IN THE COURT OF APPEAL OF TANZANIA

AT MTWARA

CRIMINAL APPEAL NO. 157 OF 2016

SADATH SAID @ MANZI ..... APPELLANT

VERSUS

THE D.P.P. ..... RESPONDENT

(Appeal against decision of the High Court of Tanzania

at Mtwara)

(Mzuna, J.)

dated the 21st day of August, 2015

in

Criminal Appeal No. 20 of 2014

JUDGEMENT OF THE COURT

25th & 29th July, 2016

KAIJAGE, J.A.:

On 2/10/2013 the District Court of Ruangwa at Ruangwa (the trial court) handed down a judgment in which the appellant was found guilty and convicted of having committed the offence of rape upon a charge preferred as hereunder:-

"**OFFENCE, SECTION AND LAW**: Rape **c/s 131(1) (2)** of the Penal Code Cap. 16 R.E. 2002.

PARTICULAR OF OFFENCE:-

That Sadath s/o Said @ Manzi charged on **14th day of August, 2012** at about 16.00 hrs at Namikulo village within Ruangwa District in Lindi Region did have carnal knowledge to one Zuhura d/o Said a girl of 6 years old without her consent."

[Emphasis supplied].

In convicting the appellant, the learned trial magistrate stated the following, among other things:-

*"I hereby convict the accused person for raping PW1 on **unknown date** and time on August, 2012 at Namikulo...."*

[Emphasis supplied].

Following his conviction, the appellant was consequently sentenced to life imprisonment. He was aggrieved. His appeal to the High Court against both the conviction and sentence was dismissed, hence this second appeal predicated upon the following four points of grievance comprised in a memorandum of appeal:-

(i) *That, the Hon. Judge erred in law and fact by upholding conviction and sentence without considering that the prosecution did not prove the case beyond reasonable doubt.*

(ii) *That, the Hon. Judge erred in law and facts by upholding the conviction and sentence without considering that exhibits P1 and P2 were tendered by PW1 who was not a proper witness to tender the same.*

(iii) *That the Hon. Judge erred in law and fact by upholding the conviction and sentence without considering material discrepancies between PW1, PW2, PW3 and PW4 in respect of the date of the incident.*

(iv) *That, the Hon. Judge erred in law and facts by upholding the conviction and sentence by*

relying on the evidence of PW4 which was not conclusive.

Before us, the appellant appeared in person, unrepresented. He opted to adopt the aforementioned grounds of appeal, reserving his right of reply to the respondent counsels' submission in the event of his appeal being resisted. The respondent Republic, on the other hand, had the services of Mr. Abdulrahman Mohamed assisted by Mr. Juma Maige, both learned State Attorneys who took the position, at the outset, that they were in support of the appellant's appeal.

Before canvassing the grounds of appeal, Mr. Mohamed sought, and we accordingly granted him leave to raise and argue a decisive point of law touching on the implications of the appellant having been arraigned in violation of the explicit and mandatory provisions under section 135 (a)(ii) of the Criminal procedure Act, Cap 20 R.E. 2002 (the CPA).

Expounding on the issue he raised, Mr. Mohamed correctly submitted that the charge upon which the appellant was called upon to answer was incurably defective, the statement of offence having not specified a section

of the Penal Code creating the offence as required under section 135 (a)(ii) of the CPA. Underscoring the need for strict compliance with that section, he cited to us the decision in **MAREKANO RAMADHANI V's R**; Criminal Appeal No. 202 of 2013. On the basis of the said fundamental procedural irregularity, Mr. Mohamed opined that the appellant's trial was vitiated. We were thus accordingly invited to invoke our revisional powers under section 4(2) of the Appellate Jurisdiction Act, Cap 141 R.E. 2002 (the AJA) and proceed to nullify the proceedings of the two courts below.

Quite apart from the said procedural irregularity, Mr. Mohamed went ahead to submit that the appellant's 2nd and 3rd grounds of appeal have force and merit. He contended, firstly, that the PF3's (Exhs. P1 and P2) were wrongly admitted in evidence on account of the same having been improperly tendered by a prosecution witness (PW1) who never made the entries and signed them. Secondly, he acknowledged the fact that it was improper for the first appellate court to uphold, as it did, the appellant's conviction basing on the trial court's finding that the offence in question was committed "on unknown date and time on August, 2012," while the particulars of the charge specifically alleges that the appellant committed the same offence on 14/8/2012.

We shall commence our discussion by examining the provisions of section 135 of the CPA which deals with the mode in which offences are to be charged. Of more significance are the provisions of paragraph (a)(ii) of that section which reads:-

> *"S. 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 supplied]."*

On the basis of the foregoing cited provision of law and upon consideration of the contents of the charge which the appellant was called upon to answer, we have found ourselves in full agreement with the contention by Mr. Mohamed that in this case, the appellant was arraigned in violation of the mandatory provision of section 135 (a)(ii) of the CPA. In

other words, the statement of offence comprised in the charge sheet which we have reproduced hereinabove, does not contain a reference to the section of the Penal Code creating the offence. The statement of offence merely makes reference of section 131 (1) and (2) of the Penal Code which is a penalty provision.

Under the Penal Code, it is section 130(1) (a) to (e) which creates and defines various categories of rape. However, from the manner the charge was framed in this case, it is evident that the appellant was not called upon to answer a charge with respect to any offence known to the law. Noteworthy is also the fact that the trial court, in its judgement, did not specify the offence and the section of the Penal Code under which the appellant was convicted, a flagrant violation of section 312 (2) of the CPA which provides:-

> *"In the case of conviction the judgement shall specify the offence of which and the section of the Penal Code or other law under which, the accused is convicted and the punishment to which the accused is sentenced."*

Be it as it may, when faced with an identical problem of non-citation, in the statement of offence, of a section in the Penal Code creating the offence, this Court in **ABDALLAH ALLY V.R.** Criminal Appeal No. 253 of 2013 (unreported) observed:-

> *"...being found guilty on a defective charge, based on wrong and/or non-existent provision of the law, it cannot be said that the appellant was fairly tried in the courts below. In view of the foregoing shortcoming, 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 she was facing a serious charge of rape..."*

Again, more or less corresponding remarks were echoed thus in **OSWALD MANGULA V. R;** Criminal Appeal No. 153 of 1994 (unreported):-

> *"We wish to remind the magistracy that it is a salutary rule that no charge should be put on an*

accused before the magistrate is satisfied, inter alia, that it disclosed an offence known to law. It is intolerable that a person should be subjected to the rigours of a trial based on a charge which in law is no charge. It shall always be remembered that the provisions of section 129 of the CPA 1985, are mandatory. The charge laid at the appellant's door having disclosed no offence known to law, all the proceedings conducted in the District Court on the basis thereof were a nullity since you cannot put something on nothing."

While we fully subscribe to the remarks expressed in the above cited decisions of this Court, we shall proceed in this case to hold, in line with Mr. Mohamed's submission, that the appellant was not fairly tried on account of an incurably defective charge sheet. We are thus constrained to invoke our revisional powers under the provisions of section 4 (2) of the AJA. In the result, we nullify the proceedings of the two courts below, quash and set aside, respectively, the conviction entered and the sentence meted out against the appellant.

Mr. Mohamed had pressed for a retrial or an order which shall have the effect of leaving the fate of the appellant in the hands and the wisdom of the DPP who should then consider preferring a fresh charge or otherwise. On this, we wish to associate ourselves with the following instructive observation made in **FATEHALI, MANJI V. R;** (1966) E.A. 343:-

> *"In general, a retrial may be ordered only where the original trial was illegal or defective; it will not be ordered where the conviction is set aside because of insufficiency of evidence or for purposes of enabling the prosecution to fill in gaps in its evidence at the first trial ... each case must depend on its own facts and an order for retrial should be made where the interest of justice required it."*

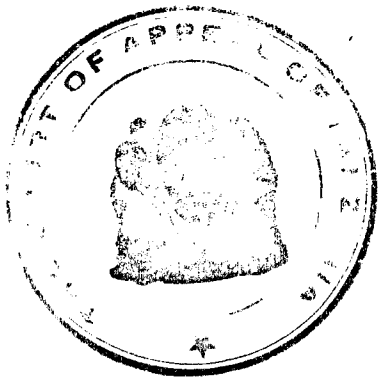
Having, in this case, scanned and subjected the entire proceedings of the two courts below to our close scrutiny, we agree with Mr. Mohamed that Exhibits P1 and P2 which were heavily relied upon in securing the appellant's conviction were improperly tendered and wrongly admitted in evidence. That apart, we also agree that the appellant was convicted for having committed

the offence of rape on unknown date and time in August, 2012, but the charge which was laid at his door specifically alleges that he committed that offence on 14/8/2012. It is now settled that the accused person should be convicted upon proof that the alleged offence was committed on a date mentioned in the charge. If there is a variation in the dates, then the charge must be amended accordingly to enable the accused to effectively defend himself. See, for instance, **ZOMBO s/o RASHID V. R;** Criminal Appeal No. 7 of 2012 (unreported). In this case, the trial court proceeded to convict the appellant of having committed rape on unknown date in August, 2012 without there being an amendment to the charge.

On the authority of **MANJI's case** (supra) and upon consideration of the patent shortcomings in the seemingly incriminating evidence against the appellant, we decline the invitation by Mr. Mohamed for making an order that will find the appellant in court, once again, being retried. To do so will enable the prosecution fill the glaring gaps in their case. It will certainly not be in the interest of justice to order a retrial.

Accordingly, we order that the appellant should be released forthwith from prison unless he is otherwise lawfully held.

DATED at MTWARA this 28th day of July, 2016.



N.P. KIMARO
JUSTICE OF APPEAL

S.S. KAIJAGE
JUSTICE OF APPEAL

S.A. LILA
JUSTICE OF APPEAL

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

E.Y. MKWIZU
DEPUTY REGISTRAR
COURT OF APPEA