IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

IN THE DISTRICT REGISTRY OF SHINYANGA

AT SHINYANGA

CRIMINAL APPEAL NO. 108 OF 2023

(Originating from Criminal Case No. 58 of 2023 in the District Court of Kishapu at Kishapu)

DIRECTOR OF PUBLIC PROSECUTION..... APPELLANT

VERSUS

EMMANUEL ZENGO ..... RESPONDENT

JUDGMENT

9th & 16th November, 2023

KAWISHE, J.:

In the District Court of Kishapu at Kishapu the respondent Emmanuel s/o Zengo was charged with the offence of grave sexual abuse of a girl aged 4 years contrary to section 138C (1)(d) of the Penal Code Cap. 16 R.E 2022.

It was alleged that the respondent on 27th March, 2023, at noon hours at Msagala Village within Kishapu District in Shinyanga Region for the purpose of sexual gratification did touch by using his fingers the vagina

and suck the tongue of one girl aged 4 years (name withheld for the purpose of concealing her identity). The accused pleaded not guilty when the charge was read and explained to him. Prosecution paraded 6 witnesses to prove the case against the respondent. The respondent did not defend himself as he absconded, and therefore, the trial court delivered its judgment in absentia.

After determination of the case, the trial court held that the charge sheet was defective as it did not include the ingredients with or without the consent of the person under the age of eighteen years. Thus, it acquitted the accused.

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

> ***First,*** *that, the trial magistrate erred in law and fact to acquit the respondent on a charge of sexual abuse on the reason that lack of consent was not proved without considering that the victim of this offence was a child of 4 years old thus consent was immaterial.*
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> ***Second,*** *that, the trial magistrate erred in law and fact to acquit the respondent on the reason that, the prosecution failed to prove if the acts of sucking tongue and touching the vaginal of a girl aged 4 years done by the respondent was for the purpose of sexual gratification.*

Third, *that, the trial magistrate erred in law and fact by holding that the prosecution case was not proved against the accused person despite the plausible evidence adduce by prosecution witnesses.*

The appellant prayed that, this honourable Court quash the decision of the trial court and convict the respondent with the offence he was charged with.

When this appeal was called for hearing, the appellant was represented by Mr. Luis Mbwambo learned State Attorney. On the other hand, the respondent did not appear though duly served with the notice of hearing which he signed in the presence of Mr. Francis James Shija the Chairman of Kitongoji cha Ikombabuki, Ikonongo within Kishapu District in Shinyanga Region. This matter has been adjourned five times, I cannot adjourn it any more. 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, Mr. Mbwambo started with the 1st ground by submitting that, the trial court erred in law and fact by finding that consent on the part of the victim was not proved without considering that the victim is aged 4 years. He submitted further that, the age of the victim was proved by her grandmother PW3 as

indicated at page 8 of the proceedings. He referred to section 138C(1)(d) of the Penal Code (supra) which states that, a person commits the offence of grave sexual abuse when commits any act which does not amount to rape to a victim, with or without a consent. He alluded that, the law is clear that whether there is consent or not an offence can be proved as per the provisions on rape of a girl of under the age of 18 years.

Mr. Mbwambo arguing the 2nd ground of appeal insisted that, the trial magistrate erred in law and fact in acquitting the respondent by stating that, the testimony adduced did not show that the act of the respondent was intended for sexual gratification. He referred to the contents of pages 5, 6 and 7 of the proceedings which contain the testimonies of PW1 & PW2 who were eye witnesses. That, they caught the respondent sucking the tongue and touching the vagina of the victim. That, upon interrogation, the respondent tried to escape but they managed to arrest him at the very place. He backed his argument basing on the provisions of section 122 of the Evidence Act, Cap 6 R.E 2022 which gives the court power to make inference in certain acts and come up with a conclusion, as per the evidence adduced, the respondent's act was for sexual gratification.

Building on the 3rd ground of appeal, Mr. Mbwambo stated that, the trial magistrate erred in law and fact in finding out that the prosecution failed to prove the offence beyond reasonable doubt. He alluded that, the prosecution proved the offence beyond reasonable doubt by calling two eye witnesses who witnessed the commission of the offence by the respondent. That, the trial magistrate was aware that due to the age of the victim, could not understand the duty of telling the truth as recorded at page 11 of the proceedings, hence, the magistrate could have relied on the testimony of the eye witness in finding that the offence was proved beyond reasonable doubt. He anchored his argument on the observation made in **Siaba s/o Mswaki vs. Republic (Criminal Appeal 401 of 2021) [2021] TZCA 562** (4 October 2021) where it was observed that, conviction can be grounded on account of the evidence of eye witness without calling the victim to testify. He further argued that, when PW1 eye witness testified, the accused did not cross examine him, which in law means that the respondent agreed with the evidence given, as observed in the case of **Siaba Mswaki** (supra).

Mr. Mbwambo insisted that, the trial magistrate should have given weight to the evidence adduced and find out that the prosecution proved

the case beyond reasonable doubt. He referred to the provisions of section 138C (1)(b) of Penal Code (supra) by arguing that, since the respondent used his mouth to suck the tongue of the victim and fingers to touch her vagina amounts to sexual gratification as testified by prosecution. He prayed that, this Court quash the decision of the trial court, convict and sentence the respondent in accordance with the law.

In determining this appeal, the issue to be considered is whether this appeal has merit.

The learned trial magistrate to referred to **Ally Ramadhan @ Dogo vs. Republic, CAT, Criminal Appeal No. 45 of 2007**, **Nassoro Juma Azizi vs. Republic, CAT, Criminal Appeal No. 58 of 2010, Zefania Siame vs. Republic, CAT, Criminal Appeal No. 250 of 2011** and **Fred s/o Nyenzi vs. Republic (Criminal Appeal 121 of 2016) [2019] TZCA 95** (3 May 2019) and concluded that:

> *"Omission renders the charge sheet patently defective and incapable of founding any conviction"*

Given the conclusion by the learned trial magistrate I decided to peruse the authorities referred to. In the case of **Fred s/o Nyenzi** (supra) from page

10 to 13 of the judgment, the Court of Appeal consented to the defectiveness of the charge on two issues:

> ***First,*** *... that the statement of offence is defective for predicating the offence under sections 132 and 131 instead of the appropriate sections 132(1) and 2(a) of the Code. The learned Senior State Attorney took the position that the anomaly is fatal and the same cannot be cured by section 388(1) of the CPA"*
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> ***Second,*** *apart from the misdescription of the offence charged in the statement of the offence, the matter at hand is further undermined by the particulars on the charge sheet which, we think, omitted to state at least two essential ingredients of the offence of attempted rape. ...it is beyond question that the apparent prosecution's intent was to predicate the offence under section 132(1) and 2(a) of the Code. Thus, at least the words " ... with intent to procure prohibited sexual intercourse, attempted to rape XYZ aged 8 by threatening the girl for sexual purposes ..." ought to have been posted in the particulars of the offence.*

In the case of **Fred Nyenzi** (supra) the charge sheet suffered from citing wrong section and missed crucial ingredients of the offence of attempted rape whereas the appeal at hand the trial magistrate acquitted the respondent on account that the charge sheet was defective for not disclosing ingredient of the offence, ***"with or without consent."*** (emphasis added). In this case the victim is aged 4 years old, she literally knew what was going on. In my view, consent is impracticable.

With regard to the offence of grave sexual gratification, the contents of the charge sheet were clear. The charge reads:

> *EMMANUEL S/O ZENGO on the 27th day of Mach; 2023 at noon hours at Msagala Village within Kishapu District in Shinyanga Region for purpose of sexual gratification did touch by using fingers the vagina and suck the tongue of (XXXD) [I hide her identity] a girl aged 4 years old.*

This charge sheet is very elaborative, it stated the date, time and place of commission of the offence and the offence. Further, I scanned through the evidence on record and realized that, the testimonies of PW1 & PW2 given under oath stated that, they saw the respondent sucking the tongue and touching the vagina of the victim. This gave the respondent enough information to understand the offence he was charged with. That is to say, the offence of sexual gratification. The evidence adduced by the eye witness was not disproved by the respondent. See page 6 of the proceedings where he cross examined PW1 eye witness who caught him in action. The response of the eye witness was very clear *"it was the first time to see (sic) you while committing such act"* he did not proceed to ask the witness questions. He further, cross examined PW2 the second eye witness. The escaping pigeonhole for the respondent was the alleged

defects on the charge sheet. Defects which were searched by binoculars by the trial learned magistrate.

It is my considered view that, the appeal at hand has similar issue with the case of **Jamali Ally @ Salum vs. Republic (Criminal Appeal 52 of 2017) [2019] TZCA 32** (28 February 2019). In this case the Court of Appeal at page 17 stated:

> *"... the particulars of the offence were very clear and, in our view, enabled the appellant to fully understand the nature and seriousness of the offence of rape he was being tried for. The particulars of the offence gave the appellant sufficient notice about the date when the offence was committed, the village where the offence was committed, the nature of the offence, the name of the victim and her age:*
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> *"JAMAL s/o ALLY @ SALUM on 5th day of August, 2013 at Nahukahuka Village within the District and Region of Lindi, did had carnal knowledge of one (PW1) a girl of 12 years old. "*

Also, the case of **Khamis Abderehemani vs. Republic (Criminal Appeal 21 of 2017) [2019] TZCA 520** (26 February 2019) supports the appeal at hand. The Court of Appeal at page 14 stated that:

"On our part, we do not share the appellant's view of the defect. The way the appellant responded to the charge when it was read out, and the way he cross-examined PW1 and the way he testified in his own defence, are not consistent with a person who did not understand the seriousness of the charge facing him, or with a person who was prejudiced in any way."

I am strongly convinced that, the evidence given by PW1, PW2, PW3 and the information on the charge sheet disclose the offence as was held in **Jamali Ally @ Salum vs Republic** (supra) and **Khamis Abderehemani vs. Republic** (supra). Inclined to the position of this case, I agree with Mr. Mbwambo that, the prosecution proved the case beyond reasonable doubt. Thus, this appeal has merit.

Form the reasons above, therefore, the offence of grave sexual abuse to a person of less than eighteen years (a 4-year girl) was proved beyond reasonable doubt. Thus, in terms of section 382(a)(i) of the Criminal Procedure Act, Cap 20 R.E 2022, I reverse the finding of the trial court and convict the respondent with the offence of grave sexual abuse to a girl of 4 years old. Pursuant to section 138C(1)(d) and subsection 2(b) of the Penal Code (supra), I accordingly sentence the respondent to 20 years imprisonment and pay the victim Tzs. 1,000,000/= compensation

respectively. The sentence will start running upon surrender or arrest of the respondent.

It is so ordered.

Right of further appeal explained.

DATED at SHINYANGA this 16th day of November, 2023.

E.L. KAWISHE

JUDGE

Court: Judgment delivered in chambers this 16th day of November, 2023 in the presence of Mr. Luis Mbwambo and Ms. Upendo Mwakimonga State Attorneys for the appellant and in the respondent.

E.L. KAWISHE

JUDGE

16/11/2023