IN THE COURT OF APPEAL OF TANZANIA
AT TABORA

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

CRIMINAL APPEAL NO. 217 OF 2016

ALEX ATHUMAN ..... APPELLANT

VERSUS
THE REPUBLIC ..... RESPONDENT

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

(Mrango, J.)

dated on 4th day of May, 2016
in
DC. Criminal Appeal No. 247 of 2015

.....

JUDGMENT OF THE COURT

18th & 21st October,2016

MZIRAY, J.A.:

In the District Court at Kasulu at Kasulu, the appellant was charged with rape in breach of section 130 and 131 of the Penal Code, Cap. 16 R.E 2002. The particulars of the offence alleged that on 17/11/2014 at about 21.15 hours at Nyarugusu Refugees Camp within Kasulu District in Kigoma Region, the appellant raped one Zaina Abwe, a girl aged 7 years old.

The appellant was tried and found guilty and sentenced to 30 years imprisonment. His first appeal to the High Court was unsuccessful, hence this second appeal.

In brief, the prosecution case can be put in this compass. The appellant is a close relative of PW4 Msamvya Shabani who is the father of PW1 Zaina Abwe, the victim of the offence. They live in close proximity at Nyarugusu Refugees Camp in Kasulu. On the fateful night the appellant lured PW1 with biscuits and a pen and led her to a nearby latrine where upon he mercilessly ravished the poor girl. It was later discovered by PW2 Abwe Benjamin, the mother of Zaina, that the girl was raped PW1 named Alex, the appellant as the ravisher.

After the incident, PW1 was taken to a nearby hospital. It was PW3 Dr. Steven Simba @ Majesa who medically examined her. He confirmed that the girl was raped. According to the doctor's remarks in the PF3

tendered as exhibit, the vaginal wall of the victim was teared and co-joined the rectal wall. He termed the injury as grievous harm with a potential of becoming "maim". A surgical procedure had to be conducted to correct the damage and the victim had to remain in hospital for five days.

In his defence, the appellant denied to have committed the offence. He stated that he is implicated because he was at logger heads with PW4 after a conflict in a joint business transaction the two were undertaking. He asserts that the case against him is fabricated to put him in turmoil after that business misunderstanding. Commenting on the evidence of PW1, he stated that even if PW1 mentioned him by his name Alex, it could be another Alex altogether and not him, so there is a possibility of mistaken identity according to him.

In convicting the appellant, the trial court believed and relied on the evidence of PW1, PW2 and PW4 to be true and rejected the appellant's defence that the case

against him was fabricated due to sour relationship with PW4 after a wrangle in business transaction. These findings were endorsed by the first appellate court and dismissed the appellant's appeal in its entirety.

In his appeal to this Court, the appellant filed a Memorandum of Appeal with four grounds of appeal which basically challenges the charge sheet to be defective for citing wrong provisions of the Penal Code.

At the hearing of the appeal, when the appellant was given a chance to elaborate his grounds of appeal he opted to allow the learned State Attorney to submit first.

On his part, Mr. Rwegira Deusdedit, learned State Attorney for the respondent/Republic at the outset supported the appeal. He was in agreement with the appellant in his grounds of appeal that the charge sheet is incurably defective in that no specific enabling provision was referred to and that the provision of section 130 of the Penal Code is non- existent. Additionally, he pointed

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. He submitted that the charge sheet preferred against the appellant offended the mandatory provisions of section 135(a) (ii) of the Criminal Procedure Act, Cap. 20 R.E. 2002 (the CPA) which has insisted that if the offence charged is one created by enactment, then it should contain reference to the section of the enactment creating the offence. To underscore the point, the learned State Attorney referred us to the unreported case of **Charles Makapi V R,** Criminal Appeal No. 85 of 2012 (unreported).

Apart from the deficiencies pointed out in the charge sheet, the learned State Attorney added another discrepancy in the proceedings which appears at page 11 of the Record of Appeal to the effect that the record is silent to the proceedings in respect of the *voire dire* test conducted to PW1. It is submitted here that the trial court

made general conclusions that the child was not possessed with sufficient intelligence to give sworn testimony without first putting questions to her to test her intelligence. Without such questions, in his view, was contrary to the spirit in the section 127 (2) of the Tanzania Evidence Act and the holding in the unreported case of **Juma Fungwe V R,** Criminal Appeal No. 220 of 2013 (unreported). which had cited with approval this Court's decision (full bench) in **Kimbute Otiniel V R,** Criminal Appeal No. 300 of 2011 (unreported). He contended that as section 127 (2) of the Tanzania Evidence Act was not complied with, the effect of that non- compliance is to expunge the evidence of PW1 and if that is done the remaining evidence is hearsay and scanty to sustain a conviction.

In conclusion, the learned State Attorney submitted that the cumulative effect of non- compliance with section 135(a)(ii) of the CPA and section 127(2) of the Tanzania Evidence Act is to quash the conviction, set aside the

sentence and the appellant be set free. He accordingly prayed so.

On the part of the appellant, he fully supported the learned State Attorney's submission and insisted for his release from jail.

The point of departure in our discussion is on the validity of the charge sheet. The charge sheet that was laid against the appellant and upon which he was convicted reads;

CHARGE SHEET

NAME : ALEX S/O ATHUMAN

AGE: 20 YEARS

TRIBE : BEMBE

OCCP: REFUGEE

REL: CHRISTIAN

RESD: NYARUGUSU CAMP

STATEMENT OF OFFENCE:- Rape c/s 130 and 131 of the Penal Code Cap. 16 (R.E. 2002).

PARTICULARS OF OFFENCE:- That ALEX S/O ATHUMAN is hereby charged on 17th day of November, 2014 at about 21:15 hrs at Nyarugusu

Refugees Camp within Kasulu District in Kigoma Region did rape ZAINA D/O ABWE a girl aged 7 years old.

STATION: KASULU

DATE:21.11.2014. .....

PUBLIC PROSECUTOR

There is no doubt that at the time of the commission of the offence the age of the victim was 7 years old. With this age, undoubtedly the offence committed to the victim was statutory rape which is created by section 130 (2) (e) of the Penal Code. This section reads:-

> " *130 (2) A male person commits the offence of rape if he has sexual intercourse with a girl or woman under circumstances falling under any of the following descriptions.*
> *(a).....*
> *(b).....*
> *(c).....*
> *(d).....*
> *(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 ad is not separated from the man"

It is to be noted that section 130 (1) and 2(e) which creates the offence of statutory rape does not feature in the statement of offence of the charge which we have reproduced herein above. What we have is section 130 which apparently is non- existent in the Penal Code and section 130 (1) which makes a general stipulation that:-

" *it is an offence for male person to rape a girl or woman"*

As rightly pointed by the learned State Attorney, the correct provisions to have been cited were sections 130 (1) and 2(e) and section 131 (1) of the Penal Code. We agree with him and his submission that without incorporating these sections the statement of offence in a charge of statutory rape becomes defective. In the instant case, the prosecution side has failed to satisfy itself that the charge laid at the door of the appellant was

correct as it failed to meet the mandatory requirement of section 135 (a) (ii) of the CPA which states:-

> " *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].

As the charge sheet in this case failed to cite the appropriate provisions of the Penal Code, this anomaly left the appellant unaware of the charge he was facing thus the appellant did not receive a fair trial. See **Abdallah Ally V R,** Criminal Appeal No. 253 of 2013; **Marekano Ramadhani V R,** Criminal Appeal No. 201 of 2013 (both unreported).

Apart from the grounds of appeal raised by the appellant, Mr. Rwegira Deusdedit, learned State Attorney

raised a pertinent issue on the procedure adopted by the trial court in conducting the *voire dire* examination as reflected at page 11 of the Record of Appeal. The proceedings of 19/2/2015 in respect of the *voire dire* examination reads:-

> *"**Court:***
> *The intended witness herein is a child of tender age. Voire dire conducted as per section 127 (2) of the Evidence Act (Cap. 6 R. E. 2002).*
> *This Court found that the intended prosecution witness doesn't understand the nature of oath. However the same, who is in standard 1, Primary School persons (sic) sufficient intelligence to justify reception of her evidence. And the same understands the duty to speak the truth"*

After this purported *voire dire* examination, PW1 gave unsworn testimony. From the above proceedings we are of settled view that the trial court did not comply at all

with the mandatory provisions of section 127 (2) of the Tanzania Evidence Act.

Section 127 (2) states thus:-

> *"Where in any criminal cause or matter a child of tender age called as a witness does not, in the opinion of the Court, understand the nature of an oath, his evidence may be received though not given upon oath or affirmation, if in the opinion of the Court, which opinion shall be recorded in the proceedings, he is possessed of sufficient intelligence to justify the reception of his evidence, and understands the duty of speaking the truth".*

In the case at hand we see that the trial court made general conclusions that the child does not understand the nature of an oath but she is possessed of sufficient intelligence to justify the reception of her evidence. We have failed to comprehend the source of that conclusion because as per the record there is nowhere to show that there were some questions put to the child to test her

intelligence. In actual fact there was no *voire dire* examination conducted in this case. The trial court therefore failed to comply with the provisions of section 127 (2) of the Evidence Act.

The effect of non- compliance with these provisions has well been explained in the case of **Kimbute Otiniel V R,** Criminal Appeal No. 300 of 2011 (unreported). where the full bench held among others as follows:-

> *"Where there is a complete omission by the trial court to correctly and properly address itself on section 127(1) and 127 (2) governing the competency of a child of tender years, the resulting testimony is to be discounted".*

In the light of the above, we are settled in our minds that the unsworn testimony of PW1 was received in clear breach of the statutory provisions as a result is does not deserve to form part of the record in this case and the remedy available is to discount it, as we hereby do.

Having discounted the evidence of PW1, we find that the remaining evidence of PW2, and PW4 is of hearsay nature and scanty to sustain a conviction.

Having dealt with this appeal to this stage, we are satisfied that the cumulative effect of non- compliance with section 135 (a) (ii) of the CPA and section 127 (2) of the Tanzania Evidence Act is to allow this appeal. Accordingly, we quash the conviction and set aside the sentence. We order the appellant to be set free from prison forthwith unless otherwise lawfully held.

DATED at **TABORA** this 20th 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