IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

TANGA DISTRICT REGISTRY

AT TANGA

CRIMINAL APPEAL NO. 9 OF 2022

(Appeal from the judgment of the District Court of Tanga at Tanga (Hon. Majani RM) dated 29.9.2021 in criminal case No. 31 of 2021)

PAULO MTONO ..... APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

Date of last order: - 2/3/2022
Date of Judgment: - 18/03/2022

JUDGMENT

L. MANSOOR, J

The appellant appeared before the District Court of Tanga at Tanga charged with the offence of grave sexual abuse contrary to sections 138C (1)(a) and (2)(a) of the Penal Code [Cap. 16. R.E. 2002]. It was alleged that on different dates within the month of January 2021 at Magomeni Area within the District, City and Region of Tanga did commit grave sexual abuse to a girl of eight years old by tearing her underpants and sucking her vagina for sexual gratification.

The appellant entered a plea of not guilty therefore, the prosecution/respondent availed four witnesses (PW1, PW2, PW3

and PW4) while the appellant defended by bringing one witness (DW2). In a nutshell, the facts of the case are as follows.

PW3, Asia Mohamed, a neighbour of the appellant, had regularly witnessed the victim entering the house of the Appellant. At first, she warned her not to go in the house of the appellant. Another day she saw her heading to the same house, this time she warned her by canning her. However, the victim instead of going to madrasa she went into the house of the appellant. The circumstances of the incident raised doubts therefore, she reported the matter to PW3, mother of the victim.

PW1 inquired from the victim what prompted her to go to the appellant's home. She replied that she had gone for guavas but instead the appellant gave her Tshs.100 and sucked her vagina.

It was PW3 evidence that while she was going to madrasa, the appellant called her through the window to go for guavas. He asked her to undress her clothes. Then he sucked her *kikojoleo* meaning her genital part. Upon completion, the appellant gave her guavas.

The matter was then reported to police station. The Medical report revealed that the victim was still a virgin.

The trial magistrate having satisfied herself that the prosecution has proved the case beyond reasonable doubt, the Magistrate convicted the appellant and sentenced him to serve 20 years in prison.

Dissatisfied with the conviction and sentence, The appellant has levelled a total of three grounds of appeal, namely:

1. That the honourable trial magistrate erred in law and fact to proceed with hearing, sentence and convict the appellant on a defective charge.
2. That the Honourable trial magistrate erred in law and in fact to proceed with hearing, sentence and convict the appellant through non existing provision of the law.
3. That the honourable trial magistrate erred in law and in fact to proceed with hearing, convict and sentence the appellant, whereas the prosecution failed to prove the case beyond reasonable doubt.

The Appellant, therefore, humbly prays before this Honourable court to allow the appeal, quash the conviction, and set aside the sentence and set him at liberty.

At the hearing of the appeal, the appellant was represented by the learned counsel Ms. Susan Peter Mwansele, while Mr. Emmanuel Barigila, learned State Attorney appeared for the respondent.

Submitting on the first ground of appeal, the appellant's counsel submitted that the defectiveness of the charge is pegged on two ways.

The first defect is the citation of wrong revised edition. The revised edition cited is CAP 16 R: E 2002 instead of Cap 16 R: E 2019. She cited section 4(1) of the Revised Edition Act CAP 4 to support his argument. I am indebted to reproduce the section.

> *As soon as possible after the commencement of this Act, the Chief Parliamentary Draftsman shall prepare, publish, and maintain in accordance with the provisions of this Act a Revised Edition of the laws to which this Act applies, in a convenient form, and such revised laws shall be known as the Revised Edition.*

She submitted that since there is the use of the word ***"shall"*** in the provided section, so the law recognised is the Revised Edition in operation. She further stated that since the Revised Edition of

2019 came into operation in 2019 and the charge sheet was filed on 23/5/2021 it was, therefore, wrong to cite section 138(1)(a) and 2 (a) of the Penal Code [CAP 16 R.E 2002].

The second defect is on the variance between particulars of the offence and statement of offence. She submitted that the appellant was wrongly charged as 138C (1) (a) and 2 (a) is not applicable to victims under the age of 18 years thus a violation of section 132 of the CPA. To her opinion, the variance, prejudiced the appellant because he was not fairly tried for, he was denied a chance of understanding the charge and the offence he was facing.

Regarding the second ground of appeal, she submitted that the law cited on the charge sheet does not exist and the trial magistrate convicted the appellant basing on a non-existence of the provision. Even the provision, of which he was sentenced, does not provide a sentence of 20 years imprisonment. That the trial magistrate never even cited a provision that warranted a sentence of 20 years.

submitting on the third ground of appeal, the learned counsel stated that the charge was not proved beyond reasonable doubt.

First, the charge sheet shows that the appellant tore apart the undergarments of the victim but the evidence on record does not support the fact. Neither PW2 nor PW3 did address the court on this fact. In her opinion this has shaken the truthfulness of the prosecution evidence.

On the other limb of doubt, the learned counsel has moved the court to have a look at page 8 of the proceedings of the trial court. Her concern is that the appellant was not given an opportunity to cross examine PW1 but instead it was the State Attorney who cross - examined PW1.

Another aspect of doubt is on the evidence of PW1, the eyewitness. She submitted that the worries/doubts of PW3 were amply explained by the victim herself, DW1, and DW2 as to why the victim went into the house of the victim; that she went for guavas.

Mr. Emmanuel Barigila, learned State Attorney, conceded that it true that the law was wrongly cited but he addressed the court that the mistake is not fatal giving a reason that in the year 2019 only section 138C (2)(a) was revised by increasing the age of 15

years to 18 years therefore, the citation of Revised Edition 2002 did not prejudice the appellant.

He cited section 12 (1) and (2) of the Interpretation of Law Act [CAP 1 R.E 2019] which states that; A reference in a written law to a written law shall be deemed to include a reference to such written law as it may be amended and a reference in a written law to a provision of a written law shall be construed as a reference to such provision as it may be amended.

He also cited section 20 of CAP 1 (supra) on citation of the law and for the sake of reference I do reproduce part of section 20.

> *20(1) Where a written law is referred to, it shall be sufficient for all purposes to cite or refer to that written law by–*
>
> *(a) the short title or the citation (if any) by which it was made citable.*
>
> *(b) in the case of an Act, the year in which it was passed and its number among the Acts of that year; or*
>
> *(c) in the case of an Act, the Chapter number given to the Act in any revised edition of the laws.*

Regarding the variance between the statement of offence and particulars of the offence, the learned State Attorney admitted that it is true that section 138C (1) (a) of CAP 16 RE 2002 does not mention the issue of consent. The age appears in subsection 2 therefore, the mistake was not for the prosecution but by the draftsman.

He also conceded that the sentence derived based on improper citation of the provision of the law. The prosecution ought to have cited section 138C (2) (b) instead of section 138C (2) (a).

He submitted that the provision of punishment, though not mentioned in the charge sheet, is in existence. Therefore, though there was a mistake in citing the law, the mistake is not fatal to the effect that the particulars of the offence were sufficient to show the intensity of the charge against the appellant. The appellant was not prejudiced since the particulars mentioned the age of the victim therefore, curable under section 388 of the CPA.

To cement his argument, he cited the case of **Jamal Ally @ Salum V. The Republic Criminal Appeal No.52 of 2017 at page 15. (unreported)** in which the Court of Appeal held that

wrong citation of the provision did not occasion miscarriage of justice as the particulars of the offence gave full details of the offence charged. Therefore, the appellants of appeal ground hold no water.

Regarding the second ground of appeal, the learned state attorney submitted that the provisions cited in the charge sheet exists in the Penal Code. Section 138C (2) (b) do exist though the trial magistrate failed to mention it in the judgment. Therefore, this ground is meritless.

Submitting on the third ground of appeal, the learned State Attorney conceded that it is true that there is variance in the charge sheet and in the evidence. However, this variance did not go to the root of the charge. The root in the offence is the use of the genitals or any other part of the body or instrument or any orifice or part of the body of another person, being an act, which does not amount to rape under section 130.

There was proof by the victim that the appellant used his tongue to derive pleasure from the victim's genitals.

PW3 being the eyewitness saw the victim enter the house of the appellant. She reported the matter to PW1. PW1 reported the

incident to police. Therefore, PW2 is to be believed as she said what clearly happened in the appellant's house. He urged the court to have a look at page 9 of the proceedings. The victim states how she was undressed, and how the appellant caused grave sexual abuse to her. He finally prayed that the appeal be dismissed as all the grounds of appeal are meritless.

In rejoinder the leaned counsel submitted that the improper citations of the provision and citation of inapplicable provision of the law occasioned miscarriage of justice hence not curable under section 388(1) of the CPA.

From the submissions of the parties and the evidence on record, I find that issues for determination by this court are two.

1. Whether wrong citation of the law/provision and citation of inapplicable provisions occasioned miscarriage of justice.
2. Whether the prosecution proved its case beyond reasonable doubt.

I will begin with issue number one. The concern of the learned state attorney is failure of the prosecution to cite the proper Revised Edition of the Penal Code CAP 16 and the variance between particulars of the offence and statement of offence.

Having gone through the charge sheet it is true that the prosecution cited CAP 16 as the Revised Edition of 2002.

On 28/2/2020 a notice made under section 4(3) of the Revised Edition Act cap 4 was published in GN 140 of 2020. Section 2 of the notice that is, the General revision Notice,2020 declared 62 laws specified in the schedule thereto to have been revised and published as 2019 Revised Edition. The revision incorporated all amendments up to November 2019. The penal code being among the specified law falling under the schedule and taking reference to section 4(1) of the Revised Edition Act Cap 4, I therefore, concur with the learned council that it was wrong for the republic to cite revised edition 2002 instead of revised edition 2019. As to whether this prejudiced the appellant, I will pause and discuss the effect later.

The second defect is on the variance between particulars of the offence and statement of offence. The argument is whether the appellant was wrongly charged as 138C (1) (a) and 2 (a) is not applicable to victims under the age of 18 years thus a violation of section 132 of the CPA. Am motivated to reproduce section 138C (1) (a) and 2 (a) of Cap 16 RE 2019.

138C.-(1) *Any person who, for sexual gratification, does any act, using 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-*

(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 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.

I am aware that section 132 of the CPA makes it mandatory 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.

Section 135 of the CPA accordingly provides a Mode in which offences are to be charged 135: That.

(i) a count of a charge or information shall commence with a statement of the offence charged, called the statement of the offence.

(ii) the statement of offence shall describe the offence shortly in ordinary language avoiding as far as possible the use of technical terms.

(iii) if the offence charged, is one created by enactment, shall contain a reference to the section of the enactment creating the offence.

(iv) after the statement of the offence, particulars of such offence shall be set out in ordinary language, in which the use of technical terms shall not be necessary, save that where any rule of law limits the particulars of an offence which are required to be given in a charge or an information.

I have made a reference to section 132 and 135 of the CPA to illustrate that statement of the offence goes in hand with the particulars of the offence. In other way the purpose of the particulars of the offence is to amplify or to elaborate the statement of the offence and if the offence charged, is one created by enactment, **shall contain a reference to the section of the enactment creating the offence.**

I have gone through section 138C (1) (a) and 2 (a) of the penal code and found that the statement of the offence varies with particulars of the offence. The offence created by the section is grave sexual abuse. The cited section does not deal with minors

but rather adults. However, reading the particulars of the offence the victim referred is of tender age. It is, therefore, the contention of the learned council for the appellant that since the section is inapplicable to minors, the irregularity prejudiced the appellant to a fair trial.

I subscribe with her to the extent that the section is inapplicable as the victim referred to is a child. As to whether the effect prejudiced the appellant, I too reserve the answer and I will propound later.

Another aspect of contention is on non-existence of the provision of the law which the appellant was convicted and sentenced to 20 years in prison. It is true that subsection (2) (a) which is a sentencing provision does not provide a punishment of 20 years imprisonment but rather a term of not less than fifteen years and not exceeding thirty years, with corporal punishment, and a compensation of an amount determined by the court. But does this mean that a punishment of 20 years based on a non-existence of the provision?

To my opinion and determination, I decline the appellants submission on this. I subscribe the submission by the learned

State Attorney. The offence in trial entails sexual abuse to a minor victim. The trial magistrate bearing this in mind, she invoked subsection 2(b) to sentence the appellant. For ease of reference, I quote the relevant subsection 2 (b) of section 138C of the code.

(2) Any person who-

(a) ..... N/A

(b) commits grave sexual abuse on any person under eighteen 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.

I therefore rule out that, though not mentioned in the judgment, the provision is in existence.

I now turn as to whether the above identified irregularities, mistakes and omission prejudiced the accused/appellant. In

answering this issue, the guiding principle or test of court is whether the particulars of the offence in the charge sheet fully informed the appellant of the seriousness of the offence he was charged with?

My answer is affirmative. The charge against the appellant is grave sexual abuse. The particulars of the offence fully informed the appellant the nature of the offence, the date when the offence was committed, the place where the offence was committed, the name of the victim and the age. In summary, all the essential elements creating the offence of grave sexual abuse to a minor were clearly explained in the particulars of the offence.

Taking reference to the case of **Jamal Ally @ Salum V. The Republic (supra)** am of the finding that, the irregularities over non- citation and citation of inapplicable provision in the statement of offence did not prejudice the appellant therefore, curable under section 388(1) of the CPA. With this finding, ground one and two of the appeal are meritless.

Now, as to Whether the prosecution proved that accused on the fateful day in the vicinity of Tanga City did commit sexual abuse

on a minor girl under 16 years of age, and thereby committed an offence punishable under section 138C of the Penal Code

The Trial Court discussed the evidence at length in the context of each point and answered them in the affirmative. It held the appellant guilty of the offence referred to above. The Trial Court thereafter compared the `aggravating circumstances' vis-a-vis the `mitigating circumstances' and having found that the crime was committed, it found that the harsher sentence is fully attracted, hence the appellant was imprisoned for 20 years. The Learned Counsel for the Appellant argues that the particular of the charge varies with the evidence of the victim on the issue of whether the appellant undressed her underpants or not. While the charge reads that the victim was undressed, the victim herself denies having been undressed. Again, the scene of crime was not described at all. There is not the sketch map of the crime scene presented in court for clarity of the scene. I find that the prosecution could not prove as to where and when the victim was last seen and in whose company? The argument is that the victim was not lastly seen in the company of the appellant. The evidence of PW1 was a mere hearsay. PW1, was a neighbor to

the Appellant, and claims to have seen the child entering the house of the Appellant and had warned her. PW1 never said she saw the Appellant committing the crime, she simply said she has seen the child entering the house of the appellant. Where did the child enter, did she enter the room or the corridor or the open ground? How is the house of the appellant built, who lives with the appellant? The scene of crime was not explained. How and where the appellant's house is located. Does he have any neighbors, and how crowded is the neighborhoods. Are there guava trees in the appellants house, and what is the distance from where the neighbor was sitting to the appellant's house. All the prosecution witnesses, namely, P.W.1, P.W.2, and P.W.4 have been told by the informer that she saw a child entering the appellant's house, but they all failed to describe a scene of the commission of the crime. It was strongly urged that most of these persons did not witness the crime or scene of the crime. No one has seen the child been undressed. It thus suggests that the testimony of all these witnesses is not accurate and at best it leads to an inference that the child was never found in the same house as was the appellant, and it could not be ruled out whether or not there was animosity between the informer and

the appellant as the defense of the appellant was not considered at all and the issue of whether the child was couched to implicate the appellant cannot be ruled out. If the houses in the neighborhoods were in a close cluster and it would have been difficult for the appellant to take the child away without being noticed by many other neighbors. Why the other neighbors did not see the child entering the appellant's house and being molested. It raises an eyebrow as to where the other neighbors where when the child entered the house of the appellant, and why they did not notice the child entering the house of the appellant.

Further, prosecution has failed to establish two crucial facts, namely, the place where the victim child was seen at the house of the appellant and the scene of crime was not described. In the absence of surety of these two facts, the statement of one neighbor only per se is insufficient to establish the charge beyond reasonable doubt.

It has not been stated by P.W.1 (the informant) whether the appellant lives with his family or not and how long he had been residing in that very house and with who or whether he lives

alone, but the prosecution has failed to explain as to where had the other members of the family been during those hours, when the child entered the house of the appellant. There is thus no overwhelming eye-witness account, circumstantial evidence criteria were not met as there are a lot of missing links in the prosecution story, medical evidence reveled nothing as the child was not found with any signs of abuses and there was no DNA analysis on record which conclusively proves that it is the appellant and he alone, who is guilty of committing the horrendous crime in this case. I understand that it is well settled law that it is not the quantity, but it is the quality of the testimony that weighs upon the consideration of the Court. Section 143 of the Evidence Act stipulates that no number of witnesses shall in any case be required for the proof of any fact. The rule of appreciating evidence is that it must be weighed and not counted. Thus, the Law which has developed over the time is that the testimony of a single witness is sufficient to base the conviction of the accused, if it is found to be cogent, reliable, and consistent. In the present case, the main witness is the victim herself, but the incident was reported to the victim's mother by a neighbor. There was animosity over religious issues

between the neighbor and the appellant, and the possibility that she decided to frame her neighbor for a serious offence such as this one to punish him cannot be ruled out. The testimony of the victim is completely unreliable and not sufficient for proving the commission of offence by the appellant as the possibility of her being couched have not been ruled out by the prosecution.

This court is of the view that the prosecution has failed to prove the case successfully against the accused beyond reasonable doubts. The appeal succeeds and the conviction and sentence passed by the Trial Court in Criminal Case No. 31 of 2021 is quashed and set aside.

Thus, the appellant PAULO MTONO is hereby acquitted, and is to be released from imprisonment forthwith unless he is otherwise held for any other lawful cause.

DATED and DELIVERED at TANGA this 18th day of March 2022

L.MANSOOR
JUDGE
18/03/2022