IN THE COURT OF APPEAL OF TANZANIA
AT DODOMA

(CORAM: KILEO, J.A., ORIYO, J.A., And JUMA, J.A.)

CRIMINAL APPEAL NO. 589 OF 2015

MATHAYO KINGU..... APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

(Appeal from a decision of the Resident Magistrates' Court at Singida)

(Lema, PRM (Ext. J)

dated the 3rd day of December, 2015
in
Criminal Appeal No. 38 of 2015.

JUDGMENT OF THE COURT

15th & 18th April, 2016

JUMA, J.A.:

This second appeal originates from the Judgment of the District Court of Iramba District in which the trial Principal District Magistrate (G. Moshi-PDM) convicted the appellant, Mathayo Kingu, of the offence of rape contrary to section 130 (1) and 131 (e) of the Penal Code as amended by Sexual Offences (Special Provisions) Act, 1998, No. 4 of 1998. He was sentenced to life imprisonment plus twelve strokes of the cane. The particulars of the charge alleged that at about 23:00 hours on 23/6/2000 at

Kinampanda village in Iramba District of Singida Region, the appellant had sexual intercourse with a ten years old girl, Mwanjaa Andrew.

The appellant's first appeal was transferred to the Resident Magistrate Court of Singida under section 45 (2) of the Magistrates Courts Act, Cap. 11 where it was heard by the Principal Resident Magistrate, W.E. Lema on extended jurisdiction. That appeal was dismissed in its entirety prompting the appellant to prefer this second appeal.

The appellant and the complainant's mother, Anna d/o Yindi (PW1), were husband and wife. On the material day, the couple had a quarrel, whereupon the appellant chased his wife from the matrimonial home. She went to sleep over with neighbours. The appellant remained behind with his wife's three children from another relationship, including the complainant who was his step daughter.

The complainant gave unsworn evidence as PW2 after being subjected to a *voire dire* examination. She explained that when she retired to sleep with other children, the appellant spread the sleeping mat and

ordered her to sleep beside him. PW2 stated the appellant proceeded to rape her.

In his sworn evidence, the appellant denied the accusation that he had raped the complainant. Although he slept in the same house as the three children of his wife, he did not know the person who raped the complainant that night.

The memorandum of appeal which the appellant filed contains four grounds of appeal. The first ground faults the two courts below for acting on the evidence of a child of tender age whose evidence was not properly conducted in compliance with section 127 (2) of the Evidence Act, Cap 6 governing *voire dire* examination. In his second ground, the appellant discredits the way the two courts acted on the evidence of the complainant, without demanding appropriate corroboration. The third and fourth grounds of appeal fault the two courts below for failing to summon the medical officer who had examined and treated the complainant to come forward as a witness under section 240 (3) of the Criminal Procedure Act, Cap. 20.

At the hearing of the appeal, the appellant appeared in person while the respondent Republic was represented by Ms Judith Mwakyusa, learned State Attorney. When we called upon the appellant to submit on his grounds of appeal, he elected to let the learned State Attorney react first to his grounds of appeal, and he would come in later to offer his own response.

The learned State Attorney supported the appeal on basis that the charge sheet preferred against the appellant was fatally defective and could not sustain a conviction for any offence known in law. She premised her submissions from perspectives of section 132 of the Criminal Procedure Act, Cap 20 (CPA) to the effect that every charge is required in mandatory terms, to contain a statement of the specific offence or offences with which the accused person is to face in the trial. She submitted that by preferring a charge against the appellant under sections 130 (1) and 131 (e) of the Penal Code created confusion to the appellant on what offence in law he is facing. She explained that by citing only section 130 (1) of the Penal Code, the charge sheet is defective for failing to specify the distinct type of rape the appellant was scheduled to face in court. She pointed out none of

paragraphs (a) to (e) of section 130 (2) which specify distinct categories of offences of rape were included in the charge sheet.

The learned State Attorney gave an example of distinct type of the offence of rape committed against a girl of under the age of eighteen years, whose proper charging provision to be specified in the charge sheet is section 130 (2) (e). This specificity will serve to alert the accused person that he will face an offence where consent of the girl subject of rape is immaterial. By citing section 130 (1), the learned State Attorney argued, the appellant was denied his right to know the specific category of rape he was facing, the type of evidence he should lead in his defence and the evidence to expect from the prosecution witnesses. The relevant subsections (1) and (2) of section 130 provides:

> *130.-(1) It is an offence for a male person to rape a girl or a woman.*
>
> *(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:*

(a) not being his wife, or being his wife who is separated from him without her consenting to it at the time of the sexual intercourse;

(b) with her consent where the consent has been obtained by the use of force, threats or intimidation by putting her in fear of death or of hurt or while she is in unlawful detention;

(c)with her consent when her consent has been obtained at a time when she was of unsound mind or was in a state of intoxication induced by any drugs, matter or thing, administered to her by the man or by some other person unless proved that there was prior consent between the two;

(d) with her consent when the man knows that he is not her husband, and that her consent is given because she has been made to believe that he is another man to whom, she is, or believes herself to be, lawfully married;

(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.*

The learned State Attorney also faulted the charge sheet for citing a non-existent section 131 (e). She submitted that the existing section 131, which prescribes various punishments for the various types of offences of rape, does not have clause (e), but has three sub-sections— (1), (2) and (3). She wondered why the trial court and the first appellate court finally imposed a sentence of life imprisonment on the appellant as if the charge sheet had properly cited provision of sections 130 (2) (e) and 131 (3) to justify the sentence of life imprisonment.

Ms. Mwakyusa argued that the age of the complainant has not been established by evidence to be under the age of ten years, to justify the sentence of life imprisonment under section 131 (3) of the Penal Code. On this line of submission the learned State Attorney placed reliance in our decision in **Solomon Mazala vs. R.**, Criminal Appeal No. 136 of 2012 (unreported) to submit that in the instant appeal before us, the mere fact that particulars of the offence have indicated that the complainant was a girl aged 10 years was not sufficient. She added that there must be further evidence from witnesses specifically proving the age of the complainant. Because this proof is missing, the complainant should not have been taken

to have been of under the age of eighteen to justify the sentence which the two courts below imposed.

On the strength of her submissions that the entire evidence of the prosecution was a source of confusion to the appellant because it was predicated on a defective charge arising from non-citation of proper provisions, the learned State Attorney urged us to allow the appeal.

The appellant had nothing useful to add in his reply, except to recall the way the actual age of the complainant was subject of heated dispute during his trial, a dispute which was neither resolved nor determined.

There is no doubt in our minds that in a criminal trial a Charge Sheet is the foundation of any prosecution facing an accused person and provides him with a road map of what to expect from the prosecution witnesses during his trial. So much so, section 132 of the CPA restates that foundation following compulsive words:

> *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]

For purposes of this appeal, we can only but agree with the learned State Attorney that the non-citation of proper provisions of the law specifying the type of rape and resulting sentence should the conviction be entered, prevented the appellant from appreciating not only what form of defence he should marshal, but the important elements of which type of the offence of rape he was going to face. The non-citation of proper provisions also prevented the appellant from appreciating the important element of punishment he would face if convicted.

The important role of the charge sheet to alert the accused person of the important elements of the offence he is facing was discussed by the Court in **Magesa Chacha Nyakibali and Yohana Josia Manumbu vs. R.**, Criminal Appeal No. 307 of 2013 (unreported) where the particulars of offence of armed robbery contrary to section 287A of the Penal Code did

not show out the important element of use of threat and to whom that threat was directed at. The Court stated:

> *'...As it is, this was a defective charge because important elements of the offence were not disclosed in order to allow the Appellants the opportunity to meaningfully understand it and to be able to prepare their defences. At this juncture, it is instructive to observe that in* ***Mussa Mwaikunda v Republic*** *[2006] TLR 387 this Court observed that the principle has always been that an accused person must know the nature of the case facing him and that this can be achieved if the charge discloses the essential elements of an offence. Restating the same principle of law in* ***Isidori Patrice v Republic,*** *Criminal Appeal No. 224 of 2007 (unreported) this Court stated:-*
>
> > *'...It is now trite law that the particulars of the charge shall disclose the essential elements or ingredients of the offence. This requirement hinges on the basic rules of criminal law and evidence to the effect that the prosecution has to prove that the accused committed the actus reus of the offence with the necessary mens rea. Accordingly, the*

particulars, in order to give the accused a fair trial in enabling him to prepare his defence, must allege the essential facts of the offence and any intent specifically required by law...'.."

In the instant appeal before us, citation of sections 130 (1) which is a general provision without specifying which type of rape under section 130 (2) the appellant was about to face, amounted to the failure to specify important elements of the type of the offence of rape. It was not enough for the particulars of the charge sheet to show that the complainant was a ten-year old girl.

In the instant appeal because the issue of the age of the complainant was disputed at the Preliminary Hearing, it required proof during the trial. But no evidence was led to prove the age of the complainant. Because the age of the complainant was not proved, the first appellate court misapprehended the evidence when she stated the following on page 45 of the record:

"...the age of the victim is very important to determine the proper punishment to impose. In this case the victim was 10 years by then. So the sentence is well within the

ambit of section 131 (3) of the Penal Code as amended by Sexual Offences (Special Provisions) Act No. 4/1998. The trial court was proper in imposing such a sentence.

For the above reasons the appeal is allowed. The conviction of the appellant is quashed and the sentence of life imprisonment and twelve strokes of the cane are set aside. The appellant shall be released from custody forthwith, unless he is otherwise lawfully held.

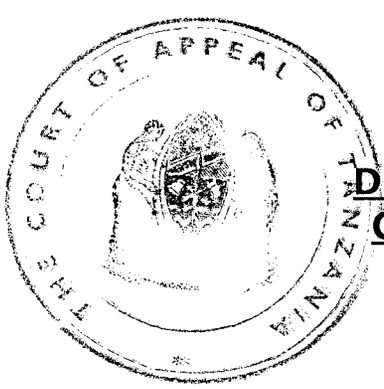
DATED at **DODOMA** this 16th day of April, 2016.

E.A.KILEO
JUSTICE OF APPEAL

K.K. ORIYO
JUSTICE OF APPEAL

I.H. JUMA
JUSTICE OF APPEAL

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



E.F. FUSSI
DEPUTY REGISTRAR
COURT OF APPEAL