IN THE HIGH COURT OF TANZANIA
(DAR ES SALAAM DISTRICT REGISTRY)
AT DAR ES SALAAM
CRIMINAL APPEAL NO. 306 OF 2017

(an appeal from the judgment of Mkuranga District Court delivered by Hon. Barnabas RM on 8th November, 2016 in Criminal Case No. 171 of 2016)

IBRAHIM KASIM @ ABDALLAH ..... APPELLANT

VERSUS

THE REPUBLC ..... RESPONDENT

JUDGMENT

06/06/2018 & 02/07/2018

BANZI, J.:

The appellant was arraigned before the District Court of Mkuranga at Mkuranga charged with unnatural offence contrary to section 154(1) of the Penal Code [Cap.16 R.E. 2002]. At the end of trial, he was convicted and sentenced to thirty (30) years imprisonment. In addition to the prison term the appellant was ordered to pay TShs.1,000,000/= to the victim. Aggrieved with both conviction and sentence, the appellant preferred this appeal.

Before this Court the appellant filed a Petition of Appeal with five grounds which may be crystallized into the following: -

1. *That, the trial Magistrate erred in convicting the appellant basing on fatally defective charge.*
2. *That, the Prosecution did not prove its case beyond reasonable doubt.*

The factual background led to the conviction of the appellant can be summarized as follows; the victim one Harja Rajabu (PW1), a young girl aged seven (7) was living at Vikindu Village with her mother before they moved to Mbagala after the incident. In the morning of 4th June, 2016 PW1 went to their neighbour named mama Amina to buy snacks. On her way back she met the appellant who asked for her company to construction site. They went together until they reached bush area whereby the appellant asked her to hold his shovel claiming that he is going for a short call. Thereafter, he took off his clothes and asked PW1 to undress her underpants and inserted his penis into her anus. PW1 felt pain and when she told the appellant, he beat her with his hands. After finishing, he wore his clothes and asked PW1 to wear hers and they went back home.

Upon her return, and being asked by her mother PW1 told her that, a young boy took her to the bush and sodomized her. When her father Rajabu Athuman Mselemu (PW2) returned, she examined PW1 and saw bruises on her anus. He reported the matter to police and after given PF3 they went to

hospital. PW2 made two arrests following the description claimed to be given by PW1 that the person who abused her has a mark on his face and used to hold shovel but PW1 failed to identify them.

PW1 and her parents moved to Mbagala and a month later PW2 was informed that there is a person arrested with a child near the cemetery at Vikindu. PW2 was called at Vikindu police station with PW1 for the purpose of identifying the appellant whereby upon arrival PW1 managed to identify him. As a result, the appellant was arraigned to court.

In his defence, the appellant denied to have committed the offence. He told the trial court that on the day of the incident he was at Mwandege area taking care of her sick grandmother. He claimed on 11th July, 2016 while on his way from hospital, he was arrested by three persons and taken to Vikindu Police Station and later brought to court.

At the hearing of this appeal, the appellant appeared in person and fended for himself. The respondent Republic had the service of Mr. Bryson Ngidos, the learned State Attorney.

The appellant, being a layperson did not have much to say he merely requested the court to consider his grounds and allow the appeal.

Arguing in support of the appeal, Mr. Ngidos opted to submit on the first ground only which to his opinion suffice to dispose of the appeal. Mr. Ngidos conceded that, the conviction of the appellant was based on the fatally defective charge. He argued that, the charge sheet indicates the appellant was charged with unnatural offence contrary to section 154(1) of the Penal Code. He further contended that, section 154 (1) has three paragraphs whereby each indicates a category of unnatural offence. To his view section 154(1) cannot stand alone to create unnatural offence without either paragraph (a), (b) or (c).

Mr. Ngidos further argued that, the charge before the trial court was framed contrary to the mandatory requirement of section 135(a)(i) to (iv) of the Criminal Procedure Act [Cap.20 R.E. 2002] (CPA). According to him the appellant was charged under wrong/non-existence provision of the law that makes the charge to be defective hence he was not fairly tried. To support his argument, he referred the case of **Shabani Masawila v Republic**, Criminal Appeal No. 358 of 2008 CAT (unreported).

Finally, the learned State Attorney submitted that, in the instant case the appellant was convicted on a defective charge and hence it prejudiced his defence. He rested his submission by stating that, this irregularitv was

very fatal and not curable under section 388(1) of the CPA. He prayed for this appeal to be allowed.

After having considered the grounds of appeal and the submission by the learned State Attorney, I inclined to agree with him that, the appellant's conviction was based on a fatally defective charge. The charge sheet before the trial court reads as hereunder: -

> ***Statement of offence**: unnatural offence c/s 154(1) of the Penal Code Cap 16 [R.E 2002]*
> ***Particulars of offence**: that Ibrahim s/o Kasim @ Abdallah, charged on 4th day of June 2016 at about 09:30 Hrs. at Vikindu village within Mkuranga District in Coast Region did have carnal knowledge against the order of nature to one Harja d/o Rajabu a school girl aged 7 years old".*

Before examining the irregularity in the quoted charge above, I would like to reproduce section 154 of the Penal Code for ease of reference, the same states that;

"(1) Any person who–

(a) has carnal knowledge of any person against the order of nature; or

(b) has carnal knowledge of an animal; or

(c) permits a male person to have carnal knowledge of him or her against the order of nature,

commits an offence, and is liable to imprisonment for life and in any case to imprisonment for a term of not less than thirty years.

(2) Where the offence under subsection (1) of this section is committed to a child under the age of ten years the offender shall be sentenced to life imprisonment".

As clearly shown above, section 154(1) has three categories of unnatural offence indicated under paragraphs (a), (b) and (c). The charge sheet in our case shows that the appellant was charged under section 154(1) of the Penal Code without specifying any of the categories laid down under paragraphs (a), (b) and (c).

The position of the law is very clear on the issue of framing of charges. Section 135(a)(ii) of the CPA requires the statement of offence to have a correct reference of the section which creates the specific offence. In the case of **Jafari Mohamed v Republic**, Criminal Appeal No. 495 of 2016 CAT (unreported), the appellant was charged with unnatural offence contrary to section 154(1) of the Penal Code. It was stated that:-

"The appellant was simply charged with section 154 (1) without any mention of the categories laid down under (a), (b) and (c) respectively. The law is settled that the particulars of the offence must state and include all the

essential ingredients to the offence, failure of which would render the charge defective"

In another case of **Shabani Masawila v Republic**, Criminal Appeal No. 358 of 2008 CAT (unreported) it was held that;

"The reason for showing in the statement of offence a correct reference of the section which creates the particular offence is not farfetched. It is to enable the accused to understand the nature of the charge laid against him and prepare his defence. This would also minimize the chances of him/her being prejudiced."

Coming to the case at hand, the appellant was charged with a serious offence with a severe punishment of life imprisonment. Yet still, the charge sheet did not specify the category of unnatural offence under which the appellant was charged. I totally agree with the learned State Attorney that this irregularity is very fatal and cannot be salvaged by section 388(1) of the CPA.

The next issue for determination is whether the appellant was fairly tried after being convicted on defective charge. It is a settled principle that, being found guilty on a defective charge, based on wrong and/or non-existent provisions of the law, it cannot be said that the appellant was fairly

moved to Mbagala, a month later he was informed on the arrest of the appellant, hence he took PW1 to Vikindu Police station and she managed to identify the appellant as the one who sodomized her. In these circumstances, it was expected for police to conduct an identification parade. Surprisingly, this was not done.

Alongside, PW4 being a police officer and investigator of the case, did not to explain how the "so called identification of the appellant" was conducted at police station. In these circumstances, it is clear that identification of the appellant was very weak and unreliable. It is a settled principle that, for court to act on evidence of visual identification it must fully satisfied itself that the evidence before it is absolutely water tight and all possibilities of mistaken identity are eliminated. This principle was set in the celebrated case of **Waziri Amani v Republic** [1980] TLR 250. See also the case of **Godlisten Raymond and Another v Republic**, Criminal Appeal No. 363 of 2014 CAT (unreported).

For the reasons stated above, the appellant's conviction cannot be sustained. I accordingly allow the appeal, quash the conviction and set aside the sentence imposed on him together with the compensation order of

Tshs.1,000,000/=. I order the release of the appellant forthwith from prison, unless otherwise lawfully held.

I.K. BANZI
JUDGE
02/07/2018

Delivered this 2nd day of July, 2018 in the presence of Bryson Ngidos the learned State Attorney for the respondent and the appellant in person.

I.K. BANZI
JUDGE
02/07/2018

Right of appeal explained.

I.K. BANZI
JUDGE
02/07/2018