IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

IN THE DISTRICT REGISTRY OF ARUSHA

AT ARUSHA

CRIMINAL APPEAL NO. 91 OF 2022

(Arising from Resident magistrate's court of Arusha at Arusha, Criminal Case No. 342 of 2020)

SEGILO LEMBRIS MOLLEL ..... APPELLANT

VERSUS

REPUBLIC..... RESPONDENT

20/04/2023 & 15/06/2023

JUDGMENT

MWASEBA, J.

Before the Resident Magistrate's court of Arusha, the appellant herein was charged and convicted of the offence of unnatural offence C/s 154 (1) (a) of the Penal Code, Cap 16 R.E 2019. It was alleged that on diverse dates between 1st and 30th September, 2020 at Njia ya Ngombe-Sakina area within the city, District and Region of Arusha the appellant did have carnal knowledge of **R.S** (Name withheld to conceal his true identity), a boy of 14 years against the order of nature. After full trial the appellant was convicted and sentenced to life imprisonment.

Aggrieved by the conviction, sentence and orders passed against him, he appealed to this court challenging the whole judgment and paraded four grounds of appeal. Later, he filed two additional grounds of appeal which in this judgment will be listed after the four grounds in the sequence as hereunder: -

1. *That, the trial court erred in the law and fact in convicting the appellant while the evidence available was weak in establishing the case against the appellant.*
2. *That, the trial court erred in the law and fact when convicting the appellant while the whole case was not properly investigated, prosecuted and proved beyond reasonable doubts.*
3. *That, the trial court failed to properly scrutinize and consider the circumstantial evidence surrounding the alleged unnatural offence while the appellant works with others on public place selling sugarcane.*
4. *That, no watertight evidence identifying the Appellant in connection with allegations in the charge sheet.*
5. *That, the trial court erred in law by convicting the appellant to serve life imprisonment without considering that the charge against him was defective.*

6. *That, the trial court did not consider the fact that the testimonies and evidence adduced contradicted in each other favouring the accused person*

At the hearing of this appeal the appellant was represented by Mr. Lengai Nelson Merinyo learned counsel while the respondent enjoyed the representation of Ms. Eunice Makala learned State Attorney. The appeal was disposed of by way of written submission.

Supporting the appeal, Mr. Merinyo submitted on the second and fourth grounds of appeal based on the investigation and prosecution of the case generally. He averred that the record shows that it was the victim (PW4) and PW2 who went to arrest the appellant and took him to police station. The police and militiaman were not mentioned so it was the mission of the PW2 and the victim (PW4) to choose and arrest the culprit of their own. Further to that, the victim was not familiar with the appellant that is why he did not describe him to the person he first reported. The allegation of the victim that the appellant is a young man selling sugar cane at Njia ya Ng'ombe is not a description worthy determination by the court of law. He referred this court to the case of **Frank Christopher @Mallya vs Republic**, Criminal Appeal No. 182 of 2017 in which the Court of Appeal sitting at Dodoma had this to say:

"It is a correct position that the offence took place under the circumstances stated above. With respect however, in her evidence PW1 did not say anything as regards the description of the person who raped her. It is such description which is necessary to eliminate the possibility of mistaken identity."

He said the evidence of the PW2 and PW4 in this case had nothing to do with identification as the victim failed to supply prior description of the appellant before such evidence was acted upon.

Regarding the issue of investigation, Mr. Merinyo submitted that there is nothing in record suggesting that this matter was investigated. It is only through investigation the question of identification of the appellant and other serious matters relating evidence connecting the appellant with the offence charged would have been attended accordingly. More so, the doubt that there is existence of coffee trees at the point of selling sugar cane could have been cleared as well. He referred this court to the case of **Wambura Marwa Wambura vs Republic**, Criminal Appeal No. 115 of 2019 (Unreported) whereby the Court of Appeal among other things stated that the investigator of the case was a material witness who could tell a number of things which remained unattended by the prosecution. This position is very relevant to this case as issues of identification and investigation were left unattended.

Submitting on the first, third and sixth grounds of appeal Mr Merinyo averred that the prosecution case is very weak. The victim has not stated any date he was penetrated in any of the dates of September 2020. He further stated that it is not the duty of the appellant to establish his defence whether the case was fabricated against him or otherwise, rather it is the duty of the prosecution to establish the offence by adducing watertight evidence (See **Mwita and Another vs Republic,** (1971) HCD 54). He pointed out the weaknesses and contradictions that PW1 and PW2 testified in court that they are mother and father of the victim respectively. The victim testified that those were his small father and small mother to mean uncle and aunt. Further to that, PW1 and PW2 testified that they reside at Sakina kwa Idd while the victim said they lived at Ngaramtoni Njia ya Ng'ombe then they shifted to Daraja mbili. So, due to the above contradictions, the allegation regarding the victim to defecate himself is fabricated evidence.

He winded up by submitting on the fifth ground of appeal that the chargesheet is defective. He pointed up two aspects, one that the place of the occurrence of the offence as appears in the chargesheet differs with the place mentioned by the victim. The second aspect is that the charge sheet did not specify punishment or sentencing provisions. He

averred that it is the settled law that the sentencing provision must be specified in the charge so as to enable the accused to understand the nature of the charged offence and the requisite punishment. So, in this case the omission to state the punishment provision prejudiced the appellant who was not made aware of the gravity of the impending sentence. He referred this court to the case of **Godfrey Simon and Masai Yosia vs Republic**, Criminal Appeal No. 296 of 2018, CAT at Arusha (Unreported).

Responding to the submission in chief, Ms. Eunice Makala learned State Attorney at first instance declared that she supports conviction and sentence meted by the trial court.

She further submitted on the second and fourth grounds of appeal that the appellant was well identified by the victim (PW4) and his identification had no doubt thereto since the victim knew the appellant even before he was arrested. The record shows that the appellant and the victim met several times and the incident occurred on day times. More so, PW4 indicated clearly that the appellant is the one who sodomized him and not otherwise.

On the aspect of investigation, she argued that there is no number of witnesses required to prove a certain fact as it is well stipulated under

Section 143 of Evidence Act, Cap 16, R.E 2022. In this case the victim appeared in court to testify and clearly established the charges against the appellant. Therefore, there was no need to call the investigator to testify. Hence, these grounds have no merit.

Responding to the first, third and sixth grounds of appeal she argued that on the issue of the crime scene, the PW1, PW2 and PW4 did not state that the incident occurred at Sakina kwa Idd or Ngaramtoni Njia ya ngómbe. What the witnesses were stating in their evidence, is their place of residence and not otherwise. She said there is no variance as to the place the incident occurred. And if the variance occurred on the place of residence the same is curable under **Section 388 of the Criminal Procedure Act**, Cap 20 R.E 2022 (See the case of **John Ngoda vs Republic,** Criminal Case No. 45 of 2020, CAT Arusha (Unreported). More to that, the contradiction as to whether the PW1 and PW2 are the parents of the victim or small father and mother of the victim (uncle and aunt), it does not go to the root of the case as the victim clearly established that he was sodomised by the appellant and no one else. She referred this court to the case of **Halfan Ndubashe vs Republic**, Criminal appeal No. 493 of 2017 which referred the case of **Victory S/o Mgenzi@Mlowe vs Republic,** Criminal appeal No. 354

of 2019 and stated that there can be no more direct evidence than the evidence of the victim of the crime.

On the last ground of appeal which is about the defectiveness of the charge, it was her submission that the omission to cite sentencing provision is curable under **Section 388 of the Criminal Procedure Act** as the said omission did not prejudice the appellant thereto as he knew the seriousness of the offence under the particulars of the offence as it was illustrated in the case of **Halfan Ndubashe vs Republic**, (Supra) which referred the case of **Jamali Ally@ Salum vs Republic**. She finally prayed for dismissal of the appeal and that the conviction and sentence imposed by the trial court be uphold according to the law.

In his brief rejoinder, Mr. Lengai insisted that there was no evidence or anything linked by investigation that the victim used to meet with the appellant. Likewise, no evidence to show that there is coffee trees farm near the sugar cane market. He further proceeded to reiterate his submission in chief.

Having heard the rival submissions from both parties and revisiting the record thoroughly, the main issue that calls for my determination is whether this appeal has merit or not.

In determining the above issue, I wish to start with the fifth ground of appeal in which the appellant is challenging the chargesheet to be defective. I am inclined to do so due to the fact that chargesheet is the foundation of a criminal trial. That means it has to be clear to the accused to enable him to understand the nature of the case he is facing and prepare his defence. In the case of **Issa Mwanjiku @ White vs Republic,** Criminal Appeal 175 of 2018 the Court of Appeal sitting at Dar es salaam had this to say,

> *"It is a settled position that a charge sheet is a foundation of a criminal trial. The purpose of charge sheet among others is to inform the accused person the nature and magnitude of the charge facing him with a view of enabling him/her to prepare his/her defence."*

Basing on the above settled position, Mr. Lengai learned counsel complained that the chargesheet was defective. He clarified its defectiveness on two aspects which I am going to determine one after another as hereunder.

On the first aspect he challenged the variance of the place the offence was alleged to be committed. While the chargesheet is coached in the position that the offence was committed at Njia ya Ngómbe- Sakina, the victim insisted that he is living at Ngaramtoni Njia ya Ngómbe. PW1 and

PW2 said they are living at Sakina kwa Iddi. So, it is not clear where exactly the offence took place. This complaint was briefly retorted by Ms. Makala Learned state attorney that there is no variance at all on the place of occurrence of the incident as the victim, PW1 and PW2 mentioned the place of their residence and not the crime scene. I agree with the learned state attorney that there is no variance on the place the offence was committed. Even the learned counsel in his submission he referred to the place of commission of offence as appears in the chargesheet and the place of living as stated by the victim, PW1 and PW2. These are two different things which can not make the chargesheet defective.

In the second aspect, the learned counsel for the appellant challenged the chargesheet for not specifying punishment or sentencing provisions. He said it is a settled law that punishment/sentencing must be specified in the charge so as to enable an accused person to understand the nature of the charged offence and the requisite punishment. He said failure to abide with the said requirement in the present case prejudiced the appellant who was not made aware of the serious implications of the offence charged. To buttress his argument, he referred this court to the case of **Godfrey Simon and Masai Yosia** (Supra). Retorting to this

complaints, Ms. Makala asserted that the omission to cite sentencing subsections is curable under **Section 388 of the Criminal Procedure Act** as the said omission did not prejudice the appellant thereto as he knew the seriousness of the offence through the particulars of the offence. She referred this court to the case of **Halfan Ndubashe** (Supra).

In the case at hand both sides agree that there is an omission to cite subsection (2) of section 154 of the Pena code which is a sentencing provision to a person who committed an offence to a child under the age of 18 years. However, the learned state attorney states that the said omission is curable under **Section 388 of CPA** as through the particulars of the offence the appellant understood the nature of the offence and its seriousness. To make it clear I wish to quote the chargesheet on record as follows:

> *STATEMENT OF OFFENCE*
>
> *UNNATURAL OFFENCES; Contrary to Section 154 (1) (a) of the Penal Code [Cap 16 R.E 2019]*
>
> *PARTICULARS OF THE OFFENCE*
>
> *SEGILLO S/O LEMRIS MOLLEL on diverse dates between 1st and 30th September, 2020 at Njia ya Ngómbe- Sakina area within the city, District and Region of Arusha, did have carnal*

knowledge of "R.S" a boy of 14 years old against the order of nature.

Dated at Arusha this 11th day of December, 2020.

Sgd.....

STATE ATTORNEY

Looking at the content of the chargesheet, the provision cited there establishes both the offence of unnatural offence and its punishment of 30 years imprisonment if it is committed to an adult. The particulars of the offence shows that the offence was committed to a child of 14 years of which in case of conviction, the offender have to be sentenced to life imprisonment as it was done to the appellant herein. I don't think if the appellant was made aware with the charged offence and its seriousness while the concerned sentencing provision was not disclosed. In the case of **Mussa Nuru @ Saguti vs Republic,** Criminal Appeal No. 66 of 2017 cited with approval in the case of **Godfrey Simon and another vs Republic**, Criminal Appeal No. 296 of 2018, Court of Appeal sitting at Arusha encountered with similar scenario and had this to say:

> *"Even in this case, we think the appellant was required to know clearly the offence he was charged together with the proper punishment attached to it. We are of a settled mind that by failing to cite sub section (2) of Section 154 which is a specific provision for punishment to a person who*

committed an offence of unnatural offence to a person below the age of [eighteen] might have led the appellant not to appreciate the seriousness of the offence which was laid at his door. On top of that, he might not have been in a position to prepare his defence (See- Simba Nyangura's case). the end result of this he was prejudiced."

Being guided by the above position, I concur with the stance of Mr. Lengai that the omission to state the punishment provision prejudiced the appellant who was not made aware of serious implications of the offence charged, the gravity of the impending sentence and as such, he was unable to make an informed defence. The omission cannot be cured by **Section 388 of CPA** as alleged by the learned state attorney The cited case of **Halfan Ndubashe vs Republic** (Supra) is distinguishable as the appellant was tried and convicted of rape of a 65 years old woman C/s 130 and 131 of the Penal Code. The relevant subsections to Section 130 and 131 were omitted. While in the case at hand the specific provision which governs the sentence was omitted. Thus, the same cannot be curable as stated above. Therefore, this ground has merit.

So long as the chargesheet is defective which is the foundation of this trial, the conviction of the appellant which is founded by a defective charge can not stand. Thus, this ground suffices to dispose of the

appeal. Hence, there is no need to determine the remaining grounds of appeal as they won't add anything to the verdict of this appeal.

In the final analysis, I find this appeal with merit. The conviction is quashed and sentence set aside and the appellant should be set at liberty unless otherwise lawful held.

It is so ordered.

DATED at **ARUSHA** this 15th day of June, 2023.

N.R. MWASEBA

JUDGE