IN THE COURT OF APPEAL OF TANZANIA
AT TABORA

(CORAM: LUANDA, J. A, MMILLA, J.A , And MWARIJA, J.A.)

CRIMINAL APPEAL NO. 110 OF 2016

SAID HUSSEIN..... APPELLANT
VERSUS
THE REPUBLIC .....RESPONDENT

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

(Mrango, J.)

Dated on 14th day of March, 2016
in
DC Criminal Appeal No. 223 of 2015
.....

JUDGMENT OF THE COURT

18th & 22nd August, 2017.

MMILLA, JA.:

The appellant, Said Hussein, was charged before the District Court of Nzega at Nzega in the Region of Tabora with the offence of rape contrary to sections 130 and 131 of the Penal Code Cap.16 of the Revised Edition, 2002 (the Code). He pleaded guilty. He was consequently convicted, and sentenced to a life imprisonment term. He unsuccessfully appealed to the High Court of Tanzania at Tabora, hence this second appeal to the Court.

The facts of the case were briefly that on 27.2.2005 around 4:00 pm, the appellant followed the complainant one Mariana d/o Mashemi at her farm in the outskirts of Uchama village where she had gone to pick sweet potato leaves for vegetable. On finding her there, the appellant, who was armed with a panga, charged at her and hit her with the panga in the head. The complainant staged a formidable resistance, but he overpowered her. He threw her down, removed her underskirt and started raping her, coupled with threats to kill her if she continued to resist. The appellant quenched his lust twice, after which he ditched her there and disappeared.

Later on, the complainant headed to the village and reported the incident to the village authorities, and subsequently to Nzega Police Station. The appellant was traced, arrested, and charged of that offence as it were. As already pointed out, he pleaded guilty and was sentenced to a life imprisonment term.

Before us, the appellant appeared in person and fended for himself, whereas the respondent Republic enjoyed the services of Mr. Deusdedit Rwegira, learned State Attorney. He did not contest the appeal on the basis of the first ground of appeal, out of the four grounds

which were raised, which alleges that the charge to which the appellant pleaded guilty was defective for failure to cite the proper provisions of law on which the charged offence was anchored.

In his brief but powerful submission, Mr. Rwegira contended that the appellant's plea was equivocal because it was wrong for the Republic to have charged him under sections 130 and 131 of the Code without citing the particular sub sections and/or paragraphs which could have shown the actual offence the appellant was alleged to have committed. He supported his stand by citing the case of **Isidory Patrice v. Republic**, Criminal Appeal No. 224 of 2007, CAT (unreported). For that reason, Mr. Rwegira urged the Court to allow the appeal.

We share Mr. Rwegira's concern, and we think this ground alone is sufficient to dispose of this appeal.

As already pointed out, the appellant was charged with rape contrary to sections 130 and 131 of the Code without more. What is clear is that the offence of rape is defined under section 130 (1) of the Code, and that sub sections (2) and (3) of that section provides circumstances under which the offence of rape can be committed. While

sub section (2) of section 130 of the Code stipulates different categories of rape from paragraphs (a) – (e) thereof, subsection (3) of section 130 as well provides for other categories of rape which likewise, are stipulated from paragraphs (a) – (e) thereof. Since there are many categories of rape under section 130 of the Code, it is indispensable, for those seized with the duty to prepare charges against accused persons in offences of this nature, to specify in the charge sheet the category of the allegedly committed rape.

Also, section 131 of the Code provides for punishment for those different categories of rape. This section too has subsections (1), (2) and (3), of which sub section (2) has paragraphs (a) to (c). In our view, this again, explains the reasons why it has often been emphasized by the Court that the punishment of each category of the offence must be specifically indicated in the charge sheet.

Also, as we said in the case of **John Martin Marwa v. Republic**, Criminal Application No. 20 of 2014, CAT (unreported), it is a legal requirement for a charge sheet worth its name to comply with the provisions of section 132 and 135 of the Criminal Procedure Act Cap. 20

of the Revised Edition, 2002 (the CPA). Section 132 requires offences to be specified in charge with necessary particulars. It provides that:-

> *"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."* [The emphasis is ours].

On the other hand, section 135, specifically clause (a), (i) and (ii) of the CPA emphasizes the mode in which offences are to be charged. That section provides that:-

> *"The following provisions of this section shall apply to all charges and information and, notwithstanding any rule of law or practice, a charge or 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 charged, called the 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."*** [The emphasis is ours].

There is a long list of cases in which the Court emphasized the need to indicate the specific provisions under which any particular offence is created, amongst which are those of **Mussa Mwaikunda v. Republic [2006] T.L.R. 387, Isidory Patrice v. Republic** Criminal Appeal No. 224 of 2007 CAT, **Simba Nyangura v. Republic**, Criminal Appeal No 144 of 2008 and **Peter Shangwe v. Republic,** Criminal Appeal No. 282 0f 2015, CAT (all unreported).

In the case of **Simba Nyangura v. Republic** (supra), the appellant was charged with the offence of rape contrary to sections 130 (1) and 131 of the Code. The Court observed that:-

> " *...in a charge of rape an accused person must know under which description (a) to (e) the offence he faces falls so that he can be prepared for his defence....this lack of particulars unduly prejudiced the appellant in his defence."*

On the basis of what we have stated in this judgment, the appellant's plea which was based on sections 130 and 131 of the Code without more was equivocal and prejudicial, as it amounted to pleading to a non-existent offence. Thus, the first ground of appeal has merit and we allow it.

Since he has served the period of about 12 years which almost half of the otherwise legal sentence of 30 years, we leave the matter in the wisdom of the Director of Public Prosecution (the DDP) on whether or not to re-charge him. However, should the DPP decide to re-charge him, and in case of conviction, we direct that the period he has already served be taken into consideration during imposition of sentence.

That said and done, we quash the conviction and set aside the sentence of life imprisonment. We order the appellant's immediate release from prison unless he is otherwise being continually held for some other lawful cause.

We accordingly order.

DATED at **TABORA** this 21st day of August, 2017.

B. M. LUANDA
JUSTICE OF APPEAL

B. M. MMILLA
JUSTICE OF APPEAL

A. G. MWARIJA
JUSTICE OF APPEAL

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

P. W. BAMPIKYA
SENIOR DEPUTY REGISTRAR
COURT OF APPEAL