IN THE COURT OF APPEAL OF TANZANIA
AT TABORA

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

CRIMINAL APPEAL NO. 180 OF 2015

NICHONTIZE ROJELI ..... APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

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

(Kaduri, J.)

dated the 5th day of April, 2011
in
Criminal Appeal No. 124 of 2007

.....

JUDGMENT OF THE COURT

12th & 18th October, 2016

MZIRAY, J.A.:

The appellant was charged in the District Court of Kibondo at Kibondo with the offence of rape c/s 130 and 131 (1) of the Penal Code Cap. 16. RE 2002 of the Laws as amended by section 5(e) and 6 of the Sexual Offences Special Provision Act No. 4 of 1998. He was convicted and sentenced to a prison term of 60 years. Aggrieved by the conviction and sentence, he appealed to the High

Court of Tanzania at Tabora which upheld the conviction but varied the sentence of 60 years imposed by the trial court and substituted the same with a sentence of 30 years imprisonment. Still aggrieved, the appellant has filed this second appeal raising six (6) grounds of appeal. All the same, the centre of his complaints is exhibited in ground 1 and 4 in his Memorandum of Appeal.

In ground 1 he is complaining that he was not properly charged, because the charge sheet was defective for not specifying the category of the offence he was charged with. Ground 4 challenges the lower courts for convicting him on a charge that was not proved to the required standard by the prosecution, that is, beyond all reasonable doubt.

At the hearing of the appeal, the appellant appeared in person, unrepresented, while the respondent/Republic had the services of Mr. Rwegira Deusdedit, learned State Attorney.

The appellant, however, chose to elaborate on his grounds of appeal after he heard what the respondent Republic had to say about his grounds of appeal. The learned State Attorney in

response to the grounds of appeal was in agreement that the charge sheet is incurably defective in that no specific enabling provision was referred to and that the provision of s. 130 of the Penal Code is non- existent. He pointed out that the charge sheet was not properly drawn so as to have enabled the appellant to understand the nature of the charge preferred against him and make an informal defence.

The learned State Attorney, however, informed this Court that in the course of trial there was a change of magistrates and that the successor trial magistrate proceeded with the trial without recording any reason for the transfer of the case. He said that this was not proper as it contravened the provision of section 214(1) of the Criminal Procedure Act, Cap 20 R.E. 2002 and that the irregularity was incurable. The learned State Attorney stated that under the circumstances and on the basis of the glaring irregularities, he could have prayed for retrial, but, still the evidence on record is scanty to ground the appellant's conviction for which, an order for retrial will not serve any useful purpose. In view of that, he asked us to invoke the Court's revisional powers

under Section 4(2) of the Appellate Jurisdiction Act, Cap 141 RE 2002 to quash all the proceedings of the lower courts and set the appellant free. On his part, the appellant agreed with the views expressed by the learned State Attorney, and had nothing useful to add.

We will have to start with the validity of the charge sheet. The charge sheet that was laid against the appellant and upon which he was convicted reads;

CHARGE SHEET

STATEMENT OF THE OFFENCE: *Rape c/s 130 and 131(1) of the Penal Code 16 Vol. 1 of the Laws as amended by Section 5(e) and 6 of the Sexual Offences Special Provision Act No. 4 of 1998.*

PARTICULARS OF OFFENCE: *That, Nichontinze s/o Rojeli is charged on the 29th day of April,2004 at 13.00 hrs at Nduta Refugees Camp within*

Kibondo District in Kigoma Region did have carnal knowledge one SHIMILIMANA D/O HELENA.

It is apparently clear that the age of the victim is not disclosed in the charge sheet but when giving evidence the victim was recorded to be 11 years old. According to her age, no doubt then, that the offence committed to a girl below the age of 18 years was a statutory rape. Statutory rape is created by Section 130 (2) (e) of the Penal Code which states:-

(2) A male person commits the offence of rape if he has sexual intercourse with a girl or a woman under circumstances falling under any of the following descriptions.

(e) with or without her consent when she is under eighteen years of age, unless the woman is his wife who is fifteen or more years of age and is not separated from the man.

Section 130 under which the appellant was arraigned is non- existent as it does not feature anywhere in the code, rather, what is contained in the code is Section 130 (1) which makes a general stipulation that:-

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

It is settled law that if the offence charged is one created by enactment, then it shall contain a reference to the section of the enactment creating the offence in terms of Section 135 (a) (ii) of the Criminal Procedure Act, Cap 20 R.E 2002 (CPA), which provides:-

> *"135(a)(ii).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 added].*

That being the position, the appellant ought to have been charged under the provisions of Section 130 (2), (e) and not under Section 130 of the Penal Code, which in fact, is non- existent. Non-citation of the appropriate provisions of the Penal Code under which the charge was preferred, left the appellant unaware of the charge he was facing; thus the appellant did not receive a fair trial in court. See **Abdallah Ally v. R,** Criminal Appeal No. 253 of 2013; **Marekano Ramadhani v. R,** Criminal Appeal No 201 of 2013 **(**both unreported).

As to the issue of change of magistrates, it is on record that while Mr. L. Lugakingira – DM recorded the evidence of PW1 and PW2, Mr. Ngovongo -SDM recorded the evidence of PW3 and DW1, thereafter he composed the judgment and there were no reasons recorded for the change of magistrates. This was contrary to section 214(1) which provides:-

> " *214 (1) Where any magistrate, after having heard and recorded the whole or part of or any part of the evidence in any trial or conduct in whole or partly any committal proceedings, is* ***for***

any reason unable to complete the trial *or committal proceedings or* ***he is unable to complete the trial or committal proceedings within a reasonable time****, another magistrate who has and who exercises jurisdiction may take over and continue the trial or committal proceedings, as the case may be and the magistrate so taking over may act on the evidence or proceedings recorded by his predecessor and may, in the case of a trial, and if he considers it necessary resummons the witnesses and recommence the trial or committal proceedings".*

[Emphasis added].

In **Priscus Kimaro v. Republic,** Criminal Appeal No. 301 of 2103 (unreported) this Court stated:-

"..... Where it is necessary to reassign a partly heard matter to another magistrate the reason for the failure of the first magistrate to complete must

be recorded. If that is not done, it may lead to chaos in the administration of justice. Anyone, for personal reasons could just pick up any file and deal with it to the detriment of justice. This must not be allowed."

(See also **Mary Richard Nzingura v. Republic,** Criminal Appeal No. 153 (B) of 2011 (unreported).

On that basis, it is necessary under the provision of section 214(1) of the CPA to record the reasons for reassignment or change of trial magistrates. It is a requirement of the law and has to be complied with. Since there is no reason on record in this case as to why the predecessor trial magistrate was unable to complete the trial, the proceedings of the successor magistrate were conducted without jurisdiction, hence a nullity. We therefore agree with the learned State Attorney that the irregularity was incurable.

Basing on that and on the fact as correctly submitted by the learned State Attorney that there is scanty evidence on record to sustain a conviction, we exercise our powers under section 4(2) of the

Appellate Jurisdiction Act [Cap 141-R.E. 2002] and revise all the proceedings of the two courts below and quash them. We make no order for retrial. We however direct that the appellant be released from custody forthwith unless, he is otherwise lawfully incarcerated.

DATED at **TABORA** this 15th 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