IN THE COURT OF APPEAL OF TANZANIA

AT MBEYA

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

CRIMINAL APPEAL NO.251 OF 2014

KASTORY LUGONGO.....APPELLANT

VERSUS

THE REPUBLIC.....RESPONDENT

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

(Chocha,J.)

dated the 25th day of March, 2014

in

Criminal Appeal No. 3 of 2013

JUDGMENT OF THE COURT

10th & 18th August, 2015

MUSSA, J.A.:

In the District Court of Mbarali, Sitting at Rujewa, the appellant was arraigned as hereunder:-

> ***"OFFENCE, SECTION AND LAW:*** *Rape c/s130 and 131 of the Penal Code, cap 16 of the laws R.E.2002 and amended by SOSPA No. 4/1998.*

PARTICULARS OF OFFENCE: *That KASTORY S/O LUGONGO charged on 8th day of May, 2012 at about 21:00hrs at Ihanga area within Mbarali District, Mbeya Region did have carnal knowledge with one AGNES D/O MAHENGE a girl aged 12yrs."*

The appellant refuted the allegation, whereupon the prosecution featured a total of four witnesses and two documentary exhibits to establish its claim. The alleged victim, namely, Agnes Mahenge (PW1), introduced herself as a twelve year old class VI pupil at Ibara Primary School. Her account was that she previously knew the appellant quite well as the latter runs a chipshop within the locality. On the fateful day, she actually saw the appellant standing at his doorstep as she (Agnes) was strolling past. Upon seeing her, the appellant abruptly grabbed and abducted the young girl into his dwelling house. Whilst inside the house, the appellant forcefully undressed the girl, following which he ravished her. Having accomplished the awful mission, the appellant allowed Agnes to proceed home after warning her that she would risk her own life in case she reveals the incident.

Agnes, who was bleeding profusely, disobeyed the appellant's warning as she disclosed the encounter to her grandfather, namely, Lucas Mahenge (PW2), immediately upon her arrival home. According to Lucas (75), his granddaughter arrived home relatively late, around 9:00 p.m. or so. Upon being told of the despicable occurrence, the grandfather, in turn, promptly took the victim to Rujewa Police Station onwards to Mbarali District Hospital for, respectively, a crime report and a medical check. Dr. Lundanda (PW4), the medical officer who examined Agnes noted that the young girl's hymen was perforated just as there were stained blood clots and bruises on her genital area. With this detail, so much for the prosecution version as unfolded in the course of the trial. It is noteworthy, however, that, for some obscure cause, there was no telling from the prosecution as to exactly when, where and how the appellant was apprehended.

In reply, the appellant was remarkably brief in his complete disassociation from the prosecution accusation. He confirmed that he knew both Agnes and Lucas and that, indeed, he was a chips vendor at the Ihanga locality. But, according to him, on the 29th April, 2012 he travelled to Songea where he attended the funeral of his grandfather and stayed

there up until the 12th May, 2012 when he arrived back. His account was, so to speak, that he was not at Rujewa on the date when the rape was, allegedly, perpetrated. Having so raised the defence of *alibi,* the appellant rested his case.

On the whole of the evidence, the presiding learned Resident Magistrate was impressed by the version told by the prosecution witnesses, more particularly, the testimony of the alleged victim of the sexual violence. As regards the appellant's defence, the Magistrate observed:-

> *"with regard to the fourth issue of defence of alibi, section 194(4) of the CPA cap 20 RE 2002 provides for the requirement of such defence to be raised orally or in writing on the first day of hearing of the case, but in the present case, it was raised at the defence case then, what the court can do? (sic). This situation was resolved in the case of Charles Samson VR (1990) No. 39 (CAT) together with the above cited section of law".*

In the upshot, the appellant was found guilty, convicted and sentenced to a term of thirty (30) years imprisonment with corporal punishment of five (5) strokes of the cane. The appellant was aggrieved through a **"memorandum of appeal"** but at the end of hearing, the first appellate court found no cause to vary the verdict of the trial court and accordingly, the High Court (Chocha, J.), dismissed the appeal in its entirety.

Still discontented, the appellant presently seeks to impugn the decision of the first appellate court in a memorandum which enlists six (6) points of grievance. At the hearing before us, the appellant was fending for himself, unrepresented, whereas the respondent Republic had the services of Mr. Joseph Pande, learned Principal State Attorney.

From the very outset, we prompted Mr. Pande to comment on the propriety of the charge sheet which was laid at the appellant's door. We were driven to that course by an apparent infraction on the face of the statement of offence. The learned Principal State Attorney readily conceded that the charge sheet was defective on account that the statement of

offence did not particularise the category of the offence of rape against which the appellant was arraigned.

Mr. Pande expounded that in every case where an accused person is indicted for rape under the provisions of the Penal Code, Chapter 16 of the revised laws (the code), the charge should particularize which, amongst the categories of rape itemized under section 130(2) (a) to (e) of the code, is intended in the indictment. But, the learned Principal State Attorney just as promptly rejoined that the defect did not work to the prejudice of the appellant much as, in the course of trial, he was fully made aware of the accusation facing him. For his part, the appellant quite understandably refrained any substantive comment and simply left the matter to be determined by the Court in the interests of justice.

As regards the appeal, the appellant fully adopted his memorandum and deferred his elaboration on it to a later stage, if need be, after the submissions of the learned Principal State Attorney. As it were, Mr. Pande supported the appeal mainly on account that there was a dearth of evidence from the prosecution with respect to how, if at all, the appellant was identified to be the ravisher. The learned Principal State Attorney had

reference to PW2's detail to the effect that, on the fateful day, Agnes arrived home around 9:00p.m which was shortly after the latter's alleged encounter with the appellant. Going by that detail, Mr. Pande charged that an issue necessarily crops out as to how the appellant was identified to be the culprit at that time of the night. And yet, he argued, the alleged victim did not buttress her implication of the appellant with any evidence as to the source of light which aided her recognition of the appellant, let alone its intensity. In the absence of clear evidence to that effect, the learned Principal State Attorney urged that it cannot be ascertained with certainty that the recognition of the appellant was unmistaken and, for that matter, he concluded, the conviction cannot be sustained. To this submission, again, quite understandably, the appellant had no rejoinder.

We propose to first address the issue pertaining to the propriety of the charge sheet which, as hinted upon, was raised by the Court *suo motu.* To begin with, in our view, Mr. Pande rightly conceded that from the way the statement of offence was framed in the charge sheet, it is not known under which category of rape the appellant was arraigned against. In this regard, we should go further and observe that the charge sheet is additionally undermined by an even more fundamental non-disclosure. We

have purposefully extracted in full the charge sheet to postulate, beyond question, that the appellant was arraigned under a non-existent provision of the law. Upon our perusal of the code it is noteworthy that section **'130"** under which the appellant was arraigned is no show. 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 a woman".*

More particularly, it is section 130(2) of the code which classifies the circumstances under which a male person commits the offence of rape under five descriptions (a) to (e) of which, as Mr. Pande rightly formulated, were not reflected in the charge sheet. But to reiterate what we have just stated, 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. 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.** Indeed, in both decisions the court held that the defective charge sheet unduly prejudiced the appellant in his defence. With respect to the learned Principal State Attorney, we are minded of the same view in the matter 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.

Nonetheless, we are reluctant to make an order for a retrial much as we take the position that, on the adduced evidence, the prosecution fell short of establishing its case. To say the least, the incident occurred at night but as rightly observed by the learned Principal State Attorney there was a complete dearth of material with respect to the identification of the appellant. Quite apart, it is also noteworthy from the trial proceedings that the appellant's defence was unfairly and fleetingly dispatched simply because he (appellant) did not furnish a notice in terms of section 194(4) of the Criminal Procedure Act, Chapter 20 of the revised Laws. Again, we have herein above extracted the Magistrate's remarks on this subject, in the first instance, to discount the distortion that section 194 (4) *"...provides for the requirement of such defence to be raised orally or in writing of at the first day of hearing of the case..."* The quoted extract from the trial courts' Judgment obviously distorts the relevant provisions pertaining to the defence of alibi as comprised in section 194 which we think it is instructive to reproduce them in full:-

> *"(4). Where an accused person intends to rely upon an alibi in his defence, he shall give to the court and the prosecution notice of his*

intention to rely on such defence before the hearing of the case.

(5). Where an accused person does not give notice of his intention to rely on the defence of alibi before the hearing of the case, he shall furnish the prosecution with the particulars of the alibi at any time before the case for the prosecution is closed.

(6). If the accused raises a defence of alibi without having first furnished the prosecution pursuant to this section, the court may, in its discretion, accord no weight of any kind to the defence".

On a proper construction of the foregoing provisions, it was held in **CHARLES SAMSON VS THE REPUBLIC** [1990] TLR 39: -

(i) The court is not exempt from the requirement to take into account the defence of alibi, where such defence has not been disclosed by an accused person before the prosecution closes its case;

(ii) Where such is not made, the court, though taking cognizance such defence, may in its

discretion accord no weight of any kind to the defence;

(iii) *Where the court takes no cognizance whatsoever of the alibi, such non-direction would amount to a mistrial and a consequential miscarriage of justice.*

Thus, although in the case under our consideration, the appellant, indeed, did not disclose the defence of alibi before the prosecution closed its case, it was improper for the trial to ignore it off-handedly as it did. In **CHARLES SAMSON**,(supra) the Court found there was a miscarriage of justice in the non-cognizance and ordered a new trial but, as we have already stated, a retrial is not quite a viable option in the situation at hand.

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.

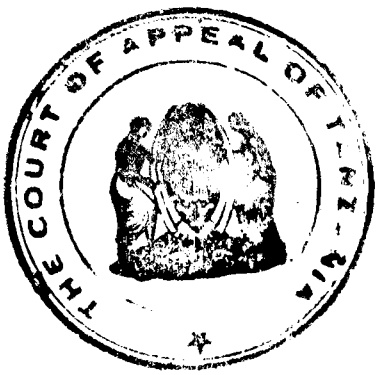
Before we pen off, we are constrained to make a few remarks, by way of postscript, with regard to an argument which was prompted *suo motu* by the first appellate Judge. As already hinted, in the High Court, the appellant sought to impugn the verdict of the trial court through a **"Memorandum of Appeal"**. Having heard both sides, in the course of compiling his decision, the learned first appellate Judge single –handedly prefaced his judgment with an argument as to whether or not the appeal was properly before him, the more so as it was presented via a **"memorandum"** as distinguished from a **"petition".** Incidentally, the issue, if at all it was, did not feature at the hearing of the appeal, rather, as we have already intimated, it was raised *suo motu* by the Judge. At the height of his enquiry, the Judge concluded thus: -

> *"An appeal presented to court by way of a memorandum is therefore"ipso facto" incompetent".*

Ironically though, the Judge proceeded to sit on the proceedings which he had just adjudged "*incompetent*" and, eventually, determined the appeal on the merits. To express at once, the approach adopted by the first appellate court was unprecedented and incomprehensible. Nonetheless, it is not our desire to dwell on the issue raised by the first

venture and, to cap it all, the presiding Judge, seemingly, ignored and vacated the finding of his own making and proceeded to entertain and determine the appeal on the merits. We, accordingly, leave the question open for the determination of the Court, if called to do so, at the appropriate moment.

DATED at **MBEYA** this 17th 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