

**IN THE HIGH COURT OF TANZANIA
(DISTRICT REGISTRY OF MTWARA)**

AT MTWARA

CRIMINAL APPEAL NO.65 OF 2022

*(Originating from the District Court of Liwale in Criminal Case No.21 of
2022)*

HASHIMU AHAMAD HASHIMU.....APPELLANT

VERSUS

THE REPUBLIC.....RESPONDENT

JUDGMENT

Muruke, J

In the District Court of Liwale at Liwale, **Hashimu Ahamad Hashimu**, the appellant was arraigned and charged with grave sexual abuse contrary to section 138C (1)(a),(2)(a) of the Penal Code [Cap.16 R.E. 2002] now the R.E. 2022. When the charge was read and explained to the appellant, he pleaded not guilty to the offence. Consequently, on proving its case, the prosecution paraded a total of five witnesses and one documentary evidence. The prosecution witnesses were Rukia Said Kiruke, the victim's mother (PW1), Zubeda Mohamed, VEO of Makata Village (PW2), Faraja Kyogeo, a midwife of Makata Dispensary (PW3), Yasri Yusufu, the victim's older sister (PW4) and WP.3648 D/C Ummu (PW5). The only documentary evidenced tendered, admitted and marked by the trial court was the victim's PF3 (Exh. P1), whereas, the appellant defended himself.

The brief factual background of the case is that, on 21/3/2020 at around 11:00 hours in the morning the victim, a child of three years old, was

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outside playing with the appellant, Shabibu and Aisha. It was PW4 who informed PW1 that the appellant was making toys for the victim using mango leaves. Later on PW1 went outside and looked for the victim. Unfortunately, PW1 did neither find the victim nor the appellant. Suddenly, the victim showed up while holding four guavas in her hands. Thereafter, the victim told PW1 that the appellant removed 'kiroboto' in her private parts. After inspecting her private parts, PW1 found that "eneo lake la ukeni kuna wekundu na kumevimbana nikigusa anasema anaumia." Furthermore, PW1's evidence was supported with the evidence of PW2, PW3, PW4 and PW5. However, on his part, the appellant totally distanced himself from raping and abusing the victim sexually.

After a full trial, the appellant was convicted and sentenced to a term of twenty (20) years imprisonment. Dissatisfied and aggrieved with both conviction and sentence the appellant has lodged this appeal predicating eight grounds of appeal. At this juncture, I will not reproduce them because during my deliberation the same will appear where need will arise.

During the hearing of this appeal 18/01/2023, the appellant appeared in person and unrepresented while the respondent Republic had the services of Mr. Enosh Kigoryo, learned State Attorney.

On being called to submit on the grounds of appeal, the appellant prayed this court to adopt his grounds of appeal as his submission in chief. The appellant went further and stressed that he will make his rejoinder after the respondent's submission.

In response, Mr. Kigoryo, at the outset supported the appeal on strength of the eight ground of appeal. The learned State Attorney contended that at




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the trial court accused was charged with the offence of grave sexual abuse contrary to section 138C (1)(a) of the Penal Code Cap.16 R.E 2002. Looking at the charge sheet in the particulars of the offence, for sexual gratifications and without consent of "YYK", did enter his fingers in the genitalia of "YYK". The learned State Attorney stressed that the charge sheet insist that the appellant/accused used fingers. To this end, the learned State Attorney argued that none of the prosecution witnesses testified to that effect. Mother of the victim PW1 just said she was told by the victim that accused "amemtolea kiroboto" on her private part. Mr. Kigoryo insisted that PW2 also did not witness, he was just told by PW1. The learned State Attorney maintained that there is no any explanation of inserting fingers.

Furthermore, the learned State Attorney submitted that PW3 at page 13 testified that she is midwife who examined the victim and filled the PF3 which admitted as exhibit P1. However, PW3 is not competent to do examination and fill in the PF3 or medical report. According to medical, Dental and Alleged Health Professional Act, No.11/2017 under section 2, medical report need to be filed by the medical practitioner who has certificate of medicine. The learned State insisted that the midwife is not a medical practitioner.

Midwife is governed by Nurse and Midwife Registration Act, Cap.325 R.E. 2002. According to section 2 of Cap. 325 defines midwife as the person who had completed an approved midwifery program duly recognized in Tanzania. Midwife attend program in which she does not obtain a certificate of medicine, thus midwife is not a qualified person to examine and prepare medical report for patient. To this end, the learned State Attorney insisted

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that the evidence of PW3 and exhibit P1 have no weight at all in the prosecution case.

On top of that, the learned State Attorney insisted that at page 16 of the typed proceedings PW4 just saw the victim with the appellant outside the victim's house preparing toys. He further stressed that PW4 did witness anything apart from being told by PW1 that the appellant "alimtoa kiroboto" on her private parts, but she did not explain how "kiroboto" was taken. However, Mr. Kigoryo contended that the charge sheet says the appellant inserted fingers to which proof of the same was necessary. He further argued that section 138C (1) of the Penal Code requires use of any other part of his body or any instrument to commit the offence. The fact that there is no clear evidence, on part of the body of the accused or instrument used, then, it cannot be said that the offence was committed by the accused now appellant. It is upon prosecution to prove charge sheet leveled against the accused, this is done through witnesses. In this case prosecution did not prove the offence, insisted learned State Attorney.

I have examined the submissions from both parties and considered the trial court record, the issue for determination is whether the prosecution has proved the case against the appellant beyond reasonable doubt. At the outset, I should state that the prosecution is duty bound to prove the charges against the accused beyond reasonable doubt and in case there are some doubts such doubts should be resolved in favour of the accused. See, **Jonas Nkinze v. R** [1992] T.L.R. 213. The offence of grave sexual abuse of which the appellant was charged is provided under section 138C(1)(1) of the Penal Code which reads:



*"-138C.-(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;

From the above section, two essential elements of proving grave sexual abuse can be grasped. These two essential elements are **sexual gratification** and **lack of consent** of the victim. See, **Andrew Lonjine vs Republic**, Criminal Appeal No.50 of 2019 of 2019, CAT at Dodoma. Furthermore, the law is very certain that sexual gratification is proved when any person who does any act, by 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. At the present case, the particulars of the offence provides that sexual gratification by the appellant was done by inserting appellant fingers in the genitalia of the victim who by her age did not consent to it. Now, the issue is whether the evidence testified by the prosecution witnesses proved that the appellant inserted fingers into the victim's private parts. Witness among the prosecution witnesses is PW1 who testified that:-

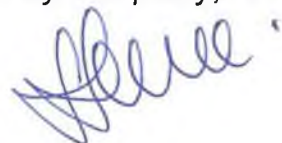
"...suddenly I found YYK came back with four guava in hands, and she said that accused has remove 'kiroboto' in her private parts and that she should not tell mother...I decided to inspect her private parts and found that "eneo lake la ukeni kuna wekundu na kumevimbina nikigusa anasema anaumia"."



Reading between the lines, the above phrase of the testimony of PW1 does not specify which part of the body of the appellant or type of instrument or any orifice or part of the body of another person other than the appellant was used to get sexual gratification. Again, the mere words that the appellant had removed 'kiroboto' in the victim's private part, on itself does not amount to sexual gratification. The evidence of PW1 needed to go further to amplify how the appellant did remove 'kiroboto' on the victim's private parts leading to the commission of the offence of grave sexual abuse.

More so, according to the testimony of PW4, testified that she found the appellant with the victim; Shabibu and Aisha making toys by using mango leaves. I expected the prosecution could have called Shabibu and Aisha to testify on what had transpired while they were with the appellant. However, the trial court record is silent on the presence of the other two persons who were with the victim and appellant during the material time. I am also aware that the victim was brought in court but as far as her age is concern, she failed to testify even by the aid of social welfare officer. The issue here is on the two persons named by PW4 who were not called to. It is a settled law that failure of the prosecution to call an important witness without assigning any reason would prompt the court to draw an adverse inference against the prosecution. Testify by prosecution. The Court of Appeal of Tanzania in the case of **Samwel Joseph Kubaya vs R**, Criminal Appeal No. 40 of 2017 at page 15 stated that:-

"...It is thus now settled that, where a witness who is in a better position to explain some missing links in the party's case, is not called without any sufficient reason being shown by the party, an

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adverse inference may be drawn against that party, even if such inference is only a permissible one”.

More so, the evidence of PW3 has no any evidentially value since a midwife is precluded by the law to conduct medical examination, preparing medical reports and filling in medical form for that effect. Equally so, even her oral testimony is not an expert opinion thus, cannot be acted upon by this court. Therefore, the PF3 (exhibit P1) form filled-in by PW3 suffers the consequences of being expunged from the record of the trial court. This position was elaborated by the Court of Appeal of Tanzania in the case of **Hamis Kayanda v. The Director of Public Prosecutions**, Criminal Appeal No. 166, CAT at Mbeya stated that:-

“...a nurse midwife is not a medical practitioner for purposes of medical examination reports. The court expunged exhibit P2 which a PF3 that had been prepared by the nurse. On this aspect we must follow suit, and 8 without further ado we hereby expunge exhibit P6, the medical examination report dated 3rd January 2016.’ In the case at hand, in absence of the PF3 form, the prosecution evidence remains with the oral testimony of a nurse which also cannot be taken as an expert's opinion.”

More importantly, as the court of record it is important to deliberate on the charge sheet filed before the trial court. That the charge sheet featuring the trial court record, features a wrong cited provision of the law which provides for a punishment of the offender. The statement of the offence states that “Grave Sexual Abuse, contrary to section 138C (1) (a) (2)(a) of the Penal Code [Cap 16 R.E. 2002].” While the particulars of the offence provide that



the victim was 3 years old. As far the facts of the particulars of the offence are concern, the correct paragraph ought to have been paragraph (b) of subsection 2 of section 138C of the Penal Code. Despite the fact that, the learned trial Magistrate cured the anomaly under section 388 of the Criminal Procedure Act [Cap. 20 R.E. 2019] now the R.E. 2022.

Consequently, the above listed and elaborated flaws, gives no doubt that the prosecution evidence left doubts which could not ground conviction against the appellant. In the upshot, I allow the appeal and quash the conviction and sentence imposed by the appellant. I order the immediate release of the appellant from custody unless he is held for any other lawful purpose.

It is so ordered.



A handwritten signature in blue ink, appearing to read "Z. G. Muruke".

Z. G. Muruke
Judge
31/01/2023

Judgment delivered in the presence of the appellant who has appeared in person, unrepresented and Mr. Enosh Kigoryo, learned State Attorney for the respondent Republic.



A handwritten signature in blue ink, appearing to read "Z. G. Muruke".

Z. G. Muruke
Judge
31/01/2023