IN THE COURT OF APPEAL OF TANZANIA

AT MBEYA

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

CRIMINAL APPEAL NO. 62 OF 2012

JOSEPHAT SHONGO.....APPELLANT

VERSUS

THE REPUBLIC.....RESPONDENT

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

(Mmilla,J.)

dated the 1th day of August, 2012

in

Criminal Appeal No. 9 of 2010

JUDGMENT OF THE COURT

14th & 19th August, 2015

ORIYO, J.A.:

The appeal arises from the decision of the High Court of Tanzania sitting at Mbeya upholding a conviction of rape, sentence of thirty (30) years imprisonment, twelve (12) strokes of the cane and compensation of Shs T. 150,000/= imposed on the appellant by the District Court of Mbeya.

In their concurrent findings of fact, the courts below were satisfied that on 23rd August 2009, at Ilungu Village, Mbeya District, the appellant had carnal knowledge of one Oliva Jimu, a wife and a mother aged 30yrs, without her consent. At the trial the appellant did not deny to have had sexual encounter with PW1 but he raised a defence of consent as they were lovers and their encounter was not the first one.

His first appeal to the High Court was dismissed. He has come to the Court on a second appeal. In this Court, the appellant who was unrepresented as was the case in the lower courts, lodged a memorandum of appeal containing four (4) grounds of appeal.

All the same, the centre of his complaints is exhibited in grounds 3 and 4. In ground 3 he complains that his defence was not considered. Ground 4 challenges the lower courts for convicting him on a charge that was not proved to the required standard by the prosecution.

Ms.Catherine Paul, learned State Attorney, who represented the respondent Republic before us, vehemently resisted the appeal. In her opinion, the grounds of appeal are merely an afterthought on the part of

the appellant who did not deny in the courts below of having had carnal knowledge of PW1 on the material day, with her consent.

In conclusion, the learned State Attorney drew our attention to the sentence of 30years imprisonment imposed on the appellant who was only eighteen (18) years old, as of the date of the incident. She submitted that the sentence of imprisonment for 30 years was contrary to law.

On our part, this appeal need not detain us. The evidence is overwhelming that PW1 had carnal knowledge of PW1 on the material day. The only issue before us is whether it was consensual as alleged by the appellant.

The evidence on record shows that penetration, which is an essential element in sexual offences, was proved by both, PW1 and DW1 respectively.

We have noted that in convicting the appellant, the trial court relied on the caution statement of the appellant, (Exhibit P2), as authored by PW4, the police investigator. Briefly, the appellant admitted to have met PW1 on the fateful day when the appellant was carrying a bush knife

(panga) in his hand for his daily chores. Apparently, they knew each other from before. After a brief exchange of greetings, the appellant proposed a sexual encounter, which was initially rejected by PW1. In reaction, thereto the appellant grabbed her hand. PW1 sensed danger and proposed that the sexual encounter takes place near the road. After some discussion, PW1 agreed to have the sexual encounter in the nearby bush, which they did; hence the basis of the defence of consensual sex.

In their judgments, both lower courts accepted the evidence of PW1 that she refused the proposal for a sexual encounter from the appellant. Her further evidence was that despite the refusal, the appellant dragged her into the bush where he carnally knew her without her consent. It was this piece of evidence from the caution statement of the appellant, (Exhibit P2) that formed the basis of the conviction of the appellant.

Upon our reading of the trial court decision, we have not been able to come across the reasons assigned for accepting the first part of the caution statement that PW1 had initially refused to have a sexual encounter with the appellant and rejecting the last part of the statement that PW1 agreed to have consensual sex with the appellant in the bush.

When we invited the learned State Attorney for her views on the discrepancy, she was forthright that it was not proper for the trial court to evaluate the evidence in exhibit "P2" in piecemeal. It was her considered opinion that the trial court ought to have evaluated the evidence in the caution statement as a whole and either accept or reject the same. Unfortunately, the discrepancy was not brought to the attention of the first appellate court.

This being a second appeal, which lies to this court only on points of law, the Court rarely interferes with the concurrent findings of fact by the courts below. The Court will only interfere if on the face of it, it appears there are misdirections or non directions on the evidence by the first appellate court when the Court is entitled to look at the relevant evidence and make its own findings of fact; see **DPP Vs Jaffari Mfaume Kawawa** [1981] TLR 149 at 153, **Edwin Mhando Vs Republic** [1993] TLR 170 at 174, **Mussa Mwaikunda Vs Republic** , [2006] TLR 387, **Salumu Mussa Vs Republic,** Criminal Appeal No 1 of 20011, (unreported).

The crucial issue for our determination is whether there are midsections or non directions on the evidence to entitle our interference.

It has been observed earlier that exhibit "P2" was admitted without any objection from the appellant. When given an opportunity to cross examine the author thereof, the appellant declined to do so.

The first appellate court properly directed itself at page 54 of the record where it stated:-

> *"It is clear from page .... of exhibit "P2" that the appellant said he had sex with the complainant, but with her consent. This has been repeated in his defence. That being the case, it cannot be said that it amounted to a confession that he raped her."*

Having stated the correct position of the law regarding the prosecution evidence in exhibit "P2" and its probative evidential value, the first appellate court strangely proceeded to uphold the conviction of rape and sentence on the basis of section 127 (7) of the Evidence Act, Cap 16, (R.E. 2002). We say "*strangely*" because having found he had sex with the complainant, but with her consent, the first appellate Court went on to

evaluate the credibility of PW1 alone without Exh P2, as if it ceased to be part of the prosecution evidence.

If the prosecution genuinely believed that the appellant did rape PW1 as alleged in the charge sheet, why did it introduce the evidence of consensual sex at the same time, which automatically negated the offence of rape? Relying on exhibit "P2", PW1 was not raped; rather, they had consensual sex. We find that the trial courts erred in holding that exhibit "P2" was a confession by the appellant that he raped PW1. Grounds 3 and 4 of appeal could have sufficiently determined the appeal.

However, our decision will not be complete without reverting to the charge sheet which appears as hereunder:-

"IN THE DISTRICT/RESIDENT MAGISTRATES COURT OF

MBEYA

AT MBEYA

CRIMINAL CASE NO 158 OF 2009

REPUBLIC

VERSUS

JOSAFATI S/O SHONGO

CHARGE

STATEMENT OF OFFENCE

RAPE C/S 130 and 131 of Penal Code Cap 16 of the Laws.

PARTICULARS OF OFFENCE

JOSAFATI SHONGO on the 23rd day of August, 2009 at Ilungu Village within Mbeya Rural District in the Region of Mbeya did have carnal knowledge of one OLIVIA D/O JIMMU without her consent.

Dated at Mbeya this .....day of 2009

(Signed)
.....
STATE ATTORNEY"

BEFORE Hon. Sallum H/SDM
RESIDENT MAGISTRATE INCHARGE
03/09/2009

As depicted in the charge sheet, the appellant was generally charged under sections 130 and 131 of the Penal Code. It does not state the

relevant subsections under section 130 thereof upon which the charge was based.

It is now settled that an accused person must know the nature of the case facing him. In order to achieve this, the prosecution is duty bound to ensure that the charge discloses the essential elements of an offence. In this respect it was expected that the statement of offence would have specified the category of rape with which the appellant was charged; in terms of section 130 of the Penal Code; See **Charles s/o Makapi Vs Republic,** Criminal Appeal No 85 of 2012, **Marekano Ramadhani Vs Republic**, Criminal Appeal No 202 of 2013, (both unreported).

A charge sheet in **Simba Nyangura Vs Republic**, Criminal Appeal No 144 of 2088 (unreported), the appellant had been charged of rape contrary to sections 130 (1) and 131 of the Penal Code, similar to the charge sheet under consideration. This Court made the following observation:-

> *" ...in a charge of rape an accused person must know under which description (a) to (e) the offence he faces falls so that he can be prepared for his defence."*

The Court went further and stated:-

> *"...this lack of particulars unduly prejudiced the appellant in his defence." (Emphasis supplied).*

Similarly, in **Mussa Mwaikinda Vs Republic** (Supra) the Court observed:-

> *"The principle has always been that an accused person must know the nature of the case facing him. This can be achieved if a charge disclosed the essential elements of an offence ..... In the absence of disclosure, it occurs to us that the nature of the case facing the appellant was not adequately disclosed to him".*

The Court held the Charge to be defective. See also the Court's decisions in **Felix Patrice Vs Republic** Criminal Appeal No. 18 of 2012, and **Abdallah Ally Vs Republic** Criminal Appeal No. 253 of 2013, (both unreported).

And lastly, before we conclude, as it was correctly observed by the learned State Attorney, the appellant was eighteen (18) years old when the

sentence of thirty years imprisonment was imposed on him. The sentence of imprisonment was contrary to the express provisions of section 131 (2) of the Penal Code which provides the following:-

131.- (2) Notwithstanding the provisions of any law, where the offence is committed by a boy who is of age of eighteen years or less, he shall-

(a) if a first offender, be sentenced to corporal punishment only;

(b) if a second time offender be sentenced to imprisonment for a term of twelve months with corporal punishment;

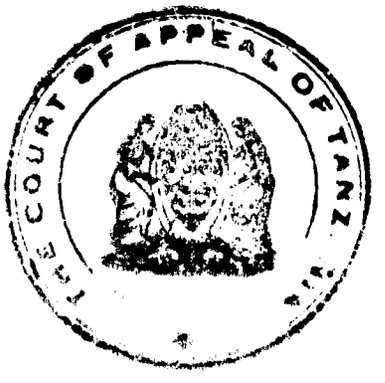
(c) if a third time and recidivist offender, he shall be sentenced to life imprisonment pursuant to subsection (1)".

Having accepted the evidence of the appellant without any objection that he was eighteen years old when he testified, the courts below erred in sentencing him to a term of 30 years in prison. The prison term was violative of the clear provision of section 131(2), of the Penal Code.

For the reasons we have given, we find the appeal to be meritous. We therefore allow the appeal. The conviction is quashed and the sentence of 30 years imprisonment, corporal punishment and monetary compensation are set aside. The appellant is to be released forthwith from prison unless he is otherwise lawfully held.

DATED at **MBEYA** this 18th 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