IN THE UNITED REPUBLIC OF TANZANIA

JUDICIARY

HIGH COURT OF TANZANIA

MOSHI DISTRICT REGISTRY

AT MOSHI

CRIMINAL APPEAL NO. 09 OF 2023

(C/F Criminal Case No. 62 of 2021 District Court of Mwanga at Mwanga)

ERICK VENDELINE KICHERUNDE…….…….. APPELLANT

VERSUS

REPUBLIC……..……RESPONDENT

JUDGEMENT

Date of Last Order: 21.08. 2023
Date of Judgment: 18.09.2023

MONGELLA, J.

The appellant herein was arraigned before the District Court of Mwanga at Mwanga (the trial court, hereinafter) with two counts of grave sexual abuse contrary to section 138 C (1) and (2) (b) of the Penal Code Cap 16 R.E 2019.

The particulars of the offence are to the effect that: on 23.04.2021 at or about 12:00hrs at Chanjale village within Mwanga District in Kilimanjaro region, the appellant, for sexual gratification did put his finger in the female organs of the victims (hereinafter to be referred to as PW2 and PW4 or the victims) who were five-year-old girls, without their consent. The case proceeded to full trial whereby the

prosecution paraded 7 witnesses to prove its case: PW1, Sheila Ally Mvamba (mother of PW2), PW2, PW3, Mwajuma Iddi (mother of PW4), PW4, PW5, Gaston Mvungi , ward leader; PW6, WP 3741 SGT Mkunde and, PW7 Happiness Shigela, the doctor who medically examined PW2 and PW4, and also tendered the PF3s of both victims, which were admitted as exhibit PE1 and PE2, respectively.

The prosecution case was to the effect that: on 23.04.2021at around12:00hrs, PW2 and PW4 were called by the appellant as they were coming back home from school. The appellant who lived close to the school called them to rest in his house. He then carried them to his bed undressed their underpants and inserted his fingers into their female organs. PW1 also alleged that he also inserted his penis into their female organs. He then told them to dress themselves up and to go home.

Upon arriving home PW1 saw PW2 having sweets. She questioned her as to where she got the sweets. PW2 revealed what transpired at the appellant's house mentioning that she was accompanied by PW4. PW1 informed PW3 of the incident. The incident was then reported to PW5 who advised them to report the same to the police. The matter was thus reported to Kisangara Police post. It was PW1, PW2, PW3 and PW4 who went to the police station. PW7 examined both victims (PW2 and PW4) and found that their female organs had neither bruises nor injuries, but had no hymen. The incident was then reported at Mwanga Police station whereby PW6 was assigned to investigate the case.

The appellant was arrested and arraigned before the District Court of Mwanga at Mwanga. In his defence, he raised an alibi alleging to have travelled for two weeks from 18.04.2021 for mason work and was arrested on 30.04.2021, thus he was absent on the 23.04.2021, which is the date alleged for the commission of the offence. The trial court however found the case against him proved. It thus convicted and sentenced him to serve 20 years in prison and further ordered him to pay a sum of Tsh.1,000,000/- to each victim as compensation.

Aggrieved by the conviction and sentence, the appellant has preferred this appeal on the following grounds:

1. *That, the trial magistrate erred in law and facts to convict and sentence the appellant despite the prosecution's failure to prove its case beyond reasonable doubt.*

2. *That, the trial magistrate grossly erred in both law and facts to convict and sentence the appellant by relying on insufficient evidence, that medical examination was conducted without PF3 see the date which PF3 was issued and the date which medical examination was conducted. (sic)*

3. *The trial magistrate grossly erred in both law and facts to convict and sentence the appellant relying on contradictory evidence adduced by the prosecution witnesses.*

4. *That, the trial magistrate grossly erred in both law and facts for failure to consider the evidence adduced by the defense side.*

The appeal was resolved by written submissions whereby the appellant fended for himself while the respondent was represented by Mr. Ramadhani A. Kajembe, learned state attorney.

The appellant jointly addressed the 1st and 2nd grounds of appeal. He averred that the prosecution failed to prove its case beyond reasonable doubt as required under **section 110(2) of the Evidence Act Cap 6 R.E. 2022**. He alleged that, the case was fabricated against him since there is no way that the victims being tender aged, could have not possibly walked on their own to their homes after suffering injuries from fingers being inserted in their female organs as that would have been too painful.

He further argued that while it was alleged that the offence was committed on 23.04.2021, the medical examination was conducted on 27.04.2021. He considered that a bad practice that creates doubts on the alleged evidence as the medical examination was conducted long after the date the offence took place. He had the view the delay in conducting medical examination shows that the case was fabricated against him. Further, he said that PW2 testified that both of their female organs were penetrated by the appellant using fingers and that the appellant inserted his penis inside their female organs and they felt

pain. In the circumstances, he contended that if that was indeed the case, the victims would have inevitably suffered injuries, but the medical expert who examined the victims concluded that no injuries or bruises were found which further proves that the case was fabricated against him.

The appellant also challenged the discovery allegedly made by PW1 and PW3, the parents of both victims. He contended that PW1 testified that she questioned PW2 as to where she got the sweets (pipi kifua) and biscuits and PW2 replied that she and PW4 got the sweets from the appellant's house and she further questioned her on what they did after they were given the snacks. The appellant challenged this conversation as being unreal contending that if the victims had been raped or had fingers inserted in their female organs then their appearance would indicate so as they would have had a hard time walking and could be crying due to the pain.

The appellant further challenged the evidence of the prosecution averring that the same was not sufficient to procure his conviction and sentence because the PF3 was issued on 29.04.2021 while the medical examination was conducted on 27.04.2021. He contended that procedurally, the PF3 is first obtained from the police station and then followed by the victim going to the hospital for treatment.

The appellant further raised another issue to the effect that he was arrested on 25.04.2021 and brought to court on 04.05.2021 thus he was not brought before a magistrate within 24 hours as required under **section 33 of the Criminal Procedure Act, Cap 20 R.E. 2022**.

On the third ground, the appellant averred that the evidence of prosecution witnesses was contradictory. That, contrary to the promise to speak the truth they made under section 127(2) of the Evidence Act, PW2 and PW4 deceived the court. He argued so saying that PW2 testified that they were raped and fingers inserted in their female organs and given mint sweets and roasted bananas, while PW4 testified that the appellant inserted his fingers into their female organs and gave them sweets, biscuits, cassava and maize. He found the contradictions creating doubts as to whether the children understood the nature of oath. Further, he averred that there was contradiction as to the date the matter was reported. that, while PW3 testified to have reported the incident to the Ward leader on 25.04.2021, PW5 testified that he instructed PW1 and PW3 and the victims to report the matter to the police station on 23/04.2021.

As to the 4th ground, the appellant averred that his defense of alibi was not considered and that it was impossible for him to have a bus ticket according to the geographical area. That, on the material day he was traveling with his bicycle and could not produce a bus ticket. He finalized his submissions by praying that this court allows the appeal, quash his conviction and sentence and set aside his

sentence and compensation order of Tsh.1,000,000/- issued by the trial court.

In reply, Mr. Kajembe, as well, jointly addressed the 1st and 2nd grounds of appeal. He averred that all elements of the offence of grave sexual abuse under section 138C (1) and (2) (b) of the Penal Code were proved through the testimony of both PW2 and PW4. He said that both victims testified that the appellant inserted his fingers into their female organs after he undressed them. That, the act did not amount to rape under Section 130 of the Penal Code, but grave sexual abuse. He added that the victims' testimony was supported by that of PW7, the doctor who examined the victims and testified that both victims had no hymen, but had been penetrated. That, PW7 further tendered exhibit PE1 and PE2 to support her findings.

Mr. Kajemebr further averred that the offence was proved against the appellant by the witnesses whose testimony was believed by the trial magistrate upon application of the principle settled in the case of **Goodluck Kyando vs. Republic** [2006] T.L.R 363. He added that the trial magistrate had the opportunity to assess the demeanor of the witnesses particularly the victims and came up with findings.

Further, he contended that the appellant was unable to raise any doubts in his cross examination by failing to cross examine PW2 and PW4 regarding insertion of his fingers into their female organs, but

only questioned them on who accompanied them home from school. He thereby restated the cardinal principle of law that failure to cross examine a witness on a particular matter is deemed as accepting that matter and one will be estopped from asking the trial court to disbelieve the witness. He supported this point with the case of **Nyerere Nyangue vs. Republic** Criminal Appeal No. 67of 2010 (CAT at Arusha).

As to the allegation that the investigation was conducted without the PF3 and the offence being committed on 23.04.2021, but the medical examination conducted on 27.04.2021, he averred that there is no law requiring medical examination to be conducted on the same day the offence is committed, but rather it is material that the medical examiner fills the PF3 soon after the medical examination is conducted. He had the stance that that was done by PW7 as he testified. Commenting on the medical evidence, he averred that such evidence is not the only evidence that can prove the offence. That, the evidence adduced by other witnesses on record also proved the offence. To buttress his point, he cited the case of **Christopher Marwa Mturu vs. Republic** Criminal Appeal No 561.

Mr. Kajembe further argued that under section 127(6) of the Evidence Act, the court may convict an accused by relying on the evidence of a child of tender age without the same being corroborated, if it is satisfied that the child is telling the truth. In that respect, he had the stance that even without the medical

evidence, the court can still convict an accused basing on the victim's evidence which is considered to be the best evidence. He referred the case of **Selemani Makumba vs. Republic** [2006] TLR 379 to support his stance. He concluded by stating that the trial court is therefore required to observe the evidence of the victim at most, something which was done by the trial magistrate.

Replying to the 3rd ground, Mr. Kajembe averred that contradictions are unavoidable but the court has a duty to measure whether contradictions go to the root of the case or not. He supported this argument with the case of **Eliah Barki vs. Republic** Criminal Appeal No. 321 of 2016 (CAT). He considered the contraction on the dates between the evidence of PW1 and PW3 and the contradiction on the evidence of PW2 and PW4 whereby PW2 testified to have been raped and inserted fingers inserted into her female organ, while PW4 stated to have been inserted fingers into her female organ, to be minor.

Regarding contradictions on the dates, he was of view that it was undisputed that the offence took place on 23.04.2021 as testified by PW1, PW2, PW4 and PW5. That, even if the record shows that PW5 instructed PW3 to report the incident on 25.04.2021 or 23.04.2021 or even if there was contradiction on the date the matter was reported to the police, the same was immaterial in proving the offence. He reiterated his stance that all the particulars of the offence were proved. However, he added, on the other hand, PW5 did not specify on what date he instructed PW2 and

PW4 to report the matter to the police station, but rather he testified to have received information that PW4 and PW2 had been sexually assaulted.

On the asserted contradiction that while PW2 testified that the appellant's penis and fingers were inserted in their female organs, PW4 testified that only fingers were inserted into their female organs, he had the position that the same does not connote contravention of **Section 127(2) of the Evidence Act** as the trial court complied with the requirement set under the provision prior to recording their evidence and both promised to tell the truth and not lies. He concluded that since the appellant was charged with grave sexual abuse it is only the inserting of fingers that had to be proved.

Regarding the 4th ground, Mr. Kajembe had the firm stance that the appellant's defense was considered and the same was found without merit. He averred that the trial court correctly examined the evidence within the dictates of the law whereby it found that the appellant was required to file notice of alibi. That the appellant failed to do so and in the premises the trial court considered the defence of alibi he advanced as an afterthought. He challenged the appellant's submission regarding the geographical area and him traveling by bicycle for being new facts. He had the stance that the arguments being new, they could not be raised at this stage and thus, it was unfair for the appellant to blame the trial court over facts he never raised before it. He finalized his

submissions by praying that the appeal be found without merit and the conviction and sentence of the trial court be upheld.

After considering the grounds of appeal, the trial court record and the submissions by both parties, I am confident that the appeal at hand can be conveniently disposed under one main ground, that is, as to whether the offence of grave sexual abuse was proved by the prosecution beyond reasonable doubt. In the course of deliberating this ground, I shall address the issues advanced in the rest of the grounds of appeal, particularly the claim that the prosecution witnesses' testimony contradicted.

Before I start my deliberations, I wish to restate the settled position that, in law, the prosecution is burdened with the task of proving the case beyond reasonable doubt. The Court of Appeal, in the case of **Daimu Daimu Rashid @ Double D vs. The Republic** (Criminal Appeal No. 5 of 2018) [2019] TZCA 366 TANZLII, explained the meaning of proof beyond reasonable doubt. While quoting its previous decision in the case of **Samson Matiga vs. Republic**, Criminal Appeal No. 205 of 2007 (unreported) it stated that:

> "*A prosecution case, as the law provides, must be proved beyond reasonable doubt. What this means, to put it simply, is that the prosecution evidence must be so strong as to leave no doubt to the criminal liability of an accused person. Such evidence must irresistibly point to the accused person, and not any other, as the one who committed the offence. (See also* ***Yusuf Abdallah Ally v. Republic****, Criminal Appeal No. 300 of 2009, (unreported))*. *The said proof does not depend on*

> *the number of witnesses but rather, on their credibility (See section 143 of the Tanzania Evidence Act Cap 6 R.E. 2002 and the case of **Goodluck Kyando v Republic**, Criminal Appeal No. 118 of 2003, and **Majaliwa Guze v. Republic**, Criminal Appeal No. 213 of 2004 (both unreported)."*

In law, it is trite that every witness is entitled to credence unless there are cogent reasons not to believe the witness. These could be such as where there are contradictions or inconsistencies in the witness' testimony or where the testimony of such witness contradicts materially with the testimony of other witnesses; or where the evidence is implausible of any reason. See: **Daniel Malogo Makasi & Others vs. Republic** (Consolidated Criminal Appeals No. 346 of 2021) [2022] TZCA 230 TANZLII; and **Shaban Daudi vs. Republic** (Criminal Appeal No. 28 of 2001) (CAT, unreported). It is also a settled legal principle that credibility of a witness is a monopoly of the trial court and the appellate court can interfere in the presence of circumstances as pointed above. In **Shabani Daudi vs. Republic** (supra) the Court held:

> *"… Credibility of a witness is the monopoly of the trial court but only in so far as the demeanour is concerned. The credibility of a witness can be determined in two other ways. One, when assessing the coherence of the testimony of that witness, two, when the testimony is considered in relation to the evidence of other witnesses, including that of the accused person."*

In the same line, in rape cases, it is settled law that the evidence comes from the victim. See: **Selemani Makumba vs. Republic** (supra); and **Godi Kasenegala vs. The Republic** (Criminal Appeal

No. 10 of 2008) [2010] TZCA 166 TANZLII. It is however, also, the position of the law that the court should be careful not to take the victim's testimony wholesale. The court therefore is obliged to critically analyse the victim's testimony to ascertain its credibility, reliability and sufficiency to avoid punishing innocent persons. See: **Majaliwa Ihemo vs. The Republic** (Criminal Appeal No. 197 of 2020) [2021] TZCA 304; and **Paschal Yoya @ Maganga vs. The Republic** (Criminal Appeal No. 248 of 2017) [2021] TZCA 36.

In the matter at hand, the appellant, among other things, challenges the trial court's decision for being founded on contradictory evidence of the prosecution witnesses, particularly PW1, PW2, PW3 and PW4. To this point, being the first appellate court, I am obliged to scrutinize the evidence on record to ascertain the credibility of the appellant's claim. PW2 and PW4 are the victims in this matter while PW1 and PW3 are the parents (mothers) of the victims. To be specific, PW1 is the mother of PW2 while PW3 is the mother of PW4.

It was the testimony of PW1 that, on 24.04.2021 at 12:00 hours, she found PW2 with sweets and biscuits and upon questioning her, PW2 told her that she went to the appellant's house with PW4 and were given the snacks. Then after eating the snacks the appellant carried them to his bed, undressed their under-wears and put his fingers into their female organs. Thereafter she went with PW3 to report the incident to the ward chairman who gave them a letter to take to Kisangara police post.

PW2 stated that on their way home from school, while with PW4, they met the appellant. That, the appellant took them to his room, undressed their underpants and raped them. That, he unzipped his trousers, took off his male organ and inserted it into their female organs leading them to feel pain. PW2 further stated that the appellant inserted his fingers inside their female organs. That, the appellant raped them for like ten (10) times. That, he gave them mint sweets, and roasted bananas.

PW3 testified that on 24.04.2021 at 18:00hours, PW1, who is her neighbour, went to her home and told her that PW2 usually comes home with sweets and biscuits. That, PW2 alleged before PW1 to have been given the sweets and biscuits by PW4. PW3 stated that she told PW1 that she had never given PW4 any amount of money to go with to school. Then the two of them decided to interrogate on the matter whereby they questioned PW4 as to where does she obtain the sweets and biscuits. PW4 told them that when on their way from school the appellant usually calls them to have some rest in his home. He carries them to his bed, undresses their underpants and puts his fingers in their female organs, and then gives them sweets and biscuits. That, PW4 told them that the appellant tells them not tell elders as they will be beaten. That, on 25.04.2021 at about 17:00hours they went to the village ward leader, who gave them a letter to take to Kisangara police post.

PW4 stated that it was on 23.04.2021 at about 12:00 noon she was with PW2 heading home from school. The appellant called them

and took them inside his house. He gave them sweets, biscuits, cassava and maize. That, the appellant carried her and PW2 to his bed and inserted his fingers into their female organs. After that he told them to go home and never tell elders because they will beat them. When she reached home, she told her mother. That, PW3, her mother questioned her as to where she got the biscuits and sweets. Then they were taken to the police station.

Considering the above testimonies, it is evident that there were contradictions between the prosecution witnesses. While the appellant calls for the court to consider them as rendering the charge unproved, Mr. Kajembe considered then as minor, with no effect to the conviction entered against the appellant. The law is settled that when contradictions exist in the witnesses' testimonies, the court is duty bound to address them and rule as to whether the same go to the root of the case or not. This was decided in the case of **Mohamed Said Matula vs. Republic** [1995] TLR No. 3, in which it was held:

> *"Where the testimony by the witnesses contains inconsistencies and contradictions, the court has a duty to address the inconsistencies and try to resolve them where possible. Else the court has to decide whether the inconsistencies and contradictions are only minor or whether they go to the root of the matter"*

In the case at hand, like I pointed out, there exists a number of contradictions among the witnesses by the prosecution. First regards the statement of PW2 to PW1. While PW1 stated that when

she found PW2 with sweets and biscuits and asked her as to where she obtained the same, PW1 told her that she was given by the appellant; on the other hand, PW3 stated that PW1 went to her home and told her that she saw PW3 with sweets and biscuits and she told her that she was given the same by PW4.

Another contradiction is between the victims, PW2 and PW4 on the encounters they both had with the appellant. While PW2 stated that both of them were penetrated by the appellant's male organ and fingers, PW4 stated that they were only penetrated by fingers. While PW2 stated that the appellant did to them the alleged acts 10 times, PW4 never stated any repetitions of the acts connoting that it happened only once. Further, while PW2 stated that they were given mint sweets and roasted bananas, PW4 stated that they were given biscuits, cassava and maize. It should be noted that that these victims alleged to have been together when the alleged incidents occurred.

Mr. Kajembe, while conceding to the contradictions, argued that the same were minor and not going to the root of the case. With due respect to the learned counsel, I do not subscribe to his view. In my considered view these contradictions are material and going to the root of the case as they relate to the question as to whether the victims were indeed at the appellant's place and went through the alleged acts. The contradiction between PW1 and PW3 on what PW2 stated to PW1 creates doubt as to whether PW2 as a victim mentioned the appellant, as her assailant, in the first place

and at the earliest possible opportunity. The contradictions between PW2 and PW4 also raise doubts as to whether the two were indeed together at the appellant's house.

Mr. Kajembe argued that the testimony by PW2 that she was also penetrated by the appellant's male organ was irrelevant to the case as the charge against the appellant was that of grave sexual abuse and not rape. I do not agree with his contention on the reason that, if the victim (PW2) indeed testified to have as well been carnally known by the appellant, she should have stated the same to the rest of the witnesses and the offence would have been included in the charge.

The fact that the same was not revealed earlier and not mentioned by the fellow victim (PW4) evidences that such act never happened. In that respect, bringing up the same during trial by PW2 shows that it was fabricated. That fabrication, in my view, diminishes the credibility of the victim witnesses even in relation to the offence charged. This is in the sense that they have portrayed that they are capable of giving untrue statements before the court. The law is trite that witnesses who lie before the court are not to be accorded credence. See: **Zakaria Jackson Magayo vs. Republic** (Criminal Appeal No. 411 of 2018) [2021] TZCA 207 TANZLII.

The trial court appears to have accepted the victims' testimonies wholesomely on the ground that the appellant never cross examined them on the alleged facts. This position was strongly

supported by Mr. Kajembe. However, with due respect, I think both of them never directed their minds to the settled position that the rule is not absolute, especially where the credibility of the testimony accorded is in question. In **Zakaria Jackson Magayo vs. Republic** (supra) the Court held:

> *"It appears to us to be clear that the rule is not absolute. Our understanding of it is that it focuses on the material evidence adverse to the other party excluding incredible evidence."*

The Court took inspiration from a High Court decision (Samatta, J. as he then was) in the case of **Kwiga Masa vs. Samwel Mtubatwa** [1989] T.L.R. 103, in which it was held:

> *"A failure to cross-examine is merely a consideration to be weighed up with all other factors in the case in deciding the issue or truthfulness or otherwise of the unchallenged evidence. The failure does not necessarily prevent the court from accepting the version of the omitting party on the point. The witness' story may be so improbable, vague or contradictory that the court would be justified to reject it, notwithstanding the opposite party's failure to challenge it during cross-examination. In any case, it may be apparent on the record of the case, as it is in the instant case, that the opposite party, in omitting to cross-examine the witness, was not making a concession that the evidence of the witness was true."*

Considering the above authorities and the observations I have made herein in this judgement regarding the credibility of the prosecution witnesses, particularly PW1, PW2, PW3 and PW4, I am of

the settled view that the appellant's failure to cross examine, if any, cannot he held to bear adverse impact against him.

To this juncture, I find the prosecution case not proved beyond reasonable doubt. Consequently, the conviction, sentence and order by the trial court against the appellant are hereby quashed. I order for the release of the appellant from prison custody forthwith, unless held for some other lawful cause.

Dated and delivered at Moshi, in chambers, on this 18th day of September 2023.

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
MOSHI DISTRICT REGISTRY

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L. M. MONGELLA
JUDGE
Signed by: L. M. MONGELLA