

IN THE HIGH COURT OF TANZANIA

TABORA SUB-REGISTRY

DC CRIMINAL APPEAL NO. 54 OF 2023

(Originating from Tabora District Court in Criminal Case No. 31/2022)

FRANCIS JULIUS @ MATIKO ----- APPELLANT

VERSUS

THE REPUBLIC ----- RESPONDENT

JUDGMENT

13/11/2023 & 21/12/2023

MANGO, J:

The Appellant, Francis Julius @ Matiko was indicted before the District Court of Tabora facing the charge of grave sexual abuse contrary to section 138 C (1) (a) and 2(b) of the Penal Code Cap 16 R.E 2019. The facts confirmed at the trial court are that on 22nd May 2022 in Sokoni area in Isevy Street Tabora Municipality, the Appellant touched the buttocks of one XX a girl aged six years for sexual gratification.

It was further alleged that in the same instance and for sexual gratification the Appellant touched another girl XY aged seven years on her buttocks, breasts and vagina. The real names of the alleged victims are purposely withheld to protect their dignity and the fact that they are children under the age of majority preservation of their dignity is of paramount importance as the law and practice of this Court directs. The prosecution called five witnesses to prove their case against the Appellant.

Upon full hearing of both the prosecution and defence case, the trial Magistrate was satisfied that the prosecution proved its

case beyond reasonable doubt hence the Appellant was sentenced to serve 20 years in prison on each count, and the sentence was set to run concurrently. Also, the Appellant was ordered to pay Tshs 200,000 as compensation to the victims.

Dissatisfied with both conviction and sentence, the Appellant appealed to this Court armed with five grounds of appeal namely;

- 1. That the case for the prosecution was not proved against the Appellant beyond reasonable doubt as required by the law.*
- 2. That, the learned trial Magistrate erred in law and fact for failure to address his mind to the issue of the discrepancy on the evidence of money given to the victims by the Appellant.*
- 3. That, the learned trial Magistrate erred in fact and law for failure to evaluate the defence evidence of the Appellant on its merit.*
- 4. That the learned trial Magistrate erred in law and fact to convict the Appellant on uncorroborated evidence.*
- 5. That, the learned trial Magistrate erred in law and fact to warrant conviction against the Appellant based on unsworn testimonies adduced by witnesses.*

Based on the above-listed grounds, the Appellant prayed this Court to allow the appeal, quash the conviction and set aside the sentence meted against him with an order of his immediate release from prison custody.

When the appeal was called up for hearing, the Appellant appeared in person unrepresented, the Respondent Republic was represented by the learned State Attorneys Ms Ida Lugakingira, Ms Wivina Rwebangira and Mr Charles Magonza.

When the Court invited the Appellant to submit on the listed grounds of appeal, he opted to adopt his grounds of appeal to allow the Respondent attorneys submit first so that he can rejoin after Respondent's submission. The Court allowed the Appellant to take that course.

Submitting against the appeal, Ms Idda stated that, Appellant was charged with two counts of grave sexual abuse and the law requires two elements to be proved that, the act needs to be done for sexual gratification and lack of consent. Ms Idda contends that the prosecution managed to prove the two elements through the testimonies of PW1 (the grandmother of the victim) who stated what she was told by the victim.

Moreover, Ms Idda stated that the evidence of PW2, PW3 and PW5 connote that the Appellant used to touch the victim's buttocks and breasts in exchange for money and he threatened them not to reveal his acts to any person. Ms Idda added that, the corroboration made by WP 12662 D/Cpl Teddy established that, the Appellant committed the offence thus, ground number one is meritless.

As to the second ground of appeal where the Appellant challenged the uncertainty of the amount that was given to the victim on whether it was Tshs. 500/= or Tshs 1,000/= Ms Idda referred this Court to the Case of ***Alex Wilfred vs Republic (Criminal Appeal 44 of 2015) [2016] TZCA 579 (22 February 2016)*** where the Court of Appeal of Tanzania considered to ignore minor contradictions which do not go to the root of the case, Ms Idda added that, the variance on amount of money given to the victims is a minor contradiction which should be ignored.

Regarding the third ground of appeal on non-consideration of defence evidence, Ms Idda submitted that the judgment of the trial Court indicates that, the learned Magistrate considered the evidence as it appears on pages 8, 9 and 10 of the judgment. Moreover, the learned attorney prompted the attention of the Court to consider referring to the decision of the Court of Appeal in ***Mosi Chacha and Another vs Republic Criminal Appeal No. 508/2019*** CAT at Musoma.

As to the fourth ground of appeal in which the Appellant aimed to challenge the trial Court's reliance on uncorroborated evidence adduced by the prosecution side, Ms Idda submitted that, section 143 of the Evidence Act does not indicate the number of witnesses to be called by the prosecution to prove the offence. It is her opinion that the testimonies of witnesses established the offence against the Appellant.

On the fifth ground of appeal, the Appellant contended that the conviction against the Appellant was based on unsworn testimonies of PW2, PW3 and PW5 thus, they did not tell the truth as they were not aware of what they were supposed to do. In her submission Ms Idda did not speak of the alleged unsworn testimonies rather she concluded that, the evidence established the offence of grave sexual abuse.

In a short rejoinder, the Appellant raised a concern that the victim's grandmother wanted to have a sexual affair with him but he turned down the offer that is why all these happened. He prayed the Court to allow the appeal due to contradictions in the prosecution evidence and failure by the prosecution to call material witnesses.

I have carefully studied the trial Court's record, considered the submissions for either side, the law and authorities cited therein. This being the first appeal the law allows this Court to review the evidence and make my inferences of law and fact where I find it necessary.

On my analysis of the grounds of appeal in connection to the proceedings and the judgment of the trial court, I will merge the first, second and third grounds of appeal to form one that the prosecution case was not proved beyond reasonable doubt. The fourth and fifth grounds will make into one that, the trial Magistrate erred in law and fact to convict the Appellant based on unsworn and uncorroborated testimonies.

Starting with the second merge of the grounds that faulted the trial Magistrate's decision for grounding a conviction on unsworn and uncorroborated evidence. Indeed, it is a requirement of the law that testimony of witnesses must be taken under the law of Oaths. Section 198(1) of the Criminal Procedure Act Cap 20 R.E 2022 provides thus;

(1) Every witness in a criminal cause or matter shall, subject to the provisions of any other written law to the contrary, be examined upon oath or affirmation in accordance with the provisions of the Oaths and Statutory Declarations Act.

However, as the quoted provision state, the requirement is subject to provisions of other written laws. Section 127(2) of the Evidence Act Cap 6 R.E 2022 provides for an exception when the evidence in question comes from a child of tender age. The law provides;

(2) A child of tender age may give evidence without taking an oath or making an affirmation but shall, before giving evidence, promise to tell the truth to the court and not to tell any lies.

I have inspected the testimonies of PW2, PW3 and PW5 which the Appellant alleged to have been recorded without an oath or affirmation. Though the law allows taking of unsworn evidence of a child there are to conditions that must be satisfied. In ***Mbaga Julius vs Republic (Criminal Appeal 131 of 2015) [2016] TZCA 274 (24 October 2016)*** the Court of Appeal of Tanzania cited the case of ***Dhahiri Ally vs Republic [1987] T.L.R 2018*** to emphasise the said conditions, I quote;

*“In terms of section 127 (2) of the Evidence Act, a trial magistrate may receive unsworn evidence of a child if satisfied that the child: **one**, is possessed of sufficient intelligence to justify reception of his/ her evidence and **two**, he/she understands the duty of speaking the truth”*

The two cited conditions were not completely met by the trial magistrate, he only endorsed that PW2 was capable of giving rational answers but he never went further to inquire as to whether she understood the duty of speaking the truth. The Court of Appeal in ***Mbaga Julius’s case (supra)*** maintained that partial compliance to the mandatory requirement of section 127(2) of the Evidence Act renders the whole evidence received unworthy. Therefore, I will expunge the evidence of PW2 from the record.

As to PW3 and PW5, the records of the trial Court are crystal clear that the witnesses promised to tell the truth as required by

the law so I find no reason to fault the procedural course taken by the trial magistrate in recording the testimonies of the two witnesses.

Another limb on the second merged grounds of appeal is based on uncorroborated evidence of PW1. The Appellant alleged that the testimony of PW1 that the Appellant confessed before the ten-cell leader and promised to pay Tshs. 15,000 to settle the matter out of the Court was not corroborated. I had time to read the judgment of the trial Court and on my observation of facts, I find it pertinent to answer every question pertaining to the testimony of PW1 in the following ground of appeal because I find it to be a fitting slot for that discussion.

Now, turning to the first set of grounds of appeal on whether the prosecution case was proved beyond reasonable doubt, I will start with the evidence of PW1 one Modesta d/o John Charles. The facts of the case as adduced by PW1 come from two separate stories that on May 2022 she found PW2 crying, her hand and thighs were swollen and when the Appellant was asked as to what had happened the day before yesterday, the Appellant insisted that PW2 should be asked. Suddenly, the Appellant came out of his room with a broom handle and again whipped PW2 in front of PW1.

If you look closely at PW1's story one may find that there is a piece of information that was invented by PW1 herself. Page 8 of the proceedings speaks that when PW1 found PW2 with swollen hands and thighs she (the victim) did not tell her about what had happened meaning that she never got any information from the victim but her further testimony reveals that when she was exchanging words with the Appellant, he asked him about what

had happened a day before yesterday. This reveals that PW1 had other information apart from the story that formed the basis of the allegations at hand.

Another piece of the story in PW1's testimony is that XX told her that the Appellant used to touch their buttocks and breasts in exchange for Tshs 500/= and he asked them not to reveal to their parents. The Appellant was specifically charged to have sexually abused the victims on 22nd May 2022 but the testimonies seems to be of other incidences than the ones that was said to have happened on 22nd of May 2022. The only incident that is clearly visible through evidence is that on 22nd of May 2022 the Appellant whipped PW2.

The absence of important information to prove the allegations of grave sexual abuse makes me believe that the first piece of the story found in PW1 evidence that the Appellant whipped PW2 two times and caused her swollen hand and thighs sounds more believable than the second piece of the story which lacks proof and even the testimonies of PW3 and PW5 do not connect the Appellant to the allegations.

That being said and done, I am enjoined to agree with the Appellant that the two allegations of grave sexual abuse were not proved beyond reasonable doubt. Therefore, I allow the appeal with an order of Appellant's immediate removal from prison custody, unless held there for other lawful reasons.



Z. D. MANGO

JUDGE

21/12/2023