

**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. 494 OF 2016**

**VASCO S/O JOHN ..... APPELLANT**

**VERSUS**

**THE REPUBLIC ..... RESPONDENT**

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

**(Ruhangisa, J)**

**Dated 17<sup>th</sup> August, 2016**

**In**

**HC. Criminal Appeal No. 36 of 2015**

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**JUDGMENT OF THE COURT**

**9<sup>th</sup> April & 3rd June, 2019**

**MUSSA, J.A.:**

In the District Court of Kisarawe, the appellant was arraigned for grave sexual abuse. It is noteworthy that the alleged victim was aged four (4) years and, in order to disguise her identity, we shall henceforth refer to her in the prefix letters ABC. The charge sheet to which the appellant stood arraigned was couched as follows:-

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

***Particulars of the offence:*** *That Vasco s/o John charged on 05<sup>th</sup> day of August, 2013 at about 10:00hrs at Bomani area, within Kisarawe District, Coast Region, did penetrate his finger to the vagina of one ABC a girl under the age of 15 years, the act which effect her psychologically."*

The appellant denied the charge, whereupon the prosecution featured four witnesses and a PF3 (exhibit P1). In a nutshell, the case for the prosecution hinged on a brief account of the alleged victim (PW1) who happened to be a four years old child. Her testimony which was comprised of only three sentences went thus:-

*"I know the accused. He entered his finger in my vagina. The accused called me in his house at Makuti."*

In his sworn testimony, the appellant completely disassociated himself from the foregoing condemnation. After all, he said, he had never seen PW1 previously.

On the whole of the evidence, the trial court accepted PW1's account and, in the result, the appellant was found guilty, convicted and sentenced to a prison term of twenty (20) years with an order to compensate the victim a sum of shs 500,000/=. Dissatisfied, the appellant preferred an appeal but, the High Court (Ruhangisa, J.) found no cause to vary the decision of the trial court. In the upshot, the appeal was dismissed in its entirety.

Still discontented, the appellant presently seeks to impugn the High Court decision upon a memorandum of appeal which is comprised of seven (7) points of grievance. At the hearing before us, the appellant who was fending for himself, unrepresented, fully adopted the memorandum of appeal but opted to let the respondent to submit first and retained his right to rejoin, if need be.

The respondent Republic had the services of Ms. Dorothy Massawe, learned Senior State Attorney who was assisted by Ms. Daisy Makakala, learned State Attorney. From the very outset, the learned Senior State Attorney declined to support the conviction for the reason that the same was based on an incurably defective charge sheet.

Expounding her contention, Ms. Massawe submitted that the statement of Offence was wrongly predicated under section 138 C (1) and (2) instead of the appropriate section 138 C (1) (a) and (2) (b) of the Penal Code, Chapter 16 of the laws (the Code). Furthermore, she charged, the particulars of the offence were also defective for want of the detail that the appellant did the wrongful act “*for sexual gratification*”.

On account of the referred anomalies which were not raised in the memorandum of appeal, the learned Senior State Attorney urged us to invoke section 4(2) of the Appellate Jurisdiction Act Chapter 141 of the laws (AJA) so as to, respectively, quash the conviction and set aside the sentence imposed on the appellant.

Having heard the submissions of the learned Senior State Attorney, the appellant fully supported her in his brief rejoinder. He also, similarly, urged us to quash his conviction and sentence and set him at liberty.

We have carefully 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 provision of the law under which the appellant was arraigned:-

*"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 artifice 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;*

*(c) with the consent of the other person where such consent has been obtained at a time the other person was of unsound mind or*

*was in a state of intoxication induced by alcohol or any drugs, matter or thing.*

(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 shall 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) **commits grave sexual abuse on any person under fifteen 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.” [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 138C (1)(a) as well as subsection (2) (b) 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 the same was perpetuated **"without the consent of the other person."** Such requirements were not met and the vexing issue is as to what is to be tied to the referred shortcomings.

Fortunately, of recent, we were occasioned to grapple with corresponding shortcomings in the unreported Criminal Appeal No. 179 of 2016 **Kassim Said v. The Republic**. The appellant there similarly stood arraigned for grave sexual abuse and the statement of offence simply referred to section 138 C (1) of the code instead of the appropriate section 138 C (1) (a) and (2) (a). Furthermore, in that case, the particulars of offence just as well did not allege the details to the effect that the wrongful act was perpetuated **"for sexual gratification"** as well as that it was done **"without the consent of the other person."** Addressing the misdescription of the appropriate provision of the law in the statement of offence we paid homage to another recently

decided unreported Criminal Appeal No. 21 of 2017 **Khamisi Abderehamani v. The Republic** and held:-

*"... 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."*

We were, however, of the firm view that the situation obtaining in the case of **Kassim Saidi** (supra) was on a different footing from that obtaining in the case of **Khamisi Abderehamani** (Supra) in that, in the latter case, the particulars of the offence on the charge sheet were explicit enough to inform the person accused on the nature of the offence he was facing; whereas, in the former case at least two essential ingredient's of the charged offence were not alleged in the particulars of the offence. Thus, in **Kassim Saidi** (supra) we likened the obtaining situation with the one in the case of **Mussa Mwaikunda v. 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 is 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 case under our consideration, as we have already intimated, the particulars of offence did not allege that the wrongful act was done **"for sexual gratification"** as well as that the same was perpetrated **"without the consent of the other person."** Both details are essential ingredients of the offence of grave sexual abuse to which the appellant stood arraigned and going by the referred case of **Mussa Mwaikunda** (Supra), the defect is fatal and cannot be cured by the provisions of section 388(1) of the CPA.

All said, we entirely subscribe to the submissions of the learned Senior State Attorney and, in the result, we allow the appeal, quash the conviction and set aside the sentence imposed on the appellant who should be released from prison custody forthwith unless he is held for some other lawful cause. Order accordingly.

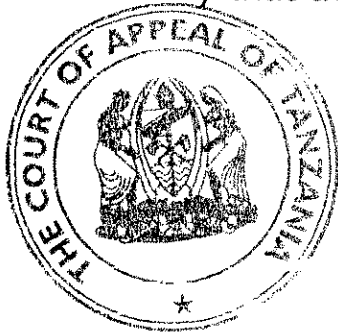
**DATED** at **DAR ES SALAAM** this 24<sup>th</sup> day of May, 2019.

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**