

TANZANIA / JUDGMENT

ISRAEL JOHN VS THE REPUBLIC

COURT
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3 December 2024

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IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA ARUSHA SUB-REGISTRY AT
ARUSHA CRIMINAL CASE NO. 15846 OF 2024 (Originate from the District Court of Arumeru at
Arumeru Criminal/ Case No. 44 of 2023) ISRAEL JOHN

N APPELLANT VERSUS
REPUBLIC..... RESPONDENT

JUDGMENT

26th November; 3rd December 2024 D. D. NDUMBARO. J, Appellant Israel John was charged with the Offence of grave sexual abuse contrary to section 138 C (1)(a) and 2(b) of Penal Code Cap 16 R. E 2019 and convicted of 30 years. It was alleged that on 23rd May 2023 Ngurdoto District and Regional of Arusha rubbed the vaginal of "MO" a girl of 11 years old with his penis and ejaculated on her without her consent. Being dissatisfied with the said decision is appealing before this court against conviction and sentence. When the matter was scheduled for orders, the counsel for the appellant made a prayer to amend the grounds for appeal by adding two grounds, the prayer was granted to that effect and tabled 10 grounds to support his appeal;

1. That, the trial Magistrate erred in law and facts by relying on the doctrine of failure to cross-examine witnesses and that one admitting the truthfulness while not always failing to cross-examine does not mean the evidence will be taken as it is.
2. That, the trial magistrate erred in law by considering medical evidence while is not conclusive proof.
3. That, the trial Magistrate erred in law and facts in not finding that there was variance regarding the names of victims.
4. That, the trial Magistrate erred in law and fact for failure to find that, there was a contradiction between PW1 and PW2.
5. That, the trial Magistrate erred in law and facts by failure to observe the unexpected delay in reporting the incident.
6. That, the trial Magistrate erred in law and fact in failing to assess the credibility of PW1.

7. That, the trial learned Magistrate erred in law and facts in not finding the evidence adduced was tainted with inconsistency and discrepancies.
8. That, the trial magistrate erred in law and facts in relying on evidence of PW3(Doctor) who was not competent as he failed to diagnose the type of S.T.I. the victim suffered.
9. The trial Magistrate erred in law and facts by failing to prove the case beyond a reasonable doubt.
10. The trial magistrate in law and facts by failure to prove the case beyond reasonable doubt. When the matter was scheduled for hearing, the appellant was represented by Mr Mandella Mziray Advocate and the respondent enjoyed the service of Amanda Lushakuzi learned State Attorneys. The appeal was disposed of orally. Mr Mziray chooses to abandon the 4 and 7 grounds. On the 1st ground submitted that trial magistrate employs the principle of failure to cross-examine means admission, argue the principle is to be used in caution particularly when the accused is layperson, in support of argument cited a case of Michael John Kajera Vs Republic Criminal Appeal No. 487 of 2021 CAT Mbeya page 17 referring to the case of Issa Reji Mafia Vs R, which held that where the accused is a layperson and not presented the court must be caution on using the doctrine, the court must explain to the accused on the right of cross-examine and consequences of failure. Faulted that the accused in this case was not told on the same. In the above-cited case, the Court of Appeal quashed the sentence for failure to explain the consequences of failure to cross-examine. On the 2nd ground, submitted that the fact that the victim was diagnosed to have sexually transmitted diseases transmitted from the accused after the commission of the offence but the accused was not diagnosed to prove to have the said diseases and probably infected a victim, is a grave miscarriage of justice and creates doubt. In supporting the argument cited a case of Thomas Okoth Ojwant Vs R Criminal Appeal No. 620 of 2020, page 11 CAT Musoma, whereby the victim was found with gonorrhoea, but CAT held, that it was not proved that the accused committed the offence. On 3rd ground, argued for the offence to be committed must satisfy the key ingredients which are threatening a victim, and using her body without her consent as it was stated in the case of Vasco John Vs R Criminal appeal No. 494 CAT, page DSM, on pages 7 and 8 referring the case of Kasim Said Vs R whereby CAT consider threatening as key ingredients, however, the said ingredient was not proved by the prosecution in this case, and remedy of the same is to order retrial as it was stated in case of Kasim Said Vs R supra. Therefore made a prayer that the accused is set free for failure to analyse as to whether the victim was threatened. On the 5th ground, there was a contradiction between PW1 a victim and PW2. It was a testimony of PW2 that the offence was committed on 26/05/2023, the testimony contradicts that of the victim that the offence was committed on 23/05/2023, arguing the contradiction is clear between PW1 and PW2 to create doubt. On the 6th ground, there was a delay in reporting the incident, the offence was committed on 23/05/2023 and it was reported on 26/05/2023, the doctor claimed to have received the victim on 27/05/2023, argued there is doubt as the matter was reported after three days, to create doubt as to what goes on within those three days. On the 8th ground, argued, that it was reported that the

victim suffered sexually transmitted diseases, however, the doctor's report does not show what kind of sexually transmitted creating doubt on the report. On the 9th and 10 grounds accused testified to have not been present at the scene of the crime on the date alleged to have committed the said offence, that the accused finalized the tender of building a house in that locality before the date of the incident. The appellant submitted further that the arresting officer was not brought to testify, and the cation statement was not tendered. Argued the offence was planned, accused did not commit the offence. In reply, Ms Amanda submitted that the trial magistrate employed the doctrine of failure to cross-examine the accused after being aware that the accused knew the victim had two names but did not cross-examine the validity of that. It was proper for the magistrate to employ the doctrine, argued this ground has no merit. On 2nd, 3rd and 9th grounds argued prosecution evidence corroborated to the effect of proving the offence beyond a reasonable doubt, the victim testified that the accused used his penis to rub into her vaginal and ejaculated, accused was identified before the court and the doctor testified victim has sexually transmitted diseases contracted from accused. The doctor was cross-examined on page 22 of trial court proceedings on the kind of sexually transmitted deceases, and replied it was Chlamydia or Syphilis, arguing this ground has no merit. On the 5th and 6th grounds there was no contradiction the victim testified crime was committed on 23/05/2023 which was Tuesday, she reported the incident after feeling pain on 26/05/2023. The victim was threatened by the accused that should not speak out on the same, the child kept quiet till 26/05/2023 after having rashes and bruises and went to report to PW2 who went to inform PW4, who reported the matter to the police. Therefore there was no contradiction and delay and these grounds have no merit. On grounds 8th and 9th the magistrate analysed the evidence with no inconsistencies and the accused was found to have committed an offence. On rejoinder, Mr Mziray retaliated against what was submitted in chief and argued that the doctrine of failure to cross-examine was employed. The accused was not diagnosed. The date for reporting the matter was contradictory: 23/05/2023 and 27/05/2023. The accused was absent from the scene of the crime. Due to those discrepancies, a prayer was made that the accused be set free and the sentence and penalty quashed. After considering the parties' submissions, the court must decide whether the appeal has merit. On the first ground, the trial magistrate employed the principle of failure to cross-examine means admission on pages 9 and 10 of the judgment that the accused defended to the effect that he entered an agreement with the victim's grandmother to build a house on finishing the grandmother refused to pay him, hence fabricated the case and taught victim how to testify before the court, the trial magistrate was with the view that accused defence is too general and after afterthought, as he failed to cross-examine accused means admission. The position of law to that effect is clear, as the current Court of Appeal in the case of Michael John Kajela Vs R Criminal Appeal No. 487 OF 2021 CAT Mbeya October 2024, pages 16 and 17 worn that, the principle should not be acted in entirely, particularly when the accused person is layperson, quoting the case of Issa Reji Mafita v. R (supra) where it was observed that: "It would also appear to us to be the law that, where, like in this case, the accused is an unrepresented layman, before drawing an inference that, he did not cross-examine the witness because he

accepted his evidence to be true, the court has to warn itself if the layman accused knew the meaning and effect of not cross-examining a prosecution witness". The same position was also decided in the case of *Kwiga Masa v. Samweli Mtubstwa* [1989] TLR 103, whereby Samata J, draw inspiration in the case of *Zakaria Jackson Magayo v. R* (Criminal 9 Appeal No. 411 of 2018) [2021] TZCA 207 (19 May 2021; TANZLII) and *Issa Reji Mafita v. R* (Criminal Appeal No. 337 of 2020) [2020] TZA 404 (24 August 2021; TANZLII), that "In the interest of justice when a living at who is likely not to be familiar with the intricacies of court procedure appears before him, a magistrate should explain to him, briefly and in a simple language, the objects of cross-examination" Based on the above decision the trial court magistrate ought to consider the position, I therefore find this ground to have merit. On the 2nd ground, the accused was not diagnosed to prove that he was the one who committed the offence. It was testimony prosecution that the doctor reported the victim committed sexual transmission diseases due to, the prosecution connected the report on the offence committed without proving whether the accused is also suffering from sexually transmitted diseases, I consider it a grave omission sufficient to render the offence not proved beyond a reasonable doubt. On 3rd ground, the appellant argued that for the offence to be committed prosecution must prove that the victim was threatened and her body was used without consent and argued, under this case the prosecution did not prove that there was a threat, considering the argument I find opt to reproduce the section 138 C (1) hereunder: 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 if he does so in circumstances falling under any of the following descriptions, that is to say-

- (a) without the consent of the other person;
- (b) with the consent of the other person where the consent has been obtained by the use of force threat, or intimidation or putting that other person in fear of death or of hurt or while that other person was in unlawful detention; It's my view that the above provision is to the effect that, the offence must be committed without consent, if there is consent the consent must be obtained with fear of threat, considering the matter at hand the offence was committed against a child of 11 years old, to whom requirements of consent is not applicable, therefore the argument that the ingredient of using force without her consent is not applicable. Therefore, this ground has no merit. On the 5th and 6th ground, there was a contradiction and delay between PW1 a victim and PW2. It was a testimony of PW2 that the offence was committed on 26/05/2023, the testimony contradicts that of the victim that the offence was committed on 23/05/2023. It is clear that there was no contradiction rather there was a delay, I agree with the submission of the appellant that the delay may create doubt as anything may happen in between. On the 8th ground, argued, that it was reported that the victim suffered sexually transmitted diseases, but the doctor did not testify which kind of sexually transmitted diseases. It was the testimony of the respondent that the doctor said could be Chlamydia or Syphilis. Going through trial court records, particularly the medical

report the doctor shows there were no penetrations but the victim was infected, as to whether the 12 accused infected the victim it is not clear. The accused cross-examined the doctor on page 11 of the trial court proceeding as to whether he was examined to connect him to the commission of the offence the doctor admitted having not examined the accused. It is my view that the failure is a grave miscarriage of justice, that cannot be overstated. It is the testimony of the victim on page 6 of trial court proceedings that, the accused took his dudu and rubbed it into her vaginal; it was also a testimony of the victim during cross-examination on page 7 that, when the accused committed such offence she could not scream because accused covered his mount, after being released he could not say because she was threatened to be beaten, thereafter she was in pain. She told her grandmother the next day. It is my view that the prosecution testimony of the victim is very general, did not explain how exactly happened, the victim did not describe the room where the offence was committed and the position of the accused and victim during the commission of the said offence, to establish the possibility of said hymen to flow inside her vaginal or downward, considering the doctor's report shows there was no penetration, all these create doubt. The victim testified she could not scream, thereafter she was in pain, however, as I said the doctor's report 13 shows there was no penetration which could make her feel pain, the testimony of the victim creating doubt. The position of law is clear, and the evidence of the victim's child is sufficient to prove the commission of offence however needs to be taken into caution, the position is clear in Sec. 127(6) of Tanzania Law of Evidence Act Cap 6 provides Notwithstanding the preceding provisions of this section; where in criminal proceedings involving sexual offence the only independent evidence is that of a child of tender years or a victim of the sexual offence, the court shall receive the evidence, and may, after assessing the credibility of the evidence of the child of tender years or as the case may be the victim of sexual offence on its own merits, notwithstanding that such evidence is not corroborated, proceed to convict, if for reasons to be recorded in the proceedings, the court is satisfied that the child of tender years or the victim of the sexual offence is telling nothing but the truth. That is, the evidence of the victim's child is credible only if the child proves to testify the truth. But in this case, victim evidence is considered to be under little weight. On 9th and 10 grounds accused testified to have not been present at the scene of the crime, whereby the prosecution did not argue on the ground. The position of law is clear to the effect that once a person wants to rely on an alibi he has to produce a notice of alibi before hearing the case, as it is in section 194(4) of the Criminal Procedure Act, Chapter 20 RE 2022 that the defence can be raised orally or in writing on the first day of the hearing of the case, the position receives support in a number of cases including the case of 2014 Kastory Lugongo Vs R Criminal Appeal NO.251, CAT Mbeya, page 11 and 12. In the case at hand, the accused raised the defence suo moto during the hearing. The accused cannot rely on defence suo moto, I therefore find this ground to have no merit. As a matter of law, it is the duty of the prosecution to prove the accused committed the offence as per section 110 of TEA which receives support in the case of Pascal Yoya @Maganga Versus Republic, Criminal Appeal No. 248 of 2017(Unreported) that: - "It is a cardinal principle of criminal law in our jurisdiction that, in cases such as the one at hand, it is the prosecution that has a burden of proving its

case beyond reasonable doubt The burden never shifts to the accused. An accused only needs to raise some reasonable doubt on the prosecution case and he need not prove his innocence". Above analysis, it is clear that this appeal has merit, on the reasons that the accused was not medically examined as to whether is also infected with the said sexually transmitted deceases to draw an inference that he committed such offence. The testimony of the victim during cross- examination creating doubt as when accused of committing the offence she could not scream because the accused covered her mouth, thereafter she was in pain, and she reported to her grandmother the next day, connecting the dot with the doctor report that, there was no penetration to make her feel pain on the same day as the victim testified. Furthermore, the trial 16 magistrate relied on the principle of failure to cross-examine means admission to the detriment of the lay accused; the fact that there was a misunderstanding between the victim's grandmother and the accused was not accorded weight. All these create doubt in the commission of the offence by accuse. The doubt created by the appellant benefited him; I therefore, quash the sentence and conviction of the District District Court of Arusha at Arusha Criminal Case No. 124 of 2023 imposed against the appellant and order the appellant be released in custody unless lawfully ordered otherwise. It is ordered accordingly. DATED at ARUSHA this 13 day of December 2024. D. D. NDUMBARO JUDGE 03/12/2024 17

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Prepared on 12 October 2026 · Esheria