial court erred to convict and sentence the accused persons while there was violation of law in the trial, 7th ground that the court

did not consider the defense evidence, 8th ground that the Court decided the case basing on the evidence given by witnesses who have interest to serve in that case.

As earlier on pointed out, the remaining seven grounds of appeal will be argued jointly since they all attract matters of evidence.

The fact that the Court based its conviction on flimsy evidence under the 1st ground and the 8th ground that it based on the evidence of witnesses who have interest in this matter to decide the case, in this regard, the case of **Shabani Daudi vs Republic,** Criminal Appeal No. 28 of 2001 (unreported) is telling as the Court held that;

> *"Credibility of witness is the monopoly of the trial Court but only in so far as demeanor is concerned. The credibility of the witness can also be determined in two other ways. One, when assessing the coherence of the testimony of that witness, and two when the testimony of that witness is considered in relation to the evidence of other witnesses including that of the accused person. In those two occasions, the credibility of a witness can be determined even by a second appellate court when examining the findings of the first appellate court"*

In line with the above principle, these two grounds are unjustifiable since both parties adduced their evidence and the trial court was duty-bound to analyze the evidence and come up with its findings based on the weight of the evidence and the law. Parties are at liberty to bring before the Court witnesses who will help in presenting their case, including the defense side. It is not the other Party's duty and certainly not the prosecution, to deny the opposing party's evidence but rather to challenge them by way of cross-examination. If it is upon the prosecution to prove the case beyond the reasonable doubt, it is on the defense to raise a doubt, by way of evidence too. Consequently, the trial court will only be able to pick on what is recorded in evidence. And I am alive to the position of the law as propounded by the Court in **Christian S/O Kale and Rwekaza S/O Benard vs Republic** [1992] TLR 302 which observed that:

> "an accused ought not to be convicted on the weakness of his defense but on the strength of the prosecution "

Regarding the 2nd ground of appeal that the charge is defective, I consider it as an afterthought since the Appellants have not submitted how the charge sheet is defective – whether it is on the content or in form. The Appellant

can not expect the court to go on an expedition in finding what could have been wrong with the charge. In any case, this court has looked into the charge sheet and found that there is nothing amiss. It is my finding that unless it can be shown that the defect in the charge sheet has prejudiced either of the party, a mere assertion of its defect is of no consequence.

Turning to the 3rd ground of appeal that proceedings, judgment and the sentence are not corresponding is vague, and the appellants have not made it any easy, in submitting and putting clarity to what is it that they would like the court to consider. Also regarding the 4th ground that the prosecution did not prove their case beyond reasonable doubt, I found guidance in the case of **Robert Andondile vs Republic,** Criminal Appeal No. 465 of 2017, where the Court of Appeal stated that;

> *"As the above recited grounds of appeal before the High Court vividly show, the appellant had raised as a ground of appeal that, the prosecution case was not proved beyond reasonable doubt. General as it is, such a ground calls for an appellate court to consider all the evidence, oral, documentary, and physical evidence to ascertain whether in their totality establish the appellant's guilt, several grounds or points of grievance may be drawn from the general ground.*

Although we find it not to be good practice for an appellant who has come up with specific grounds of appeal to again include such a general ground, but where it is raised as was the case in the present case, it should be considered and taken to have embraced several other grounds of grievance "

That said, it is proper to say that the ground that the Prosecution did not prove their case beyond reasonable doubt is general in such a way that it touches almost all grounds with regards to the evidence adduced before it, the said grounds lack merit since are not backed up by the circumstances observed on the records. Both Parties' evidence has been considered, and the compatibility of the judgment, proceedings, and sentence is the matter of the Court in its reasoning, since there is no specificity as to what the Appellants deem incompatible, then this court finds that the trial court directed itself properly.

On the 7th ground of appeal that the Court did not consider the evidence of the defense, this ground is also unmerited. Looking at pp 7, and 8 of the typed judgment, The defense case through DW1 and DW2 is that the duo were not at the place where the crime was committed. But the court analysis of the evidence is that PW3 and PW4 both points out on how they were all

in their father's home together with both the accused on the material day, but the crime was committed at the grandmother's house, after which they were all sent to Arusha to the home of the relative of their stepmother, a fact that they have a relative in Arusha, which the accused do not deny. As a matter of fact, the defense of alibi that the accused have put forth crumbles out of the contradiction of the defense witness DW3 who explained that on that particular day (06th December 2016), they were in a conciliation meeting which lasted from 11:00 hours to 15:00 at the village at Emboret. They had a meeting for the conciliation of the marital dispute between Thadei Porokwa and his two wives since they are quarreling. So while it is credible that the wives of the 2nd accused/appellant herein were fighting each other, that fact has not managed to cast any reasonable doubt on the prosecution case regarding the charges leveled against the Appellants. That means to say, the evidence of the defense was looked at but did not flop the case of the prosecution in proving the charges against the accused person and convicting them of the charges against them. In any case, in the defense of alibi, there has not been any credibility in saying that they were not at the crime scene but rather in Arusha without any further evidence of their being in Arusha on the material date. On another note, its is also in evidence (DW3

and DW4) that the tradition would have it that the parents of the children were responsible for the mutilation. The undisputed fact is that these children were mutilated. Would it not be in the interest of the parents to find out who mutilated them? This does not come up anywhere in the defense evidence, nor does their defense point to any other alternative. I find this ground is also without any merit.

In the upshot, this appeal lacks merit with the effect that the decision and all orders of the Trial Court are hereby upheld.

Order accordingly.

DATED at **ARUSHA** on the 02nd day of June 2023

A.Z. BADE
JUDGE
02/06/2023

DELIVERED at **ARUSHA** on the 02nd day of June 2023 before the parties' representative in chambers.

HIGH COURT OF TANZANIA

A.Z. BADE
JUDGE
02/06/2023