IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

AT KIGOMA

IN THE DISTRICT REGISTRY OF KIGOMA

APPELLATE JURISDICTION

(DC) CRIMINAL APPEAL NO. 12 OF 2020

(Original Criminal Case No. 31 of 2020 of the District Court of Kigoma Before K. Mutembei ,RM dated 26/03/2020)

MOHAMED ATHUMANI.....APPELLANT

VERSUS

REPUBLIC ..... RESPONDENT

JUDGMENT

Dated: of last order: 28/5/2020

Date of Judgment: 28/5/2020

Before Hon: A. MATUMA -JUDGE

The appellant Mohamed s/o Athumani stood charged in the District Court of Kigoma at Kigoma for Grave Sexual Abuse contrary to section 138 C (1) (a) and (2) (a) of the Penal Code, Cap. 16 R.E 2002.

It was alleged that on the 7th January, 2020 at Mjimwema area within the District and Region of Kigoma the appellant for sexual gratification inserted his finger into the vagina of a sixteen years old girl one Venansia Bregeya.

The appellant was arraigned on the 26/03/2020 and is recorded to have pleaded guilty to the charge and admitted all the facts narrated against him. He was thus convicted on his own plea of guilty and sentenced to suffer fifteen (15) years custodial sentence, to suffer three strokes of the cane and

to pay compensation of **Tshs. 500,000/=** to the victim for the injuries sustained.

The appellant was aggrieved with the findings, conviction, sentence and order of the trial Court. Under the services of Mr. Ignatius Kagashe learned advocate he has preferred this appeal with three grounds challenging his plea to have been treated as unequivocal while it was equivocal and imperfect resulting from misapprehension of the charge.

At the hearing of this appeal the appellant was represented by the said learned advocate (Ignatius Kagashe) while the Respondent/Republic had the service of Mr. Robert Magige learned state attorney.

Mr. Kagashe learned Advocate submitted on the 1st and 2nd grounds together arguing that the plea of the accused person was not taken as nearly as possible in the language he used as mandated by section 228 (2) of the Criminal Procedure Act. In his view it would have been better to have the plea recorded in Swahili language so that we could exactly know what did the appellant say in reply to the charge. He cited the case of ***Ndihokubwayo s/o Emmanuel versus Republic, Criminal Appeal No. 300 (B) of 2011 (CAT)*** of fortify his argument.

He also argued that the ingredients of the offence were not explained to the appellant and therefore the plea thereof was a result of mistake or misapprehension.

I stopped the leaned advocate not to proceed on the 3rd ground of appeal which is all about the sentence as I thought it sufficient to determine this appeal on the consolidated first and second grounds of appeal.

I therefore invited Mr. Robert Magige learned state attorney to reply on the 1st and 2nd grounds of appeal.

The learned state attorney maintained that the appeal is devoid of any merit because the proceedings are very clear that the appellant unambiguously pleaded guilty to the charge, the trial Magistrate re-explained to him the ingredients of the offence but the appellant continued to maintain his plea of guilty.

About the requirements in section 228 of the CPA (supra) the leaned state attorney argued and I think rightly so, that there is no requirements that the plea be taken in a language the accused has used to plea on the charge or the facts. It suffices to take the plea as nearly as possible in the words used and therefore, it isn't the requirements of reducing the plea exactly as it was given in the language used by the accused/Appellant.

Mr. Kagashe learned advocate argues that it is difficult to grasp clearly the plea of the appellant in the manner it was written or reduced by the trial Magistrate because he used the term **"for sexual gratification"** on the plea of the appellant which has been interpreted differently between him and the learned state attorney.

I am of the same view that Mr. Gagashe learned advocate is absolutely right. The plea of the appellant was taken by using technical words. He is recorded to have pleaded; *"It is true I did insert my fingers into her vaginal* ***for sexual gratification".*** The term ***"for sexual gratification"*** is a technical one inferred by the trial magistrate in interpreting the plea of the appellant into English language. At the hearing of this appeal the learned state attorney

has at all times interpreting such a term as ***"Kwa nia ya kumdhalilisha kingono"*** while the learned advocate has been interpreting it to be ***"kwa tamaa zake za kimwili".*** Under the circumstances the possibility that the appellant was misled on what exactly the term **"for sexual gratification"** meant, and thus pleaded on the wrong interpretation of the charge is not eliminated. I would thus agree with the learned advocate that the plea of the appellant was not taken as nearly as possible in the language he used because the plea was taken under technical terms of which I firmly find that the appellant did not use.

I further agree with both learned brothers that under section 138 C (1) (a) of the Penal Code, the essential ingredients of the offence are **"for sexual gratification"** and **"without the consent".** Mr. Kagashe argued that all the ingredients ought to have been reflected in the charge while Mr. Robert Magige learned State Attorney argued that despite the fact that the charge does not state whether the act was done without consent, the facts thereof fully disclosed that the appellant forcibly committed the offence.

The Court of appeal in the case of **Kassim said versus Republic, Criminal Appeal No. 179 of 2016** held that for an offence of Grave sexual abuse to stand, two key words must be included in the particulars of the offence which are **"for sexual gratification"** and **"without consent".** Just to quote at page 11 of the decision, the Court of Appeal held:-

> *"The particulars of the 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 **essentials 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".***

In the instant appeal the particulars of the offence alleged the **"sexual gratification"** but did not allege that the same was done **without the consent of the victim**. Mr. Robert Magige learned State Attorney as herin above stated was of the view that the facts indicated that appellant had forcibly grabbed the victim into the locus in quo and that presupposes that even the inserting of fingers into the vagina of the victim was by force. With due respect to the learned state attorney the grabbing constituted a difference offence possibly unlawful confinement. The offence alleged in this case was not unlawful confinement but **Grave sexual abuse** but both the charge and the facts did not state whether that act of inserting fingers into the vagina of the victim was without her consent which is a necessary ingredient of that offence. Even the relevant part of the facts which was laid against the appellant did not state whether the inserting of the fingers was done without consent. Just to quote, it reads;

"While in the small watchman's room the accused person for sexual gratification inserted his finger into the vagina of the said sixteen (16) years old girl (victim)."

He would perhaps enter plea of not guilty had the charge informed him that he did the alleged act without the consent of the victim. I thus agree with Mr. Kagashe learned advocate for the appellant that the ingredients of the offence must be reflected in the particulars of the offence and been further

explained in the facts of the case. The facts are there to explain further the charge as a substitute to the evidence that would have brought to prove the charge and not to cover the omissions in the charge. The evidence given out of the context of the charge cannot be relied upon to convict, likewise the facts out of the context of the charge cannot legally be used to convict. In the circumstances and with the herein above authority of the Court of Appeal, I have no option rather than deciding that the offence of grave sexual abuse was not properly pleaded in the charge sheet and it cannot be said that the appellant was properly arraigned on it. The plea of the appellant therefore as rightly argued by his advocate was a result of misapprehension of the charge as the same did not explain all the ingredients of the offence.

I therefore reject the arguments of the learned State Attorney that the appellant was properly convicted on his own plea of guilty and I proceed to rule out that the conviction and sentence on that count cannot was illegally entered.

Even though I have in the course of thorough perusal of the original records of the trial court observed some unpleasant features therein. The trial magistrate took the plea of the appellant, recorded the facts of the case and took the plea of the appellant on the facts but someone undisclosed seems to have intruded the proceedings and recorded the findings of the court and entered the conviction against him. The trial magistrate resumed in taking the aggravated factors and mitigation facts then enter the sentence. Having given both learned brothers the trial court's original record, they unanimously submitted before me that the findings of the trial court and the conviction of the appellant thereof was entered by a different person other

than the trial magistrate. That is clearly seen on the handwritings therein. Under section 312 (1) of the Criminal Procedure Act it is clearly provided that the judgment of the court shall be **written by** or **reduced to writing** under the personal direction and superintendence of the presiding judge or magistrate in the language of the court. In my understanding of that provision the trial Magistrate or Judge may be assisted in reducing into writing his or her judgment by another officer under his/her direction and superintendence. That does not however empower such other officer to compose the judgment but merely reduce it in writing from the trial Magistrate of Judge. Even though I have not come across with the similar provision when the conviction is likely to be entered on the plea of guilty.

In the instant matter, it was not the trial Magistrate who made the findings of the court nor it is him who entered the conviction against the appellant. It is someone undisclosed. The findings and the Conviction was thus entered by unauthorized person. I know well the handwriting of Hon. Mtembei (RM) as he is my subordinate and I am acquainted with his handwriting in terms of section 49 (1) and (2) of the Evidence Act. Also through comparison under section 75 (1) and (2) of the Evidence Act supra the parties have agreed that indeed it was someone else and not Hon. Mtembei who convicted the appellant.

Under the circumstances there is unpleasant features in the trial courts records and this court is entitled to invoke its revision powers to remedy the situation as it was held in the case of ***Paul Jacob versus Republic, Criminal Appeal No. 2 "B" of the 2010*** (CAT)

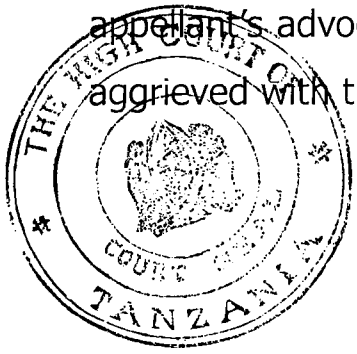
The appellant's appeal against conviction and sentence in the offence of Grave sexual abuse has thus been brought with sufficient cause and accordingly allowed.

The conviction thereof is quashed, the sentence of fifteen years jail term and order of compensation thereof are set aside. The corporal punishment of three strokes is also set aside.

Since the charge upon which he was arraigned is defective, I cannot order a retrial and in lieu thereof I order his immediate release from custody unless otherwise held for some other lawful cause.

In the circumstances that the appellant has not served any serious sentence, I leave the Director of Public Prosecutions to exercise his discretion whether or not to arraign the appellant afresh.

Right of further appeal to the Court of appeal of Tanzania subject to the requirements of the Appellate Jurisdiction Act, Cap. 141 R.E 2019 and the Court of Appeal Rules, 2009 as amended has been fully explained to the appellant's advocate and the learned State Attorney, for whoever becomes aggrieved with this judgment. It is so ordered.



Sgd: A. Matuma

Judge

29/05/2020