

IN THE HIGH COURT OF TANZANIA

AT ARUSHA

CRIMINAL APPEAL NO. 93 OF 2022

(Originating from Cr. Case no. 115/2021 Karatu District Court)

PATRICE LEONCE @ SURUMBU.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGEMENT

21 September & 03 October, 2022

KOMBA, J

The Appellant, PATRICE LEONCE stand charged with the offence of grave sexual abuse contrary to section 138 (C) (1)(b) and 2 (b) of the Penal Code [Cap 16 R.E. 2019].

It is alleged that, on 22 day of August, 2021 at 12:00 hours at Endamararieck village within Karatu District in Arusha Region, for sexual gratification did rub his genital over the vagina of NEEMA PASCHAL a girl of 12 years old. At the end of trial, Resident Magistrate Court of Arusha convicted him and sentenced to 20 years imprisonment. Being decertified by the conviction and sentence he appeal to this court.

Facts of case can be summarized as follows; it was on 22nd August, 2021 at about 12:00hrs at Endamararieck village within Karatu District in Arusha Region, appellant alleged for sexual gratification did rub his genital over the vagina of NEEMA PASCHAL (PW2) who is a girl of 12 years. When charge sheet was read to him he denied allegation thus obligate prosecution side to bring a number of witnesses and exhibit which was admitted and form part of the prosecution. It was alleged during hearing at the trial court that on 22/8/2021 PW2 was at the farm picking vegetable when appellant come on the back of her and ordered her to lay down by her back, put off his skirt and underwear and appellant remove his trouser and lay over PW2 and started to put his penis over PW2 vagina until when he produces white fluid (men semen) when he dressed up and leave.

When PW2 reached home she informed her grandmother what appellant has done to her. PW3 (Paschal Sikai) is the father of PW 2 who informed the trial court that he heard of the occurrence of crime from his daughter who first was hesitating to tell the story until when she was beaten when she told what Patrice done to her. PW3 then phoned victims' mother, Monica Paschal (PW1) and tell her that PW2 is sick. The mother showed up three days later, upon hearing the story from grandmother who resides with the victim what

appellant has done. After the story PW1 took PW2 for medical services where they were informed that they were late although Police Form No. 3 were filed and returned. The trial ends up by conviction and sentenced appellant for grave sexual abuse.

In petition of appeal the appellant filed two grounds as follows;

- 1. That, the learned trial Magistrate erred in law and in fact in holding that the charge of grave sexual abuse against the appellant was proved beyond reasonable doubt.*
- 2. That, the learned trial Magistrate erred in law and in fact in convicting appellant without considering his defense.*

When the matter came for hearing at this level, appellant was represented by Counsel John Matemu and Ms. Lilian Kowel, State Attorney represented the Republic.

In his submission Mr. Matemu break the first ground into three sub issues that, the charge was not prepared in line with the requirements of Civil Procedure Act, [Cap 33 R. E 2019] (CPA) that it lacks particulars offence. The charge fails to disclose whether the action done by the appellant was sexual gratification which is the important ingredient of the offence. He further explains the aspect of 'use of force' was not featured. In order for

the charge to be in the standard as required by law it should explain in particulars the gratification and whether it was done with or without force. It was his submission that the charge sheet is defective hence the trial court erred in convicting the appellant and pray charge to declared nullity. In support of his argument, he cited the case **of Andrew Lonjine V. Republic Cr. App No. 50 of 2019** At Dodoma where it was held that in the offence like this, particulars of sexual gratification and use of force are important ingredients.

Another sub issue was age of the victim. It was his submission that the evidence of PW2 who was victim of tender age was taken contrary to the Law of Evidence, [Cap 16 R. E 2019]. He explains that PW2 being a child of tender age as defined in Section 127 (4) of the same act to mean a child of below the age 14 her evidence was supposed to be administered under the spirit of S. 127(2). He elaborated that at page 7 of proceedings of the trial it is only written that 'The child has ability to testify'. It was his submission that PW2 was supposed to promise the court that she will tell the truth and not lies. He supported his argument by the **case of Shaibu Nalinga V. R, Cr. Appeal No. 34 of 2019 (unreported)** when Court of Appeal faced with same issue it analyzed and directed that the court hearing matter should

certify itself that the child promise to speak truth and not lie and the counsel concluded that, that promise if done should be reflected on the proceedings. He prayed that the evidence of a victim PW2 which was received in violation of law to be expunge. He further submitted that if the court will remove the evidence of PW2, the remaining evidence will be hearsay evidence which will not hold water. He prays the court to direct itself in admissibility of the evidence.

The last sub issue was variance between charge sheet and evidence adduced in court. He said that PW2 explained that she was raped even when she was asked by PW3 how many times did you do this she answered three times. He further said even PW 5 explained in court that the mother of PW2 told him that the victim was raped, testimony shows rape but the charge is about grave sexual abuse. He addressed the court to the case of **Vicent Kija V.R, Criminal Appeal No. 232/2017** (unreported) which was to the effect that such variance of charge and evidence, if not amended, may lead to an acquittal. It was his submission that trial court did not analyses neither take into consideration the evidence of appellant and it is his believe that the case was framed against him as he was claiming some amount of money for job done. He said up to the time when the alleged offence took place the debt

was not paid. He contended that accused did not run away from the village as PW3 informed the court that accused was visiting him. The trial court only ask itself why the appellant run from the village instead of analyzing the evidence of the appellant and that it is there submission that the trial court decide by relying on one side evidence which in law is not accepted. He said the same was explained in case **Andrew Lonjine (supra)** where the court was analyzing failure to consider accused evidence that conviction cannot stand when the trial court failed to consider his defense in judgment. He asked this court as the first appellate to consider respondent defense.

Ms. Lilian objected the application by first agree with the counsel for applicant that charge sheet lack the issue of consent and sexual gratification but the same was proved by PW2 at pg. 7 of proceedings, sexual gratification was proved when she said the appellant place his penis on her vagina he presses then white fluid come out. She was ordered to lay down and warned not to put on alarm otherwise he will kill her. She said, appellant as an adult directing a child of 12 years to lay down that was intimidation, hence the element which is missing in charge can be seen in evidence. To cement her argument she referred the **case of Andrew Lonjile (supra)** where it was said when the prosecution fail to show consent in the charge the same can

be proved through evidence adduced. About the issue of contravening the provision regarding evidence of a tender age, she said there has been development of Law and Court of Appeal found that noncompliance of Section 127 (2) is not fatal as the 1st appellate court can check the credibility of child of tender age. She prayed this court to take the consistence of PW2 evidence from the day PW2 was at the shamba picking vegetable, when appellant see the PW2 and ordered to lay down and up press and put his penis, she told the same to her mother and to her father and that the evidence of PW2 even though was taken contrary to Section 127 of TEA is admissible.

She said there is no contradiction of whatsoever in the charge sheet and evidence of PW2 as she did not said she was raped rather appellant took his penis and put on her vagina, and that PW6 who said the investigation was about rape this controversial is small doesn't go to the root of the case and cannot warrant dis-mental of prosecution case. She finally said prosecution did prove its case beyond reasonable doubt and that PW2 is a credible witness and entitled to credence and that all elements in grave sexual abuse has been proved in evidence.

On the second ground of appeal, respondent submit that, the ground is less weight as at the page 4 on 3rd line the trial Magistrate considered the appellant defense on destines of money but even if that was not considered, this court being the 1st appellant can enter into shoes of trial court and consider that evidence. This defense is after thought because PW3 was not cross examined by Appellant on the issue of debt, that why we pray your court to dismiss this ground. So, she pray this court to dismiss this appeal and upheld the trial court decision.

In rejoinder Mr. Matemu was satisfied that state Attorney agree that the two ingredients must be in charge sheet. But he objected the issue of the evidence of PW2 to have all ingredient to be disregard as was taken contrary to section 127. He further said if this evidence of PW2 is removed or disregarded then the ingredients which is said can be traced in PW2 evidence won't be there. He directed the court to cases which he cited earlier one of **Shaibu Nalingwa**. Credibility of accused is domain of trial court which had an opportunity to see witness where the appellate court can't. Variance between the charge and evidence can affect conviction centrally to what respondent explained that if there are variance there is no harm. On the issue of the evidence of lending money was not considered by the trial court

there is nowhere the evidence was analyzed. He concluded by praying this appeal be allowed quash conviction and set aside sentence and appellant be released from prison.

After reviewing the evidence on record and the submissions by the Counsel for appellant and the learned State Attorney, I am of the view that the whole appeal hubs on the issue of admissibility of the evidence. Whether there was grave sexual abuse to PW2 or not and whether it was without her consent. What needs to be considered is whether or not the evidence on record supports the allegation.

On the first ground which had sub issues, one being of failure of charge sheet to explain that action was done without consent, apart from the concession by Ms. Lilian in her submission that the charge sheet did not disclose facts as required by law, especially to explain the issue of gratification and that the action was done without consent, she informed the court that the same is not destructive as they are covered in testimony of PW2 about gratification, when said the appellant place his penis in her vagina he place white fluid. She said the consent was revealed in her explanation. Ms. Lilian further addressed the court that appellant being an adult directing a child of 12 years to lay down that was intimidation hence elements which

are missing in the charge can be seen in evidence. At this juncture, Lilian referring this court to the case of **Andrew Lonjine (supra)** that when the essential ingredients of the 'sexual gratification' and 'lack of Consent' was presented in the evidence the prosecution can be seen to prove the offence. For easy of analyzing substituted charge sheet for this appeal so as to know whether essential ingredients of charge are adhered, let me reproduce it as follows;

'STATEMENT OF OFFENCE:

GRAVE SEXUAL ABUSE; Contrary to Section 138 (C) (1) (b) and 2 (b) of the Penal Code, [Cap 16 of the R. E. 2019]

'PARTICULARS OF OFFENCE:

PATRICE S/O LEONCE @SURUMBU, on 22 day of August, 2021 at 12:00 hours at Endamararieck village within Karatu District in Arusha Region, for sexual gratification did rub his genital over the vagina of one NEEMA D/O PASCHAL a girl of 12 years old.'

Reading careful the lines of section 132 and 135 of Criminal Procedure Act, [Cap 20 R E 2022]CPA, the act provides that;

S.132 '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.

S. 135 The following provisions of this section shall apply to all charges and informations and, notwithstanding any rule of law or practice, a charge or an information shall, subject to the provisions of this Act, not be open to objection in respect of its form or contents if it is framed in accordance with the provisions of this section—

(a)

(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 and without necessarily stating all the essential elements 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;

(iii) 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, nothing in this paragraph shall require any more particulars to be given than those so required;

(iv)

(v).....'

It is established that, the charge is the foundation of any trial, the mode of framing the charge is prescribed and regulated by the provisions of section 132 and 135 (a) (ii) of the CPA. While section 132 requires the offence to be stated in the charge along with specific particulars stating the nature of the charged offence, section 135 requires the statement to be described together with the essential elements of the offence and reference to the section creating the offence. Moreover, the punishment provision must be stated in the charge.

Having explained the manner in which the charge must be framed, let me analyze charge sheet that appellant was arraigned on. From the reproduced charge sheet above, there is no particulars that concerning gratification to appellant and it did not elaborate whether gratification was done and if at all, was it with or without consent. This is not proper.

The court has always stated that a charge or information that is laid before the accused person, must contain all necessary ingredients of offence for which the accused person is charged with, to enable him to make an

informed defense. The Charge sheet in this appeal does not indicate whether gratification was without Neema's consent **See Zefania Siame VS Republic** (CRIMINAL APPEAL NO.250 OF 2011) [TZCA 152];(14 OCTOBER 2014)TANZLII

Nevertheless, Ms. Lilian in her submission was of the view that this fault is not fatal as it was rectified by PW2 in her testament. This proposition drives me to prudently read the proceedings of the trial court. I found, as adduced by the counsel for the appellant in his submission that the trial court did not adhere to section 127 of the evidence act while PW2 was called to testify.

For easy of reference the provision reads;

'S. 127 .-(1) Every person shall be competent to testify unless the court considers that he is incapable of understanding the questions put to him or of giving rational answers to those questions by reason of tender age, extreme old age, disease (whether of body or mind) or any other similar cause.

*(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.**' (emphasis supplied)*

From the wording of the above provision, Sub section 1 enunciates that every person is competent to testify unless where the court finds the contrary by reasons of age or state of mind. Consequently, the Court must test whether the witness is competent to testify or not. That can only be done by the court by imposing some questions to the witness as observed by the Court of Appeal in **Geoffrey Wilson Vs Republic, Cr. App No. 168 of 2018** CAT that;

'We think the trial Magistrate or Judge can ask the witness of tender age such simplified questions which may not be exhaustive depending on the circumstances of the case as follows:

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

From the answers given by the child, the court will arrive into possibility whether a witness is competent to testify or not. The trial court's proceedings show that there were no questions put before the PW2 for her to give answers so that the court can certify itself that the child is competent to

testify, and that she promises to tell the truth. Part of the trial court proceeding at page 6 reads as follows;

Date: 22/10/2021

Coram: Hon. E. E. Mbonamasabo

Prosecution: Insp Josephine

Accused: Present

Court clerk: Angel Akyoo

Pros: For hearing, we have two witnesses, we pray to continue.

Accused person: Am ready also.

PW2, Neema Paschal, 12 years, rel. Christian.

COURT: The child has ability to testify.

SGD: HON. E. E. MBONAMASABO-SRM

22/10/2021

XXD BY THE PROSECUTOR.'

Then PW2 started testifying what happened in that day. The record does not show whether PW 2 made any promise to tell the truth to the court and not lie.

According to Section 127(2) of the Evidence Act, Cap 6 R.E 2019 where the court is satisfied that a child of Tender age is incapable of giving evidence

under oath or affirmation, it should make him promise to tell the truth to court and not to tell lies. **See Geoffrey Wilson Vs Republic** (supra) and **Msiba Leonard Mchere Kumwaga Vs Republic**, Criminal Appeal 550 of 2015 (un reported).

It was settled principle in criminal proceedings involving sexual offences the true evidence of its commission has to come from the victim. In the case of **Selemani Makumba V. Republic (2006) TLR 379** the Court stated as follows:

'True evidence of rape has to come from the victim/ if an adult that there was penetration and no consent/ and in case of any other woman where consent is irrelevant that there was penetration.'

While I agree that the above is the correct position of law, but it does not mean that such evidence should be taken as conclusive, believed and acted upon to convict the accused person without considering the circumstances of the particular case. **See Pascal Sele vs. The Republic, Criminal Appeal No 23 of 2017 CAT (unreported)**. In the appeal at hand, PW2 testimony was not administered according to Section 127 of the Evidence Act bearing in mind that at the time the offence was committed she was a

child of tender age. The court said in **Geoffrey Wilson** (supra) and so was the position in **Shaibu Nalinga** (supra) thus:-

'In the absence of promise by PW1, we think that her evidence was not properly admitted in terms of section 127 (2) of the Evidence Act as amended by Act No. 4 of 2016. Hence the same has no evidential value.'

In the circumstances of this appeal, evidence of PW2 which was taken contrary to the law lacks evidential value and is not worth being accorded credence although the trial court having observed PW2 was satisfied her to be credible witness which, to my opinion, was not correct and the evidence of PW2 is hereby discarded from the record.

Having removed PW2 evidence, the remaining evidence is not sufficient to sustain appellants' conviction. The rest of witnesses provided hearsay evidence, at this moment, I join hand with Mr. Matemu that PW1 and PW3 both heard the story from PW2 except PW5 (Doctor) who testify in court that on 26/08/2021 he was called by a nurse and told that a child was raped three days ago.

One should ask whether the omission in the charge sheet could have been remedied. Seemingly, this was possible before the conclusion of the trial if

the prosecution had sought leave of the trial court to amend the charge for the second time in terms of section 234 (1) of the CPA to show important ingredients. This did not happen, it follows that, the charge remained defective from the date it was amended throughout the proceedings. This, together with the credence of PW2 weakened the trial as in criminal case the standard of proof must be beyond reasonable doubt.


I am not convinced to uphold the decision of the trial court, the offence was not proved beyond reasonable doubt, the evidence relied upon conviction of appellant was received contrary to law and many anomalies pointed out rendering the proceedings and judgments of the court below to be a nullity.

With the foregoing analysis, I find the first ground meritorious which is sufficient to dispose of the appeal.

I hereby allow the appellant's appeal. I further quash conviction and set aside sentence meted against the appellant by the District Court and order the appellant be released from the prison immediately unless otherwise lawfully held.

IT IS SO ORDERED.


Right of Appeal explained.


M. L. KOMBA
JUDGE

03rd October, 2022

Judgement Delivered on 03rd October, 2022 in chamber in the presence of Appellant and his Advocate Mr. Denis Didas and in the absence of the Respodnent.




M. L. KOMBA
JUDGE

03rd October, 2022

