IN THE COURT OF APPEAL OF TANZANIA
AT TABORA

(CORAM: MBAROUK, J.A., LUANDA, J.A. And MZIRAY, J.A.)

CRIMINAL APPEAL NO. 218 of 2016

CHOBALIKO SOSPETER.....APPELLANT

VERSUS

THE REPUBLIC .....RESPONDENT
(Appeal from the decision of the High Court of Tanzania at Tabora)

(Mrango, J.)

dated the 4th day of May, 2016
in
Criminal Appeal No. 219 of 2015

JUDGMENT OF THE COURT

21st & 26th October, 2016

LUANDA, J.A.:

The above named appellant was charged, convicted and sentenced to 30 years imprisonment by the District Court of Kasulu at Kasulu for rape. He unsuccessfully appealed to the High Court, hence this appeal.

Briefly, the prosecution case is that, on 26/03/2015 at night time, Happsia Wilfred (PW1) was fast asleep in her house. She was alone. Suddenly she saw a man on her bed seated.

She querried the intruder as what he was after. She took a torch and flashed on his face. She recognized him as the appellant.

The appellant was a familiar face as he used to see him at a well where they drew water. The appellant did not reply to the question he was asked. Instead he got hold of her, bite her left hand finger and left ear. The appellant managed to tear her jacket and a short and raped her. The appellant ejaculated.

Having being satisfied, the appellant took to his heels leaving behind his shirt. His escape was a short lived one as he was chased and arrested by Jonas Mtima (PW3) following the alarm raised by PW1. According to PW3 he saw the appellant bare chest.

Perpetua d/o Timbalio (PW2) was among the people who responded to the alarm raised by PW1. On arrival, PW1 told them that she was raped. PW1 showed them her private parts, PW2 saw sperms. She also saw torn pants of PW1.

In his defence, the appellant denied to have committed the offence. He said on the material day he was at his home sleeping.

In this appeal, the appellant appeared in person; whereas the respondent/Republic had the services of Mr. Iddi Mgeni, learned State Attorney. The appellant filed six grounds of appeal. The same can be condensed into two grounds. One, the conviction of the appellant was based on a defective charge. Two, the prosecution did not prove its case beyond reasonable doubt.

At first, Mr. Mgeni supported the appeal on the ground that the charge sheet is incurably defective because the section cited did not indicate which category of rape the appellant had committed. He made reference to our decision in **Charles Makapi v. Republic**, Criminal Appeal No. 85 of 2012 (unreported) and section 135 (a) (ii) of the Criminal Procedure Act, Cap. 20 R.E. 2002 (the CPA). He then argued on the merits

of the appeal. But in the course of his submission he changed position as earlier said.

In short, he said the charge is defective but curable under section 388 of the CPA. The conviction was proper, he concluded.

On the other hand the appellant leave it to the Court to decide.

The appellant was charged with rape c/ss 130(1) (2) and 131 (1) of the Penal Code. S.130 (2) of the Penal Code listed five categories under which rape can be committed. In our case the victim of rape was 39 years of age. Since, she did not consent to the sexual intercourse, the charge ought to have included paragraph (a) which reads:

> *(a)* ***not being his wife,*** *or being his wife who separated from without her consenting to it the time of sexual intercourse.*

From above, it is clear that the charge sheet is defective. The question is whether the omission to cite paragraph (a) is fatal.

The case of **Makapi** cited supra is distinguishable with the present case. First, in that case the appellant was charged with rape without citing sub-rule and paragraph. The appellant in that case was charged under ss. 130 and 131 of the Penal Code. Second, there is no proof of the age of the victim of statutory rape.

Because of these defects the Court said:-

"We are increasingly of the view that the cumulative effect of the defects examined herein above leads us to find that section 388 of the Act cannot apply under the circumstances in this case to cure the defects."

The case of **Makapi** should not be taken as a panacea for all defects that will surface in a charge sheet. The question whether the defect is curable or not will depend on the circumstances of each case.

In this case the omission to cite paragraph (a) to s.130 (2) of the Penal Code did not in any way prejudiced the appellant as the appellant knew the charge he was facing as indicated in the particulars of the offence. In terms of s. 388 of the CPA the omission did not in any way prejudiced the appellant; he knew the charge he faced. It is curable.

Next is about evidence. The evidence on record is strong to ground conviction. PW1 explained in details how the appellant entered her house without permission; sat on her bed; how she was roughed and finally raped. PW1 said clearly that the appellant inserted his penis into her vagina and finally he ejaculated without her consent. The offence of rape is committed or completed when a male organ penetrates a female organ however slight without consent. In our case the appellant not only penetrated PW1's vagina but went further; he ejaculated. The offence of rape was committed. The appellant was arrested not far away from the scene of crime by a villager PW3 while running bare chest. He left the shirt at the homestead of PW1. PW1 explained to those who responded to

the alarm raised and actually showed them her private parts which had sperms. The prosecution case is credible and reliable showing that it was the appellant and no one else who raped the complaint (PW1).

The defence was properly rejected. It raises no any doubt leave alone reasonable one.

In fine, the appeal is dismissed in its entirety. The sentence of 30 years imprisonment is the bare minimum.

Order accordingly.

DATED at **TABORA** this 25th day of October, 2016.

M.S. MBAROUK
JUSTICE OF APPEAL

B.M. LUANDA
JUSTICE OF APPEAL

R.E.S. MZIRAY
JUSTICE OF APPEAL

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

E.F. FUSSI
DEPUTY REGISTRAR
COURT OF APPEAL