IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(TANGA DISTRICT REGISTRY)

AT TANGA

CRIMINAL APPEAL NO. 68 OF 2022

HASSAN ADAM.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Arising from Criminal Case No. 32 of the District Court of Lushoto)

JUDGMENT

07/09/2023 & 29/09/2023

NDESAMBURO, J.:

Child abduction is an offence of wrongfully removing or wrongfully retaining, detaining or concealing a child or a baby. Abduction is generally the act of taking away a person by persuasion, fraud or by open force or violence. Under the Laws of Tanzania, the definition of abduction is jotted down under section 246 of the Penal Code, Cap 16 R.E 2022 *that a person who by force compels, or by deceitful means induces any person to go from any place is said to abduct that person.* Abduction of girls under the age of sixteen is specifically provided for under Section 134 of the same Act.

It is with this offence, that the appellant herein by the name of Hassan Adam, together with one Amiri Saidi Kingazi (not a part of this appeal) were indicted in the District Court of Lushoto. Particulars of the offence were that, on the 07th day of January, 2022 at Mlola village within Lushoto District in Tanga region the accused persons unlawfully took an unmarried girl under the name of Shahida Twaha aged 15 years out of custody or protection of her parents and against the will of her parents.

They both pleaded not guilty to the charge and consequently a full trial ensued. The appellant who was the first accused person was convicted and sentenced to 3 years imprisonment while his fellow who was the second accused, was acquitted. The appellant was aggrieved hence this appeal. At the trial court, the prosecution called a total of four witnesses. The Defence had three witnesses, the accused persons together with one other witness.

A brief narration of the evidence collected during the trial is that sometime in November 2021, the first accused person approached PW1 who is the victim's father and asked him for his daughter to go to work in Tanga. PW1 rejected the thought and so the appellant left. On the day of the incident, on 07th January 2022

upon PW1 getting back from Horohoro, he was informed by PW2, his wife, that the appellant had taken his sixteen-year-old girl child.

PW2 testified that when the appellant went to her home earlier that day and proposed to take her daughter to work in Tanga, she refused. She confirmed the evidence of PW1 that it was the second time the appellant went to them with that request. Later on, PW2 went to the river to fetch some water then she saw the appellant carrying the victim on his motorcycle. She made efforts to stop them but she failed. The matter was reported to the Ward Executive Officer and later to the police. Another witness PW3, who is the victim's grandfather, also testified that on 20th January 2022 while at Mlingano Petrol Station, in Korogwe District, he saw the appellant carrying the victim on a motorcycle heading to Mashewa area in Korogwe District. He learnt later on that the victim had been missing.

The matter at the police was investigated by PW4 who was assigned the case file on 01st May 2022. He testified that the appellant did confess that he took the girl without her parents' consent. He was required to bring the girl as he said she was at his uncle's house, who was the second accused person. Upon

interrogation, the second accused person confessed to having received the victim from the first accused person. Efforts to bring back the victim to her parents proved futile. All witnesses identified the appellant in court as the perpetrator of the crime.

The first accused in defence purported to raise a defence of alibi as he asserted that since 7th November 2021, he was absent from Lushoto but got back on 28th April 2022. On this same date, he went to Mashewa where he met PW1. PW1 asked about his daughter but he did not know anything about her. PW1 reported him to the police and he was arrested, sent to Mashewa police post and later to Korogwe Police Station. Upon interrogation by a policeman named Paul, he denied having had anything to do with the girl. He was thereafter tortured and finally stated that he had taken the victim to the second accused person. The second accused was interrogated and admitted to having received the victim after being tortured. As for the second accused person, he simply prayed to be acquitted as no witness had connected him with the offence. DW3's testimony was completely nugatory as he denied everything, he was led to testify by the first accused person. The court in the end found the first accused person guilty of the offence and passed a sentence of three years in custody.

The appellant was not pleased with the conviction and sentence on only three grounds framed as follows:

1. *That the trial District Court erred in law and fact by convicting and sentencing the appellant while the charges levelled against him were not proved beyond reasonable doubt*
2. *That the trial District Court erred in law and fact by convicting and sentencing the appellant while the evidence adduced by the prosecution was full of contradictions and inconsistencies*
3. *That the trial District Court erred in law and in fact by its failure to analyze properly the evidence adduced by both parties hence reached an erroneous decision.*

The appellant prayed that this court quash the conviction and set aside the sentence imposed plus any other orders this court may deem fit to grant.

At the hearing of this appeal, the appellant appeared in person, while Mr. Kulaya, a learned State Attorney appeared for the Respondent/Republic. Hearing of this appeal was conducted verbally.

The Appellant preferred that the Republic submitted first and he submitted later. Mr. Kulaya supported the decision of the District Court. Arguing on the first ground, he submitted that the prosecution did prove the case to the required standard that is beyond reasonable doubt. It was his submission that the ingredients of the offence under section 134 of the Penal Code, are, first, the age of the victim which was proved to be under the age of sixteen. The second element is consent which was not given by the parents of the victim as they testified in court.

On the second ground regarding contradictions and inconsistencies, Mr. Kulaya submitted that there were none. However, if there were any, the same did not go to the root of the case. He cited the case of **Dickson Elias Nsamba Shapatwa v Republic,** Criminal Appeal No 92 of 2007.

The learned State Attorney stated that the contradictions and inconsistencies that occurred in the case at hand were due to the age of the victim. While PW1 stated that the victim was 16 years old, PW2 stated that the girl was 15. Mr. Kulaya was of the view that the difference of one year was minor and still placed the victim under the age of 16 years.

Regarding the last ground, Mr. Kulaya conceded that the learned trial magistrate did not analyse the evidence of both sides but that of the prosecution only, in that case, he prayed that this court wears the shoes of the trial court and determine the effect of the defence on the prosecution. He cited the case of **Kaimu Said v Republic,** Criminal Appeal No. 391 of 2019. The learned State Attorney therefore prayed that this court dismisses the appeal and uphold the conviction and sentence against the appellant.

On his part, being a lay person, the appellant had nothing material to respond more than praying that the court exonerates him from liability. He also added that the parents, PW1 and PW2 did consent to the girl being taken to work as a housemaid.

During the hearing, the court invited the parties to address it on the appropriateness of the sentence passed on the appellant. The learned State Attorney agreed that the sentence meted out to the appellant was contrary to the law since the appellant was charged under the section 134 and 35 of Cap 16 R.E 2019 where the sentence was imprisonment for a term not exceeding two years or with a fine or with both. He prayed for the court to invoke the

provisions of section 366(1) (a) (ii) of the Criminal Procedure Act, Cap 20 R.E 2019 and pass an appropriate sentence.

I have carefully read the judgment of the trial court and also studied the record of appeal plus the submissions of the parties. The main contention of this appeal is whether the prosecution proved its case beyond a reasonable doubt.

This is the first appeal and therefore, the duty of a first appellate court as articulated in **Pandya v R [1957] EA 336** is to re-appraise and re-evaluate the evidence presented before the trial court and the materials thereto. The appellate court must then make up its mind not disregarding the judgment appealed from but carefully weighing and considering it before coming to its independent conclusion.

Particularly in this matter, the appellant laments that the case against him was not proved beyond reasonable doubt. Proving the case beyond a reasonable doubt means proving all elements of the offence as it appears in the charge sheet. I agree with the learned State Attorney as well as the trial magistrate that the major ingredients of this offence are first, that the age of the girl victim should be below sixteen years and secondly, that there is no

consent from the parents or any other persons having lawful care or charge of her.

I will start with deliberating on the first ingredient of the offence that is, the age of the victim. In law, evidence as to proof of age can be given by the victim, relative, parent, medical practitioner, or where available, production of a birth certificate. (See the case of **Isaya Renatus v The Republic,** Criminal Appeal No. 542 of 2015, CAT (unreported) and also section 114 (2) of the Law of Child, Cap 13 of 2019). Section 114(2) of Cap 13 provides as follows:

> *"Without prejudice to the preceding provisions of this section, where the Court has failed to establish the correct age of the person brought before it, then the age* ***stated by that person, parent, guardian, relative or social welfare officer*** *shall be deemed to be the correct age of that person."*

The age of the victim in this case was brought into evidence by two witnesses. The victim's father, PW1, stated that the victim at the time of the incident was sixteen (16) years of age. Then there is another piece of evidence from PW2, the mother of the victim, who

stated that she was fifteen years old when she was abducted. The trial magistrate in his judgment on page four stated as follows: -

> *"...proof of the offence of abduction entails disclosure of age and lack of consent. Concerning age, the same was attested to by PW1 and PW2 who are both biological parents of the victim, who stated that the victim was 15 years old, having been born in 2010".*

With respect, I do not find anything in the record that supports the averment of the trial court quoted above. That is because PW1 and PW2 did not both state that the victim was 15 years of age. The age of the victim being 15 years in this case was only stated by PW2. PW1 stated that the victim was 16 years old. It must be understood that in a case like this where conviction or acquittal depends much on the age, it is imperative to prove the age of the victim. Proving the age means giving concrete unshakable evidence about the age of the victim. Not just mentioning it like what the prosecution did in this case. This requirement is more significant in cases of this nature where there is no other evidence available to make the court infer the age of the victim. The only evidence which was expected to prove the age of the victim was that of the parents.

Further, there is nowhere that the parties stated that the victim was born in 2010 as the judgment reflects. But even assuming that the victim was born in 2010, then when the parties were testifying in 2022, the victim would have been twelve years of age and not fifteen or sixteen. Matters become even worse as the father who is also a person eligible to prove age gave a contradictory age compared to that was given by the victim's mother. The State Attorney stated that the contradictions are minor and do not go to the root of the case. However, these contradictions cannot be said to be minor. I find that the contradiction in the age of the victim in this case went to the root of the matter and had the effect of tainting the prosecution's case.

Given the above account and the evidence available, I am of a firm view that the proof of age of the victim was left hanging by the prosecution at the trial court as there is glaring doubt on the age of the victim which is one of the major ingredients of the offence. Hence the first ground of appeal is merited that the prosecution's case was not proved to the required standards.

I would typically conclude here, however, there is another noteworthy slipup noted in the record that is worthy by

consideration by this court. It pertains to the imposed sentence, which was based on section 35 of Cap 16, R.E 2019 the same section with which the appellant was charged. While the use of this section for sentencing was appropriate, the trial court erred in its interpretation of the said section. The Section provides:

> *"When in this Code no punishment is expressly provided for any offence, it shall be punishable with imprisonment* ***for a term not exceeding two years*** *or with a fine or with both".*

The appellant herein was sentenced to serve a term of three (3) years in jail. This sentence was contrary to the precepts of law cited above.

In the above consideration, I allow the appeal. The appellant's conviction and sentence are accordingly quashed. The appellant shall be set free immediately unless he is lawfully held for any lawful cause.

It is so ordered.

DATED at **TANGA** this 29th day of September 2023

H. P. NDESAMBURO

JUDGE