IN THE COURT OF APPEAL OF TANZANIA
AT TABORA

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

CRIMINAL APPEAL NO. 490 OF 2015

MAYALA NJIGAILELE.....APPELLANT

VERSUS

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

(Mgonya, J.)

dated the 26th day of October, 2015
in
DC Criminal Appeal No. 184 of 2015

JUDGMENT OF THE COURT

21st & 25th October, 2016

LUANDA, J.A.:

In the District Court of Shinyanga sitting at Shinyanga, the above named appellant was charged with two counts of rape allegedly committed upon two girls of tender years. He was convicted as charged and sentenced to 30 years imprisonment in respect of each count, and the sentences were ordered to run concurrently. The trial District Court also

ordered the appellant to pay 150,000/= as compensation to each victim.

Aggrieved, the appellant unsuccessfully appealed to the High Court of Tanzania (Tabora Registry). However, the sentences of 30 imprisonment imposed for each count were set aside. Instead, the High Court imposed a sentence of life imprisonment. But the record does not appear to indicate whether the sentence of life imprisonment was imposed in respect of each count. Be that as it may, the appellant was dissatisfied, hence this appeal. So, this is a second appeal.

The appellant has filed six grounds of appeal. The six grounds can be condensed into two grounds. One, the first appellate court upheld the conviction of the trial District Court without the plea of the appellant taken when the charge was substituted. Two, the evidence as a whole does not prove the prosecution case to the standard required.

When the appeal was called on for hearing, the appellant opted the respondent to start. Mr. Ildefonce Mukandara learned

State Attorney for the respondent/Republic at first resisted the appeal. But before he could go further, the Court wished to satisfy itself whether the charge sheet which is the basis of the appellant's conviction was proper. We did so because the charge sheet appears to be defective. Definitely this is not a ground of appeal. But this Court being the superior Court of the Land, has a duty to make sure that the courts below apply the laws properly.

After we pointed out the defects, Mr. Mukandara changed position and told us that the charge sheet is incurably defective. As to the citation of non-existence section i.e. Section 130(a) and 131 of the Penal Code, Cap. 16 R.E. 2002, Mr. Mukandara said those defects are not fatal at all. It is curable. He, however, expressed his sentiments that the victims of the crime were very young to remember the dates of the incidents. He prayed that the proceedings be quashed, sentence set aside and we order a retrial. The appellant had nothing to contribute to the point of law raised, understandably.

The charge sheet which has prompted us to pose that question reads as follows:

TANZANIA POLICE FORCE
CHARGE SHEET

NAME AND TRIBE OR NATIONALITY OF THE PERSON(S) CHARGED:

NAME: MAYALA NJIGAILELE

AGE: 26 YRS

TRIBE: SUKUMA

OCC: PEASANT

RESD: KINAMDAGULI

10/10: THOMAS S/O?

OFFENCE SECTION AND LAW: *Rape contrary to section 130(a) and 131 of the Penal Code Cap. 16 Vol. 1 of the Law as amended by sexual offences special provisions section 5 and 6 Act. No. 4 of 1998.*

PARTICULARS OF OFFENCE: *That MAYALA S/O NJIGAILELE is charged that on the lasty months 2002 at various times at Kimadaguli area within in the Municipality of Shinyanga did unlawfully several intercourses with one Restituta d/o Charles a girl of 10 years.*

2ND COUNT:

OFFENCE SECTION AND LAWS: *Rape c/s 130(a) and 131(1) of the Penal Code Cap.16 Vol.1 of the Law amended by sexual offences special provision section 5 and 6 Act No. 4 of 1998.*

PARTICULARS OF THE OFFENCE: *That Mayalla s/o Njigailele is charged that on the same date, time and place did unlawfully have several intercourse with one Menna d/o Charles a girl of 7 years.*

STATION: SHINYANGA

.....

PUBLIC PROSECUTOR

The charge sheet has a number of defects. Firstly, the section cited in both counts in the statement of the offence namely SS. 130(a) and 131 of the Penal Code, Cap. 16 RE.2002 are not in existence at all. That goes contrary to s. 132 of the Criminal Procedure Act. Cap -20 RE. 2002 (the CPA).

The section provides:-

> *"132. Every charge or information shall contain, and shall be sufficient if it contains, a statement of the* ***specific offence*** *or offences with which the accused person is charged, together with such particulars as may be necessary for giving reasonable information as to the nature of the offence charged."[Emphasis added].*

Secondly, the particulars of the offence do not indicate the dates the alleged rape were committed. The charge sheet should always indicate the date(s) on which the alleged offence was committed. The need to do so is not far to get- it will enable the accused know the case he is going to face and prepare himself for his defence.

In **Simon Abonyo V R,** Criminal Appeal No. 144 of 2005 (unreported) the Court said:-

> " *From the charge, the accused is made aware of the case he is facing with regard to* ***the time of the incident*** *and place so that he would be able to marshall is defence.* " [Emphasis added].

In yet another Case **Anania Turian V R,** Criminal Appeal No. 195 of 2009 (unreported) the Court made the following observation, we quote:-

> " *When a* ***specific date*** *of the commission of the offence is mentioned in the charge sheet, the*

defence case is prepared and built on the basis of that specified date. This defence invariably includes the defence of alibi. If there is a variation in the dates, then the charge must be amended forthwith and the accused explained his right to require the witnesses who have already testified recalled. If this is not done, the preferred charge will remain unproved and the accused shall be entitled to an acquittal as a matter of right. Short of that, a failure of justice will occur."

Again failure to indicate the time of the incident in the charge sheet goes contrary to S. 132 of the CPA reproduced supra.

Lastly, in both counts it is shown in the charge sheet the two girls had sexual intercourse with the appellant on **several occasions.** They did not state the number. If that is the case then in terms of s. 133(1) and (2) of the CPA, the appellant had committed a series of rape. So long as the offences were of similar character, each offence is required to have a separate

paragraph which in legal parlance is called count. S. 133(1) and (2) provides:-

> *"133 (1) Any offences may be charged together in the same charge or information if the offences charged are founded on the same facts or if they form or are a part of, a series of offences of the same or a similar character.*
>
> *(2). Where more than one offence is charged in a charge or information, a description of each offence so charged shall be set out in a separate paragraph of the charge or information called a count."*

The cumulative effect basing on the above defects renders the charge sheet incurably defective.

Mr. Mukandara prayed that we order a retrial after we quashed the proceedings. Normally an order of retrial is granted, in criminal cases, when the basis of the case namely, the charge sheet is proper and is in existence. Since in this

case the charge sheet is incurably defective, meaning it is not in existence, the question of retrial does not arise.

In the exercise of our revisional powers as provided under s.4(2) of the Appealate Jurisidction Act, Cap. 141, we declare the entire proceedings of both the trial court and the High Court nullity. The same are quashed, the conviction and the sentence set aside. The appellant to be released from prison forthwith unless he is detained in connection with another matter.

Order accordingly.

DATED at **TABORA** this 24th 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