

**IN THE HIGH COURT OF TANZANIA
DAR ES SALAAM DISTRICT REGISTRY
AT DAR ES SALAAM
CRIMINAL APPEAL NO. 86 OF 2023**

(Originating from Criminal Case No. 71/2021, Kibaha District Court)

PAULO SIMEU MKAME.....APPELLANT

VERSUS

THE REPUBLIC.....RESPONDENT

JUDGMENT

22/08/2023 to 18/09/2023

E.B. LUVANDA, J

Paulo Simeu Mkame the Appellant herein was indicted for the offence of grave sexual abuse contrary to section 138 C (1) (d) and (2)(b) of the Penal Code, Cap 16 R.E. 2019.

At the end of the trial, the Appellant was convicted, sentenced to twenty years imprisonment with an order for payment of compensation a sum of Tshs 1,000,000/=.

In the petition of appeal, the Appellant raised five grounds of appeal to challenge the above verdict. One, there was no sufficient evidence given by PW1 to support the particulars of the offence regarding the months of the said incident; Two the evidence adduced by PW1, PW2, PW3, PW4 PW5, and Pw6 contains

contradictions and lack of coherence when PW1 was sent to the police and hospital; Three, a birth certificate exhibit P1 failed to sufficiently prove biological mother, age of the victim; Four, PF3 exhibit P2 failed to corroborate the evidence of PW1 as to when the latter was taken to hospital; Five, the prosecution failed to prove the case beyond reasonable doubt.

On his written submission, the Appellant combined ground number one and five, submitted that the prosecution failed to prove the allegation that the Appellant did sexual abuse to the victim (PW1) on diverse dates between August and September, 2022, arguing what is on record is that on 19/09/2022 the victim was asked by PW2 (victim's mother) regarding her relationship with the Appellant. To the Appellant's view, the offence against the Appellant remain unproved. He submitted that the testimony of PW2, PW3, just heard from PW1, but did not say whether PW1 told them that the crime occurred between August and September, 2022. He submitted that PW6 and exhibit P2, only prove that PW1 was examined and seen to have labia majora expanded, vaginal discharge, but does not prove that the offence was committed between August and September, 2022.

In reply, the learned State Attorney submitted that PW1 did not state the month, but she stated that it was when her grand mother sent her to fetch firewood from the Appellant, citing page 6 of the proceedings. She submitted

that PW3 stated that it was in August, when the Appellant asked for children to go to collect fire wood. She submitted that the issue of specific month was not in dispute and the Appellant did not cross examine on that, argued to take into consideration the age of the victim who is seven years old, to her opinion its difficult to be comprehensive and state every thing in details.

It is true that the particular of offence in a charge sheet captured the incident to had occurred on divert dates between August, 2022 and September, 2022. PW1 (victim of sexual abuse) at the age of seven years old, a pupil of stand and two, to fault her testimony for a mere fact that she was expected at such middle child hood, to say she ought to mention specific date, month and year is tantamount as to make mockery of justice, and acquit fugitives at the very detriment of the survivors of these sexual abuse offences gaining momentum and becoming rampant in the society.

According to the testimony of PW1, stated that several times when she visited to the Appellant's home to collect firewood, the later used to call her inside his place, undress the victim, takes his member and keeps on rubbing the vulva and anus against the penis without penetration. PW1 stated that the Appellant used to do it several times. As such when PW1 was referred to the date of 19/09/202, to have been asked by her mother (PW2) and narrated the ordeal, contextually it falls within the dates or months captured in the charge sheet. Indeed PW3

(grandmother of the victim), explained clearly to have send the victim to the Appellant in August, 2022 and on one Saturday the Appellant invited the victim at his (Appellant) place, where the victim collected fireword. Therefore in totality, the testimony of PW1 and PW3 by large and necessary implication, explained on acts which occurred within the period of August and September, 2022 depicted on the charge sheet. Therefore, ground number one and five are dismissed.

Ground number two and four, the Appellant submitted that PW1, PW2, PW3 said it was on 19/09/2022 when they got a PF3 and proceeded to the hospital where PW1 was examined, while PW5 said it was on 21/09/2022 when she took PW1 to the police then hospital, argued there is a contradiction. In reply, the learned State Attorney submitted that PW5 stated that she escorted the victim to the police station on 21/09/2022, where they got a PF3 and took the victim to hospital, arguing this fact is corroborated by PW6 who stated to have attended PW1 on that day. The Learned State Attorney submitted that, there is no contradiction, arguing what matter is a fact that the matter was reported and the victim taken to hospital.

According to the record, PW1 did not mention a specific date when she was taken to hospital, she only asserted to have been taken to hospital, PW3 did not say on express terms to have escorted PW1 to hospital, because PW3 said Gift took the victim to hospital and said, she (PW3) was told PW1 had contracted

veneral diseases. PW5 (victim's aunt) is the one who have explained to have escorted PW1 to the police and thereafter to the hospital on 21/09/2022. PW6 (clinical officer) explained to have attended and examined PW1 on 21/09/2022. A PF3 exhibit P2 depict it was issued by Police on 21/09/2022 and the examination was done on 21/09/2022. Therefore the alleged contradiction is an illusory, does not exist or feature anywhere. Therefore ground number two and four are dismissed.

Ground number three, the Appellant submitted that PW2 stated that PW1 was born on 21/05/2015. The Appellant faulted a birth certificate exhibit P1, that it reflect Lois Tamimu Msuya and not PW2 who had introduced as the mother of PW1.

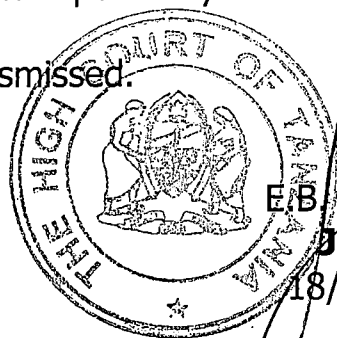
In reply, the learned State Attorney submitted that the dispute on biological mother in the birth certificate was responded by PW2 at page 9 of the proceedings, where she stated that in the birth certificate the name appearing was for the aunt who went to follow up the birth certificate.

To my view, this ground is not merited at all. The testimony of PW2 cleared the doubt, according to PW2 stated that PW1 have been living with her grandmother (PW3) since when she was of the age of two months old. According to PW2, exhibit P1 reflect the name of PW5 because is the one who was making followup on the birth certificate. To my view, the said misnomer even if is there, cannot

vitiating the testimony of PW2 that the victim was born on 21/05/2015, neither make exhibit P1 invalid. For the sake of argument, PW1 proved that she was aged seven years. Therefore ground number three is dismissed.

Generally speaking, the offence was proved beyond reasonable doubt. PW1 explained how the Appellant used to undress her, takes his penis and keeps rubbing on outer parts of vagina and anus for purpose of appealing to prurient sexual arousal or pleasure. PW6 stated to have examined PW1 and confirmed that labia majora had expanded, vagina discharge with smell caused by bacteria. According to PW6, PW1 said it was inflicted by *Kidude cha kukojolea*. PW6 opined that there was a foreplay done to PW1 which caused her to get the discharge. The appeal is without merit whatsoever. The verdict, and sentence and an order for compensation imposed by the trial court are sustained.

The appeal is dismissed.



E.B. LUVANDA
JUDGE
18/09/2023

Judgment delivered in the presence of Ms. Agness Mtunguja learned State Attorney for Respondent and the Appellant in person.



E.B. LUVANDA
JUDGE
18/09/2023