IN THE COURT OF APPEAL OF TANZANIA

AT DAR ES SALAAM

(CORAM: MJASIRI, J.A., KAIJAGE, J.A. And MUSSA, J.A.)

CRIMINAL APPEAL NO. 270 OF 2013

CHARLES MLANDE.....APPELLANT

VERSUS

THE REPUBLIC.....RESPONDENT

(Appeal from the decision of the High Court of Tanzania at Dar es Salaam)

(Shangwa, J.)

dated the 18th day of June, 2013
in
HC. Criminal Appeal No. 35 of 2013

JUDGMENT OF THE COURT

10th November, 2015 & 11 February, 2016

MUSSA, J.A.:

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

> ***Statement of Offence:*** *Rape c/s 130 and 131 of the Penal Code Cap. 16 of the laws as amended by Act No. 130 (1) (e) and 131 (1) of the Sexual of Offence Special Provision Act 1998.*
>
> ***Particulars of Offence:*** *that Charles s/o Mlande charged on 16th day of April 2001 at*

unknown time at Mtakuja Village Wami Dakawa within the District and Morogoro Region did have unlawfully carnal knowledge of one Ester d/o Shabani the girl of 9 years."

The appellant denied the charge, following which the prosecution featured four witnesses and a Police Form No. 3 (exhibit P1) before closing its case. For his part, the appellant refuted the accusation upon sworn testimony of which he supplemented with his own police cautioned statement before he also rested his defence. At the height of the trial, the presiding Principal District Magistrate was impressed by the version told by the prosecution witnesses and, in the upshot, the appellant was found guilty and, accordingly, convicted as charged.

Upon conviction, he was handed down a sentence of thirty (30) years imprisonment and, in addition, he was ordered to be subjected to a corporal punishment of twenty four (24) strokes of the cane. On the first appeal, the High Court found no cause to vary the conviction but, taking into account the age of the alleged victim, as well as the provisions of section 131 (3) of the Penal Code, the sentence which was meted by the trial court was set aside and substituted with life imprisonment.

Dissatisfied, the appellant seeks to impugn the decision of the first appellate court in a lengthy memorandum of appeal which is comprised of seven (7) points of grievance. At the hearing before us, the appellant who was fending for himself, unrepresented, fully adopted the memorandum but deferred its elaboration to a later stage, if need be, after the submission of the Republic. On the adversary side, the respondent Republic had the services of Ms. Christine Joas, learned Senior State Attorney who was being assisted by Ms. Brenda Massawe, learned State Attorney. As it were, the learned Senior State Attorney declined to support the conviction and sentence for the reason that the charge under which the appellant was arraigned and tried was incurably defective. Ms. Joas also deplored the trial court for not conducting a *voire dire* test ahead of receiving the evidence of the alleged victim. For a better appreciation of the concurrent conclusions of the parties herein, it is necessary to briefly explore the factual setting giving rise to the arrest, arraignment and the ultimate conviction of the appellant.

As hinted upon, the case for the prosecution as unfolded by its four witnesses was to the effect that on the day and place alleged in the charge sheet, the appellant ravished the nine (9) years old Esther Shabani. The

alleged victim who was featured as PW1 informed the trial court that on the fateful day, around 10.00 a.m. or so, she was sent on an errand at a family *shamba* which is located at Mtakuja area, within Wami Dakawa Village. The evidence was to the effect that the little girl had gone there to guard the crops against destructive birds. At the *shamba*, Esther spent a mere half an hour and, having accomplished her mission, she departed towards home, apparently, unaware of what lay in store for her. As she walked towards her destination, Esther came across the appellant whom she previously knew quite well. As it turned out, the appellant was up to no good, much as he momentarily grabbed, fell to the ground and stripped down the little girl's underwear. He then carnally entered his manhood into her sexual organ and also penetrated her against the order of the nature. Having satisfied his beastly desire, the appellant cleared himself from the scene.

Upon arrival home, the victim disclosed the despicable incident to her grandmother, namely Celina Mwingu (PW3). Esther who sustained a host of bodily impairments was hospitalized for four months at Morogoro Government Hospital. Dr. Christopher Mgode (PW4), the medical officer who treated her noted that the little girl's vagina was torn, her hymen

perforated and the girl's hip bone was dislocated resulting uncontrolled discharge of faeces and urine. In sum, the medical officer's finding was to the effect that Esther had sustained a permanent defect.

Against the foregoing backdrop, on the 22nd April, 2001 the appellant was arrested by WP 375 Detective Sergeant Diana and, accordingly, formally arraigned. With this detail, so much for the prosecution version as unfolded during the trial.

In his sworn reply, the appellant was relatively brief. He completely disassociated himself from the prosecution accusation by asserting that on the 16th April, 2001 he spent the entire day at Morogoro Municipality till around 6.00 p.m. when he returned home from where he did not move out. He was arrested on the 22nd April, 2001 as he was on his way to Dakawa Village centre to have his radio repaired. In the upshot, the appellant reiterated that the prosecution accusation was sheer fabrication.

As already hinted upon, on the whole of the evidence, the trial court was more impressed by the prosecution version and, accordingly, rejected the defence case. We have already indicated the extent to which the appellant was found guilty, convicted and sentenced. As, again, already

intimated, on the first appeal, the High Court (Shangwa, J.) found no cause to vary the verdict of the trial court which was upheld save for the enhancement of the sentence to life imprisonment.

Before us, the learned Senior State Attorney commenced her submission with the contention that section 130 under which the appellant was arraigned is, in the first place, non-existent as the same does not feature at all in the Penal Code, Chapter 16 of the laws (the Code). Furthermore, she added, the statement of the offence did not particularise which amongst the several categories of rape itemized under section 130 (2) (a) to (e) of the Code was contemplated by the indictment. Ms. Joas urged that the irregular framing of the charge against the appellant cannot be cured and, thus, the shortcoming would alone suffice to allow the appeal.

Quite apart, the learned Senior State Attorney further urged, the evidence of the alleged victim who happened to be a child of tender age was taken without recourse to a *voire dire* examination. In the circumstances, Ms. Joas submitted that her testimony was improperly ingressed and, for that matter, the entire evidence of Esther (PW1) should

be expunged from the record. Once that is done, the learned State Attorney concluded, the remaining evidence is skeletal and would not suffice to uphold the conviction.

To begin with, we entirely associate ourselves with the contention of the learned Senior State Attorney to the effect that the charge sheet is incurably defective. Quite apart from the fact that the statement of offence did not disclose the category of rape which was contemplated against the appellant, the same was, in the first place, predicated under a non-existent provision of the law. We have purposefully extracted in full the charge sheet to demonstrate, beyond question, this disquieting aspect of the case for the prosecution. It is noteworthy that section **"130"** under which the appellant was arraigned does not feature anywhere in the code. Rather, what is contained in the code is section **"130 (1)"** which makes a general stipulation as follows: -

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

Thus, it is as clear as pikestaff that section **"130"** under which the appellant was arraigned is, after all, non-existent. The mode in which a

statement of offence ought to be framed is vividly 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].*

The bolded expression tells it all, in that, the statement of offence must contain a reference and, for that matter, a correct reference to the section of the enactment creating the offence. Quite obviously the statement of offence in the case at hand made an incorrect reference. We are, however, keenly aware that not every defect in the charge sheet would invalidate 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 infraction worked to the prejudice of the person accused. 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 in wrong and/or non-existent provisions of the law, it cannot be said that the appellant was fairly tried in the Court below... In view to 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 **Marekano Ramadhani vs The Republic** (supra) and, more recently, in Criminal Appeal No. 251 of 2014 – **Kastory Lugongo vs The Republic**; and Criminal Appeal No. 12 of 2015 – **David Halinga vs. The Republic** (both unreported). Indeed, in all these decisions, the Court held that the defective charge sheet unduly prejudiced the respective appellants. We

are minded of the same view in the matter presently under our consideration.

As regards the trial court's omission to conduct a *voire dire* examination ahead of availing itself the evidence of PW1, we also entirely subscribe to the submission of the learned Senior State Attorney to the effect that the omission was, in the circumstances, fatal. Of recent, in the unreported Criminal Appeal No. 300 of 2011 – **Kimbute Otiniel Vs The Republic**, a full bench of 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*: -

> *"... 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."*

As we have earlier intimated, apart from this fatal omission, the conviction and sentence cannot be allowed to stand on account of the incurably defective charge sheet. Having highlighted the shortcomings

which undermined the trial proceedings below, we are constrained to allow the appeal and, respectively, quash the conviction and set aside the sentence. In the final result, we order the immediate release of the appellant from prison custody unless if he is held for some other lawful cause. Order accordingly.

DATED at **DAR ES SALAAM** this 11th day of February, 2016.

S. MJASIRI
JUSTICE OF APPEAL

S.S. KAIJAGE
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