IN THE COURT OF APPEAL OF TANZANIA
AT TABORA

CRIMINAL APPEAL NO. 372 OF 2015

(CORAM: MBAROUK, J.A., MUGASHA, J.A. And MWAMBEGELE, J.A.)

LUBINZA NYOROBI ..... APPELLANT
VERSUS
THE REPUBLIC .....RESPONDENT
(Appeal from the decision of the High Court of Tanzania at Tabora)

(Mujulizi, J.)

dated the 1st day of June, 2009
in
DC. Criminal Appeal No. 147 of 2008

JUDGMENT OF THE COURT

18th & 22nd September, 2017

MBAROUK, J.A.:

In the District Court of Maswa at Maswa, the appellant, Lubinza Nyorobi was charged with the offence of rape contrary to sections 5(1) and 6(1) of the Sexual Offences Special Provisions Act, No. 4 of 1998. The trial court convicted the appellant and sentenced him to thirty (30) years imprisonment with twelve (12)

strokes of the cane. Aggrieved by the conviction and sentence, he preferred an appeal to the High Court of Tanzania at Tabora where his appeal was dismissed. Undaunted, hence this second appeal.

Briefly stated, the facts upon which the conviction of the appellant was grounded was as follows: On 7/7/2002, Sundi d/o Semela (PW1) who was a granddaughter of Wande d/o Ntemi (PW2) was grazing cattle of PW2 in grazing field. At mid-day, PW2 took lunch to PW1, but she only saw cattle grazing on crops, PW1 was nowhere to be seen. PW2 tried to look for PW1 and at some paces away, she spotted the appellant who was trying to put on his trousers. PW2 then saw PW1 crying and when she interrogated her, she said, she was ravished by the appellant. She examined her and found blood and sperms spread all over PW1's thighs. By that time, the appellant had already run away and abandoned his hat, a stick, a matchbox and tobacco in a piece of paper. PW2 resorted to sound an alarm, which attracted the attention of many

people including Kwalu s/o Sambu (PW4) who first reached at the scene of crime and saw the appellant running away. PW4 also found PW1 crying and was being assisted by her grandmother (PW2). Thereafter, the appellant was traced and arrested.

The record and facts show that after a *voire dire* examination conducted to PW1 (the victim) she testified that she knew the appellant before as he formerly lived at her grandmother's house and also married to her mother, hence he was the victim's step father. PW1 also testified that, at the field, she was grabbed by the appellant, who then pushed her down and undressed her and ravished her. After obtaining a PF 3, PW1 testified to have been taken to hospital. According to Dr. Mussa Mahulu (PW6) in his remarks in the PF3 (Exhibit P2), he noted that at the site of the vagina there were bruises at the minor majora and no hymen was seen. As to the weapon used, PW6 noted that,

the injury was caused by a blunt object and the extent of the injury was dangerous.

In his defence, the appellant simply categorically denied the charges against him.

In this appeal, the appellant appeared in person unrepresented, whereas the respondent/Republic was represented by Mr. Juma Masanja, learned Senior State Attorney.

At the hearing of the appeal, before going to hear the merits of the appeal, the Court raised a point of law as to whether the charge sheet was proper. The same reads as follows:-

"TANZANIA POLICE FORCE:

CHARGE SHEET:

NAME, TRIBE OR NATIONALITY OF THE PERSON CHARGED:

Accused:

Name: ..... Lubinza s/o Nyorobi

Tribe: ..... Sukuma

Age: ..... 55 yrs

Occ: ..... Peasant

Ress (sic):..... Kizungu Village Maswa.

Offence section and law: rape c/s 5 (1) and 6 (1) of the Sexual Offence Special Provision Act No. 4/1998.

Particulars of offence: That Lubinza s/o Nyorobi charged on the 7th day of July, 2002 at about 17.30 hrs at Kizungu Village within Maswa District in Shinyanga Region, did have canal (sic) knowledge with one Sundi d/o Semela a girl of 10 years old.

STATION ..... MASWA POLICE.

DATE: ..... 12/7/2002 **.....**

PUBLIC PROSECUTOR."

The learned Senior State Attorney promptly reacted by submitting that, the charge sheet in this case is defective for the reason that, instead of citing the enabling provisions in the Penal Code it has cited the amended provisions in the Sexual Offences

Special Provisions Act No. 4 of 1998 which was wrote. He said, that defect was never cured, hence that vitiates the whole proceedings at the trial court as well as those before the High Court.

For that reason, he urged us to invoke section 4(2) of the Appellate Jurisdiction Act and exercise our revisional powers and nullify all the proceedings at trial District Court and those before the High Court. He however, added that, he will not pray for re-trial as the appellant has been in prison since 7/2/2003.

On his part, being a lay person, the appellant had nothing useful to submit.

Reverting to the defect in the charge sheet raised by the Court, it is now settled that an accused person must know the nature of the offence/case facing him. In that regard, the prosecution is duty bound to ensure that the charge framed against an accused person discloses the essential elements of the offence. To bolster that contention in showing the importance of framing

correct charge, this Court in the case of **Marekano Ramadhani v. Republic,** Criminal Appeal No. 202 of 2013 (unreported) emphatically stated that:

> *"Framing of charges should not be taken lightly. We think it is imperative for the prosecution to carefully frame up a charge in accordance with the law. It becomes even more vital to do so where an accused is faced with a grave offence attracting a long prison sentence as it was the case in this matter."*

As to the mode in which an offence is to be charged, we have found it prudent to reproduce the provisions of section 135 of the Criminal Procedure Act (the CPA) which reads as follows:

> *"135. The following provisions of this section shall apply to all charges and informations and,*

notwithstanding any rule of law or practice, a charge or an information shall, subject to the provisions of this Act, not be open to objection in respect of its form or contents if it is framed in accordance with the provisions of this section:-

(a) (i) A count of a charge or information shall commence with a statement of the offence;

(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 pointed out earlier in the instant case, the charge framed against the appellant at the trial court showed that he was charged of Rape contrary to sections 5(1) and 6(1) of the Sexual Offences Special Provisions Act (the SOSPA). Even looking at the record of appeal at page 2 of the proceedings before the trial court, it was recorded that the charge was "Rape contrary to sections 5 (1) and 6(1) of the Sexual Offences Act No. 4 of 1998." But in essence, sections 5 and 6 have no sub-sections, hence quoting sections 5(1) and 6 (1) was wrong. However, it has to be born in mind that the SOSPA was meant only to repeal and replace sections 130 and 131 of the Penal Code through sections 5 and 6 of the SOSPA and did not create any substantive offence. It was therefore incorrect to lay the charge against sections 5 and 6 of the SOSPA. As clearly pointed out by this Court in the case of **Minani s/o Selestin v. Republic,** Criminal Appeal No. 66 of 2013 (unreported) where it was stated that:

"It is not correct therefore for the prosecution to lay a penal charge under section 5 of the Sexual Offences Special Provisions Act. The proper section under which a charge of rape should be laid is section 130 of the Penal Code, taking into account the proper sub-section applicable."

However, we wish to restate the position we took in **Minani s/o Selestin** (supra) that laying a charge against an accused person under sections 5 and 6 of the SOSPA is improper but not a fatal ailment; it is curable under section 388 of the Criminal Procedure Act, Cap. 20 of the Revised Edition, 2002.

We would have rested in peace if the case under scrutiny fell in all fours with **Minani s/o Selestin** (supra). However, there is another problem which has been found in the instant case which is that from the way the charge sheet was framed, it has not been stated under which of the categories listed in section 130 (2) (a)

to (e) of the CPA the appellant is alleged to have been committed with. However, a mere assumption collected from the particulars of the offence that, as far as the child was a girl aged 10 years old, that the offence fell under section 130 (2) (e) of the Penal Code was wrong.

As to whether the irregularity in framing the charge against the appellant is curable under section 388 of the CPA or not in the circumstances of this case, we agree with what has been decided in the case of **Marekano Ramadhani** (supra) that the defect cannot be cured. For that reason, we see it prudent to invoke our revisional powers under the provisions of section 4(2) of the Appellate Jurisdiction Act and nullify the proceedings of the two courts below, quash and set aside respectively the conviction entered and the sentence meted out against the appellant.

Finally, leaving aside those defects, having looked at the evidence as a whole, we are of the view that, we should leave the matter to the wisdom of the DPP to consider preferring a fresh charge or otherwise. However, currently the appellant is to be set free from Prison. It is so ordered.

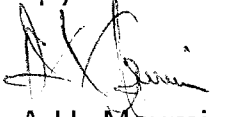
DATED at **TABORA** this 20th day of September, 2017.

M.S. MBAROUK
JUSTICE OF APPEAL

S.E.A. MUGASHA
JUSTICE OF APPEAL

J.C.M. MWAMBEGELE
JUSTICE OF APPEAL

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



A.H. Msumi
DEPUTY REGISTRAR
COURT OF APPEAL