

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

IN THE DISTRICT REGISTRY OF SHINYANGA

AT SHINYANGA

CRIMINAL APPEAL NO. 106 OF 2023

(Arising from Criminal Case No. 118 of 2023 in the District Court of Shinyanga at Shinyanga)

DIRECTOR OF PUBLIC PROSECUTION..... APPELLANT

VERSUS

ABUBAKAR S/O SAID @ ABUU..... RESPONDENT

JUDGMENT

14th & 17th November, 2023

KAWISHE, J.:

In the District Court of Shinyanga at Shinyanga the respondent Abubakar s/o Said @ Abuu was charged with the offence of grave sexual abuse of a girl aged 14 years contrary to section 138C (1)(d) and (2)(b) of the Penal Code, Cap. 16 R.E 2022.

It was alleged that the respondent on 9th October, 2022, at Ndembezi area within Shinyanga Municipality in Shinyanga Region for sexual gratification did sexually abuse one Mazoea (the victim, for moral reasons her name is withheld). The accused pleaded not guilty to the offence.

After full determination of the case, the trial court held that the prosecution failed to prove the case beyond reasonable doubt against the accused to the offence he has been charged with. Thus, the accused was acquitted.

Dissatisfied with the decision of the trial court the appellant approached this Court with three grounds namely:

***First,** that, the learned trial magistrate erred in law and fact for not according weight to victim's evidence.*

***Second,** that, the trial magistrate misdirected himself by trying to change version on the sexual offence that the victim's evidence though of truthfulness must be corroborated.*

***Third,** that, the trial magistrate erred in law and fact by acquitting (sic) the respondent despite the fact that prosecution side did prove the case beyond reasonable doubt.*

The appellant prayed that, this honourable Court allow the appeal on its merit, convict and sentence the respondent accordingly.

When this appeal was called for hearing, the appellant was represented by Ms. Upendo Mwakimonga learned State Attorney. On the other hand, the respondent did not appear though duly served through publications of the notice in the Mwananchi Newspaper. This matter has

been adjourned six times. The appeal was thus, heard in his absence in terms of section 383(2) of the Criminal Procedure Act, Cap 20 R.E 2022.

Addressing this Court on the grounds of appeal, Ms. Mwakimonga started with the 1st ground by submitting that, the learned trial magistrate erred in law and fact for not according weight to the victim's evidence. She referred this Court to pages 7 and 8 of the proceedings while arguing that, the victim's evidence is credible. That, she testified that, she went to her grandfather Abubakar Said, the respondent and found him eating groundnuts with soda. She continued alluding that, the respondent told victim to enter into his house so that he can give her protection. Upon entering the house, the respondent ordered the victim to undress and sucked her breasts and vagina. That, he undressed too and commanded the victim to suck his penis but the victim refused. That, the respondent forced the victim to bed but she managed to escape.

Ms. Mwakimonga further fortified her submission by arguing that, every evidence of a witness has to be believed and accepted where there is good reason for not trusting the witness. She cited the case of **Edson Simon Mwombeki vs. Republic Criminal Appeal No. 94 of 2016**, at

page 15 where the court cited the case of **Goodluck Kyando vs. Republic 2006 T.L.R 363**, stating that, every witness is entitled to credence and believed and his testimony accepted unless there are good and cogent reasons not believing the witness. She closed her submission on the first ground by stressing that, given the reasons adduced the trial magistrate ought to have trusted the evidence of the victim.

Building on the second ground of appeal, Ms. Mwakimonga contended that, the trial magistrate misdirected himself by trying to change version on the sexual offence that the victim's evidence though of truthfulness must be corroborated. She stated that, the best evidence in sexual offences is the victim's evidence as it was held in the case of **Seleman Makumba vs. Republic 2006 T.L.R 379**. Ms. Mwakimonga referred pages 7 and 8 of the proceedings where the witness testified how the offence was committed. That, she was commanded to undress, he sucked her breasts and vagina, and how she escaped from the ravaging respondent. She supported her argument with the provisions of section 127(6) of the Evidence Act, which states that, in sexual offences the evidence of the victim needs no corroboration unless she tells lies. Thus, the testimony of the victim did not need corroboration. She nailed her

submission with the position stated in the case of **Edson Simon Mwombeki vs. Republic** (supra).

Arguing the third ground of appeal Ms. Mwakimonga stated that, the trial magistrate erred in law and fact by acquitting the respondent despite the fact that prosecution side did prove the case beyond reasonable doubt. She contended that, the prosecution proved the case beyond reasonable doubt as they manage to prove that it was the respondent who committed the offence for sexual gratification and not any other person. Ms. Mwakimonga insisted that, in proving the case, the prosecution paraded witnesses, PW1 the victim testified how the offence was committed and it was the respondent who did it.

Biffing up her submission Ms. Mwakimonga stated that, PW2 the victim's father at page 9 of the proceedings testified that, on 9th October, 2022 he was looking for his daughter, when he got her upon interrogation, she replied that she went to the respondent's house and find him eating groundnuts with soda. That, the respondent told the victim to enter into the house, commanded her to undress, sucked her breasts and vagina. That, the respondent undressed himself and commanded the victim to suck

his penis but she refused, when he forced her to the bed, she managed to escape from the awful grandfather.

Ms. Mwakimonga stressed that, since the victim identified the respondent at the earliest stage it is a credit on the evidence of the victim. She cemented her submission by leaning on the position stated in the case of **Kasandu Mboje vs. Republic Criminal Appeal No. 353 of 2018**. She closed the door of her submission by stating that, prosecution proved its case and prayed to this Court to allow this appeal, quash and set aside the trial court's decision, convict the respondent and sentence him accordingly.

Since the respondent was at large, there was no reply to the petition of appeal, hence I am set to visit the records available and re-evaluate the evidence adduced.

I have considered the submission presented in the light of the three grounds of appeal. I have also studied the records of the trial court. I shall address the three grounds of appeal as two separate issues; one, whether the trial magistrate did not accord weight to the victim's evidence thus, needed corroboration and; two, whether the prosecution proved the case

beyond reasonable doubt. The first issue will cater for ground one and two of this appeal and the second issue will determine the third ground of appeal.

Starting with the first issue, it was averred in the first ground of appeal that, the learned trial magistrate erred in law and fact for not according weight to victim's evidence. I will examine the records available and the evidence adduced by the victim and other witnesses to see whether it was not accorded weight as argued by Ms. Mwakimonga.

I scanned the proceedings and specifically pages 7 and 8 as stated by Ms. Mwakimonga, the victim gave her testimony in court. She stated that she left home on 8th October, 2022 spent night in her friend's house kept on moving from one family to the other. On 9th October, 2022 according to the records available she visited her grandfather the respondent who abused her sexually. From the victim's testimony, I am mystified with three questions which were not asked neither answered during the trial. **One**, she was undressed and escaped from the thirsty respondent. She did not tell whether she put on the clothes first before running out of the house or she ran out naked? **Second**, when she was

being abused, she never raised alarm for help, and when she got to her friend's home, she never disclosed the matter until when her father followed her. **Third**, why didn't she ask for escort to go home? She said she was afraid of going home, why?

Under normal circumstances, a girl of 14 years old left home with the permission of her parents, she never came back from 8th to 10th October, 2022 and the parents did not take any step to know the whereabouts of their daughter. The parents permitted her to go to Elizabeth's home to pick her exercise book. It is my view that, the parents should have looked for the girl for the very first day when she did not come back home. This kind of freedom to the girl, independent decisions of the girl to decide to sleep in anyone's home is leaves a lot to be desired.

Building up her case, Ms. Mwakimonga cited the case of **Edson Simon Mwombeki vs. Republic Criminal Appeal No. 94 of 2016** where the court cited the case of **Goodluck Kyando vs. Republic, (2006) TLR 363**. She quoted the following principle:

"Every witness is entitled to credence and must be believed and his testimony accepted unless there are good and cogent reasons not believing a witness."

She used this principle to default the trial magistrate for not according the victim's evidence weight. In my view, the facts of the **Edson Simon Mwombeki** (supra) are distinguishable from this appeal for the following reasons. The appellant in that case, was entrusted with the girl to take her to school but on his way turned hostile and raped the girl. Also, there was evidence from the hotel where he slept with the victim, and the fabricated story that the girl slept in Kasa Secondary School was disproved. The victim in **Edson Simon Mwombeki** (supra) was very far from her parents, moved from Mwanza to Shinyanga and while, the victim in this case alleged the offence was committed within Shinyanga Municipality where she lives with her parents. The victim in this case was able to get home the same day on foot and report the matter, but she stayed away and kept it for her own. Why didn't she report the matter on the fateful day? This creates doubt on the commission of the offence and taints the evidence of the victim. Hence, does not qualify to be accommodated with the principle laid in **Edson Simon Mwombeki** (supra).

With the reasons adduced, I agree with the trial magistrate that, the evidence of the victim became less. In fact, it needed corroboration. Had it been that, on the material day she took initiatives to report about the

alleged offence, her testimony would be credible. Consequently, grounds one and two of this appeal have no merit and are dismissed.

On the second issue whether the prosecution proved the case beyond reasonable doubt. Ms. Mwakimonga cited the provisions of section 138C(1) of the Penal Code, and insisted that, the offence of grave sexual abuse was proved as they linked the ingredients with the evidence. She banked on the evidence adduced by PW1 the victim and PW2 the father of the victim.

The evidence of the victim became weak due to the way she behaved before and after the commission of the alleged offence. What PW2 testified in court is what he heard from PW1 whose evidence needed corroboration due to her demeanor. It is a bit confusing the way the victim conducted herself, unless I failed to understand the information on pages 7 and 8 of the proceedings. It runs like this:

"I reside in Ngokolo with my father and mother. On 08/10/2022 I was home, and left home around 5:00hrs to my friend Elizabeth to pick (sic) my exercise book. I was permitted by my parents, later I, Anna and Elizabeth, we went to Winnie's house for private study. Later we went to Penina's house and stayed there until 16:00hrs. When we went to Anna's house we stayed there until 19:00hrs. As time ran off, I was afraid of going home (sic) I was afraid of my parents so I stayed in the house of our neighbour Mama Fares. On 09/10/2022 I left kina mama Fares house and went to the house of my grandfather Abubakar at

Mshikamano where I found him alone drinking soda and eating groundnuts. [...] I was naked, he sucked my breasts and vagina... I managed to run away. It was around 17:00hrs to 18:00hrs when I went directly to mama Fares, I was still afraid of going home. I slept in mama Fares house until 10/10/2022 the day which my father came to pick me, I told him the story..."

I decided to reproduce part of the victim's testimony in court in order to see how strong her evidence was to be able to prove the offence. Before the commission of the alleged offence, the victim testified she left home under the permission of her parents. She moved into three different houses and slept in their neighbour's house mama Fares. After occasion of the alleged offence, she returned to their neighbour's house and spent a night there. Why didn't she tell mama Fares about the tragedy? If she slept in their neighbour's house it means their home is very close to the extent she could walk home and inform her parents about the incidence.

Then I wish to compare the story of the victim with the case cited by Ms. Mwakimonga in fortifying her case, **Kisandu Mboje vs. Republic, Criminal Appeal No. 353 of 2018** where she quoted the following observation:

The ability of a witness to name a suspect at earliest possible opportunity is an all-important as assurance (sic) of his reliability."

The key witness in this appeal does not qualify under the observation aforementioned, according to her story she was like an untamed fowl. The victim went to her grandfather the respondent in this case willingly after a lot of excursions from one house to the next. She knew the respondent before the incident, according to the records the respondent is her grandfather, so the matter of identifying him is not that troublesome. The credibility of a witness has been well elaborated by Court of Appeal in a number of cases. See **Ali Abdallah Rajab vs. Saada Abdallah Rajab & Others [1994] T.L.R. 132** where the Court stated that:

"Where the decision of a case is wholly based on the credibility of the witnesses then it is the trial court which is better placed to assess their credibility than an appellate court which merely reads the transcript of the record. "

Further, the Court of Appeal in case of **Mathias Bundala vs. The Republic, Criminal Appeal No. 62 of 2004 [2007] TZCA 16** (16 March, 2007; TANZLII) held that:

*"Good reasons for not believing a witness include the fact that the witness has **given improbable evidence**, or the evidence has been materially contradicted by another witness or witnesses." [emphasis added].*

In my view, PW1 is the key witness in this case. Unfortunately, the evidence adduced by the victim (PW1) is deadily dented by her three days

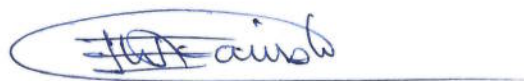
excursion, not reporting the alleged offence the earliest possible time she could, not managing to give credible evidence on how she escaped, any mark on the body or anything to show that the respondent committed the offence. Her evidence is improbable to prove the case beyond reasonable doubt. Due to her demeanor, her evidence needed corroboration.

In that respect, I fully concur with the learned trial magistrate that prosecution witnesses did not prove the offence against the respondent, and therefore, such evidence could not be acted upon to convict the respondent. In that vain, the question whether the prosecution proved the case beyond reasonable doubt is answered in negative. Thus, ground three of this appeal lacks merit and is dismissed. Accordingly, I uphold the judgment of the trial court and dismiss the appeal in its entirety.

It is so ordered.

Right of further appeal explained.

DATED at SHINYANGA this 17th day of November, 2023.

A handwritten signature in blue ink, appearing to read 'E.L. Kawishe', is enclosed within a hand-drawn oval. A horizontal line extends from the right side of the oval.

E.L. KAWISHE

JUDGE

Court: Judgment delivered in chambers this 17th day of November, 2023 in the presence of Ms. Upendo Mwakimonga State Attorney for the appellant and in the absence of the respondent.



A handwritten signature in blue ink, which appears to read "E.L. Kawishe", is written over a horizontal line.

E.L. KAWISHE

JUDGE

17/11/2023