IN THE COURT OF APPEAL OF TANZANIA

AT MBEYA

(CORAM: KILEO, J.A., MJASIRI, J.A. And MASSATI, J.A.)

CRIMINAL APPEAL NO. 252 OF 2011

FREDY MWAKAJILO.....APPELLANT

VERSUS

THE REPUBLIC.....RESPONDENT

(Appeal from the decision of the High Court of Tanzania at Mbeya)

(Mmilla, J.A.)

dated the 15th day of August, 2011
in
Criminal Appeal No. 37 of 2009

JUDGMENT OF THE COURT

15th & 17th October, 2014

MASSATI, J.A.:

Both the District Court of Kyela, and the High Court of Tanzania at Mbeya on first appeal, were satisfied that the appellant was guilty as charged and so respectively, sentenced and confirmed the sentence of life imprisonment imposed upon him for the offence of raping a 2 year girl. Dissatisfied, the appellant is now before this Court to protest his innocence.

The charge that was put before his doors was this: -

"CHARGE SHEET

NAME : FREDY S/O MWAKAJILO

TRIBE : Kyusa

Age : 44 years

Occ. : Peasants

Rel. : Christian

Res : Mbugani

STATEMENT OF OFFENCE *: Rape c/s 130 (i) and 2 (a) and 131 (1) of the penal code cap 16 Vol. 1 of the laws.*

PARTICULARS OF OFFENCE*: That* ***FREDY S/O MWAKAJILO*** *charged on 07th day of February 2009 at about 11.00 hours at Ikolo willage within Kyela District in Mbeya Region did have unlawfully carnal knowledge of one* ***DEBORA D/O PHILIBERT*** *a girl aged 2 years.*

STATION : KYELA

Date : 10/02/2009 .....

PUBLIC PROSECUTOR"

to which the appellant pleaded not guilty. After the prosecution case, built by 4 witnesses, was closed,the appellant told the trial court that on 7/2/2009 he had gone to Nganga village to purchase eggs and other agricultural products. He was, in fact, responding to the charge laid at his doors. But, that was not PW1, PW2 and PW3 (the eye witnesses) had told the trial court. According to them, they consistently said that the incident

took place on 17/2/2009. This variance notwithstanding and without amending the charge, the trial court found the accused "guilty as charged". But, the High Court,and perhaps noting the discrepancy in the statement of the offence, decided to "amend" the charge sheet by prefacing its judgment by stating that the appellant was charged with "the offence of rape c/ss 130 (1) 2 (e) and 131 (1)" which as shown above was not what the charge sheet discloses. Similarly, but contrary to the finding of the trial court, the first appellate court also found credibility in the evidence of PW1, PW2 and PW3 that the girl was raped on 17/2/2009 and not 7/2/2009 as he had surmised in the preface of his judgment. It is with this background, that, we now turn to consider the appeal.

At the hearing of the appeal, the appellant, who was unrepresented,adopted his memorandum of appeal, consisting of eight grounds, but which could be condensed into five major ones, namely, the violation of section 240(3) of the Criminal Procedure Act (CPA) in admitting the PF3; the violation of section 127(1) of the Evidence Act by not calling the child victim; the credibility of PW1, PW2, and PW3; the ignoring of the defence case; and that the prosecution case was not proved beyond reasonable doubt. After hearing the respondent, the appellant also added by elaborating that contrary to what PW1, PW2 and PW3 claimed, on the

17th February, 2009, he was in fact, in remand prison. So, he prayed that his appeal be allowed.

The respondent/Republic was represented by Ms Rhoda Ngole, the learned State Attorney. She declined to support the conviction, and we think, rightly so. She expoused three reasons. First, in her view, consistent with that of the appellant it was wrong for the victim of rape, not to have been produced in court, for the court to determine whether or not she was competent to testify in terms of section 127(1) of the Evidence Act. Secondly, she also agreed with the appellant that the PF3 was admitted in violation of section 240 (3) of the CPA. Thirdly, there was a variance between the particulars of the offence (the date the offence was alleged to have been committed) and the evidence. She elaborated that according to PW1, PW2 and PW3, the offence was committed on 17/2/2009 and not on 7/2/2009. It was her view that, without the charge being amended to accommodate the evidence, the variance was fatal, as it embarrassed the appellant in his defence. She cited to us the decision of **SANKE DONALD @ SHAPANGA**, Criminal Appeal No. 408 of 2013 (unreported) for inspiration.

Asked further from the bench, Ms Ngole also conceded that the trial court, after finding the accused guilty did not proceed to convict as

required by the law; and that the statement of offence in the charge sheet omitted the relevant paragraph of section 130 (1) (2) of the Penal Code, for the appellant to be said to have been properly charged. Besides, she was also of the view that, it was not proper for the High Court judge to have "amended" the charge sheet by citing section 130 (1) (2) (e) in his judgment. She therefore persuaded us to allow the appeal.

The law on the consequences of the omission to inform the appellant of his rights under section 240(3) of the CPA is now settled. Fortunately, the High Court had already dealt with it, and had expunged the offending PF3. So this point need not detain us.

It is true that the victim of the rape was not produced before the trial court for it to decide her competency as a witness. Ms Ngole thinks that the omission was fatal. Apparently, this complaint was also raised by the appellant in the first appellate court. The High Court considered it and ruled that although it was irregular, for the victim to not have been brought to court which would have determined her competency to testify, the irregularly was curable as it was a minor one. On our part, we think that it is the duty of the prosecution, not the court, to determine which witnesses, and how many of them to call. (See **R v GOKALDAS KANJI KARIA AND ANOTHER** (1949) 16 EACA 116). Section 127 (1) of the

Evidence Act, therefore only comes into play, if a witness is in court, and is about to testify, not otherwise. The absence of awitness might invite adverse inference in certain circumstances, and so could affect the weight of the prosecution evidence, which might be evaluated in the judgment, but, with respect, in the present case, we can find no irregularity in not calling the victim to the witness stand.

Before embarking on Ms Ngole's third ground, we would first like to put it that there is no dispute that, by omitting to mention a particular paragraph of section 130(1) (2) of the Penal Code, the charge offended section 135 (a) (ii) of the CPA in which reads as follows: -

> *Section 135(a) (ii) the statement of offence shall describe the offence shortly in ordinary language avoiding as far as possible the use of technical terms and without necessarily stating all the essential elements of the offence and, if the offence charged is one created by enactment, shall contain a reference to the section of the enactment creating the offence.*

In our view the citation of section 130(2) (a) instead of 130(2) (e) of the Penal Code was wrong, and fatal because, these two, carry different categories of rapes, and attract different penalties. Under section 130(2) (a) the minimum sentence is 30 years imprisonment, whereas under

section 130(2) (e), the prescribed penalty is life imprisonment. In this case, the lower courts imposed life imprisonment, believing that the appellant was charged under section 130 (2) (e) which was the correct one (See **JUMA MOHAMED v R** Criminal Appeal No. 272 of 2011 (unreported). But in fact he was charged under section 130(2) (a) – which reads as follows: -

> *"(a) Not being his wife or being his wife who is separated from him without her consenting to it at the time of the sexual intercourse."*

The charge sheet in this case alleges different particulars.

If in the course of the trial, the prosecution had realized this variance it would have moved the court to amend the charge sheet under section 234(1) of the CPA, where the appellant was entitled to corresponding rights listed under subsection (2) of the section. This analysis brings us to Ms Ngole's complaint, that there was variance between the charge sheet and the evidence of PW1, PW2 and PW3, with regard to the date of the commission of the offence. We agree. The insistence by PW2 and PW3 that the offence was committed on 17/2/2009 is at variance with the statement of the offence which alleges 7/2/2009 as the date the offence was committed. Short of applying the provisions of section 234 of the CPA,

the variance was incurably defective, because the appellant was prejudiced in his defence as demonstrated above.

The above analysis would have been sufficient to dispose of the appeal. But for the sake of completeness, we would also like to observe that it was not enough for the trial court to have merely found the accused "guilty as charged". Both Sections 235(1) and 312(2) of the CPA require that after hearing the prosecution and the defence, the court should either convict or acquit. "Finding Guilty" is therefore not sufficient. In a number of recent decisions pronounced by this Court, it has been held that in the case of convictions, the absence of such conviction renders the judgment invalid (See **SHABANI IDDI JOLOLO AND THREE OTHERS v R**, Criminal Appeal No. 200 of 2006 (unreported), **AMANI FUNGABIKASI v** , Criminal Appeal No. 270 of 2008 (unreported).

With all those defects, we think the proceedings and judgments of the two courts below cannot be spared as they are nothing but nullities. Exercising our revisional powers under section 4(2) of the Appellate Jurisdiction Act (Cap 141 – R.E. 2002) we revise and quash all the proceedings and judgments of the trial court and the High Court. We have toyed with the idea of ordering a retrial. However, in view of the nature

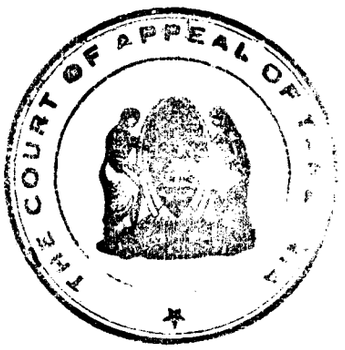
and quality of evidence on record, we think that it would not be in the interest of justice to do so.

We therefore order that the appellant be released from custody forthwith, unless he is lawfully so held.

DATED at **MBEYA** this 16th day of October, 2014.

E.A.KILEO

JUSTICE OF APPEAL



S. MJASIRI

JUSTICE OF APPEAL

S.A.MASSATI

JUSTICE OF APPEAL

I certify that this is a true copy of the original.

P.W.BAMPIKYA

SENIOR DEPUTY REGISTRAR

COURT OF APPEAL