IN THE COURT OF APPEAL OF TANZANIA
AT TABORA

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

CRIMINAL APPEAL NO. 111 OF 2016

KILALIKA RUBUYE..... APPELLANT

VERSUS

THE REPUBLIC..... RESPONDENT

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

(Mallaba, J.)

Dated the 7th day of March, 2016
in
DC Criminal Appeal No. 150 of 2015

JUDGMENT OF THE COURT

11th & 25th August, 2017.

LUANDA, JA.:

Initially the appellant KILALIKA s/o RUBUYE was charged in the District Court of Kibondo at Kibondo with rape c/ss 130 (1) (2) (c) and 131 (2) of the Penal Code Cap. 16 RE 2002 (the Code). It was alleged in the charge sheet, we reproduce verbatim as follows: *That on 15th day of September, 2012 at around 19:00 hrs. at Kasanda village within Kakonko District in Kigoma Region the accused (appellant) raped one Paulina d/o*

Sadock who was a "mad woman". The appellant pleaded not guilty to the charge. So, the case went on full trial.

At the end of the trial, the presiding magistrate whose title is new to us composed judgment. The title of the presiding magistrate reads "DRM" in short. We guess it is likely than not that it refers to a "District Resident Magistrate". If that is correct, then we were wondering whether there is such a title in the Magistrates' Courts Act, Cap. 11 RE 2002 (the MCA). To our best recollection the current MCA, we are aware of the amendment effected in 2013 vide Written Laws Misc. Amendment No. 3 of 2012, still retains five categories of magistrates as provided under section 2 of the said Act. The section reads as follows:-

> ""*Magistrate" means a primary court magistrate, a district magistrate or a resident magistrate and also includes a civil magistrate and an honorary magistrate."*

There is no such title "District Resident Magistrate" in the MCA. However, according to section 6 (1) (b) of the MCA a resident magistrate is also permitted to sit in a district court and preside over the proceedings. The section reads:-

"6 (1) Subject to the provisions of section 7, a magistrates' Court shall be duly constituted when held by a single magistrate, being-

(b) in the case of a ***district court****, a district magistrate or* ***a resident magistrate****."*

[Emphasis supplied].

It is clear that under the MCA when a resident magistrate sits in a district court, he retains his title as a resident magistrate. He does not acquire a new title or relinquish his title simply because he presides over the proceedings in a district court. The title of a "district resident magistrate" which is not recognized in the MCA is a misnomer. We do not wish to go further. Suffices to say that we should always be guided by law than whim.

Back to the case. When composing judgment, the trial magistrate was satisfied that the appellant penetrated his penis in the vagina of the victim of the offence of rape. However, because the victim was imbecile, he found that the appellant was guilty of defilement of imbecile c/s 137 of the Code. He did not say whether that offence was a minor to rape. Further, if the answer is in the affirmative, the trial magistrate did not also say he substituted it under what provisions of the law. Whatever the

position, the appellant was convicted with that offence and sentenced to 14 years imprisonment, the maximum sentence provided by the Code. The sentences is not correct because from the words "shall be liable to," the section does not impose an obligation upon the sentencing court to award that sentence. This was stated in **Opoya vs. Uganda** [1967] EA 752 as follows:-

> *"It seems to us beyond argument that the words "shall be liable to" do not in their ordinary meaning require the imposition of the stated penalty but merely express the stated penalty which may be imposed at the discretion of the Court. In other words they are not mandatory but provide a maximum sentence only and while the liability existed the court might not see fit to impose it."*

Since the sentence of 14 years is not the minimum to be imposed, then the trial magistrate ought to fall back to section 170 of the CPA in imposing a sentence of imprisonment not exceeding 5 years. Be that as it may, the appellant was dissatisfied with the finding and sentence of the trial court, he unsuccessful appealed to the High Court of Tanzania (Tabora Registry). Undaunted, he has come to this Court on appeal.

The prosecution case which was found credible by both lower courts was that on the material day Casiana Wenceslaus (PW2), the mother of the victim of the offence and Belita, her friend around 19:00 hrs were tracing her daughter who was a person with abnormal intelligence. In the course of tracing, Belita who did not feature as a witness, told PW2 that she had seen her daughter going towards the house of the appellant which was not far from where they reside. PW2 said they went to the said house. On arrival PW2 tried to call her daughter to no avail. It is the evidence of PW2 that they opened the door and entered. They found the appellant in the process of wearing his trousers. Her daughter was sitting on the floor wearing a skirt and blouse. Her underpants were on the floor. The appellant wanted to escape. The two blocked the appellant from escaping. Luckily PW2's husband gave a helping hand. The matter was reported to police. The police arrived and arrested the appellant. She of the offence was sent to hospital. She was attended by Dr. Stephen Masabo (PW4). PW4 opined that the victim was raped. The reason for saying so, according to PW4, was that he saw male sperms in the vagina of the victim who according to PF3 (Exh. P2) was 14 years of age.

On the other hand the appellant denied to have committed the offence. He said the case is a framed up.

In this appeal, the appellant was unrepresented whereas the respondent/Republic had the services of Ms. Upendo Malulu, learned State Attorney. Ms. Malulu supported the finding of both courts below and sentence.

The appellant has raised eight grounds of appeal. All eight grounds were directed at evidence. In sum the appellant said the prosecution did not prove its case beyond reasonable doubt.

Before we go further, we wish to point out that in the course of hearing this appeal, the Court wished to satisfy itself, assuming that what has been said in the prosecution is nothing but the truth, what offence the appellant had really committed? The issue we raised is not a ground of appeal. If there are doubts as to the proprietness of the move, we nave the following to say. The duty of the courts is to apply and interpret the laws of the country. The superior courts have the additional duty of ensuring proper application of the laws by the courts below (See **Marwa Mahende v. R.,** [1998] TLR 249). Ms. Malulu said the proper charge which ought to have been raised against the appellant was the initial

charge of rape under section 130 (2) (c) of the Code. She said the substitution made by the trial magistrate and upheld by the first appellate court was not proper. She said the appellant should have been found guilty of rape as spelt out under section 130 (2) (c) of the Code. The appellant who is a layman, not learned in law, had nothing to contribute.

Section 130 (2) (c) of the Code reads as follows:-

> *"130 (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:*
>
> *(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;"*

Our reading and understanding of this section is to this effect. That is it is an offence to have sexual intercourse with a woman whose consent was

obtained when she was of unsound mind or was in a state of intoxication induced by any drug administered by a man or some other person.

In our case there is no evidence to the effect that the victim of rape, though was of unsound mind, consented to have sexual intercourse while in that state of mind. We have shown in evidence how PW2 and her friend went to the house of the appellant. No one said or gave circumstances indicting the victim to have consented to sexual intercourse. It is our considered view that section 130 (2) (c) of the Code is not the proper section to have charged the appellant with. Section 137 of the Code is not applicable either. The section provides as follows:-

> *"137 Any person who, knowing a woman to be an idiot or imbecile, has or attempts to have unlawful sexual intercourse with her in circumstances not amounting to rape, but which prove that the offender knew at the time of the commission of the offence that the woman was an idiot or imbecile, is guilty of an offence and is liable to imprisonment for fourteen years, with or without corporal punishment."*

For an offence of defilement of an idiot or imbecile under section 137 to stick it must be shown the following:-

> *"(i) At the time of the commission of the offence of unlawful sexual intercourse or attempting to commit the said offence the accused person knew the woman was idiot or imbecile; and*
>
> *(ii) It must be shown the circumstances in which the offence was committed to have not amounted to rape."*

In our case the above ingredients of the offence of defilement of imbecile or idiot were not established at all. So, in both the offence of rape under section 130 (2) (c) as well as the substituted charge of defilement of imbecile or idiot under section 137 of the Code the prosecution failed to prove its case. Indeed the charge sheet and evidence are at variance. Now if the charge sheet and evidence on record are at variance is it proper to order a retrial?

Generally, a retrial is ordered where the original trial was illegal or defective; it will not be ordered where the conviction is set aside because of insufficiency of evidence or for the purpose of enabling the prosecution

to fill in gaps in its evidence at the first trial (See **Fatehali Manji v. R.,** [1966] EA 343).

In this case, the trial was neither illegal nor defective. What is amiss in this case is that the prosecution side failed to adduce evidence to prove its charge of rape under section 130 (2) (c) of the Code.

In **Mustafa s/o Said vs. R.,** [1969] HCD No. 146 the High Court of Tanzania made a pertinent observation in respect of failure on the part of the prosecution to prove its charge which we think is relevant to our case and which we fully subscribe to it. The High Court said:-

> *"The principle is that except where statutory provision has made it possible to convict on an alternative charge, if the prosecution fails to prove the charge preferred, the accused is entitled to be acquitted. That seems to me to be only fair; for the prosecution has enough powers with which to frame the charge properly."*

From the foregoing, it is clear that the prosecution failed to prove its case. Since the matter was raised by the Court, in the exercise of our revisional powers as they are provided under section 4 (2) of the Appellate Jurisdiction Act, Cap. 141 RE 2002 we quash the conviction and set aside

the sentence. We order the appellant to be released from prison forthwith unless detained in connection with another matter.

Order accordingly.

DATED at **TABORA** this 25th 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.

S. S. Sarwatt
DEPUTY REGISTRAR