IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

IN THE SUB-REGISTRY OF MTWARA

AT MTWARA

CRIMINAL APPEAL NO. 58 OF 2023

(Originating from the District Court of Kilwa at Masoko, in Criminal Case No. 24/2023)

JUMA MOHAMEDI@HAJENGI ..... APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

JUDGEMENT

14th February, 2024 & 18th March, 2024

MPAZE, J.:

In the District Court of Kilwa at Masoko, the appellant, Juma Mohamedi @Hajengi was arraigned and charged with the offence of grave sexual abuse contrary to section 138C (1) (a) and 2 (a) of the Penal Code [Cap. 16 R.E. 2022] hereinafter 'the Penal Code'.

It was alleged that on the 28th day of January,2023 at Mtanga village within Kilwa District in Lindi region, the appellant rubbed the private parts

of the victim (to hide her identity, she shall be referred to as PW1 or the victim interchangeably) who was 12 years old using his genital parts.

When the charge was read over and explained to the appellant, he entered a plea of not guilty, compelling a trial, whereas the prosecution paraded two witnesses while the defence countered by calling upon three witnesses.

After the hearing of both parties, the court determined that the prosecution had proven its case beyond a reasonable doubt. Consequently, the accused person was found guilty, convicted, and sentenced to 15 years imprisonment. Additionally, the court ordered the accused to compensate the victim with Tshs. 500,000/=.

In summary, the prosecution's account of the case revolves around the night of 28th January 2023. According to their story, the victim was asleep in her room when the appellant arrived and woke her up. Upon awakening, she was subjected to a series of questions regarding any wrongdoings she might have committed, to which she vehemently denied any wrongdoing.

Subsequently, the appellant told her that he intended to perform some kind of ritual, expressing his intention to administer medicine. The

appellant then laid a mat on the floor, undressed the victim, and proceeded to apply petroleum jelly to his genitalia, and the victim's vagina. The appellant then positioned her on his thighs, and went on rubbing his penis into the victim's vagina, PW1 told him she was experiencing pain.

Despite her pleas, the appellant pitilessly instructed her to wait shortly, persisting in his assault. Eventually, he left the room after completed his desire.

The subsequent day, the victim reported the incident to her mother (PW2), using her father's phone, which he had left in his room before heading out for his fishing activities. She communicated the details of the traumatic experience to her, shedding light on the ordeal that transpired on the fateful night.

During the time of the assault, the victim's stepmother, with whom she resides, was absent she went to attend the ceremony in another village. It is important to note that the stepmother returned two days later, only after the distressing incident had occurred.

According to PW2, the victim's mother said she received a call from the victim on 28th January 2023, at approximately 10:00 hrs. The call was made using the appellant's phone, and during this conversation, the victim

revealed that the appellant had engaged in inappropriate and insulting behaviour. The victim disclosed that the appellant had groped her vagina and subjected her to sexual intercourse.

On the following day, the victim contacted PW2 again, but this time she used her stepmother's phone. During this conversation, the victim inquired whether PW2 had shared the information with the appellant. At this point, PW2 refrained from divulging the details to the appellant, maintaining a protective stance for the victim's well-being.

PW2 inquired with the victim about whether she had informed her stepmother about the incident. The victim responded that she hadn't disclosed the information to her stepmother. Consequently, PW2 asked the victim to pass the phone to her stepmother, so she could communicate directly with her.

PW2 proceeded to narrate to the victim's stepmother the distressing events the appellant had subjected PW1 to. According to PW2, the alleged stepmother confirmed that the appellant had exhibited such behaviour extensively, having also victimized her child. This revelation prompted her decision to relocate and distance her child from the appellant's harmful actions.

In his defence, the appellant vehemently distanced himself from the factual setting presented by the prosecution, denying all accusations levelled against him. According to his account, the dispute originated when PW2 sought to relocate PW1 to Kilwa Masoko, a proposal he claims he adamantly rejected. This disagreement allegedly escalated into a conflict that ultimately led to his arrest on charges he strongly denies, asserting his innocence in a crime he claims he has never committed.

His witness, Hadija Mbwana (DW2), professed unawareness regarding the details of the case facing the appellant, providing no relevant information to support the defence. While, Shungi Mbwana (DW3) informed the court that, it is not true that the accused had committed that offence, as on the fateful day of the incident, the victim had slept at her house.

The conviction and sentencing of the appellant are based on the evidence presented during the trial by both parties. Discontent with the verdict, the appellant has lodged this an appeal, outlining seven distinct grounds which can be boiled into two grounds of appeal;

1. The trial court erred in law and fact for convicting and sentencing the appellant while the case against him was not proved beyond reasonable doubt.
2. The appellant faulted the trial court for failure to consider his defence

At the hearing of this appeal, the appellant appeared in person, unrepresented whereas, the respondent had the services of Mr. Justus Zegge, the learned State Attorney.

When called upon to argue his grounds of appeal, the appellant adopted his grounds as outlined in his petition of appeal without delving into further details. Instead, he requested the Republic, to address the court first, while reserving his right to make a rejoinder, if deemed necessary, following the submissions of the learned State Attorney.

On his part, Mr. Zegge, State Attorney opposed the appeal, he collectively addressed the 1st, 2nd,3rd,5th,6th, and 7th grounds of appeal together as they are all centred in establishing proof of the case beyond reasonable doubt while the 4th ground was argued separately.

Mr. Zegge strongly asserts that the case at hand has been proved beyond a reasonable doubt. To support this stance, he referred to the case of **Andrew Lonjine v. Republic**, Criminal Appeal No. 50 of 2019

(Unreported). According to Mr. Zegge he said in Lonjine's case (Supra), the Court, when interpreting section 138 (1) (a) of the Penal Code, articulated three crucial elements for establishing the offence of grave sexual abuse; which are the use of any part of the human body for sexual gratification, lack of consent, and the act not resulting in rape.

Mr. Zegge contends that these elements align with the facts of the case at hand, and the Lonjine precedent (Supra) firmly supports the assertion that the prosecution has successfully met the burden of proving the case beyond a reasonable doubt.

I would like to explicitly state right away here that the case referred by the state attorney took place before the amendment of that provision. After the amendments through section 42 of the Written Laws (Miscellaneous Amendment) Act No. 01 of 2020, lack of consent is no longer a requirement for an offence committed against a girl under 18 years. This case played a significant role in bringing about these changes.

The remaining elements after the amendment are sexual gratification, use of genital or any other part of the human body or any instrument or any orifice or part of the body of another person and the act not resulting in rape.

To demonstrate that the prosecution's case was proven beyond a reasonable doubt, the state attorney referred to page 8 of the typed proceedings. On this page, PW1, the victim, testified that the appellant, after applying petroleum jelly to his genitals and hers, took her on his thighs and began rubbing his penis into her vagina without her consent.

Mr. Zegge thought that the elements of the offence were successfully proven based on this piece of evidence. He added that PW1's statement should be believed since she was the victim of such an assault. To reinforce his argument, he cited the case of **Selemani Makumba v. Republic**, [2006] TLR 379, where the court emphasized that, in sexual offences, the victim's testimony constitutes the best evidence.

Mr. Zegge argued that, in this instance, PW1 effectively proved the appellant's guilt and clarified that only the two of them were present during the commission of the offence.

With the age of the victim, Mr. Zegge argued that the evidence presented by PW2, the victim's mother, on page 10 of the typed proceedings, corroborated PW1's testimony regarding the victim's age. Mr. Zegge referred to the precedent set in the case of **Isaya Renatus v. Republic**, Criminal Appeal No 542 of 2017, where the court affirmed that

age could be established even in the absence of a birth certificate if someone knows about it.

The State Attorney maintained the prosecution successfully proved the case beyond reasonable doubt and prayed the appellant's complaint be dismissed.

In response to the 4th ground of appeal, wherein the appellant raised concerns about the court not considering his defence, the State Attorney contended that the trial magistrate did take the defence into account. The evidence from the appellant's witnesses (DW2 and DW3) was considered, and the trial court explicitly acknowledged the appellant's defence and the accompanying reasons. He said this is revealed on pages 10 and 11 of the typed proceedings. The State Attorney asserted that, in his view, this ground of appeal lacks a substantive foundation.

However, before concluding his submission, Mr. Zegge brought to the attention of the court certain issues that were not raised as grounds for appeal. In his opinion, he believed it was important for this court to be aware of them.

Mr. Zegge submitted that upon examining the charge sheet, the appellant was charged with the offence of grave sexual abuse under

section 138C (1) (a) and 2 (a). According to section 138C (2) (a), the prescribed sentence is not less than 18 years. However, the trial magistrate imposed a sentence of 15 years, which he argued was contrary to the law. Mr. Zegge contended that this court, under section 366 (1) (a) (iii) of the Criminal Procedure Act, [CAP. 20 R.E. 2022] hereinafter 'the CPA', is empowered to impose the proper sentence. Therefore, he requested this court to now impose a proper sentence as per the law.

on top of that he said, that the word sexual gratification is also missing in the charge sheet and that even during the preliminary hearing, an observation was made in the fourth paragraph on page 3 of the typed proceeding, where the phrase 'sexual gratification' is also missing.

Mr. Zegge contended that the absence of this particular phrase does not undermine the prosecution's case. He underscored that the testimony of PW1 clearly illustrated that the appellant engaged in the act of grave sexual abuse.

In light of all that he has submitted, Mr. Zegge maintained that the prosecution successfully proved the case beyond a reasonable doubt. He earnestly prayed for the court to find that the grounds of appeal raised by

the appellant lack merits and should be dismissed. The appellant had nothing to rejoin.

Having thoroughly examined the trial court record, scrutinized the grounds of appeal, and taken into account the submissions put forth by the State Attorney, the main issue at hand is whether this appeal has merit.

Before discussing the grounds for the appeal, it is imperative to address the anomalies raised by Mr. Zegge regarding the charge sheet. It is crucial to note that the charge sheet serves as the cornerstone of the prosecution's case. It is through the examination of the charge sheet, that the accused becomes cognizant of the charges they are confronted with, enabling them to adequately prepare for their defence.

In essence, the charge sheet must be lucid and meticulously articulate all the essential elements of the offence to ensure a fair trial. The absence of such clarity renders the charge legally deficient.

In the case of **Francis Fabian @ Emmanuel v. The Republic** Criminal Appeal No. 261 of 2021 (Unreported) the Court of Appeal stated that;

> *'We presuppose, that it is an elementary knowledge of criminal justice that, the cornerstone of any criminal trial is the charge sheet. The charge sheet is the*

heart, brain and blood of criminal justice and fair trial. It plays a duo role of informing the accused person on the nature of his accusation and allowing him to prepare his proper defence. Apart from that, the charge sheet notifies the trial court on the subject matter to determine its jurisdiction and prepare the proper procedure to be applied during the trial. Therefore, the charge sheet is the most important document in any criminal trial.'

The mode of framing the charge is prescribed and regulated by the provisions of Sections 132 and 135 of the CPA, where the sections read;

Section 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.***'

While, Section 135 (f) of the CPA delineates the essentials that must be included in the charge sheet, ensuring that it comprehensively contains

all necessary details for the accused person to understand and adequately prepare their defence. The section reads as follows;

> *135.-(f) 'subject to any other provision of this section, it shall be sufficient to describe any place, time, thing, matter, act or omission of any kind to which it is necessary to refer in any charge or information in ordinary language in such manner as to indicate with reasonable clarity the place, time, thing, matter, act or omission referred to.'*

In the case of **Masalu Kayeye v. Republic**, Criminal Appeal No. 120 of 2017, when addressing sections 132 and 135, the Court of Appeal had the following remarks;

> *'A charge must conform with the requirements of sections 132 & 135 of the Criminal Procedure Act Cap 20 R.E 2022 in that it should contain the statement of offence stating the specific offence with which the accused is charged and particulars of offence* ***containing clear information of nature of the offence charged.'***

Similarly, in the case of **Francis Fabian @ Emmanuel v. The Republic** (Supra), the court deliberated on Section 132 of the CPA, expressing the following insights;

> *'The catchword in this section is the word 'shall' meaning that it is mandatory that the* ***particulars of the offence in the charge sheet must be proved by evidence during trial.*** *Therefore, framing a proper charge according to the dictates of law is mandatory to the prosecution.'*

Mr. Zegge contended that the charge sheet incorrectly cited a provision of the law related to punishment and the essential element of the offence, that is sexual gratification, was omitted, however, he was quick to point out that, the missing said element and citing of the incorrect provision of law relating to punishment does not make the prosecution case to floppy.

For easy reference I find it necessary to reproduce the charge which the appellant was facing at the trial court, the charge reads;

*'**STATEMENT OF THE OFFENCE***

Grave Sexual Abuse Contrary Section 138C (1) (a) and 2 (a) of the Penal Code

PARTICULARS OF THE OFFENCE

JUMA S/O MOHAMEDI @HAJENGI on 28th January, 2023 at Mtanga village within Kilwa District in Lindi Region did rub the private parts of one NASRA D/O JUMA SALUM a girl of 12 years old using your genital parts.'

Upon examining the charge sheet, it becomes evident that not only did it incorrectly cite the provision of the law of punishment, but it also cited the wrong provision of the law establishing the offence of grave sexual abuse against a person under 18 years of age.

As mentioned earlier, after Lonjine's case (Supra), there have been amendments to the law, and the correct provision applicable to the offence facing the accused who committed grave sexual abuse to a person under 18 years is section 138C (1) (d), with the corresponding penalty provision being 138C (2) (b). This provision reads;

138C.-(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) N/A

(b) N/A

(c) N/A

(d) with or without consent of a person who is under the age of eighteen

(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.

On Mr. Zegge's part, he was able to point out that the anomaly lies in the incorrect citation of the proper section for the punishment of the offence. However, he did not state anything regarding the wrong citation of the section creating the offence, although he was able to comment that the particulars of the offence failed to indicate one of the elements, which is sexual gratification.

Nevertheless, the State Attorney emphasized that the prosecution's case has been proven despite this omission. He convincingly argued that the absence of the phrase 'sexual gratification' did not weaken their case, particularly considering the compelling evidence presented by PW1.

After examining the charge sheet, the court agreed with the State Attorney that since the particulars of the offence disclosed the age of the victim was 12 years, then the cited provision about punishment was wrongly cited.

Not only that but also the court has observed that the section creating the offence was wrongly cited, and the phrase 'sexual gratification' as one of the elements creating the offence was missing as submitted by Mr. Zegge.

The question at hand is whether these defects render the charge sheet to be defective and incurable.

In his earlier remarks, Mr. Zegge addressed the wrong citation of the proper section for punishment, he contended that this can be cured under section 366 of the CPA. At the same time, he stated that the omission to include the phrase 'sexual gratification' can be remedied by examining the evidence of PW1, which managed to establish the elements of the offence.

As explained earlier, the charge sheet should meet certain criteria, including citing the proper provision of the law and stating the particulars of the offence containing clear information about the nature of the offence charged.

Upon reviewing the charge sheet, the statement of offence under which the appellant stood arraigned for Grave Sexual Abuse cited sections 138C (1) (a) and 2(a) instead of the applicable sections 138C (1) (d) and (2) (b) of the Penal Code.

While I agree that there are flaws in citing the proper provision of the law which creates the offence of Grave Sexual Abuse and its punishment and that the phrase 'sexual gratification' was not stated in the particulars of the offence. The court finds the defects did not prejudice the accused in anyhow.

In the case of **Khamisi Abderhemani v. The Republic**, Criminal Appeal No. 21 of 2017 (Unreported), when the court was confronted with the wrong citation of the statement of offence in the charge sheet under which the appellant stood arraigned for rape, citing sections 130 (1) (2) (e) and 131 (1) instead of the applicable sections 130 (1), (2) (b), and 131, the Court had this to say;

> *'The defect did not prejudice the appellant much as the particulars of the offence on the charge sheet were explicit enough to inform him of the nature of the offence he was facing. Also taken into account were the appellant's response when the charge was read over to him; his focused cross-examination of the prosecution witnesses and the way he defended himself which, it*

was said, were not consistent with a person who did not understand the nature of the charge facing him.'

In essence, it was concluded that since the appellant was not prejudiced the anomaly could be rectified under section 388 of the CPA.

Therefore, guided by the precedent set in the case of **Khamisi Abderehemani** (Supra), the key factor in evaluating the impact of wrong citation of the charged offence and the failure to include the phrase 'sexual gratification' in the statement of offence is whether or not the accused was affected by the anomaly.

To fully grasp this issue, I examined the evidence presented in the trial court proceedings. Among other things, I noted that PW1 testified as follows;

'...At late night the accused came into my room he woke up me I sat and he sat...Accused said he want to do medicine to me, accused put a mat down and ordered me to undress my clothes I wore a khanga and pant, I denied, accused undressed my clothes a khanga and pant. Accused took petroleum jelly rubbed on his penis. Accused rubbed petroleum jelly on my vagina.

Accused sat me on his thighs. Accused started to rub his penis on my vagina, I told him I am feeling pain he told me to wait a bit. Accused proceeded groping his penis on my vagina then he went away, I went back to sleep on the bed...'

In cross-examination PW1 replied;

'I was afraid of you, you were very fierce and arrogant, I decided to mention old man, I told my mother the next day after the scene and step mother. You did it twice the 1st night and the 2nd night'

In his defence, the accused stated: *'It is not true, I did not do grave sexual abuse to the victim...'*

while his witness DW3 had this to say;

' it is not true the accused did not do grave sexual abuse to the victim. When her step mother went to Pande the victim was sleeping at my home. There is a stepchild of accused who also went to her sister to sleep.'

As it can be seen from the above excerpts, PW1 categorically evidenced how the offence was committed against her, the statement by PW1 that;

> *'Accused took petroleum jelly rubbed on his penis. Accused rubbed petroleum jelly on my vagina. Accused sat me on his thighs. Accused started to rub his penis on my vagina, I told him I am feeling pain he told me to wait a bit. Accused proceeded groping his penis on my vagina then he went away'* proves the offence of grave sexual abuse.'

Again, looking at what transpired during cross-examination, it's difficult to argue that the accused was unaware of the nature of the offence he was facing. He understood his charge, which is why he was able to question PW1 during cross-examination questions relating to the offence stand charged.

Even in his defence, it can be noted that the appellant knew what he was supposed to defend against. That's why even his witness, DW3, was able to testify that it was not true that the accused committed grave sexual abuse on a fateful day, as the victim was sleeping at this witness's house.

In the case at hand, what the prosecution was required to prove is the use of any part of the appellant body for sexual gratification. Through the testimony of PW1, it was established that the appellant used his penis to rub and grope PW1's vagina.

In the case of **Hando Dawido v. R**, Criminal Appeal No. 107 of 2008 published on www.tanzlii.go.tz TZCA the court, while examining whether the offence of grave sexual abuse had been proven, was able to demonstrate two elements of this offence. The court stated;

> *'According to the above provision the prosecution was required to prove the ingredients of the offence of grave sexual abuse which are; **one** the use of any part of the human body for sexual gratification and **two**, lack of consent of the other person to whom the act is done.'*

Reiterating what I have stated earlier, lack of consent is no longer a prerequisite in the offence of grave sexual abuse committed to a person under 18 years, following the amendment of section 138 C (1) (d) of the Penal Code. Thus, the exclusion of the term 'sexual gratification' in the case at hand does not render the charge defective, as there is evidence

indicating the use of the human body for sexual gratification, as testified by PW1.

Based on this finding, the court finds that the defect in the charge sheet can be rectified under section 388 of the CPA.

In light of the foregoing analysis, the court finds that the appellant was not prejudiced by the charge sheet's citation of sections 138C (1) (a) and 2 (a) of the Penal Code, instead of relevant sections 138C (1) (d) and (2) (b) of the same law.

Likewise, the absence of the phrase 'sexual gratification' in the offence particulars did not prejudice the appellant as the evidence provided by PW1 managed to establish the act was done for sexual gratification as the same did not amount to rape.

Taking into account the reasons I have elucidated earlier when examining the defectiveness of the charge, it becomes evident that the offence of grave sexual abuse was proven beyond reasonable doubt. As such, further discussion on the first ground of appeal, will only be for academic purposes as the same has been resolved when this court was dealing with an issue of defectiveness of a charge.

Moving on to the ground of appeal, where the appellant criticized the trial court for failing to consider his defence. The court examined the judgment of the trial court, specifically page 8, where it reads;

> *'The accused defence cannot exempt him from criminal liability is a mere denial, the accused testified that they had a dispute with the mother of the victim, PW2 wanted him to transfer the victim PW1 from Mtanga Primary School to Kilwa Masoko Primary School he denied. The accused is testifying an afterthought that they came to transfer the victim surprisingly took him to Masoko and they beat him and lost consciousness and he found himself at police.'*

From the above excerpt, it is clear that the appellant's defence was considered, as such I find this ground of appeal is baseless and dismissed for want of merit.

All said and done, the court finds no justifiable reason to intervene with the guilty verdict and conviction of the appellant by the trial court for the offence of Grave Sexual Abuse, as it was proven beyond reasonable doubt.

Nevertheless, regarding the sentence which was imposed on the appellant the court found the same was inappropriate, as the proper sentence for the accused who committed the offence of Grave Sexual Abuse to a person under 18 years, the minimum sentence is 20 years whereas the maximum sentence is 30 years.

Nevertheless, during the hearing of this appeal and following the submission by the State Attorney, the court afforded the appellant an opportunity to comment on the penalty, as at the end of the day the sentence might be substituted. What the appellant conveyed was for the court to proceed with the determination of the appeal, even if the penalty were to be altered.

It was stated in the case of **Amani Bwire Kilunga v. Republic** Criminal Appeal No. 372 Of 2019, that;

> *'It is not in dispute that the sentence imposed on the appellant is below the minimum stated by law. The Court therefore being a final Court has a duty to ensure correct application of the law... Nevertheless, we are of a firm view that* ***imposing an appropriate and mandatory sentence is in the best interest of***

justice and it will not in any way prejudice the appellant.' [Empasis added]

Guided by authority above, since the trial court did not impose an appropriate sentence in accordance with the law, this court invoked its revisionary powers under section 373 (1) (a) of the Criminal Procedure Act to nullify the trial court's sentence of 15 years and replace it with a mandatory minimum sentence of 20 years imprisonment as provided under section 138C (2) (b) of the Penal Code. The order for compensation of Tshs 500,000/= to the victim remained intact.

It is so ordered.

Dated at Mtwara this 18th March 2024.

M.B. MPAZE

JUDGE

COURT: Judgement delivered in Mtwara on this 18th day of March, 2024 in the presence of the appellant and Mr. Justus Zegge, State Attorney for the Republic.

M.B. MPAZE

JUDGE

18/03/2024