IN THE COURT OF APPEAL OF TANZANIA
AT TABORA

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

CRIMINAL APPEAL NO. 309 OF 2015

SYLVESTER ALBOGAST ..... APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

(Appeal from the Judgment of the High Court of Tanzania, at Tabora)

(Mwita, J.)

dated the 30th day of October, 2001
in
(DC) Criminal Appeals No. 63 of 2000

.....

JUDGMENT OF THE COURT

13th & 15th April, 2016

MASSATI, J.A.:

The appellant was aggrieved by the judgment of the District Court of Bariadi in the then Shinyanga Region, which was handed down on 9/10/2000. His appeal to the High Court was dismissed on 30th October, 2001. After obtaining extension of time from the High Court on 17/6/2015 he filed his Notice of Appeal to this Court on the same date. That Notice gave birth to the present appeal.

Before the trial court the following charge was laid before the Appellant's door:-

CHARGE SHEET

Name: *Sylvester s/o Albogast*

Age: *35 Yrs*

Tribe: *Jita*

Occp.: *Peasant*

Resd: *Nkololo Village*

***Offence Section and law**:- Rape c/s 130 and 131 (1) (3) of the Penal Code Cap 16 Vol. I of the Law as amended by sexual offence act No. 4/98.*

***Particular of offence**:- That Sylvester c/o Albogast charge on 11th day of January, 2000 at about 14.00 Hrs at Nkololo Village within the district of Bariadi in Shinyanga Region did unlawfully have a oanal knowledge to one Dotto d/o Naftal aged 17 Yrs without her consent.*

Station. Bariadi .....
Date: 13/1/2000 *P. P.*

After taking a plea of not guilty, the prosecution presented six witnesses, and one documentary exhibit, together with other pieces of physical evidence.

The prosecution case was that on 11/1/2000 at 7.45 p.m., PW1 **DOTTO d/o NAFTARI** who was going back home from a tuition class, was waylaid by the Appellant who was found at a house belonging to one Emmanuel and where George Mtebe had rented a room. He enticed her to enter into Mtebe's room where he raped her. The girl was 17. PW1 cried in pain, which attracted the attention of neighbours and that of her brother. PW2 **MAGOME PAUL** and PW3 **KIHONGO MNADA** where among the neighbours, while PW4 **SAMSON NAFTARI** was PW1's brother who also responded to the alarm. PW1's father reported the incident to the Village Executive Officer, **PERPETUA d/o MASUKA** (PW6) at 3.30 p.m. who ordered militiamen to bring the girl and the Appellant to her office. After some routine questions, she referred PW1's to a dispensary and ordered the arrest of the Appellant. Later, she issued another letter to refer PW1 to the Government Hospital, where she was attended to by PW5, **DR. ANANIA MADUHU**. PW5 attended PW1 the next day. It was his opinion that she was raped.

In his sworn evidence, the Appellant admitted that on that day at around 1.30 p.m. he was sitting outside a house where George Mtebe had a room together with other people, when he was taken by militiamen to PW6's

office. On being informed of the accusations, he denied, but was nevertheless escorted to Bariadi police station, where he was charged with the present offence. He denied committing the offence and challenged the evidence of all the prosecution witnesses. He suggested a theory that the charge was trumped up by PW4, (PW1's brother) on account of a friction which developed between them out of an allegation of theft facing PW4 and also, because, as a health officer, he had instituted proceedings against PW1's father for violating health regulations, and the father was charged at Nkololo primary court. So, he said that those could be the possible reasons for him to have been framed up.

After hearing the prosecution and the defence, the trial court found that the prosecution had proved its case beyond all reasonable doubts and so the accused was found guilty as charged and convicted him accordingly. The judgment of the trial court is prefaced thus:-

> *"The accused stand (sic) charged with rape c/s 130 (2) (e) and 131 (1) (3) of the penal code .....as amended by Sexual Offences Act No. 4/98."*

In this Court, the Appellant appeared in person, and has set forth four substantive grounds of appeal. The **first** ground is that, there was variance

between the charge and the evidence as to the time of the commission of the offence. He said that while the charge alleges the offence was committed at 14.00 hours, PW1 testified that she reached at the scene of crime at around 7.45 p.m. The **second** ground faults the prosecution for not calling George Mtebe, the tenant of the room in which the offence was allegedly committed. The **third** is that the evidence of the Assistant Medical Officer was inconclusive as to who raped PW1, because the blood found in her private parts was not proved to be human. The **fourth** ground is that there were discrepancies and contradictions in the prosecution evidence, which goes to suggest that the case may have been planted on him by George, and Emmanuel, the tenant of the room in question, and the house owner respectively. On account of those discrepancies, the Appellant prayed that his appeal be allowed.

Mr. Miraji Kajiru, learned State Attorney, who appeared for the respondent/Republic was not impressed and was all out to support the conviction and sentence. Reacting to the grounds of appeal, the learned counsel submitted as follows. To the **first** ground, he said that the variance as to the time of committing the offence was immaterial. To the **second** ground, Mr. Kajiru submitted that as the prosecution was not obliged to call

each and every witness, and since the prosecution case was sufficiently proved by PW1, PW2, PW3 and PW4, the non-calling of George did not justify the drawing of any adverse inference against the prosecution case. As to the value of medical evidence tendered by PW5, he submitted that it was cogent evidence, and consistent with the testimony of PW1, the victim. On the last ground, Mr. Kajiru admitted that there were some discrepancies and contradictions between the evidence of PW1, PW2, PW3 and PW6, but that they were minor, which did not detract the substance of the prosecution case. He submitted that the evidence of PW1 alone was sufficient to sustain the conviction. So, he prayed that the appeal be dismissed.

After hearing the parties, we asked the parties to address us on the propriety of the charge, which unfortunately escaped the scrutiny of the first appellate court.

Mr. Kajiru, conceded that the appellant was charged under section 130 and 131 (1) and (3) of the Penal Code, which did not specify which category of rape he was facing. In the trial court judgment, the court appeared to have "amended" or "altered" the charge sheet, because it showed that he was charged under S 130 (2) (e) and 131 (1) (3), which as demonstrated

above, was not what the original charge looked like. However, Mr. Kajiru was of the view that these irregularities were curable.

On his part, the Appellant, being a lay person, had nothing useful to say in relation to this legal point. He kept on pointing to the Court that he was in fact innocent and should be set free.

It is trite law that one of the fundamental principles of our criminal justice system is that, at the beginning of any criminal trial, the accused must be arraigned; which means that the court has to put the charge or information to him and require him to plead. Non-compliance with this requirement renders a trial, a nullity (See **NAOCHE MBILE vs R**. (1993) TLR. 253). But to commence lawful proceedings, the charge must disclose an offence known to law. A defective charge cannot commence a lawful trial (See **OSWALD MANGULA vs R,** Criminal Appeal No. 153 of 1994 and **HASSAN JUMANNE @ MSINGWA vs R**, Criminal Appeal No. 290 of 2014. (both unreported).

This is not however, to say that prosecutors cannot make mistakes in drafting charge sheets. But where there are such mistakes, the law has also provided a solution. The remedy, as suggested by this Court in **LEONARD**

RAPHAEL AND ANOTHER vs R, Criminal Appeal No. 4 of 1992 (unreported) is that:-

> *"Prosecutors and those who preside over criminal trials are reminded that when, as in this case, in the course of trial, the evidence is at variance with the charge and discloses an offence which is not laid in the charge, they should invoke the provisions of s. 234 of CPA 85 and have the charge amended in order to bring it in line with the evidence".*

In the present case, we have purposely set out in full the charge sheet that commenced the trial of the appellant. One must notice that he was charged under section 130 of the Penal Code. Unfortunately, that provision does not exist in law. What exists is section 130 (1), which makes a general stipulation that:-

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

So, not only was the category of rape that the appellant faced not disclosed, but he was also arraigned under a non-existent provision of the law. In the holding of this Court in **OSWALD MANGULA vs R**. (*supra*)

where a charge laid at the door of an accused person disclosed no offence known to law, all the proceedings conducted in the District Court on the basis of that charge were a nullity (See also **DAVID HALINGA vs R**, Criminal Appeal No. 12 of 2015; **DANIEL SHAYO vs R**, Criminal Appeal No. 234 of 2007 (both unreported).

Secondly, in the beginning of its judgment, the trial court showed that the Appellant was charged under "section 130 (1) (2) (e) and 131 (1) and (3)" of the Penal Code which is not what the appellant appeared to plead. This, with respect, amounted to an amendment or alteration of the charge sheet. However, as we hinted above, if the trial court felt the need to amend or alter the charge sheet, he should have proceeded to do so under section 234 of the CPA, as suggested in **LEONARD RAPHAEL AND ANOTHER vs R.** (*supra*). That section provides:-

> *"234 (1) Where at any stage of a trial, it appears to the court that the charge is defective, either in substance or form, the court may make such order for alteration of the charge either by way of amendment of the charge or by substitution or addition of a new charge as the court thinks*

necessary to meet the circumstances of the case unless, having regard to the merits of the case, the required amendments cannot be made without injustice, and all amendments made under the provisions of this sub-section shall be made upon such terms as to the court shall seem just.

(2) Subject to sub-section (1), where a charge is altered under that subsection.

(a) the court, shall thereupon call upon the accused person to plead to the altered charge; and

(b) the accused may demand that the witnesses or any of them be recalled and give their evidence afresh or be further cross-examined by the accused or his advocate and, in such last mentioned event, the prosecution shall have the right to re-examine any such witness on matters arising out of such further cross-examination.

(c) the court may permit the prosecution to recall and examine with reference to any alteration of or addition to the charge that may be allowed, any

witness who may have been examined unless the court for any reason to be recorded in writing considers that such application is made for the purpose of vexation, delay or for defeating the ends of justice.

(3) Variance between the charge and the evidence adduced in support of it with respect to the time at which the alleged offence was committed is not material and the charge need not be amended for such variance if it is proved that the proceedings were in fact instituted within the time, if any, limited by law for the institution thereof.

(4) Where an alteration of the charge is made under sub-section (1) or there is a variance between the charge and the evidence as described in sub-section (2), the court shall, if it is of the opinion that the accused has been thereby misled or deceived, adjourn the trial for such period as may be reasonably necessary.

(5) Where an alteration of the charge is made under sub-section (1) the prosecution may demand that the witnesses or any of them be recalled and give their evidence afresh or be further examined by the prosecution and the court shall call such witness or witnesses, unless the court for reasons to be recorded in writing, considers that such application is made for the purpose of vexation, delay or for defeating the ends of justice."

It is important to note here that in the present case, the trial court altered the charge after seeing that it was defective in both the substance and form which is squarely covered under subsection (1). If that is the case, subsection (4) requires that the defence be made aware because an accused person thereby retains the right to recall witnesses, whereas such right is also reserved for the prosecution in subsection (5). So, it was not a matter to be taken at the whims of the trial magistrate alone. (See also **GODFREY RICHARD vs R**, Criminal Appeal No. 365 of 2008 (unreported). So, it was highly irregular, for the trial court to have amended the charge at the judgment stage. In **No A.5204 WRD VIATORY PASCHAL vs R**, Criminal

Appeal No. 195 of 2006 (unreported), this Court held that such a judgment was a nullity.

With due respect to Mr. Kajiru therefore, the irregularities committed in the present case are not curable. They go to the root of the principles of fair trial, and have the effect of vitiating all the proceedings in the trial court and the first appellate court.

Without going into the merits of the appeal, we think that the above irregularities are sufficient to dispose of this appeal. In exercise of our revisional powers, we quash all the proceedings and judgments of the District Court and the High Court on first appeal. We also set aside the sentence.

The question, whether or not to order a retrial has exercised our minds considerably. After taking into consideration, the quality of the evidence on record, and the time that the appellant has already spent in custody, we do not think, it would be in the interests of justice to order a retrial. So, we order that the appellant be released from custody forthwith, unless he is otherwise detained for some other lawful cause.

Order accordingly.

DATED at **TABORA** this 14th day of April, 2016.

S. A. MASSATI
JUSTICE OF APPEAL

K. M. MUSSA
JUSTICE OF APPEAL

A. G. MWARIJA
JUSTICE OF APPEAL

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

P. W. BAMPIKYA
SENIOR DEPUTY REGISTRAR
COURT OF APPEAL