

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

DC. CRIMINAL APPEAL NO. 56 OF 2023

(From the District Court of Kaliua, Original Criminal Case No. 53 of 2023)

SIMON MASUHUKO APPELLANT

VERSUS

THE REPUBLIC RESPONDENT

JUDGMENT

Date of Last Order: 27/05/2024

Date of Judgment: 26/06/2024

KADILU, J.

In the District Court of Kaliua, the appellant was charged with grave sexual abuse contrary to Section 138C (1) (d) and (2) (b) of the Penal Code [Cap. 16 R.E. 2022]. The prosecution alleged that on 27/02/2023 about evening hours at Kazaroho Village, within Kaliua District in Tabora Region, the appellant did rub his erected penis on the vagina of the victim, a girl aged 04 years. After the charge was read over to him, he pleaded not guilty. The prosecution summoned three witnesses and tendered a PF3 whereas the appellant elected to remain silent in his defence. Ultimately, the trial court convicted the appellant and sentenced him to twenty (20) years imprisonment. He was also ordered to compensate the victim to the tune of TZS. 500,000/=payable on completion of his jail term.

Aggrieved by both the conviction and sentence, he filed the instant appeal praying for the court to quash the conviction, set aside the sentence, and release him from prison on the following grounds:

- 1. That, the trial Magistrate erred in law and fact for denying the appellant the right to defend himself.*

2. That, the prosecution did not prove the case against the appellant beyond reasonable doubt.

During the hearing of the appeal, the appellant appeared in person whereas the respondent was represented by Ms. Joyce Nkwabi and Suzan Barnabas, the learned State Attorneys. The appellant requested the State Attorney to submit first. Opposing the 1st ground, Ms. Joyce explained that it is shown on page 17 of the trial court's proceedings that the appellant was allowed to defend himself and said he would call two witnesses but he had no exhibits to tender. Later on, he informed the trial court that he failed to call witnesses. So, the court allowed him to testify under oath as DW1. After having taken an oath, the appellant told the trial court that he did not wish to say anything.

About the 2nd ground of appeal, Ms. Joyce submitted that the case against the appellant was proved to the required standard because the prosecution called three witnesses including the victim. She explained that in sexual offences, the best evidence comes from the victim. She cited the case of ***Shomari Mohamed Mkwama v. R.***, Criminal Appeal No. 606 of 2021. She argued that in this appeal, the victim's medical examination report and testimony of PW3 confirmed that the victim was sexually abused. For these reasons, the learned State Attorney prayed for the appeal to be dismissed for lack of merit.

When the appellant was given the floor, he submitted that he was first charged with rape but later on, the charge was amended and substituted the offence of rape with sexual abuse. He argued that the prosecution substituted a charge after seeing that they had no evidence to prove rape.

He elaborated that he requested an extension of time to call witnesses in his defence but the trial court denied him for the reason that the case was long-standing so, it had to be finished quickly. According to the appellant, the trial court closed the defence case on the same day and pronounced the date of judgment.

He submitted in addition that the prosecution failed to prove the case against him because the victim's mother said the offence was committed in the victim's grandfather's house but the said grandfather was not summoned to testify. He also argued that the children who were allegedly playing with the victim before the incident were not among the prosecution witnesses. According to the appellant, the victim's testimony was a cooked story after she was coached. He elaborated that the medical examination showed that the victim had an infection and there was no evidence presented to the trial court to prove the charged offence. The appellant opined that the case was just implanted to him which is why no police officer was summoned to testify that he was accused of any crime.

After reviewing the evidence on record and the submissions by the appellant and the learned State Attorney, the issue for me to determine is whether or not the appellant abused the victim sexually. I find it convenient to start with the 2nd ground of appeal. I begin my determination by stating that the first appellate court is duty-bound to re-evaluate the entire evidence subjecting it to critical scrutiny and arrive at its own conclusion. *See Edwin Cheleh Swen v. R.*, Criminal Appeal No. 649 of 2021, Court of Appeal of Tanzania at Dar es Salaam.

In the trial court, the appellant was charged under Section 138C (1) (d) and (2) (b) of the Penal Code which reads as follows:

"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 if he does so in circumstances falling under any of the following descriptions, that is to say- (d) with or without the consent of a person who is under the age of eighteen years. (2) Any person who- (b) commits grave sexual abuse on any person under eighteen years of age, is liable on conviction to imprisonment for a term of not less than twenty years and not exceeding thirty years, and shall also be ordered to pay compensation of an amount determined by the court to any person in respect of whom the offence was committed for injuries caused to that person."

The appellant avers that the prosecution did not prove the case against him beyond reasonable doubt. From the provisions reproduced above, it is evident that the ingredients of grave sexual abuse within the facts of this case include the appellant's rubbing of his genital part on the victim's sexual organ, for sexual gratification. The victim, PW2 testified as hereunder:

"... the appellant took me to the grandfather's house and ordered me to lay down. He then took off my clothes and inserted his 'dudu' into my vagina. When he finished, he rubbed me and warned me not to tell my mother."

In the first place, nothing suggests sexual gratification in the above testimony. I have examined the charge sheet carefully and found it missing too. Perhaps, that is why the prosecution did not present any evidence in proving the appellant's sexual gratification while doing the complained act.

What can be deduced from the victim's testimony is that the appellant inserted his penis into her vagina. In the circumstances, the appropriate charge was rape under Section 130 (1) (2) (e) of the Penal Code. Section 138C of the Penal Code entails that for a person to be convicted of grave sexual abuse, he should have used his genitals or other body parts or any other person's body part, or an instrument on another person's body for sexual satisfaction. Grave sexual abuse does not amount to rape which includes sexual intercourse that should necessarily involve penetration. Grave sexual abuse falls short of rape in that the type of act imagined under grave sexual abuse is not penetration, but something less than that. When the victim is a person below 18 years, consent becomes immaterial.

The records display that the appellant was initially charged with rape but after the preliminary hearing, the charge was amended to be under Section 138C (1) (d) and (2) (b) of the Penal Code, changing the nature of the offence from rape to grave sexual abuse. The substitution raised the appellant's suspicion that the prosecution foresaw that they could not prove rape as initially thought. Without going deep into the parties' arguments, I am satisfied that the offence of grave sexual abuse was not proved to the standard required by the law. More so because the victim's evidence and medical examination report (Exhibit P1) have fallen short of the ingredients of the charged offence.

The medical expert (PW3) informed the trial court that he examined the victim and found that she had bruises outside her vagina but she was not penetrated. He did not find any sperms. He discovered a stinking smell discharging from the victim's vagina but he opined that the same could be

a result of an infection in the urinary track, kidney disease, or lack of proper hygiene. PW3's medical investigation revealed more that the victim had nothing unusual as she was walking properly and was behaving normally just like any other child. It is inconceivable why the trial court linked the victim's medical condition with sexual abuse. In ***Andrew Lonjile v. R.***, Criminal Appeal No. 50 of 2019, Court of Appeal at Dodoma, it was stated that:

"... the prosecution cannot be taken to have proved the offence of grave sexual abuse beyond reasonable doubt when essential ingredients of "for sexual gratification" and "lack of consent" were neither included in the particulars of the offence nor was there evidence presented to prove these ingredients. For reasons that the two courts below misapprehended the totality of ingredients constituting the offence of grave sexual abuse, we shall allow the first ground of appeal contending that prosecution case was not proved beyond reasonable doubt."

I am bound to follow the same course in the instant appeal. I, thus, allow the 2nd ground of appeal for being meritorious. Having established so, I see no reason to deal with the 1st ground of appeal since doing so will not serve any useful purpose. The 2nd ground of appeal is sufficient to dispose of the whole appeal. In view of this, I allow the appeal, quash the conviction, and set aside the sentence imposed against the appellant. I order his immediate release from prison unless he continues to be held for other lawful reasons.

Order accordingly.




KADILU, M.J.
JUDGE
24/06/2024.

Court:-

Judgment delivered in open court on the 24th Day of June, 2024 in the presence of the appellant and Mr. Steven Mnzava (State Attorney) for the Respondent.

G.P. NGAEJE
AG. DEPUTY REGISTRAR
24/06/2024

Court:-

Right of appeal fully explained.



G.P. NGAEJE
AG. DEPUTY REGISTRAR
24/06/2024