IN THE COURT OF APPEAL OF TANZANIA

AT MTWARA

(CORAM: MBAROUK, J.A, MUGASHA, J.A AND MWANGESI, J.A)

CRIMINAL APPEAL NO. 204 OF 2016

GEROLD MORIS HUGO ---------- APPELLANT

VERSUS

THE REPUBLIC ---------- RESPONDENT

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

(Dr. Twaib, J.)

dated the 2nd day of March 2016

in

Criminal Appeal No. 46 of 2014

JUDGMENT OF THE COURT

04th & 10th July, 2017

MWANGESI, J.A.:

The appellant in this appeal was arraigned at the District court of Ruangwa in the Region of Lindi with the offence of rape contrary to the provisions of sections 130 and 131 (1) of the **Penal Code Cap. 16 R. E.**

2002. The particulars of the offence were to the effect that, Gerold s/o Moris Hugo charged on the 9th day of May 2013 at about 13:30 hours, at Juhudi 'A' village, within Ruangwa District in Lindi Region, did rape one Marisela d/o Kanius a woman of 90 years of age without her consent.

The learned trial Resident Magistrate who presided over the matter, upon hearing evidence from both sides was convinced beyond doubt that, the charge laid at the door of the appellant, had been established to the hilt. He did therefore convict the appellant as charged, and sentenced him to the mandatory term of thirty (30) years imprisonment.

Aggrieved by the decision of the trial court, the appellant did challenge it at the High Court of Tanzania at the Registry of Mtwara, where he was unsuccessful. Still undaunted, the appellant has come to this Court for a second appeal, armed with about five grounds of memorandum of appeal namely:

First, that, the Honorable Judge erred in law and in fact by upholding the conviction and sentence of the trial court without

considering material discrepancies between the records of the fact in respect of the date of the incident.

Secondly, that, the Honorable Judge erred in law and in fact by upholding the conviction and the sentence relying on the evidence of PW 3 (Doctor), when he testified before the court that, after having examined PW3 (victim) in her private parts, he observed bruises on her external and internal parts of her vagina without considering the fact that, the said bruises could be easily caused by blunt object or may be by penis (sic).

Thirdly, that, the Honorable Judge erred in law and in fact, by upholding the conviction and sentence relying on exhibit P2 (PF 3), which it was overtime (sic) to examine because the complainant testified before the court that, she was raped on the 09th May 2013 at 13:30 hours and the Doctor examined her on the 10th May 2013 and the same thing shows that, the evidence proved without any reasonable doubts and still the evidence of PW4, which she testified before the court as a Doctor that, she needed not to be examined if there were sperms because she had washed. The question that was

to ask is that, which hard evidence was believed by PW2 that, the bruises seen in the vagina of PW3 was caused by the appellant?

Fourth, that, the High Court erred in law and in fact, when it misdirected itself and overlooked the provisions set by the law.

Fifth, that, the High Court erred in law and in fact in failing to consider the defense of the appellant and thereby causing serious injustice on the part of the appellant.

When the appeal came for hearing, the appellant did enter appearance in person as he was not represented by an advocate whereas, the respondent/Republic had the services of Mr. Paul Kimweri learned Senior State Attorney. The Court did *suo motu* require the parties to address it regarding the propriety of the charge under which the appellant stood charged with at the trial court. On his part, the learned Senior State Attorney did submit before us to the effect that, upon critically observing the charge sheet, he was not supporting the conviction of the appellant as well the sentence that was meted to him. This was from the fact that, the charge against the appellant did not meet the mandatory requirement as

stipulated under the provisions of section 132 of the **Criminal Procedure Act, Cap. 20 R. E. 2002.**

He did submit that, under the above named provisions of law, it is a mandatory requirement for the charging section to clearly specify the particular section and paragraph/s that create the offence alleged to have been committed by the suspect as well as those which articulate the sentence. Looking at the charge sheet under discussion, the section creating the offence has plainly been put to be 130 and that stipulating the sentence to be 131 (1) both of the Penal Code. Nevertheless, section 130 has got about five sub-sections or so and therefore, it was not easy under the circumstances, for the appellant to understand the proper offence which he was facing so as to prepare well in his defense. The proper provisions of law under which the appellant ought to have been charged with according to the learned Senior State Attorney, is section 130 (1) and (2) (a) and section 131 (1) of the Penal Code. In the circumstances, the learned Senior State Attorney has opined that, the anomaly occasioned was fatal and rendered all the proceedings at the trial court as well as at the first appellate court to be nullity. In support of his averment, he has

referred us to the decision of this Court in the case of **Mathayo Kingu Vs. the Republic** Criminal Appeal No. 589 of 2015 (unreported).

Subsequent to the anomalies pointed out above, the learned Senior State Attorney has implored us to invoke our revisionary powers under the **Appellate Jurisdiction Act, Cap 141 R.E. 2002** (the Act), to nullify the proceedings of both lower courts, quash the conviction, and set aside the sentence of thirty years imprisonment which was imposed by the trial court and upheld by the first appellate court. The learned Senior State Attorney did rest his case by asking the Court to give the necessary directives regarding the way forward to this matter, as it may deem proper for the ends of justice.

On his part, the appellant had nothing useful to offer, on the obvious reasons that, the whole issue did involve legal technicalities of which he was not conversant with, and was not legally represented. The little which we could get from him is the fact that, we should do justice.

What stands for our deliberation and determination in the light of what has been submitted above is the issue whether the appellant was

properly charged at the trial court and therefore, fairly convicted and sentenced. In the case of **Mathayo Kingu** (supra), we held that, a charge sheet in a criminal trial is the foundation of any prosecution facing an accused person, as it provides him with the road map of what to expect from the prosecution witnesses during trial of his case. It is from such reality that, the provision of section 132 of the Criminal Procedure Act, which lays the foundation for charging suspects in criminal proceedings, has been couched in imperative form thus:

> *"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 stands charged, together with such particulars as may be necessary for giving reasonable information as to the nature of the offence charged."*
>
> [Emphasis supplied]

The statement of the offence under which the appellant was charged with and convicted of in the case which is the subject of this appeal did bear the following wording that is to say:

"Offence, section and laws - rape contrary to section 130 and 131 (1) of the Penal Code Cap. 16 R.E. 2002."

In its full wording with its sub-sections, the provision of section 130 of the Penal Code is clearly illustrated as hereunder in its own wording:

"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.

(3) Whoever–

(a) being a person in a position of authority, takes advantage of his official position, and commits rape on a girl or a woman in his official relationship or wrongfully restrains and commits rape on the girl or woman;

(b) being on the management or on the staff of a remand home or other place of custody, established by or under law, or of a women's or children's institution, takes advantage of his position and commits rape on any woman inmate of the remand home, place of custody or institution;

(c) being on the management or staff of a hospital, takes advantage of his position and commits rape on a girl or woman;

(d) being a traditional healer takes advantage of his position and commits rape on a girl or a woman who is his client for healing purposes;

(e) being a religious leader takes advantage of his position and commits rape on a girl or woman.

(4) For the purposes of proving the offence of rape–

(a) penetration however slight is sufficient to constitute the sexual intercourse necessary to the offence; and

(b) evidence of resistance such as physical injuries to the body is not necessary to prove that sexual intercourse took place without consent.

(5) For the purposes of this section spouses shall be deemed lawfully separated even if the separation is arranged by the family or clan members."

From such long list of sub-sections of section 130 as indicated above, each specifying a different nature of commission of the offence of rape, it is apparent that the mere citing of section 130 of the Penal Code without specifying the particular sub-section under which the appellant stood

charged with, did prejudice the appellant in that, it did not put him in a proper position to appreciate the nature of the offence which he was facing and thereby, prepare his defense well. When faced with a similar situation in the case of **Mussa Mwaikunda Vs Republic**, [2006] TLR 387, where some essential elements of the offence had not been clearly stated in the charge sheet, the observation of this Court was to the effect that,

> *"The defect of the charge in this case was not curable under section 388 (1) of the Criminal Procedure Act 1985 because threatening, an essential element of the offence of attempted rape was omitted from the particulars of the charge and the complainant did not say anywhere in her evidence that she was threatened by the appellant, and there was as such no room for saying that the appellant knew the nature of the case that was facing him; a charge that does not disclose any offence in the particulars of the offence is manifestly wrong and incurable".*

The stance taken in the above quoted case was reiterated in the cases of **Isidori Patrice Vs Republic** Criminal Appeal No. 224 of 2007 as well as **Magesa Chacha Nyakibali and Yohana Josiah Manumbu Vs**

Republic, Criminal Appeal No. 307 of 2013 (both unreported). In the same vein, we are of settled mind that, the charge under which the appellant stood charged with did suffer similar defects as those pointed out in the above cited cases, defects which did vitiate the proceedings of the trial court and thereby, rendering them nullity. In that regard therefore, the appeal to the High Court was as well nullity as no appeal could lie from nullity proceedings. To that end, in terms of the provisions of section 4 (2) of the **Appellate Jurisdiction Act,** we invoke our revisionary powers to quash the proceedings of both the trial court and the first appellate Court, quash the conviction and set aside the sentence that was meted by the trial court and upheld by the first appellate court.

The subsequent question which does crop from the foregoing position is, what is the way forward. The learned Senior State Attorney has asked us to issue an appropriate order that will ensure justice to both sides. We have had sufficient time to go through the evidence that was relied upon by the prosecution to establish their case during trial in the proceedings which we have quashed. After due consideration of the same, we are of the view that, need does not demand us to order for retrial of

the case. As a result, we order that, the appellant be released forthwith from custody and set at liberty unless lawfully held for any other justifiable cause.

Order accordingly.

DATED at **MTWARA** this 6th day of July, 2017.

M.S. MBAROUK
JUSTICE OF APPEAL

S.E. MUGASHA
JUSTICE OF APPEAL

S.S. MWANGESI
JUSTICE OF APPEAL

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

A.H. Msumi
DEPUTY REGISTRAR
COURT OF APPEAL