IN THE COURT OF APPEAL OF TANZANIA

AT DODOMA

(CORAM: JUMA, C.J., MUGASHA, J.A. And NDIKA, J.A.)

CRIMINAL APPEAL NO 50 OF 2019

ANDREW LONJINE.....APPELLANT

VERSUS

THE REPUBLIC.....RESPONDENT

(Appeal from the Judgment of the High Court of Tanzania at Dodoma)

(Hon. L. Mansoor, J.)

dated the 14th day of November, 2018

in

Criminal Appeal No. 90 of 2017

JUDGMENT OF THE COURT

8th & 15th June, 2020

JUMA, C.J.:

The appellant, ANDREW LONJINE, was convicted by the District Court of Dodoma of the offence of Grave Sexual Abuse contrary to Section 138C (1) and (2) of the Penal Code [Cap. 16 R.E. 2002]. He was sentenced to serve 20 years imprisonment. The particulars of the offences were that on various dates of August, 2016 at Hombolo Village

within the Municipality of Dodoma Region, unlawfully inserted his fingers into the vagina of a five-year old girl **YY** [name withheld].

The prosecution's case was built around the evidence of five witnesses, including the victim (PW2) and her mother, Rose Mbeho (PW1). It was around 19:00 hrs on 30/08/2016, PW1 was back home from the church and had just finished her routine domestic chores. Before climbing on bed for the night, PW1 told her daughter (PW2) that it was time for her to sleep. But, PW2 could not climb into the bed, suffering from great pain. Her private parts, and vagina ached a great deal; she told her mother. PW2 revealed what had happened before her mother returned home from the church. PW2 told her mother about the visit by the appellant asking for a glass of water. Instead of drinking the water, PW2 told her mother, the appellant followed her to the bed and proceeded to insert his fingers into her vagina and the pain she suffered. PW1 could not handle this revelation alone. She immediately sought out her neighbour, one Martha Jailos (PW3).

Together, the two women examined PW2's private parts, and they indeed saw bruises and a swollen vagina. PW1 and PW3 both testified that they knew the appellant as their fellow villager within their locality.

In fact, the appellant was especially popular and playful with children, PW1 and PW3 said. Children referred him as their grandfather, *"Babu Andrea."*

The charge sheet identified the complainant, PW2, as a five-year old girl. It was clear to the learned trial magistrate that as a witness, PW2 was a child of tender age who, under section 127(4) of the Evidence Act is defined as a child whose apparent age is not more than fourteen years. Before allowing a child of tender age to testify, the learned magistrate had to test her competence by following a procedure under section 127(2) of the Evidence Act. After testing PW2's competence by *voire dire* examination, the trial magistrate determined that although PW2 did not understand the nature of oath; she however possessed sufficient intelligence. He allowed her to give unsworn evidence.

In her unsworn evidence, PW2 recounted how the appellant visited her home while she was alone with her little brother. She recalled how the appellant had asked for a glass of water. And, instead of drinking water he was offered, the appellant placed the glass on the table, followed her to the bed. Despite her strong protestations, the appellant

inserted his fingers into her vagina, causing pain. It was only after she let out a loud cry when the appellant left her.

The incident was reported to the police, who arrested the appellant. PW2 was given PF3 and taken to Hombolo Health Centre where she was received by doctor Sued Musa Msuya (PW4). After examining his patient, PW4 filled the PF3 which he tendered in court as exhibit P1. PW4 recorded that although PW2's vagina, *labia majora* and clitoris were bruised and swollen, her hymen or virginity was intact, suggesting incomplete penetration.

In his defence, the appellant denied the offence. He claimed that he was arrested at a local liquor house. He testified from the moment he was arrested, right to up the time he was taken to the police station, he had maintained his innocence, despite the beatings he suffered.

When this appeal came up for hearing on 8 June 2020, the appellant was unrepresented. He appeared by remote video link from the Isanga Central Prison in Dodoma where he is serving his sentence. In urging us to quash his conviction and allow this appeal, the appellant relied on five grounds of appeal.

In his first ground of appeal, the appellant challenges the prosecution evidence, claiming that it did not prove the case against him. In his second ground of appeal, the appellant faulted the evidence of the child victim (PW2). He blamed the trial and first appellate courts for failing to determine whether the child possessed sufficient intelligence, or whether she understood the duty to speak the truth.

In his third ground, the appellant blames the two courts below for relying on medical examination report (PF3) to convict him in the circumstances where the medical officer who prepared that report neither tendered it, nor was the report read out in court. The fourth ground of appeal faults the two courts below, for overlooking his defence. In his fifth ground of appeal, the appellant faults judgments of both trial and first appellate courts for failing to meet the mandatory requirements under section 312 (1) of the CPA.

When we invited him to address us on his grounds of appeal, he did not seize the moment. He preferred to hear what response the learned State Attorneys had on his grounds of appeal.

Learned Senior State Attorney Mr. Archiles Paul Mulisa appeared for the respondent Republic. Mr. Mulisa was assisted by two learned State Attorneys, Mr. Aldo Mkini and Ms. Phoibe Clifford Magili.

Submitting on behalf of her colleagues, Ms. Magili, announced that the respondent Republic was opposing this appeal and supporting the conviction and sentence. She submitted first on the second ground of appeal concerning competence of PW2 to testify, the appellant regarded the child's evidence to be unreliable and should not have been relied on.

Ms. Magili conceded that the learned trial magistrate relied on a repealed provision of Evidence Act Cap 6 to determine the competence of PW2 to testify. Learned State Attorney explained that on 5th October 2016 when PW2 testified a child witness, the learned trial magistrate relied on the repealed version of section 127(2) of the Evidence Act, Cap 6 R.E. 2002 her competence to testify. The old version of section 127(2) of the Evidence Act states:

> *"(2) Where in any criminal cause or matter a child of tender age called as a witness does not, in the opinion of the court, understand the nature of an oath, his evidence may be received though not given upon oath or affirmation, if in the opinion of the court, which opinion shall be recorded in the proceedings, he is possessed of*

sufficient intelligence to justify the reception of his evidence, and understands the duty of speaking the truth."

Following this amendment, section 127 (2) of the Evidence Act by Written Laws (Miscellaneous Amendments) (No.2) Act, 2016 [ACT NO. 4 OF 2016], section 127(2) of the Evidence Act now states:

"127(2) A child of tender age may give evidence without taking an oath or making an affirmation but shall, before giving evidence, promise to tell the truth to the court and not to tell any lies."

Ms. Magili submitted that although the trial magistrate had misdirected himself by relying on the repealed version, he all the same substantially complied with the applicable version of section 127(2) of the Evidence Act, which now requires the trial courts to test whether the child promised to tell the truth to the court and not to tell any lies. To support this line of her submission the learned State Attorney cited Court's decision in **GODFREY WILSON V. R.,** CRIMINAL APPEAL NO. 168 OF 2018 (unreported). The Court reiterated the need for courts to move away from the old version of section 127(2) of the Evidence Act which had required the trial courts to determine competence of a child witness

by determining "...*whether or not the child of a tender age understand the nature of oath and the duty of telling the truth; and if he is possessed of sufficient intelligence to justify the reception of his/her evidence."* According to Ms. Magili, the evidence of PW2 meets the requirements of the new version of section 127(2) because the learned trial magistrate tested the competence of PW2 by asking her three simplified questions which, according to our decision in **GODFREY WILSON V. R** (supra), determine competence of a child to testify:

> *"1. The age of the child.*
> *2. The religion which the child professes and whether he/she understands the nature of oath.*
> *3. Whether or not the child promises to tell the truth and not to tell lies."*

It was the learned State Attorney's submission that although the trial magistrate had misdirected himself when he relied on the repealed version of section 127(2), he in essence complied with the new version by asking three questions which assists trial courts in deciding whether the evidence of the child (PW2) is to be admitted. Ms. Magili urged us to dismiss the second ground of appeal.

Regarding the third ground of appeal where the appellant had complained that the medical examination report (PF3) was not read out in

court before it was tendered as exhibit P1, Ms. Magili conceded this ground and urged us to expunge this exhibit from the record. She was however quick to insist that although she supports the ground of appeal that medical report the medical officer Sued Musa Msuya (PW4) had prepared should expunged, the oral testimony of PW4 should remain on record. On this stand, the learned State Attorney referred us to our decision in **ANANIA CLAVERLY BETELA V. R.**, CRIMINAL APPEAL NO. 355 OF 2017 (unreported) where, despite expungement of Exhibits P.2, P.3, P.6 and P.10, this Court retained the testimonies of PW2, PW3, PW5 and PW6 who had tendered the expunged exhibits.

With respect to the first ground of appeal wherein the appellant had complained that the prosecution did not prove its case against him to the required standard, Ms. Magili urged us to dismiss this ground because so far as the prosecution evidence on record is concerned, it proved all the essential ingredients of the offence of Grave Sexual Abuse under section 138C of the Penal Code. When we asked the learned State Attorney whether her assertion that there is evidence on record extends to proof of the elements of **"sexual gratification,"** and "**lack of consent**" which are essential under the above cited section 138C, Ms. Magili conceded

that there is no evidence on record which can prove these two essential elements of the offence of grave sexual abuse.

Ms. Magili insisted much as there may be no evidence to prove essential elements of **"sexual gratification,"** and "**lack of consent**", but, she submitted, there is ample evidence which prove other equally essential ingredient of this offence. She referred to the evidence of PW2 on where she graphically explained what the appellant did to her: *"...He approached me in the bed. He started inserting his fingers in my vagina (pointing at it). I started crying because I felt pains. .... I cried loudly. That is when he left."*

Learned State Attorney submitted that even if proof of essential elements of "sexual gratification" and "lack of consent" are missing on record, still the evidence of the victim of grave sexual abuse (PW2) is sufficient to prove a lesser offence of Gross Indecency which is punishable under section 138A of the Penal Code, Cap. 16:

> ***"138A.*** *Any person who, in public or private commits, or is party to the commission of, or procures or attempts to procure the commission by any person of, any act of gross indecency with another person, commits an offence and is liable on conviction to imprisonment for a term of not*

less than one year and not exceeding five years or to a fine not less than one hundred thousand shillings and not exceeding three hundred thousand shillings; save that where the offence is committed by a person of eighteen years of age or more in respect of any person under eighteen years of age, a pupil of a primary school or a student of a secondary school the offender shall be liable on conviction to imprisonment for a term not less than ten 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 any injuries caused to that person."

She submitted that the offence of committing an act of gross indecency with another person is a cognate offence (a lesser offence) that is related to the greater offence of grave sexual abuse in so far it shares several salient elements of the greater offence.

The appellant's basic complaint in his fourth ground of appeal is failure by the trial and first appellate courts to consider his defence. In her concluding submissions, the learned State Attorney conceded this ground. When we asked her about the way forward when two courts

below fail to consider the appellant's defence, she initially suggested that we should invoke our revisional jurisdiction under section 4(2) of the Appellate Jurisdiction Act, Cap. 141 (the AJA) to quash the entire proceedings of the trial and first appellate courts, remit back the record and direct the trial court to consider not only the appellant's defence, but to also write a proper judgment that complies with the provisions of section 312(1) of the CPA.

When we prodded her whether, the Court can exercise its revisional jurisdiction over a matter that the appellant had raised as his ground of appeal, the learned State Attorney left it to the Court to decide.

When we invited him to respond to the respondent's submissions, the appellant had nothing to add, other than leaving it up to the Court to make its decisions on his grounds of appeal.

Having heard both the learned State Attorney and the appellant on the grounds of appeal, and on perusal of the record of this appeal, we find that this appeal will turn on two main issues of law. First, is whether the prosecution proved all the essential ingredients of the offence of Grave Sexual Abuse as provided for under section 138C of the Penal

Code. Second, consequence which should befall the failure by the two courts below to consider the defence evidence.

Regarding proof beyond reasonable doubt, we think it implies proving all the essential elements constituting the offence of Grave Sexual Abuse. The charge sheet, made up of the Statement of the Offence and Particulars of the Offence, is starting points for identifying what the essential ingredients of offence of Grave Sexual Abuse are. Section 138C of the Penal Code, provides the essential ingredients which are outlined in the Particulars of the Offence and later proved by evidence. Section 138C states:

> *"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-*
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> *(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 added].

Section 132 of the CPA provides a useful guide to the prosecution when drafting charge sheet, and to the trial courts when admitting charge sheets or information. Section 132 of the CPA directs that every charge or information shall contain, and shall be sufficient if it contains, a statement of the specific offence or offences with which the accused person is charged, together with such particulars as may be necessary for giving reasonable information as to the nature of the offence charged.

At a closer inspection, the Statement of the Offence appearing on page 1 of the record, is defective in so far as it cited only **section 138C (1)** and (2) (b) of the Penal Court without mentioning a specific paragraph (a), (b) or (c) of section 138C (1) for which the appellant was charged with. By failing to cite any of paragraphs (a), or (b) or (c) together with section 138C (1) made the Statement of Offence incomplete for want of important element of "**lack of consent**" which features under these three paragraphs. The Statement of the Offence which was read out to the appellant provides:

"STATEMENT OF OFFENCE

GRAVE SEXUAL ABUSE: *Contrary to Section 138C (1) and (2) (b) of the Penal Code."* [underline added].

The above Statement of Offence has omitted any of paragraphs (a) or (b) or (c) of section 138C (1). As this Court stated in **MUSSA NURU @ SAGUTI V. R.,** CRIMINAL APPEAL NO. 66 OF 2017 (unreported), section 135(a) (ii) of the CPA which is couched in imperative terms, requires the Statement of the Offence to cite a correct reference of section of the law which sets out or creates a particular offence allegedly committed. In the instant appeal, by failing to cite any of the paragraphs which carry an essential ingredient of "lack of consent" made the Statement of Offence of Grave Sexual Abuse incomplete and hence fatally defective.

This Court has always stated that a charge or information that is laid before the accused person, must contain all the necessary ingredients of the offence for which the accused person is charged with, to enable him to make an informed defence: **See- ZEFANIA SIAME VS REPUBLIC** (CRIMINAL APPEAL NO.250 OF 2011) [2014] TZCA 152; (14 OCTOBER 2014) TANZLII.

At this juncture while looking at the ingredient of "lack of consent," we could not help but wonder aloud if, for purposes of argument, whether the five-year old girl in this appeal, had consented to the act of the appellant to insert his fingers into her private parts to gratify himself; the appellant would have a defence against the offence of grave sexual abuse. This is a possible absurdity out of interpretation of section 138C (1)(a)(b)(c) and (2) of the Penal Code as it now stands. We think, this provision should be amended at very least to protect children of under the age of 18 who in law, cannot give consent to either grave sexual abuse or any other sexual offence.

With respect to the Particulars of Offence levelled against the appellant, it reads:

> *"ANDREW LONJINE charged on various dates of August, 2016 at Hombolo Village within the Municipality of Dodoma Region, did unlawfully* ***insert his fingers into the vagina*** *of one [Name withheld] a five years old girl."* [Emphasis added].

Juxtaposing the above particulars of offence of grave sexual abuse with the provisions of section 138C (1)(a),(b), (c) cited earlier, we can unhesitatingly say that while the element of **"inserting fingers into the**

vagina" is disclosed by the Particulars of Offence, the other ingredients of **"for sexual gratification"** and **"lack of consent"** are missing out from the particulars of the offence under section 138C of the Penal Code. Because essential ingredients "for sexual gratification" and "lack of consent" were not included in the Particulars of Offence of grave sexual abuse, no evidence was led by the prosecution to prove these two ingredients. Therefore, the prosecution cannot be taken to have proved the offence of grave sexual abuse beyond reasonable when essential ingredients of "for sexual gratification" and "lack of consent" were neither included in the Particulars of Offence nor was 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.

With regard to the second main issue of failure to consider the defence evidence, learned State Attorney was right to concede this ground of appeal, as she did. The learned State Attorney's concession of this ground of complaint is borne out by the failure of the trial and first

appellate courts to consider the appellant's defence. In his three-page judgment, the learned trial magistrate did not evaluate defence evidence at all. He only narrated the facts that had been presented by the prosecution and defence, before he quickly concluded that *"there is cogent and coherent evidence proving that the accused person inserted his fingers in PW2's vagina."*

The High Court did not re-evaluate the appellant's evidence that is on record as is expected of first appellate courts. Apart from expressing her own opinion on the problems facing traumatized children, the first appellate Judge neither touched nor evaluated the appellant's defence evidence.

Failure to consider defence evidence has been subject of decisions of this Court. In **MOSES MAYANIA @ MSOKE VS. R.,** CRIMINAL APPEAL NO. 56 OF 2009 (unreported) the Court stated that it is trite law that failure to consider the defence case is fatal and usually vitiates the conviction. In **ALLY PATRICK SANGA V. R.**, CRIMINAL APPEAL NO. 341 OF 2017 (unreported) learned State Attorney had agreed with the appellant that his defence had not been considered by both the trial and

first appellate courts. He urged the Court to allow the appeal. The Court agreed, stating:

> *"...the creditworthiness or probative value of the defence evidence is not evaluated anywhere. What the appellant averred and raised in his defence was not considered by the trial magistrate in his judgment. The first appellate Judge did not also evaluate the evidence of the appellant to the effect that he was not identified at the scene of alleged crime. ....*
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> *We think that a first appeal, the first appellate court was supposed to objectively evaluate the gist and value of the defence evidence, and weigh it against the prosecution case (see* ***LEONARD MWANASHOKA V. R.,*** *CRIMINAL APPEAL NO. 226 OF 2014 (unreported).*
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> *It is therefore our conviction that the first appellate court's failure to re-evaluate the evidence of the defence constituted an error of law and by affirming a conviction based on evidence which had not been duly reviewed was also another error which renders the conviction unsafe."*

As the grounds of defective charge sheet and failure to consider the evidence for the defence are sufficient to dispose of this appeal, we accordingly allow the appeal. Since the trial and subsequent conviction of

the appellant is a nullity, we quash it, and set aside the sentence. We order that he be released from prison forthwith, unless he is otherwise lawfully held.

Ordered accordingly.

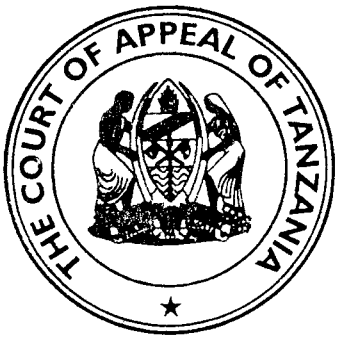
DATED at **DODOMA** this 12th day of June, 2020.

I. H. JUMA
CHIEF JUSTICE

S.E.A. MUGASHA
JUSTICE OF APPEAL

G. A. M. NDIKA
JUSTICE OF APPEAL

The Judgment delivered on 15th day of June, 2020 in the presence of the Appellant in person and Mr. Aldo Mkini, learned Senior State Attorney for the respondent / Republic, is hereby certified as a true copy of the original.



K. D. MHINA
REGISTRAR
COURT OF APPEAL