IN THE COURT OF APPEAL OF TANZANIA
AT TABORA

(CORAM: MBAROUK, J.A., MASSATI, J.A., And MUSSA, J.A.)

CRIMINAL APPEAL NO. 259 OF 2012

ELIAS DEODIDAS ..... APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

(Appeal from the Decision of the High Court of Tanzania at Tabora)

(Songoro, J.)

Dated the 13th day of June, 2011
in
Criminal Appeal No. 147 of 2010

JUDGMENT OF THE COURT

17th & 19th June, 2014

MASSATI, J.A.:

The appellant was charged with raping a five year girl. The District Court of Tabora convicted and sentenced him to 30 years imprisonment, six strokes of the cane, and ordered him to pay T.shs. 300,000/= as compensation. He unsuccessfully appealed to the High Court, which despite being pressed upon by the respondent/Republic, to enhance the sentence to life imprisonment, confirmed the decision of the trial court, undisturbed. The appellant has now crossed over to this Court to challenge the findings of the lower courts.

At the trial court, it was not disputed that the appellant was hired to ferry FATUMA d/o SAID (PW1) to and from a pre primary school by means of a bicycle. The appellant was their neighbour. This went on smoothly for about two months. In the third month, MARIA d/o MRISHO (PW2), the victim's mother, noted a strange odour and discharge from the victim's body and also difficulty in sitting. On a closer examination, PW2 noticed that PW1's hymen was perforated. When interrogated, PW1 named the appellant as the one who had ravished her. It was then that PW2 reported the matter to the police where PW3 F 9890 D/STG KENEDY issued a PF3 to PW1 which was not, however, produced in evidence.

The appellant testified on oath and produced two witnesses. His defence was to the effect that he was hired to ferry PW1 by his bicycle, but that on 31.4.2004 (sic) he was arrested on charges of having raped PW1 but that he was innocent of the accusations. It was upon the totality of this evidence that the lower courts were convinced of the appellant's guilt.

The appellant appeared in person and adopted his memorandum of appeal which contained 6 grounds. These could, however, be condensed, into four. First, the trial and first appellate courts wrongly convicted him of

rape under section 130 (1) and 131(1) (2) of the Penal Code when he was charged only under section 130 of the Penal Code and the said charge sheet was never amended. Two, that, the lower courts erred in law to have relied on the evidence of PW2 and PW3, who did not prove when the offence was committed, and without any medical evidence. Thirdly, the lower courts wrongly relied on the evidence of PW1 which was received contrary to section 127 (2) of the Evidence Act. And lastly, that, the prosecution case was not proved beyond reasonable doubt. He opted to let the respondent/ Republic start before elaborating his grounds.

Mr. Rwegira Deusdedit, learned State Attorney, appeared for the respondent/ Republic. He fully supported the appeal. Firstly, he submitted that the charge sheet was defective, for not disclosing which category of rape, the appellant was charged with. That in itself may have been curable under section 388 (1) of the Criminal Procedure Act (the CPA), save that although the age of the victim was shown in the particulars of the charge, it was not proved in evidence. Secondly, the evidence of PW1, who was a child of tender age and found not to have understood the nature of an oath, was taken on affirmation, contrary to section 127(2) of the Act. So her evidence should be reduced to that of unsworn evidence, which as a

rape under section 130 (1) and 131(1) (2) of the Penal Code when he was charged only under section 130 of the Penal Code and the said charge sheet was never amended. Two, that, the lower courts erred in law to have relied on the evidence of PW2 and PW3, who did not prove when the offence was committed, and without any medical evidence. Thirdly, the lower courts wrongly relied on the evidence of PW1 which was received contrary to section 127 (2) of the Evidence Act. And lastly, that, the prosecution case was not proved beyond reasonable doubt. He opted to let the respondent/ Republic start before elaborating his grounds.

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matter of practice, required corroboration, and the evidence of PW2 and PW3 did not amount to corroboration, he argued. So he urged us to allow the appeal.

We think that this appeal rests on firm grounds. In the first place, the appellant was charged under section 130 of the Penal Code alone. Secondly the particulars of the offence did not indicate when was the offence committed or how many times it was committed. This was therefore in the nature of a floating charge against which we find it difficult to find that the appellant could effectively have defended himself. But thirdly, having noticed those defects, the trial court took it upon itself to amend the charge, silently, and there after proceeded to convict the appellant under section 130(1) and 131(1) (2) of the Penal Code. As the appellant rightly complains, at no time in the proceedings was the charge amended or substituted, nor was he asked to plead again to the new charge, if there was any.

The failure to cite the specific paragraph of section 130 with which the appellant was charged, let alone convicted under, was bad enough. In certain circumstances it could be held to be incurable under section 388 (1)

of the CPA. (See, **ISUMBA HUKA VS.R** Criminal Appeal no 113 of 2002 (unreported). But if it could be shown that the appellant was not prejudiced thereby, for example, where the appellant himself admits the commission of the offence in his defence, it may not be held incurable (see **MICHAEL MARTIN KATIBU VS.R** Criminal Appeal No. 208 of 2012 (unreported). In the present case, there was no cogent evidence of the victim's age on record and when exactly the offence committed was nor did the appellant admit to have committed the offence.

The trial court ignored the contents of the statement of the offence, in the charge sheet which cited section 130 of the Penal Code alone, and in its judgment, decided to amend it, and convicted the appellant under section 130 (1) and 131 (1); which were in themselves, not only inadequate but, also altered contrary to the law. Although section 234 (2) (a) of the CPA permits charges to be altered or amended, it also imposes a duty on the trial court to take a new plea to the new/altered charge. The effect of not complying with that requirement is fatal. It was held in **THUWAY AKONAAY V. R.** (1987) TLR 93, that:-

"It is mandatory for a plea to a new or altered charge to be taken from an accused person, failure to do so, renders a trial a nullity."

That omission therefore is an incurable irregularity (See also **SHABAN ISACK @ MAGAMBO MAFURU & ANOTHER V R.,** Criminal Appeal No. 192 & 218 of 2012 (unreported).

From the above, it is obvious that the omission in the charge sheet and the manner in which the two courts below handled it must have embarrassed and prejudiced the appellant in his defence as he did not know on which day or days to peg his defence. So the proceedings were incurably defective.

As if that was not enough, it is also true that the law was not adhered to, when taking the testimony of PW1. The record shows that at that time this witness was a child of tender years and the trial court rightly conducted a voire dire examination to determine her competency to testify. The trial court was satisfied that PW1 did not understand the nature of an oath. Nevertheless, the court ordered.

"She is therefore affirmed and states as follows."

This means, that although PW1 did not understand the nature of an oath, she nevertheless gave her evidence on oath. This was contrary to the dictates of section 127 (2) of the Evidence Act. The evidence of such witness should not have been taken on oath.

Mr. Deusdedit has suggested that such evidence should be reduced to the level of unsworn evidence, and as such, it requires corroboration. We agree with him on that point. We also agree with him that there was no such corroborative evidence on record.

The only other evidence on record is that of PW2 and PW3. PW2, (PW1's mother) just smelt a foul odour and inspected PW1 only to find that her hymen was perforated, and her private parts were committing a revolting smell. It was PW1 who told her that, it was the appellant who ravished her. Unfortunately, the evidence of PW1 itself requires corroboration. So, what she told PW2 cannot corroborate that it was the appellant who raped her.

Similarly, PW3 who was the investigator, just repeated what PW1 and PW2 had told him in their statements, and concluded:-

> *"I believe the accused committed the offence because PW1 implicated him when I interrogated her. PW2 said it was the accused only who used to carry PW1 to school."*

So, even PW3 relied on what PW1 had told him to come to his "*belief*", With respect, that does not amount to "independent evidence" of the quality that could corroborate that of PW1.

In the final result, and for both of the above grounds, we find that there is substance in this appeal. We therefore allow it. We quash the conviction and set aside the sentence and order of compensation. We also order that the appellant be released from prison forthwith, unless he is held there for some other lawful cause.

By way of postscript, we would wish to note for future guidance, that, since the sentence of 30 years imprisonment imposed by the trial court in this case, was *prima facie* illegal, it was wrong for the High Court

on first appeal, to decline to revise the sentence as impressed upon by the State Attorney, during the hearing of the appeal, because there was no cross-appeal. In such an appeal where, the High Court discovers that there has been an illegal sentence, its first duty is to revise it and impose a lawful sentence, and perhaps, but not necessarily, in keeping with the rules of natural justice, pass the appeal over to another judge of competent jurisdiction, to hear it.

That said, the appeal remains allowed.

DATED at TABORA this 19th day of June, 2014.

M.S. MBAROUK
JUSTICE OF APPEAL

S.A. MASSATI
JUSTICE OF APPEAL

K.M. MUSSA
JUSTICE OF APPEAL

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

E. Y. MKWIZU
DEPUTY REGISTRAR
COURT OF APPEAL