

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

IN THE DISTRICT REGISTRY OF ARUSHA

AT ARUSHA

CRIMINAL APPEAL NO. 99 OF 2022

***(Arising from Criminal Case No.276 of 2020 at the Resident Magistrate's
Court of Arusha at Arusha)***

BARAKA YUSUPH.....APPELLANT

Vs

THE REPUBLIC..... RESPONDENT

JUDGMENT

Date of last order: 21-3-2023

Date of judgment: 2-5-2023

B.K.PHILLIP,J

A brief background to this appeal is as follows; The appellant herein was arraigned at the Resident Magistrates' Court of Arusha at Arusha on the offence of Rape contrary to section 130 (1) (2) (e) and 131 (1) (3) of the Penal Code (Cap 16, R.E 2019). It was the prosecution's case that on 7th day of August 2020 at Uswahilini area within Arusha City the appellant raped one ZH (name withheld), nine (9) year old girl. To prove its case, the prosecution paraded three witnesses, namely Ramla Shabani (PW1), the victim (PW2) who shall be referred to as "ZH" in this judgment and Rehema Minja (PW3). PW1 is ZH's mother. At the closure of the prosecution case the trial court made a finding that the accused had a case to answer. The accused person was called upon to defend himself. Upon analysis of the evidence adduced by the prosecution and

the defence side the trial Magistrate came up with a finding that there was no proof that the accused person raped the victim since the PF3 (exhibit P2) showed that there was no sign of penetration. However, the trial Magistrate observed that the contents of exhibit P1 (the accused's caution statement) revealed that the accused person stated that he did not manage to penetrate his penis into the victim's vagina but he rubbed his penis on the victims thighs and ejaculated thereon. Relying on the appellant's caution statement the trial Magistrate convicted the appellant of the offence of Grave Sexual Abuse contrary to section 138 C (1) (a) and (2) (b) of the Penal Code as a cognate offence to the offence of Rape and sentenced him to 20 years imprisonment.

Aggrieved by the aforesaid conviction and sentence, through the assistance of Mr. Amin Mohamed Mshana, learned Advocate, the appellant lodged this appeal on seven (7) grounds of appeal. However, in his submission in support of the appeal Mr. Mshana reduced them into one broad ground of appeal which reads as follows;

- i) *That the Hon. Magistrate erred in law and fact in conviction the appellant on cognate offence of Grave Sexual Abuse contrary to section 138(c) (1) (a) 2 (b) of the Penal Code Cap 16 R.E 2019 , hence occasioning grave injustice to the appellant.*

In this appeal the learned State Attorney Lilian Kowero appeared for the respondent. This appeal was disposed of by way of written submission.

Mr. Mshana's arguments were basically aimed at demonstrating that the trial court erred in law and fact in convicting the appellate of the

offence of Grave Sexual Abuse contrary to section 138 (c) (1) (a) 2 (b) of the Penal Code Cap 16 R.E. 2019. He argued that the court's records do not indicate that there was any prayer for substitution of charge of Rape as provided under section 300 (1) of the Criminal Procedure Act (Cap 20 R.E 2019). He contended that in order to substitute a charge section 300 (1) requires that the substituted offence must be a minor and cognate to the offence charged. To support his argument, he cited the case of **Emmanuel Thomas @ Kasamwa Vs Republic, Criminal Appeal No.183 of 2019** (unreported).He went on submitting that cognate offences to the offence of Rape are provided for under section 304 of the Criminal Procedure Act, Cap 20 R.E 2019, to wit; offences falling under sections 135, 140 and 158 of the Penal Code. He insisted that the offence of Grave Sexual Abuse under section 138(C) (1) (a) 2 (b) of the Penal Code is neither cognate offence of Rape nor to any other since it does not fall among the provisions of the Penal Code mentioned in section 304 of the CPA. He cited again the case of **Emmanuel Thomas @ Kasamwa** (supra) to cement his arguments. It was Mr. Mshana's contention that after the trial Magistrate had found out that the prosecution failed to discharge its burden of proof on the offence of Rape the only option available to the trial Magistrate was to acquit the accused.

He further contended that the purportedly cognate offence the appellant was convicted with was based on a retracted confession statement (Exhibit P1) which was illegally obtained and admitted in court. The contents of exhibit P1 were objected to by accused who stated that he was tortured and there was no serious cross examination from the learned State Attorney, contended Mr. Mshana.

He further added that accused was arrested on 7th August 2020. According to PW3's testimony the appellant's caution statement (exhibit P1) was recorded on 11th August 2020, five days from the date of arrest contrary to section 50 (1) of the CPA and no explanation was given for such a delay in interrogating the accused. He was emphatic that the delay in recording the appellant's caution statement raises doubts on the voluntariness of the appellant who alleged in his defence that he was tortured thus, the same ought not be admitted in evidence. To support his arguments Mr. Mshana cited the case of **Janta Komba Vs Republic, Criminal Appeal No. 95 of 2006**. He prayed this court to allow this appeal, set aside the conviction and sentence, and set free the appellant.

In reply to the grounds of appeal the learned state attorney submitted that she was supporting the appeal since the trial Magistrate wrongly convicted and sentenced the appellant. She went on submitting that pursuant to section 304 of the CPA cognate offence to rape are offences under section 135, 140 and 158 of the Penal Code, thus the offence of Grave Sexual Abuse found under section 138(C) (1) (a) 2 (b) of the Penal Code is not a cognate offence to the offence of Rape.

Moreover, Ms. Kowero submitted that section 300 (1) of the CPA requires that the substituted offence to be minor and cognate to the offence the accused was originally charged with. She was of the view that since the decision of the trial Magistrate is based on the offence that is not cognate to the one the appellant was charged with, it was not proper to substitute the same with the offence which the appellant was facing before the court. She urged this court to allow the appeal.

Having carefully considered the submissions made by Mr. Mshana and Ms. Kowero, as well as perused the court's records, let me proceed with the determination of the merit of this appeal. I am of the settled opinion that the task before me is to determine whether the Grave Sexual Abuse under section 138 C (1) (a) (2) (b) of the Penal Code is cognate offence of Rape and if the above question is answered in the affirmative, whether the offence was proved to the standard required by the law.

The cognate offences of Rape are provided for under section 304 (1) of the Criminal Procedure Act ("CPA"). For ease of references let me reproduce the same hereunder;

*"Where a person is charged with an offence under section 130 or 132 of the Penal Code and the Court is of the opinion that he is not guilty of that offence but he is guilty of an offence under **section 135, 140 and 158 of the Penal Code, he may be convicted of that offence although he was not charged with it**".*

Emphasis is added.

In the case of **Emmanuel Thomas @ Kasamwa (supra)** the Court held as follows;

"....., if the offence is not cognate to the one with which the appellant was charged, it cannot be substituted with the initial offence he was charged with."

From the foregoing, as correctly submitted by Mr. Mshana and Ms. Kowero, the offence of Grave Sexual Abuse under section 138 C (1) (a) (2) (b) of the penal code is not a cognate offence of Rape. The

cognate offences of Rape are the ones provided under section 135, 140 and 158 Penal Code pursuant to section 304 (1) CPA. Thus, this appeal has merit. I hereby order immediate release of the appellant from prison unless otherwise he is held therein for other lawful cause. It is so ordered.

Dated this 2nd day of May 2023




B.K.PHILLIP

JUDGE