IN THE COURT OF APPEAL OF TANZANIA
AT DAR ES SALAAM

(CORAM: MUSSA, J.A., MUGASHA, J.A., And LILA, J.A.)

CRIMINAL APPEAL NO. 179 OF 2016

KASSIMU SAID ..... APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

(Appeal from the decision of the High Court of Tanzania, at Dar es Salaam)

(Kaduri, J.)

Dated the 19th day of August, 2015
in
Criminal Appeal No. 173 of 2014
.....

JUDGMENT OF THE COURT

1st April & 3rd May, 2019

MUSSA, J.A.:

In the District Court of Kisarawe, the appellant was arraigned, tried and convicted on the following charge sheet:-

> "***Offence section and the law:*** *Grave sexual abuse c/s 138 C (1) and (2) of the Penal Code.*

***Particulars of the offence**: That Kassimu s/o Saidi charged on 9th January, 2014 at about 22:hrs at Tondoroni area, within Kisarawe District, Coast Region did penetrate his finger to the vagina of one Hadija d/o Salum a girl of 27 years the act which affected her psychologically."*

The appellant denied the charge, whereupon the prosecution featured three witnesses in support of its claim. In a nutshell, the case for the prosecution as narrated by Hadija Salum (PW1), the alleged victim, was to the effect that, on the fateful day, around 10:00 p.m. or so, the appellant went to the house of PW1 and demanded to be given food. The appellant was well known to PW1 as he was a friend of the latter's husband and he also frequently visited PW1's home for the same purpose. Upon his demand, the appellant was given food, apparently, outside the house. Having finished eating, PW1 took the utensils into the house. It is, perhaps, pertinent to observe that, on that day, PW1's husband was away from the residence.

Soon after going into the house, the appellant followed her and demanded to be availed sexual intercourse. PW1 refused following which

the appellant grabbed hold of her hand and was, apparently, intent upon taking her by force. Thereafter, a struggle ensued in the course of which PW1 wrenched herself from the appellant's grasp and immediately took to her heels. Unluckily, as she was running, the lady stumbled and fell down. Next, the appellant closed on her, whereupon he undressed her and inserted his finger on the victim's vagina. Once again, PW1 wrestled herself from the appellant and ran away naked. She stopped at the residence of Mariam Ally (PW2) where she requested to be clothed. PW1 and PW2 then reported the incident to a certain Mzee Koroboi and the three of them made an impromptu visit to the appellant's residence. When asked by Mzee Koroboi about the alleged incident, the appellant is said to have admitted involvement and asked for forgiveness. On the morrow of the occurrence, PW1 disclosed the despicable incident to her husband and, soon after, the appellant was apprehended and subsequently arraigned. This detail concludes the prosecution version of the occurrence.

In reply, the appellant completely disassociated himself from the prosecution's accusation and protested his innocence. Nonetheless, he did not quite refute the allegation that he, indeed, visited the home of PW1

where he requested and was given food. He, however, distanced himself from the prosecution accusation that he sexually abused PW1.

On the whole of the evidence, the trial court accepted as truthful the prosecution version of the occurrence as told by PW1. The appellant's defence was considered but found to fall short of casting any doubt on the case for the prosecution. In the upshot, the appellant was found guilty as charged, convicted and sentenced to fifteen (15) years imprisonment. In addition, he was handed down a corporal punishment of twelve (12) strokes of the cane and further ordered to compensate PW1 a sum of Shs. 500,000/=.

The appellant was dissatisfied by the conviction and sentence but, on the first appeal, the High Court (Kaduri, J.) found no cause to fault the trial courts findings and, in the result, the appeal was dismissed in its entirety.

Aggrieved by the decision of the High Court, the appellant presently seeks to impugn the decision upon a memorandum of appeal which is comprised of four (4) points of grievance. In a nutshell, the appellant seeks to fault the first appellate court for upholding the trial court's conviction despite the unreliable testimonies of the prosecution witnesses, a defective charge sheet and an unfair disregard of the appellant's defence.

At the hearing before us, the appellant who was fending for himself fully adopted the memorandum of appeal but deferred its elaboration to a later stage, if need be, after the submissions of the respondent Republic.

As it were, the respondent Republic had the services of Ms. Mwasiti Athumani, learned Senior State Attorney who was being assisted by Ms. Janeth Magoho, learned State Attorney. In her submission, the learned Senior State Attorney, informed us that the respondent Republic supports the appeal for the reason that the charge sheet under which the appellant was convicted is incurably defective. Ms. Athumani contended that the defectiveness on the charge sheet is upon two fronts, the first being on the statement of offence which referred to section 138 C (1) and 2 of the Code instead of the appropriate section 138 C (1) (a) and (2) (a). Secondly, she further submitted, the particulars of the offence are also defective for want of the detail that the appellant did the wrongful act "**for sexual gratification**" and, furthermore, it was not stated therein that the wrongful act was done without the consent of the alleged victim.

In sum, Ms Athumani contended that the shortcomings on the charge sheet have the effect of vitiating the entire trial proceedings and she, thus, urged us to invoke section 4 (2) of the Appellate Jurisdiction Act, Chapter

141 of the Revised Edition of 2002 (AJA) so as to quash all the proceedings of the trial court as well as those of the first appellate court. In the final prayer, the learned Senior State Attorney urged us to remit the matter to the trial court for re-trial. To buttress the latter prayer, Ms. Athumani sought reliance in the unreported Criminal Appeal No. 86 of 2017 – **Msuya Mjanja vs The Republic** which, she claimed, originated from the recently held sessions of the Court in Tanga.

Having heard the submissions of the learned Senior State Attorney, the appellant fully supported her in his rejoinder, save for the prayer for a retrial which the appellant strenuously opposed. On his part, the appellant was of the view that there is no cause for a retrial and, instead, on account of the defective charge sheet, he should be released from prison custody forthwith.

We have dispassionately considered and weighed the submissions from both sides which boil down to the issue of defectiveness of the charge sheet and its effect on the trial. For a better understanding of the issue of contention, we deem it apposite to reproduce the relevant portions of the provision of the law under which the appellant was charged:-

"138 C – (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 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) .....N/A

(c) .....N/A

(2) Any person who-

(a) Commits grave sexual abuse is liable, on conviction to imprisonment for a term of not less than fifteen years and not exceeding thirty years, with corporal punishment, and shell also be ordered to pay compensation of an amount determined by the court to the person in respect of whom the offence was committed for the injuries caused to that person;

(b).....N/A."

[Emphasis supplied].

From the foregoing, extracted provision, it is discernible that for a statement of offence to have been properly constituted under the obtaining details at hand, the same ought to have contained reference to the provisions of section 138 C (a) as well as subsection (2) (a) of the referred section. Likewise, the particulars of the offence ought to have alleged that the wrongful act was done for "**sexual gratification**" as well as that's the same was done without the consent of the alleged victim. The vexing issue is as to what is tied to the referred shortcomings.

To begin with the anomaly of the misdescription of the statement of offence by making reference to section 138 (1) and (2) instead of section 138 C (1) (a) and (2) (a) of the Code, it should be recalled that Ms. Athumani took the position that the misdescription is incurably fatal.

In this regard, we are keenly aware of what was recently decided by the Court in the unreported Criminal Appeal No. 21 of 2017 – **Khamisi Abderehemani vs The Republic**. In that case, the statement of offence in the charge sheet under which the appellant stood arraigned for rape, cited sections 130 (1) (2) (e) and 131 (1) instead of the applicable sections 130 (1), (2) (b) and 131 (1) of the Code. Addressing itself on the anomaly, the Court concluded that he defect did not prejudice the appellant much as

the particulars of the offence on the charge sheet were explicit enough to inform him of the nature of the offence he was facing. Also taken into account were the appellant's response when the charge was read over to him; his focused cross examination of the prosecution witnesses and the way he defended himself which, it was said, were not consistent which a person who did not understand the nature of the charge facing him. In sum, it was concluded, that as the appellant was not prejudiced, the anomaly was curable under section 388 of the Criminal Procedure Act, Chapter 20 of the Revised Laws (the CPA).

Thus, going by the case of **Khamisi Abderehemani** (supra), in the determination as to the fatality or otherwise of a misdescription of the charged offence, the bottom line is whether or not the person accused was prejudiced by the anomaly. It remains to be determined whether or not the appellant in the case under our consideration was prejudiced by the misdescription in the statement of offence.

In this regard, we think it is apt to observe that the situation obtaining in the appeal at hand is a distant different from the one in **Khamisi Abderehemani** (supra) in that, apart from the misdescription of the offence charged in the statement of the offence, the matter at hand is

further undermined by the particulars on the charge sheet which, as we have hinted upon, omitted to state two essential ingredients of the offence of grave sexual abuse. We think that the situation at hand is closer to the one obtaining in the case of **Mussa Mwaikunda vs The Republic** [2006] TLR 387 where the particulars of the charge sheet omitted to allege "*threatening*" which is an essential ingredient to the offence of attempted rape with which the appellant stood charged. In the upshot, the Court observed"-

> *"...the issue is whether the charge facing the appellant is curable under section 388 (1) of the Criminal Procedure Act, 1985. With respect, we do not think that it was curable. We say so for two main reasons. One, since threatening was not alleged in the particulars of offence, the effect was that an essential element of the offence of attempted rape missed in the case against the appellant. Two, at any rate, as already stated, the complainant did not say anywhere in her evidence that she was threatened by the appellant."*

Likewise, in the instant appeal, as we have already intimated, the particulars of offence did not allege that the wrongful act was done for "**sexual gratification**" and neither was it alleged that the wrongful act was perpetrated without the consent of the alleged victim. Both details are essential ingredients of the offence of grave sexual abuse to which the appellant stood arraigned and it automatically follows that their omission in the particulars of the charge unduly prejudiced the appellant.

All said, the defect on the charge sheet, which was raised by the appellant in the third ground of appeal, is fatal and cannot be cured by the provisions of section 388 of the CPA.

The learned Senior State Attorney urged us to remit the matter with an order for retrial on account of the defectiveness of the charge sheet. Unfortunately, the case of **Msuya Mjanja** (supra) to which Ms. Athumani sought reliance does not support her stance. In that case, the Court ordered the release of the appellant from prison custody without more. Nevertheless, speaking of decisions originating from the recent sessions of the Court held at Tanga, it may be that the learned Senior State Attorney had in mind the unreported Criminal Appeal No. 7 of 2017 – **Hamisi Maliki Ngoda vs The Republic**. That was a case in which the appellant

was convicted upon his own plea of guilty but, upon consideration, the court was of the settled view that the plea was equivocal. Having so found, the Court ordered a retrial, as it were, so as to specifically afford the appellant an opportunity to plead afresh.

The appeal at hand is on a different footing and having found that the charge was incurably defective, we quash the conviction and set aside the sentence. The appellant should be released from prison custody forthwith unless he is held for some other lawful cause. Order accordingly.

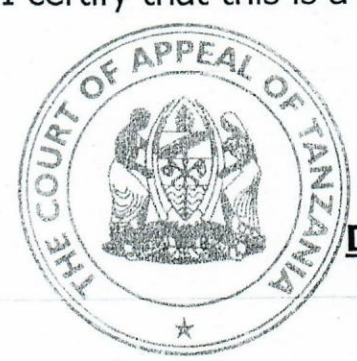
DATED at **DAR ES SALAAM** this 23rd day of April, 2019

K. M. MUSSA
JUSTICE OF APPEAL

S. E. A. MUGASHA
JUSTICE OF APPEAL

S. A. LILA
JUSTICE OF APPEAL

I certify that this is a true copy of the original.



B. A. MPEPO
DEPUTY REGISTRAR
COURT OF APPEAL