IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(SUMBAWANGA DISTRICT REGISTRY)

AT SUMBAWANGA

DC. CRIMINAL APPEAL NO. 42 OF 2021

(C/O Criminal Case No. 84 of 2020 Mpanda District Court)

(Janeth S. Musaroche, SRM)

EMMANUEL S/O MUZIUKA @
EMMANUEL S/O KALAMBWANDA ..... APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

10/11/2021 & 06/01/2022

JUDGMENT

Nkwabi, J.:

The sentences admeasured against the appellant by the trial court is 20 years imprisonment for each offence of grave sexual abuse under section 138(1) (a) and (2)(b) of the Penal Code he was charged with. With three justifications of appeal, the appellant seeks this court to adjudge him innocent of the offences he was convicted and sentenced as stated above.

The background of the case is that in the evening of 9th July 2020, the Haules were at their home. Mrs. Haule (PW4) sent her daughter and her niece an errand to bring her chips from the hut of the appellant. They noticed that the gofers were late to come, PW6 the father of PW2 "A" made a follow-up

and found the grunts waiting for their turn to be served. The appellant promised he would serve them and accompany them back home for their safety. PW6 returned home only to find still they were late. Both the Haules made follow-up. This time, they met with the victims of the offences on the way crying. They told the Haules what befell them. PW6 went to the appellant's hut and confronted him, then reported the matter to the police hence the prosecution of the appellant and his conviction and sentence.

Irritated with the convictions and sentences, the appellant seeks the conviction be quashed and sentences doled out to him be set aside on account of, **one,** the appellant was convicted on the case which was not proved beyond reasonable doubt, **second,** that the evidence of PW5 (the medical doctor) who found the victims' vaginas and labia with no bruises and hymen intact and no discharges and **lastly**, the appellant faulted the trial court in that the evidence of PW3, PW4 and PW6 was hearsay evidence.

Since this is the first appellate court, the same is entitled and duty bound to reevaluate the evidence and come to its own conclusion. I am fortified by **Emmanuel Lyabonga V Republic Criminal Appeal No. 257 of 2019**

(CAT) Iringa (Unreported) and per **C. 6237 P.C. Edwin and Another v R. [1985] TLR 31** (HC) Mushi, J.

Meanwhile, during the hearing, the appellant appeared in person paddling his own canoe. The respondent was adeptly represented by Ms. Safi Kashindi, learned State Attorney. In his submissions, the appellant merely adopted his grounds of appeal as his submissions.

In reply submission, Ms. Safi Kashindi resisted the appeal. This is because as the prosecution proved our case beyond reasonable doubt, she argued. The appellant was sentenced to twenty years imprisonment the two counts were proved beyond reasonable doubt. The offences were sexual offences under section 127(b) of the Evidence Act the important evidence is that of the victim, was Ms. Kashindi's further contention.

The victims were aged 6 and 7. The victims were elaborate in their evidence on how the offences were committed. See page 8, 9 and 10 of the proceedings. The incidence happened during the night but they stayed with him for a long time and they used to know him as they used to buy chips at his business hut, Ms. Kashindi expounded.

She further submitted that the victims also informed their parents of the incidence without delay. She referred me to the case of **Marwa Wangati V.R. [2002] TLR 39** to bolster her argument. The rest of the witnesses corroborate their evidence. The 1st ground of appeal is therefore baseless and it be dismissed, she implored upon me.

As to the evidence of the doctor, that their hymens were intact and not bruised and no semen, the evidence of an expert does not bind the court. The complaint has no basis, Ms. Kashindi argued.

On the 3rd ground of appeal which is that the evidence of PW3, PW4 and PW6 were hearsay evidence, Ms. Kashindi maintained that the trial court considered and based its decision on the evidence of PW1 and PW2. The complaint is therefore baseless. She prayed that the appeal be dismissed and the decision of the trial court be upheld.

In rejoinder submission the Appellant exhorted this court to take into consideration of evidence and release him as the evidence is not sufficient to convict him.

I start with the complaint in respect of hearsay evidence. The appellant singles out the testimonies of PW3, PW4 and PW6 as hearsay evidence, as such faults the trial court thereby in relying to their evidence to ground his conviction.

In submission in chief, the appellant merely adopted his grounds of appeal including this one I am examining. He had nothing useful in submission. On her part, Ms. Kashindi, learned State Attorney for the respondent, maintained that the court considered and based its decision on the evidence of PW1 and PW2. The complaint is therefore baseless. She prayed the ground of appeal be dismissed.

I readily accept the contention of Ms. Kashindi, the trial court's decision heavily relied on the testimonies of PW1 and PW2 to bring home the convictions. I would also add that the evidence of PWs 3, 4 and 6 were relevant as to what they did in respect of the incidence. PW3 Siti d/o Shabani sent the children an errand to bring chips. PW6 Bahati s/o Haule made follow-up of the children and found them at the appellant's chips hut the fact he did not deny and actually he promised PW6 he would see the children

home which he did not do anyway, and of course how could he see them home in the circumstances? PW 4 Aziza was necessary to prove the age of PW1 who is one of the victims of the offences. Had these witnesses not appeared in court to testify, the prosecution case could be challenged for failure to bring them. See the case of **Godson Hemedi V Republic [1993] TLR 241** (CA):

> *According to PW1 he followed the direction taken by the deceased until he reached the police station and on his return home the children told him that they saw the appellant going away from his house. None of these children was called to testify on this point which was of crucial importance in assessing the veracity and accuracy of PW1 as a witness. The question is: why were these children not called? And if they were called can one say that they would necessarily support the claim that the appellant went out of his house so soon after the attack on the deceased?*

On the contrary, the evidence of PW6 remained uncontroverted by the appellant as he did not cross-examine PW6. For that basis and reasons I

have attempted to explain above, the 3rd grievance of appeal by the appellant lacks merit. I dismiss it.

The next provocation of appeal for my consideration and determination is that the appellant ought to be acquitted since the medical doctor (PW5) who examined the victims of the offences was of the opinion that the victims' hymens were intact, there were neither bruises nor discharge in their genitalia.

Ms. Kashindi was cold to that expression by the appellant and argued that as to the evidence of the doctor, which she concedes that their hymens were intact and not bruised and no semen, the evidence of an expert does not bind the court. The complaint has no basis, she stressed.

I am fascinated by the view of Ms. Kashindi which is backed by **Agness Liundi v. Republic [1980] TLR 46 CAT:**

> *"The court is not bound to accept medical testimony if there is good reason for not doing so. At the end of the day, it remains the duty of the trial court to make a finding and in so doing, it is*

incumbent upon it to look at and assess, the totality of the evidence before it including that of medical experts."

It is trite law that proving rape for instance, proof of slight penetration is sufficient. It turns therefore, proving that the appellant committed grave sexual abuse relies on the reliability of prosecution witnesses. This was neither a rape case to require penetration, however slight. It is a case about grave sexual abuse which is determined by the actions of the culprit. In this case, PW1 and PW2 were clear that the appellant touched their genitalia in turn. The trial court found the prosecution witnesses truthful and reliable. I have nothing to hold otherwise. The ground of appeal has to go down swinging.

Lastly, the appellant had another cause for lodging this appeal, this is not other than that *the appellant was convicted on the case which was not proved beyond reasonable doubt.*

On this ground of appeal, I hasten to say, I am lured by Ms. Kashindi's submission that the case was proved beyond reasonable. She dexterously argued that the victims were aged 6 and 7. The victims were elaborate in

their evidence on how the offences were committed. She referred me to pages 8, 9 and 10 of the proceedings. She advanced that the incidence happened during the night but the victims stayed with the appellant for a long time and they used to know him as they used to buy chips at his business hut.

They also informed their parents of the incidence without delay, added Ms. Kashindi. She backed her argument with the case of **Marwa Wangati V. R. [2002] TLR 39**. The rest of the witnesses corroborates their evidence. The 1st ground of appeal is therefore baseless and it be dismissed, she implored upon me.

As to the complaint on this ground of appeal, it turns, as I have observed above, that it is the matter of credibility of witnesses. The trial court found PW1 and PW2 credible witnesses and grounded conviction on such evidence. The trial court was entitled to come to the decision it reached at. The conclusion of the trial court is supported by **Sangaru Lugaira Mathias v S.M.Z. Criminal Appeal No. 183 of 2005** C.A.T. (Unreported):

The basis of the conviction was the dying declaration of the deceased and the admission of the appellant to PW1, PW2, PW3 and PW6, the officers

It was a matter of credibility and acceptance of the evidence. As said before, the evidence was accepted by the trial Chief Justice.

Admittedly, the culprit was immediately mentioned by the victims hence his earliest apprehension. In **Marwa Wangati's** case (supra) it was held:

The ability of a witness to name a suspect at the earliest opportunity is an all-important assurance of his reliability, in the same way as an unexplained delay or complete failure to do so should put a prudent court to inquiry.

Appellant's exhortation that this court takes into consideration of evidence and release him as the evidence is not sufficient to convict him does not find purchase with me based on the above discussion.

Finally, having deliberated this appeal as I have shown above, I hold that the appeal is wanting in merits. It is dismissed.

It is so ordered.

DATED at **SUMBAWANGA** this 06th day of January, 2022.

J. F. Nkwabi

Judge

Court: Judgment is delivered in camera this 06th day of January, 2022 in the presence of Ms. Safi Kashindi, learned State Attorney for the respondent and the appellant present in person.

J. F. Nkwabi

Judge

Court: Right of appeal is explained.

J. F. Nkwabi

Judge

06/01/2022