IN THE COURT OF APPEAL OF TANZANIA

AT MBEYA

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

CRIMINAL APPEAL NO.12 OF 2015

DAVID HALINGA.....APPELLANT

VERSUS

THE REPUBLIC.....RESPONDENT

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

(Msuya ,J.)

dated the 25th day of April, 2014

in

Criminal Appeal No. 45 of 2008

JUDGMENT OF THE COURT

19th &24th August,2015

MUSSA, J.A.:

In the District Court of Mbeya, the appellant was arraigned as hereunder:-

> ***"1st Count:***
>
> ***OFFENCE SECTION AND LAW:*** *Rape c/s 130 and 131(1) of the penal code cap. 16 vol. 1 of the laws as repealed and replaced by section 4 and 5 of the sexual offences special provisions Act No. 4/1998.*

PARTICULARS OF OFFENCE: *That DAVID S/O HALINGA charged on 24th day of June, 2006 at about 19:00 hrs at Jojo Village within Mbeya Rural District and Region of Mbeya, did unlawfully have carnal knowledge of one STELLA D/O ENEKIA a girl of 12yrs old and standard four pupil at Jojo primary school.*

2nd Count:

OFFENCE SECTION AND LAW: *Rape c/s 130 and 131(1) of the penal code cap. 16 Vol. 1 of the laws as repealed and replaced by section 4 and 5 of the sexual offences special provision Act No.4/1998.*

PARTICULAR OF OFFECE: *That DAVID S/O HALINGA charged on 24th day of June, 2006 at about 19:00 hrs at Jojo Village within Mbeya Rural District and Mbeya Region did unlawfully have carnal knowledge of one LOVENESS D/O MWANGWALE a girl of 11yrs old and standard four pupil at Jojo primary school."*

The appellant denied the charge, whereupon the prosecution featured six witnesses and two documentary exhibits to establish its claim.

The appellant testified on affirmation and featured his wife as a witness. After a full trial, the presiding District Resident Magistrate (K.J. Minja) found that the case for the prosecution fell short and, accordingly, the appellant was acquitted. Dissatisfied, the learned Director of Public Prosecutions (DPP) preferred an appeal to the High Court. After a full hearing, the first appellate court (Msuya, J.) allowed the appeal by the DPP in the wake of which the acquittal order was set aside and, in lieu thereof, a conviction was entered. Upon conviction, the appellant was handed down custodial sentences of thirty (30) years imprisonment with respect to each count which were, nonetheless, ordered to run concurrently. Aggrieved, the appellant presently locks horns with the verdict of the High Court in a memorandum of appeal comprised of six points of grievance. Ahead of our consideration of the issues of contention in this appeal, we should briefly reflect the factual background giving rise to the arrest, arraignment and the eventual conviction of the appellant.

The case for the prosecution was to the effect that on the date, time and place mentioned in the extracted charge sheet, the appellant contemporaneously ravished the two girls whose names are also mentioned in the charge sheet. More particularly, the two girls, namely, Stella Enekia (PW3) and Loveness Mwangwale (PW4), who gave a similar

account, told the trial court that, on the fateful day, around 7:00 p.m, they were strolling towards Jojo Village coming from Liusongo Village where they went to buy guava fruits. As they walked past a river, the girls sighted the appellant who was taking bath. Seeing them, the appellant ordered the girls to stop and, for whatever cause, he demanded from them a sum of shs. 500/=. When the girls replied that they do not have such amount of money, the appellant reduced the demand to a sum of shs. 100/=. After the girls pleaded that they do not have any amount of money, the appellant suddenly threatened them by wielding a machete. Next, he stripped Stella down to nakedness and forcefully inserted his manhood into her vagina. As the appellant was in the middle of the awful act, Loveness stood by, as it were, motionlessly watching the besetting of her colleague. Within a while, the appellant was through with Stella, whereupon he re-directed his bodily arsenal against Loveness whom he similarly ravished. Having accomplished his mission, the appellant warned the girls against revealing the incident and allowed them to walk on.

The prosecution version was further to the effect that the girls walked straight to the residence of a certain Isamba Donald who was then the secretary of the locality (Katibu wa Kitongoji). To this person, the girls disclosed the entire episode which had just befallen on them. The hamlet

secretary, in turn, took the girls to Loveness's mother, namely, Stella Sumamosi (PW1) and, later to the aunt of the other girl (Stella), namely, Mesiya Mwansiya (PW2), to whom he broke the sad news. The occurrence was then reported to Julius Kazoyote (PW5) the Village Chairperson and after deliberations, around 4:00 a.m or so, the village leaders in the company of PW1 and PW2 paid an impromptu visit at the appellant's abode where they securely apprehended him.

If we may revert back to the evidence of the two girls, it is noteworthy that, whereas Stella (PW3) introduced herself on the witness stand as a twelve year old, her colleague, Loveness (PW4) informed the trial court that she was thirteen years of age. Both were, so to speak, *"children of tender age,"* within the definition assigned to the expression under section 127 (5) of the Evidence Act, Chapter 6 of the Revised Laws (TEA). And yet, at the time of receiving their testimony, the trial court did not conduct the requisite *voire dire* examination. We shall find time, later in our judgment, to briefly remark on this aspect of the trial.

To conclude the prosecution version, there was further evidence from James Ligwa (PW6), the medical officer who attended PW3 and PW4. From the genital areas of both girls, the medical officer noted dead spermatozoa

as well as pus cell. From the two details, the doctor opined that the girls were recently sexually penetrated. His findings were posted on two PF3 which were adduced into evidence (exhibit P1 and P2) without demur from the appellant.

In reply, the appellant completely disassociated himself from the prosecution accusation. Nonetheless, he did not quite refute being apprehended by the Village authorities on the wee small hours of the 25th June, 2006. But, he insistently pleaded that he is being accused for an occurrence which he knows nothing about. His wife, Sala Nduta (DW1), similarly expressed her bewilderment following her husband's implication.

We have already intimated that, on the whole of the evidence, the trial court was unimpressed by the prosecution version. More particularly, the presiding officer found the account given by PW3 and PW4 to be incomprehensible, the more so as he could not synchronize with reason, the latter's act of not taking the chance to run clear of the scene at the time when the appellant was molesting her colleague. As we have, again, similarly hinted upon, the first appellate Judge was minded of a different view and accepted, as reliable, the testimonies of PW3 and PW4 of which she, additionally, found duly corroborated by the evidence of PW1, PW2,

and PW4. In the upshot, the appellant was convicted and, accordingly, sentenced, hence his present quest.

At the hearing before us, the appellant entered appearance in person, unrepresented, whereas the respondent Republic had the services of Mr. Achiles Paul Mulisa, learned Senior State Attorney. From the very outset, we prompted Mr. Mulisa to make preliminary comments, if any, apart from the points raised in the memorandum of appeal. With commendable frankness, the learned Senior State Attorney conceded that the charge sheet is defective for not specifying, in the statement of the offence, the category of rape under which the appellant was arraigned. The learned Senior State Attorney had reference to section 130(2) of the Penal Code (the code) which classifies the circumstances under which a male person commits the offence of rape under five descriptions, (a) to (e), which are neither here nor there in the indictment at hand. Nonetheless, in his initial contention, Mr. Mulisa urged that the defect is curable, the more so as the particulars of the offence were framed with clarity and, thereby, enabled the appellant to fully understand that he was being arraigned for statutory rape involving two under aged girls. To buttress the contention, he referred us the unreported Criminal Appeal No.32 of 2012- **Thomas Elias Vs. The Republic**. But, when his attention

was drawn to the fact that section 130 under which the appellant was arraigned is actually non-existent, Mr. Mulisa made an about turn and urged, instead, that the defect cannot be cured. Thus, in his refined submission, the learned Senior State Attorney supported the appeal on account of an incurably defective charge sheet and urged us to set the appellant at liberty. To this latter submission, the appellant, quite understandably, went along and did not wish to make a rejoinder.

For our part, we have purposefully extracted in full the charge sheet to clearly demonstrate that section "**130"** under which the appellant was arraigned is non-existent as it does not feature anywhere in the code. Rather, what is contained in the code is section"**130(1)"** which makes a general stipulation thus:-

> *"It is an offence for a male person to rape a girl or woman"*

Thus, quite apart from the fact that the category of rape was not disclosed, the appellant was, in the first place, arraigned under a non - existent provision of the law. We are keenly aware that not every defect in the charge sheet would vitiate a trial. As to what effect the defect could lead, would depend on the particular circumstances of each case, the overriding consideration being whether or not the defect worked to the

prejudice of the person accused. We should observe, in this regard, that **Thomas Elias** (*supra*) was decided on the basis that the statement of offence did not disclose the category of rape under which the appellant was arraigned. The non-existence of section 130 in the code was not raised and did not feature at all in the decision. Our particular concern here is in the reality that the appellant was arraigned under a non-existent provision of the law. The mode in which a statement of offence ought to be framed is clearly expressed under the provisions of section 135(a) (ii) of the Criminal Procedure Act, chapter 20 of the revised laws (CPA):-

> *"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;" [emphasis supplied.]***

Of recent, the court had to grapple with a similar problem in the unreported Criminal Appeal No. 253 of 2013- **Abdallah Ally Vs The Republic,** where it was observed:-

"...being found guilty on a defective charge, based on wrong and/or non-existent provisions of the law, it cannot be said that the appellant was fairly tried in the courts below...In view of the foregoing shortcomings, it is evident that the appellant did not receive a fair trial in court. The wrong and/or non-citation of the appropriate provisions of the Penal Code under which the charge was preferred, left the appellant unaware that he was facing a serious charge of rape....."

Corresponding remarks were earlier made in another unreported Criminal Appeal No. 201 of 2013 – **Marekano Ramadhani Vs The Republic** and; more recently, in **Kastory Lugongo Vs The Republic** – Criminal Appeal No. 251 of 2014 (unreported). Indeed, in all these decisions, the court held that the defective charge sheet unduly prejudiced the appellant in his defence. We are minded of the same view in the matter presently under our consideration, the more so as the referred provision is non-existent and cannot be said to have created any offence.

Having adjudged that the appellant was not fairly tried on account of an incurably defective charge sheet, we are constrained to intervene under the provisions of section 4(2) of the Appellate Jurisdiction Act, Chapter 141 of the revised Laws. In the result, the conviction and sentence meted out against the appellant are, respectively, quashed and set aside.

The learned Senior State Attorney did not press for a retrial and we are equally reluctant to make such an order much as, on the adduced evidence, the prosecution fell short of establishing its case. As hinted upon, the evidence of the two girls was received without recourse to a *voire dire* examination. Of recent, in the unreported Criminal Appeal No. 300 of 2011- **Kimbute Otiniel Vs The Republic**, this Court took the position that as to the consequences of the misapplication of the conduct of a *voire dire*, each case is to be determined on its own set of circumstances and facts. But, the court proceeded further to hold, *inter alia,* that:-

> *"....Where there is a complete omission by the trial court to correctly and properly address itself on sections 127 (1) and 127 (2) governing the competency of a child of tender years, the resulting testimony is to be discounted."*

Unfortunately, that is what exactly transpired in the matter under our consideration and, to say the least, the resulting testimonies of PW3 and PW4 are as good as useless. Without the evidence of the two girls, the remaining evidence is only skeletal and cannot hoist the prosecution accusation. As we have earlier intimated, the conviction and sentence cannot be allowed to stand on account of the incurably defective charge sheet. Having quashed the conviction and set aside the sentence, it is further ordered that the appellant should be released from prison custody forthwith unless if he is detained for some other lawful cause.

DATED at **MBEYA** this 21st day of August, 2015.

S.A.MASSATI
JUSTICE OF APPEAL

K.K.ORIYO
JUSTICE OF APPEAL

K.M.MUSSA
JUSTICE OF APPEAL

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

P.W. BAMPIKYA
SENIOR DEPUTY REGISTRAR
COURT OF APPEAL.