

**IN THE HIGH COURT OF TANZANIA
(SUMBWANGA DISTRICT REGISTRY)**

AT SUMBAWANGA

CRIMINAL APPEAL NO. 63 OF 2023

(Arising from Original Criminal Case No. 37 of 2022 in the District Court of Kalambo at Matai)

STEVEN KASTIKO APPELLANT

VERSUS

THE REPUBLIC APPELLANT

JUDGMENT

09th April & 04th June, 2024

MRISHA, J

The appellant, Steven Kastiko was charged before the District Court of Kalambo at Matai (the trial court) for the offence of Grave Sexual Abuse contrary to section 138C (1) and (2)(a) of the Penal Code [Cap 16 R.E. 2019]. He was convicted of that offence and sentenced to serve 15 years imprisonment together with corporal punishment of six (6) cane and to pay the victim a compensation to a tune of Tsh. 300,000/=.

Initially, it was alleged that on 04th April, 2022 at about 0200 hours at Ulumi village within Kalambo District in Rukwa Region, the appellant did have grave sexual abuse with one Maksimalina Mussa aged of 27 years old by using hand and caused pain to her vaginal.

On 11th April, 2022 the appellant was arraigned before the trial court and the charge was read over and fully explained to him whereafter he pleaded guilty to the charged offence. Having admitted the offence, the public prosecutor narrated facts to him and the appellant admitted to all those facts stated by the public prosecutor. Consequently, the appellant was convicted on his plea of guilty and sentenced as alluded earlier.

Aggrieved, the appellant appealed to this court. Hence, he has preferred to appeal to this court faulting the trial court's decision on four grounds of appeal as follows: -

- 1. That, the Hon. trial court erred in both law and fact for failure to hold that the case against the appellant was not proved beyond reasonable doubts.*
- 2. That, the learned trial court had massively lost sight in point of law and fact to convict the appellant without giving an accused person the right to know and understand the charge, so that he can intelligently answer them, due to the fact that the charge reads ones and the accused as illiteracy to law.*
- 3. That, the trial court erred in law point and fact by convicting and sentencing the appellant relying on a plea of guilty which was under the*

charge which was not treated according to law and full of ambiguous and equivocal plea.

- 4. That, the trial magistrate court erred in law and fact relying on plea of guilt only and inflict harsh punishment immediately while mis observed that the charge against the appellant was not read over twice and explained correctly in order to prove if the appellant was understanding what he was pleading to something which vitiated the whole process to be null according to law.*

When the appeal was called on for hearing, the appellant appeared in person, unrepresented whereas the respondent Republic was represented by Mathias Joseph and Ladislaus Akaro, both learned State Attorneys.

At the outset, the appellant sought to adopt the petition of appeal for it form part of his submission in chief. He also prayed to the court to consider his grounds of appeal, allow his appeal, quash the conviction meted out to him and set him free.

In reply, Mr. Ladislaus Akaro supported the appeal filed by the appellant based on the third ground of appeal. He submitted that no appeal will be heard where the appellant is convicted and sentenced on his own plea of guilty, except as to

the extent or legality of sentence, he referred section 360(1) of the Criminal Procedure Act [Cap 20 R.E. 2022] in order to support his proposition.

He went on submitting that the appellant was charged with the offence of Grave Sexual Abuse and when the charge was read over to him on 11th April, 2022, he pleaded guilty. On top of that, the counsel added that when the facts constituting the offence of Grave Sexual Abuse were read over to the appellant, he admitted to all facts adduced by the prosecutor.

The learned State Attorney added by citing the case of **Mtumwa Silima @ Bonge v Republic**, Criminal Appeal No. 11 of 2019 at page 10 (unreported) in which the Court of Appeal gave its guidance on the circumstance under which the appellant can challenge the conviction stemmed from a plea of guilty.

He went on to submitting that the charge sheet from which the appellant was charged with, has two defects namely; **one**, the cited provision is totally different from the offence the appellant was charged with and **two**, the particulars of the offence differ with statement of the offence; thus, contrary to section 135 of the Criminal Procedure Act.

He further argued that, in order for the prosecution to prove the offence the appellant stood charged with, two elements needed to be proved. One, the use of any part of human body for sexual gratification and two, lack of consent of the

other person to whom the act was done. To buttress his position, he cited the case of **Handos Dawido v Republic**, Criminal Appeal No. 107 of 2018 at page 14.

However, it was his argument that facts which were read over by the prosecutor differ with the particulars of the offence, hence, that irregularity led the plea of the appellant to be equivocal.

As if that is not enough, the learned State Attorney submitted that the charge sheet is defective and the particulars of the offence differ with the facts read over to the appellant, henceforth, that entails the prosecution failed to prove the case beyond the required standard. He concluded by supporting the appeal and prayed to this court to allow appeal, quash conviction, set aside sentence and set appellant free.

On my part, I have carefully considered the grounds of appeal, the submission of the learned State Attorney, the records of appeal and the prayer of the appellant including his submission in chief. I wish to say that I will start dealing with the merits or otherwise of the third ground of appeal and if the outcome to that test will be in the affirmative, I will not deal with the remaining grounds of appeal. The issue for determination is whether the appellant was convicted on the plea which was unequivocal.

I am alive of the position that a person convicted on his unequivocal plea of guilty is, under section 360(1) of the CPA, prohibited from appealing to the appellate court unless it is against the extent and legality of sentence. The said section provides that:

"No appeal should be allowed in the case of any accused person who has pleaded guilty and has been convicted on such plea by a subordinate court except as to the extent or legality of the sentence"

Looking at the circumstances of this case in which it appears that the appellant took a plea after the charge was read over and fully explained to him. By using his own words he said, *"Ni kweli nilimuingizia mkono Maksielina d/o Mussa kwa uchi wake"* which literally translated mean, *"It is true I inserted my hand into her nakedness (virginal)"*.

In the first place, it appears plainly that the appellant understood the nature of the offence and the words used by him in responding to the charge sheet, are very clear and unambiguous. However, the learned State Attorney claimed that charge sheet the appellant charged with have two defects, one of the defects is that, the provision cited differ with the offence the appellant was charged with.

Before the trial court, the appellant was charged with the offence of Grave sexual abuse contrary to section 139(1) and (2) (a) of the Penal Code. The said section provides that:

"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) with the consent of the other person where the consent has been obtained by the use of force threat, or intimidation or putting that other person in fear of death or of hurt or while that other person was in unlawful detention;

(c) with the consent of the other person where such consent has been obtained at a time the other person was of unsound mind or was in a state of intoxication induced by alcohol or any drugs, matter or thing.

(2) Any person who—

(a) commits grave sexual abuse is liable, on conviction to imprisonment for a term of not less than fifteen years and not exceeding thirty years, with corporal punishment, and shall also be ordered to pay compensation of an amount determined by the court to the person in respect of whom the offence was committed for the injuries caused to that person."

As it can be seen from the above provisions, the prosecution cited the above provision on the offence of the grave sexual abuse, which in my view, is a proper provision for the offence the appellant was charged with before the trial court. Hence, there is no difference between the provision cited and the offence of which the appellant stood charged.

Regarding the alleged second defect which is to the effect that the particulars of the offence differ with facts of the case, I concur with the submission of Mr. Ladislaus that where the particulars of the offence differ with the facts of the case read over to the appellant, that variation leads to the failure to prove the prosecution's case beyond reasonable doubts. However, in this case it has been observed that the facts narrated by the public prosecutor did not constitute the offence charged. Hence, even though the appellant admitted to all facts, that admission does not touch the offence he was charged with. In the circumstance,

it is my settled view that the plea taken by the appellant amounted to an equivocal plea which means that the appellant was improperly convicted.

That position was also stated in the case of **Michael Andrian Chaki v Republic**, Criminal Appeal No. 339 of 2017 (unreported) in which the Court of Appeal held that:

*"Where an accused pleads guilty to the charge, before conviction, the law is that, the prosecution is duty bound and it must audibly and understandably **narrate facts establishing the offences alleged in the statement and particulars of offence.** That is, the prosecution must explain clearly and adequately the circumstances in which and how the offence was committed in specific and intelligible terms". [Emphasis is mine]*

In our case, the prosecution failed to compare the narrated facts which were read over to the appellant and the particulars of the offence of which the appellant was charged. As that was not done, the plea of guilty entered by the trial court became equivocal and the appellant was improperly convicted.

Consequently, I find and hold that the prosecution's case felt short of proof, much as upon the admitted facts to have been narrated to the appellant, it appears that the offence of grave sexual abuse was not established.

On this stance, I am guided by earlier decision of **Michael Andrian Chaki v Republic** (supra) and proceed to find merits in the instant appeal which is hereby allow. In the consequent results, the appellant's conviction and sentence are respectively quashed and set aside.

In the final event, I order that the appellant be released from the prison custody forthwith unless he is detained for some other lawful cause.

It is so ordered.



A.A. MRISHA
JUDGE
04.06.2024

DATED at **SUMBAWANGA** this 04th day of June, 2024.



A.A. MRISHA
JUDGE
04.06.2024