

**THE UNITED REPUBLIC OF TANZANIA
JUDICIARY
IN THE HIGH COURT OF TANZANIA
MBEYA SUB-REGISTRY
AT MBEYA**

CRIMINAL APPEAL NO. 63 OF 2023

*(Originating from the District Court of Mbarali District at Rujewa, in Criminal Case
No. 171 of 2022)*

MICHAEL NGOLI.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

Date of Last Order: 14/08/2023

Date of Judgement: 08/12/2023

NDUNGURU, J.

The appellant, Michael Ngoli was charged, convicted and sentenced for the offence of grave sexual abuse contrary to section 138C (i) (a) and (2) (b) of the Penal Code Cap. 16 R.E 2022. It was alleged in the particulars of the offence that on 21st Day of July 2022 at Igawa village within Mbarali District in Mbeya region the appellant wilfully and unlawfully did have grave sexual abuse to one CB a child of three (3) years old. The appellant denied the offence, however, at the end of the trial he was convicted and sentenced to serve 20 years

imprisonment. Disgruntled with the decision he appealed to this Court raising 5 grounds of appeal. Nonetheless, due to grammatical challenges contained in the grounds the same can be summarized as follows:

1. That the trial court erred when convicted and sentenced the appellant without considering that the prosecution's evidence did not prove the charge as the evidence of PW1 was not corroborated.
2. That the trial court erred to convict and sentence the appellant while Police and a Doctor were not called to give evidence.
3. That the trial court erred to convict the appellant while other witnesses such as children who were with the victim, the investigator and sketch map was not tendered.
4. That the mentioned one unknown woman was not called to support the evidence of Pw2.
5. That the trial court erred to reject the defence evidence and to properly evaluate the evidence of prosecution.

At the hearing of the appeal, the appellant appeared in person, unrepresented whereas Ms. Lilian Chagula learned State Attorney represented the respondent/republic.

Arguing for the appeal, the appellant submitted generally that the prosecution did not prove the case since the victim did neither identify him in court nor say anything in relation with the offence. That there was evidence that the victim was found with sperms on her body and underpants but no proof of the same sperms and to whom they came from. He further argued that neither investigator nor Doctor was called as witness. That PW1 said about hearing noises alleging that the victim was raped but those who made noises were not called to testify. That he was invaded and beaten but was rescued and taken to the police station. He thus prayed this appeal to be allowed.

In reply, Ms Chagula started by opposing the appeal and argued the grounds of appeal correctively that the charge against the appellant was proved beyond reasonable doubt through the evidence of PW2 who said that she found the victim on the thighs of the appellant and his penis was near to the victim's vagina and she had sperms. The complaint on failure to call other witness Ms. Chagula stated that no number of witnesses is required to prove the existence of fact as per section 143 of the Evidence Act, Cap 6 R.E 2022 and the case of **Tafifu Hassan @ Gumbe v. R.** Criminal Appeal No. 430 of 2017 CAT.

As to the 5th ground of appeal Ms. Chagula submitted that the appellant's defence was considered but was found to carry no weight to shake the prosecution evidence. She alternatively called upon this court to re-evaluate the evidence and come to its findings. She concluded that the appeal be dismissed for devoid of merits.

Having considered the grounds of appeal and submissions by the parties, the issue for determination is whether the appeal is meritorious. Essentially, all grounds of appeal are premised on the complaint that the prosecution did not prove the case beyond reasonable doubt. In resolving this complaint therefore, I will subject the entire evidence adduced by the parties before the trial Court under scrutiny bearing in mind that this is the first appellate court in which determination of appeal goes in the form of a rehearing. See **Siza Patrice v. Republic**, Criminal Appeal No. 19 of 2010 CAT at Mwanza (unreported).

In course of performing this noble duty, I will be guided by the common legal principle under section 110 of the Evidence Act, Cap. 6 R.E 2022 that he who alleges must prove. Moreso, the principle in criminal cases that a burden of proof lies upon the prosecution and it is beyond reasonable doubt. And it never shifts to the accused person. See

the holding in **Pascal Yoya @Maganga vs Republic**, Criminal Appeal No. 248 of 2017 Court of Appeal of Tanzania (Unreported).

In this matter, the appellant was charged with the offence of grave sexual abuse contrary to section 138C (1) of the Pena Code. The section provides that:

"138C.-(1) Any person who, for sexual gratification, does any act, by the use of his genital or any other part of the human body or any instrument or any orifice or part of the body of another person, being an act which does not amount to rape under section 130, commits the offence of grave sexual abuse..."

In that effect, the ingredients of the offence are the offender to use his genital or any other part of his body or of another body to do the act which does not amount to rape with intent of sexual gratification.

In this case it is unfortunate that the victim of the offence was said to be only three years whom did not manage to tell anything to the trial court. The only evidence available is that of PW2 who testified that she found the appellant carried the victim while her legs open and kept his penis nearby the victim's vagina. Also, that she found the appellant

surrounded with substances like sperms. Further that she inspected the victim and found her with sperms in her vagina.

The appellant's defence was that on the fateful date when coming from preaching activities he was tired he sat near the mosque where there were a group of children passing. Then appeared PW2 who shouted that she has found him with the child thereafter group of people appeared then he was taken to Police station.

In my view the foregone prosecution's evidence does not establish the offence. This is due to the fact that it is not clearly understood how carrying the victim can to be construed as to be for sexual gratification. Also, the account that the appellant kept his penis near the victim's vagina is not clear. PW2 also said that she saw substances like sperms, for that the appellant is complaining that no any other evidence which was adduced to establish if the said substances were really sperms. On my side it, I find it wanting if the said substances were really sperms. This is because no explanation was offered by the witnesses on how they knew the substance was sperms

Again, the claim that PW2 found sperms in the victim's vagina creates more confusion as I tried to ask myself if that was the case is that grave sexual abuse or rape? In the absence of a clear account

about the incident, I find the prosecution evidence to have left much to be desired.

In the circumstance, I find the charge against the appellant was not proved to the hilt. As the result, I allow the appeal quash the conviction and set aside the sentence imposed on the appellant. I order the appellant's immediate release from prison unless he is held therein for another lawful cause.

It is so ordered.



D. B. Ndunguru
D.B. NDUNGURU,
JUDGE
08/12/2023