

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(BUKOBA SUB- REGISTRY)

AT BUKOBA

CRIMINAL APPEAL NO. 70 OF 2023

(Arising from Misenyi District Court at Misenyi in Criminal Case No. 69 of 2023)

IBRAHIM S/O JOVINARY @ PASCHAL APPELLANT

VERSUS

THE REPUBLIC RESPONDENT

JUDGMENT

8th February & 23rd March 2024

A.Y. Mwenda, J

Before Misenyi District Court at Misenyi the appellant was arraigned for grave sexual abuse C/S 138C (1) (d) and (2) (b) of the Penal Code [Cap 16 R.E 2019]. The particulars of which are that on the 5th day of May 2023, at Kyaka Village within Misenyi District in Kagera Region, the appellant with sexual gratification had carnal Knowledge of the victim (PW3), a child girl aged 3 years old. When the Charge was read, the appellant pleaded not guilty. As such the trial commenced, and at the hearing, the republic paraded five (5) witnesses and tendered four (4) exhibits. On the other hand, the appellant fended for himself and tendered no exhibit. At the end of the judicial day, the trial Court was of the view that the prosecution proved its case beyond reasonable doubt. The appellant was then convicted as charged.

The appellant was not satisfied with the trial Court's findings. He then preferred the present appeal with 5 grounds. The said grounds read as follows;

- 1) That the case against the appellant was not proved beyond reasonable doubt because PW4 states (sic) that he was instructed to examine the victim has (sic) whether she has been raped after conducting the physical examination the report shows she had no hymen.
- 2) That, the trial court held that the case against the appellant was proved without considering (sic) section 62(1) (c) of the Evidence Act [CAP 6 R.E 2019].
- 3) That, the appellant was convicted of an offence of grave sexual (sic) c/s 138 (1) and (2) (b) of the Penal Code [CAP 16 R.E 2022] without penetration being proved.
- 4) That, the appellant was convicted on evidence which was based on speculations and conjectures which had no room in criminal trial.
- 5) That, the trial magistrate erred in law and fact by convicting and sentencing the appellant basing on the fabricated case against the appellant. (sic)

During the hearing of this appeal, the appellant was in attendance without any legal representation whilst the respondent (the republic) was represented by Mr. Elias Subi, learned State Attorney. Both parties made their submissions

for and against the grounds of appeal. However out of the grounds of appeal, the court Suo Muto noted a point of law worthy for discussion before it (the court). The same is in regard to the compliance of section 127(2) of the Evidence Act [CAP 6 R.E 2022] and improper recording of the witnesses' particulars. As such, the parties were directed by the court to air their submissions.

On his part the appellant had nothing of the essence to submit due to his ignorance on legal matters such as the present one. On the other hand, Mr. Elias Subi, the learned state attorney submitted that it is true that the child promised to tell the truth without the aid of translator which on face of it, he said is like there was no promise at all. On the other hand, he submitted that due to recently amendments in Misc. Amendment Act No. 11 of 2023 the child can testify without promising to tell the truth. On his view he said that the prosecution proved its case beyond reasonable doubt. He thus prayed this appeal to be dismissed and that marks the end of submissions from both sides.

Back to the merits or demerits of this appeal page 9 of the trial court typed proceedings shows in as far as promise to tell the truth and not lies is concerned as follows and I quote;

"PW3: Suzana Evod, 3yrs, I promise to tell this court the truth and not lies.

Court: the child has promised to tell this court the truth
and not lies."

After that promise, it seems the trial court realized that PW3 was not fluent in kiswahili as the trial court recorded as follows and I quote;

Court: PW3 discovered (sic) that she understands Swahili well but she fails to express herself in swahili language rather haya language, for that matter the translator was invited to translate.

With such discovery, the trial court decided to find an interpreter and the records shows that the said interpreter affirmed but failed to state in which language was he is going to translate. For ease of reference, the interpreter affirmed as follows:

"Translator: Hamidu Ibrahim, 61yrs, Haya, Bukoba,
Driver, Muslim, affirmed and translated."

Having so affirmed the said interpreter started to interpret from where the victim (PW3) started her testimony. The trial court did not bother itself to require the said interpreter to interpret her promise to tell the truth and not lies.


With the said anomalies this court is of the view that the victim's (PW3) promise to tell the truth and not lies without the aid of an interpreter is as good as no promise at all. Again, with the interpreter's failure to affirm from

which language was he going to interpret then the court is of the view that the victim's evidence proceeded without the aid of an interpreter.

From the foregoing observation, with regard to the said violation the proceedings of the trial court in Criminal Case No. 69 of 2023 are hereby nullified, the conviction and sentence is hereby set aside. For the interest of justice, the whole records are remitted back to the trial Magistrate with instructions to start afresh hearing in line with the above legal requirements and the said hearing should be before another magistrate.

Otherwise, the appellant shall remain in remand custody until the trial Court directs otherwise.

It is so ordered.


A.Y. Mwenda
Judge
23.02.2024

Judgment delivered in chamber under the seal of this court in the presence of Mr. Ibrahim Jovinary @ Paschal the appellant and in the present of Ms. Gloria Rugeye learned State Attorney for the Respondent.



A.Y. Mwenda
Judge
23.02.2024