IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(IN THE DISTRICT REGISTRY OF DAR ES SALAAM)

AT DAR ES SALAAM

CRIMINAL APPEAL NO. 254 OF 2021

Appeal from the decision in Criminal Case No. 52 of 2021 of the District Court of Ilala at Kinyerezi (Luvinga, RM) dated 30th of September, 2021.)

ONESMO EZEKIEL FUNDI ..... APPELLANT

VERSUS

THE REPUBLIC..... RESPONDENT

JUDGMENT

7th, & 11th February, 2022

ISMAIL, J.

This appeal arises from the decision of the District Court of Ilala at Kinyerezi. The court convicted the appellant of the offence of grave sexual abuse, contrary to the provisions of section 138C (1) (a) and (2) of the Penal Code, Cap. 16 R.E. 2019. It was alleged that on 20th December, 2020, at Pugu Bombani area, Ilala District, in Dar es Salaam Region, the appellant inserted his fingers into the vagina of XY (in pseudonym), a six-year child.

The appellant pleaded not guilty to the charge, necessitating a trial. After a hearing that saw the prosecution marshal attendance of three witnesses against one for the defence, the trial court took the view that guilt

of the appellant had been established. Consequently, he was convicted and sentenced to a 20-year custodial punishment.

The brief factual setting is to the effect that, on the fateful day, the victim, PW1, who was at her grandmother's house, was directed to go and throw some garbage to the bin, outside their house. While still out there, she met Fundi John, the appellant, who she knew well. The latter allegedly took her to an unfinished house, described by PW1 as "Mjumbani", where the appellant allegedly removed PW1's under pant and touched her vagina "sehemu ya kukojolea". As he did that, the appellant was allegedly kissing the victim. Feeling hurt by thorns which were in the said building, PW1 burst into a loud cry that alerted passersby who came to her rescue. The appellant reportedly fled, before he surfaced at the residence of a Baba Taliki. The passersby informed PW1's grandmother that PW1 had been raped.

The matter was reported to Pugu Kajiungeni Police station where a PF3 was issued for a medical examination. The examination did not find any bruises or perforation of a hymen which would suggest that she had been raped.

The appellant protested his innocence throughout the proceedings. He contended that he visited PW2, the victim's mother, who she did not find. He was suddenly attacked by people, who included PW2, and started beating

him. It took the intervention of a ten-cell leader who whisked him out to Pugu Kona Police station, where he was held before he was sent to Stakishari Police Station on allegation that he had raped PW1. Investigations led to his arraignment in court and the eventual conviction and sentence. Irked by the verdict, the appellant challenged it through the instant appeal. Ten grounds of appeal were raised as paraphrased as hereunder:

1. *That, the trial magistrate erred in law and in fact for convicting the appellant without explaining the substance of the charge and before requiring the appellant to make his defence, contrary to section 231 (1) of the Criminal Procedure Act, Cap. 20 R.E. 2019.*

2. *That, the trial magistrate erred in law and in fact by convicting the appellant based on contradictory testimony of PW2 and PW3.*

3. *That, the trial magistrate erred in law and in fact for not holding that PW1's testimony was unreliable for not naming the appellant at the earliest opportunity to her grandmother, mother, good Samaritans, and for failing to name or calling the said good Samaritans or rescuers to testify in court.*

4. *That, the trial magistrate erred in law and in fact by convicting the appellant based on the charge sheet whose statement of fact was at variance with the evidence of PW1 and PW2, meaning that ingredients of the offence were not proved.*

5. *That, the trial magistrate erred in law and in fact by convicting the appellant while there was nothing to prove that Fundi Juma was the same person as Onesmo Ezekiel Fundi, the appellant herein.*

6. *That, the trial magistrate erred in law and in fact by convicting the appellant without any evidence to prove that the appellant was seen and identified at the scene of the crime.*

7. *That, the trial magistrate erred in law and in fact by convicting the appellant while the prosecution had failed to summon for testimony a person who allegedly helped the victim from the unfinished house.*

8. *That, the trial magistrate erred in law and in fact by convicting the appellant in a case which was poorly or not investigated as the prosecution failed to call for testimony a police officer who issued a PF3 or the police investigator on the existence of the scene of the crime.*

9. *That, the trial magistrate erred in law and in fact by convicting the appellant based on an improper visual identification as there was no evidence to explain the time of incident, intensity of the light, graphic description of the assailant such as morphological appearance and/or any parameters used by PW1 to identify her assailant.*

10. *That, the trial magistrate erred in law and in fact by convicting the appellant in a case in which the prosecution grossly failed to prove its case against the appellant beyond reasonable doubt.*

At the hearing of the appeal, the appellant fended for himself, unrepresented, while the respondent was represented by Mr. Eric Shija, learned State Attorney.

When Mr. Shija rose to address the Court, he expressed his total support to the appeal. In justifying his position, Mr. Shija picked ground 4 (iv) of the appeal and conceded that, indeed, the charge that founded the trial proceedings was defective, rendering the charge of grave sexual abuse unproven. He argued that section 138C (1) (a) and (2) (b), under which the charge was levelled has set ingredients for the offence. These are sexual gratification, and the other is lack of consent. Learned counsel argued that successful proof of the charge requires establishment of the ingredients both of which must be proved. Mr. Shija's view is predicated on the decision of the Court of Appeal in ***Andrew Lonjine v. Republic***, CAT-Criminal Appeal No. 50 of 2019 (unreported). It was Mr. Shija's contention that in the instant matter, these crucial components are missing, rendering the charge incurably defective. He concluded by asserting that the omission to factor in the said ingredients means that the provisions of section 135 of the Criminal Procedure Act, Cap. 20 R.E. 2019 were flouted to the detriment of the rights of the appellant. He prayed that the appeal be allowed, trial proceedings

quashed, the conviction and sentence set aside, and the appellant be set free.

The appellant did not have anything to submit except urging the Court to allow the appeal and set him at liberty.

From this concessional submission, the simple question is whether, on account of the cited anomaly in the charge sheet, the appellant's guilt was established.

To appreciate the import of the respondent's contention it is apt that the substance of provision of section 138C (1) (a) and (2) (b). It reads as follows:

> *"(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–*
>
> *(a)* ***without the consent of the other person;***
>
> *(b) N/A*
>
> *(c) N/A*
>
> *(2) Any person who–*
>
> *(a) N/A*

(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."

As Mr. Shija contended that, "lack of consent" and "for sexual gratification" constitute ingredients of the offence which serve as an indispensable cornerstone of the charge of grave sexual abuse. This implies that a charge of grave sexual abuse that does not factor in the element of "lack of consent" and "for sexual gratification" lacks the requisite completeness.

A review of the particulars of the offence in the charge reveals that the same were coined in the following words:

"ONESMO EZEKIEL @FUNDI JUMA on 20th day of December, 2020 at Pugu bombani area within Ilala District in Dar es salaam Region, ***did insert his fingers in the vagina*** *of one SHEMSA OMARY, a girl of 6 years of age."* [Emphasis added]

Thus, other than the alleged insertion of fingers into the victim's vagina, none of the other key ingredients have been disclosed in the charge sheet, leaving it profoundly deficient. This

position mirrors the stance taken by the Court of Appeal of Tanzania in ***Andrew Lonjine v. Republic*** (supra). It was held:

> *"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."*

The foregoing position takes cognizance of the canon of law which is to the effect that, in a criminal charge, it is the charge sheet which lays a

foundation for trial proceedings. This cherished principle requires that an accused person must know the nature of the criminal allegations levelled against him, and the obvicus reason is to enable him prepare for his defence. This position has been underscored in numerous decisions. These include ***David Halinga v. Republic***, CAT-Criminal Appeal No. 12 of 2015 (unreported). It is in view of this compelling reason, that the prosecution's duty of proving the case beyond reasonable doubt must begin with ensuring that charges against an accused person are framed in strict conformity to the requirements of the law, specifically, sections 132 and 135 of Cap. 20 which guide that all ingredients of the charged offence be disclosed. The said section 132 provides as hereunder:

> *"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.*** *"*[Emphasis supplied].

Mr. Shija has held the view that the horrendous omission committed by the respondent renders the charge defective and that the proceedings predicated on the charges a mere charade. I cannot agree more with his

contention. The omission renders the charge sheet patently defective and incapable of founding any conviction.

See also: ***Ally Ramadhan @Dogo v. Republic***, CAT-Criminal Appeal No. 45 of 2007; ***Nassoro Juma Azizi v. Republic***, CAT-Criminal Appeal No. 58 of 2010; and ***Zefania Siame v. Republic***, CAT-Criminal Appeal No. 250 of 2011; and ***Fred Nyenzi v. Republic***, CAT-Criminal Appeal No. 121 of 2016 (all unreported).

Having held that the charge sheet did not have what it takes to found criminal charges against the appellant, the next crucial question is: what is the resultant consequence of all this? An answer to this question requires resolution of a question as to whether the prosecution's misstep resulted in an unfair trial. The answer to this question is in the affirmative. Insufficiency of the particulars of the offence meant that the appellant was not made to understand the nature of the charge facing him with a view to preparing an informed or rational defence. This is nothing short of an unfair trial. In the words of the Court of Appeal in ***Abdalla Ally vs Republic***, CAT-Criminal Appeal No. 253 of 2013 (unreported) "*... 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 tried in the courts below....*"

My view on this matter finds its legitimacy from the decision in the case of ***Mnazi Philimon v. Republic***, CAT-Criminal Appeal No. 401 of 2015. In the cited matter, a similar issue was a subject of discussion. Perturbed by this serious infraction of the law, the upper Bench observed as follows:

(1) *"It is now beyond controversy that one of the principles of fair trial in our system of criminal justice is that an accused person must know the nature of the case facing him, and this can only be achieved if the charge discloses the essential elements of the offence, and for that reason, it has been sounded that no charge should be put to an accused unless the court is satisfied that it discloses an offence known to law. A clear charge drawn in terms of s. 135 of the CPA, would give an accused person an opportunity to fully appreciate the nature of the allegations against him so as to have a proper opportunity to present his or her own case.*

(2) *"Being found guilty on a detective charge, based on wrong and/or non-existent provisions of the law, it cannot be said that the appellant was fairly tried."*

(3) *"We wish to remind the magistrate that it is a salutary rule that no charge be put to an accused before the magistrate is satisfied, inter alia that it discloses an offence known to law. It intolerable that a person*

should be subjected to the rigours of a trial based on a charge which in law is no charge."

See also: ***Mussa Mwaikunda v. Republic*** [2006] T.L.R. 387; ***Oswald Mangila v. Republic,*** CAT-Criminal Appeal No. 153 of 1994; ***Kobelo Mwahu v. Republic***, CAT-Criminal Appeal No. 173 of 2008; and (both unreported).

The superior Bench held a conclusion that the appellant in that case deserved nothing less than an acquittal. I hold that the appellant deserves a similar treatment in the instant matter.

In the upshot, I find and hold that the appeal is meritorious and I allow it. Consequently, I order that the conviction entered and the sentence passed against the appellant by the trial Court be, respectively, quashed and set aside. I also order that the appellant be immediately released from prison unless he is held for other lawful reasons.

It is so ordered.

DATED at **DAR ES SALAAM** this 11th day of February, 2022.

THE HIGH COURT OF TANZANIA

M.K. ISMAIL

JUDGE