

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
DAR ES SALAAM DISTRICT REGISTRY**

AT DAR ES SALAAM

CRIMINAL APPEAL NO. 4 OF 2023

(Arising from Criminal case No. 84 of 2022 of the District Court of Bagamoyo)

HAPPYNESS RASHID BONGWA APPELLANT

VERSUS

THE REPUBLIC.....RESPONDENT

JUDGMENT

23rd June & 14th July 2023

MKWIZU J:

In the District Court of Bagamoyo the appellant, Happiness Rashid Bungwa was charged with child stealing contrary to section 169 (1) (a) of the Penal Code. The incident is reported to have happened on the 26th day of December 2021 at Makurunge Ward within Bagamoyo District where the accused is said to have stolen a child of 2 years and 10 months. She was convicted as charged and sentenced to three (3) years imprisonment term.

Aggrieved, the appellant has appealed to this court with six grounds of appeal raising four main points (i) failure by the trial court to properly evaluate the evidence (ii) failure to consider the contradictions in the prosecution evidence (iii) specious admission of the accused's cautioned statement and (iv) relying on weak prosecution evidence.

At the hearing of the appeal, the appellant, was in person without legal representation while the respondent/ Republic had the services of Mr Clemence Masua learned State Attorney.

Submitting in support of her appeal, the appellant said, the facts of the case were all incorrect. She said, since the prosecution's allegations were that the stealing was effected to facilitate payment of her money by the child's parents then the appropriate charge would have been the signing of an illegal bond and not child stealing. She censured the trial court for accepting the evidence that she was on 1/1/2022 paid 1000,000/= through her mobile phone without proof. And failure by the prosecution to tell the court why they had to arrest her two months after the incident.

On contradictions, she said, the accusation laid against her was that she fled to an unknown place, while the police and the child's father said she was at Ikwiriri. The document issued at the local government office indicates that the victim's parents were to pay her 1500,000 while the charge sheet shows that the debt was 1100,000/= only. She lastly prayed for the acquittal.

The learned State Attorney on the other hand grouped the appellant's grounds into two groups (1) failure by the prosecution to prove the case

beyond a reasonable doubt and (2) contradictory prosecution evidence. He said the entire case by the prosecution was established by five witnesses including the victim's parents. To him, the prosecution was required to establish that the appellant had fraudulently enticed away and detained the child. PW1 to PW3's evidence tells the court how the incident was committed. The Appellant took the child from Pw1 pretending to take it to Pw2. The incident was reported to the police on 16/12/2021 as testified by Pw4, the appellant was phoned to return the child but said she would not return the child until full payment of her money. This evidence was, according to the state attorney supported by PW5 appellant relative who connected the appellant with the victim's parents and managed to exchange the Child victim with the demanded money from the victim's child to the appellant. He underlined that the evidence given sufficiently proved the offence.

He disagreed with the defence evidence that there was an arrangement between the appellant and Pw1, Pw2, and Pw3 to take the child to the orphanage center for being an afterthought. He said the appellant failed at all to cross-examine Pw3 on this issue.

The learned State Attorney was also of the view that there is no major contradiction in the prosecution evidence. Relying on the decision of

Bakari Hamisi Ling'ambe V R, Criminal Appeal No 161 of 2014 (Unreported) he said, minor contradictions are bound to happen, but they are not, in this case, major to erode the credibility of the evidence of the prosecution.

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. I will start resolving ground No 5 on the procedural aspect of the trial. On this ground the trial court is faulted for admitting the cautioned statement without reading its content in court. A firm review of the evidence both in the typed as well as the original handwritten proceedings finds no cautioned statement admitted in evidence and /or relied upon by the trial court to ground the appellant's conviction. The fifth ground of appeal is therefore misconceived.

Before I examine the merits or otherwise of the appellant's grievances, it is worthwhile to state here that, the first appeal is in the form of re-hearing. The first appellate court has a duty to re-evaluate the entire evidence in an objective manner and arrive at its own findings of fact, if necessary. This is what this court is going to do in this appeal to appropriately resolve the appellant's contentions. Secondly, it is to be

noted that this is a criminal case where the burden of proof against the accused lies on the prosecution and the standard is beyond a reasonable doubt. The burden does not shift, and the accused can only be convicted on the strength of the prosecution case and not because of any weaknesses in his defence, (See **Wool Mington v DPP** (1935) AC 462 and **Matula v R** 1995 T.L.R. 3.

The appellant is charged with child stealing contrary to section 169 (1) of the penal code. The section reads:

"169.-(1) Any person who, with intent to deprive a parent, guardian or other person who has the lawful care or charge of a child under the age of eighteen years, of the possession of that child-

(a) forcibly or fraudulently takes or entices away, or detains the child; or

(b) receives or harbours the child, knowing it to have been so taken or enticed away or detained, is guilty of the offence and is liable to imprisonment for seven years"

For the accused to be convicted of child stealing the prosecution must prove each of the following essential ingredients beyond a reasonable doubt.

- 1. Unlawful taking of the victim with intent to deprive a parent, guardian, or other person who has the lawful care or charge of a child.*
- 2. The use of force, fraud, enticing, or detaining the child.*
- 3. The accused participated in the commission of the act.*

It is the prosecution's case that the child, in this case, was unlawfully taken away without the authority of the parent. According to PW1, the mother of the child, the appellant had on the material date visited her asking for the child's father. The appellant was informed that the father was at work. Explaining how the appellant managed to escape with the child, PW1 said, the appellant, who was their friend, lured her that she was going with the child to the child's father working places as she wanted to talk to him while knowing that she was escaping with the child to Ikwiriri vowing not to return the child until given paid back her money by the child's father or else she would sale the child to the "Mang'ati" people.

The child's disappearance was reported to her father PW2, the Hamlet chairperson (PW3), and the police (PW4). All these three witnesses testified to how they all communicated with the appellant who confirmed to have been with the child vowing to only return her after she is paid her money. PW5 also testified on how he participated in rescuing the child

from the appellant after he had handled her 1000,000 from the child's father on 1/1/2022. This proves the 1st and second elements of the offence.

It is also certain that the appellant was involved in the entire process. Her defence is an admission that the child's father owed her money, she wanted her money back and the argument advanced that she was asked to take the child to the orphanage center is purely an afterthought. The appellant's conduct after taking the child demonstrates a deliberate act aimed at using the child as a means to get back her money. Her answer to the victim's father P.W.2, was that she is going to sell the child to Mangati if she is not given back her money, the appellant gave the same statement to the hamlet chairperson (PW3), the police PW4 and PW5. There is no doubt that the prosecution has managed to prove all the ingredients of the offence beyond a reasonable doubt. I say so because the review of the entire evidence on the records has failed to notice anything directly or implied demonstrating why all the five prosecution witnesses, including the Hamlet chairperson and the police, should have teamed up to incriminate the appellant. The 1st, 3rd, and 4th grounds of appeal are devoid of merit.

I agree with the learned State Attorney that contradictions are bound to happen in a case, the main issue to resolve is if they are detrimental to the prosecution case or not. See **Luziro s/o Sichone v. Republic**, CAT-Criminal Appeal No. 231 of 2010 (unreported). The review of the entire evidence has failed to notice any major contradictions going to the root of the matter. The 2nd ground is also baseless.

In the event, I find the appeal by the appellant without merit and proceed to dismiss it in its entirety.

DATED at Dar es Salaam this 14th day of July 2023



E. Y Mkwizu
Judge
14/7/2023