IN THE COURT OF APPEAL OF TANZANIA

AT TANGA

(CORAM: LUANDA, J.A., MZIRAY, J.A. And NDIKA, J.A.)

CRIMINAL APPEAL NO. 133 OF 2016

RICHARD MAGINGA ..... APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

(An appeal against the conviction and sentence from the Judgment of the High Court of Tanzania at Tanga)

(Aboud, J.)

Dated the 4th day of April, 2016
In
Criminal Appeal No. 35 of 2014

JUDGMENT OF THE COURT

11th & 14th July, 2017

LUANDA, J.A.:

The appellant RICHARD MAGINGA was charged in the District Court of Handeni at Handeni with two counts namely rape and impregnating a school girl. We shall give in detail the provisions of law he was charged with at a later stage in this judgment.

When the charge was read over, the appellant is reported to have pleaded guilty to the charges. The trial District Court entered a plea of guilty in respect of both counts and then the facts were adduced. The

appellant was called upon to confirm or otherwise as to whether the facts were correct. The appellant admitted the facts to be correct. He was accordingly convicted and eventually sentenced to 30 years imprisonment for rape and 5 years imprisonment with 10 strokes for impregnating a school girl. The custodial sentences were ordered to run concurrently.

Aggrieved by conviction and sentence, the appellant unsuccessfully appealed in the High Court of Tanzania (Tanga Registry). Still dissatisfied, the appellant has come to this Court on appeal.

The appellant raised four grounds of appeal. For reasons which we are about to give, we will not reproduce them in this judgment.

At the commencement of the hearing of the appeal, the Court wished to satisfy itself as to whether the changes levelled against the appellant was proper. The charge sheet reads as follows:-

> ***1ST COUNT***
>
> ***STATEMENT OF THE OFFENCE:*** *Rape contrary to section 130(1) (e) and 131(1) of the penal code cap 16 vol 1 of the Tanzania Law (R.E. 2002)*
>
> ***PARTICULARS OF OFFENCE****:*
>
> *RICHARD S/O MAGINGA stand charge that on January 2014 at about night hours at Zizini area within Handeni*

District in Tanga region did have carnal knowledge of one ROSE D/O SEVERINE a girl of 17 years.

2ND COUNT

***STATEMENT OF THE OFFENCE**: Impregnating a school girl contrary to rule 5 of the Education Act No. 25 of 1978 read together with rules 2003.*

***PARTICULARS OF OFFENCE**: RICHARD S/O MAGINGA stand charge that on January 2014 at about night hours at Zizini area within Handeni District in Tanga region did impregnate ROSE D/O SEVERINE a form three pupil at Kwenjugo*

STATION: HANDENI

Sdg

PUBLIC PROSECUTOR

***DATE**: 25/06/2014*

Mr. Saraji Iboru, learned Senior State Attorney who represented the respondent, informed the Court that the charge sheet is defective. As to the 1st count, he said it is defective in that it does not include sub section (2) of section 130 of the Penal Code, Cap 16 RE 2002. He, however, went on to say that the omission is not fatal at all; it is curable under S. 388 of the Criminal Procedure Act, Cap. 20 R.E. 2002 (the CPA). In any case he

said, the omission did not occasion any injustice on the part of the appellant.

As regards the 2nd count, he said the charge is proper. At that juncture we were not in a position to say with certainty that the charge is incurably defective, we allowed Mr. Iboru to address us on the merit of the appeal as well. The appellant was also given opportunity to present his case. As we have discovered the charge sheet is incurably defective, we find no need for going into the merits of the appeal. We shall explain.

As can be seen from the charge sheet in the 1st count, the statement of offence does not contain sub- section (2) of S. 130 of the Penal Code. Sub-section (2) with its paragraphs enumerates categories of rape a male person can commit. Not only that the particulars of the offence do not specify the date on which the offence was alleged to have been committed. As regards the 2nd count, the statement of the offence as shown supra is not clear. Is it section 5 of the Education Act or rule 5 of the Rules? If it were the so called Rules, the title of the Rules ought to be stated very clearly. Like the 1st count, a specific date on which the alleged offence was committed was not stated either. It is our view that to say January, 2014

without specifying the period involved is not enough. The Charge Sheet must contain information, like the date, so as to enable the accused person understand the charge he is going to face so as to enable him prepare himself. Section 132 of the CPA insists on that. It reads, as follows:-

> *"32 (1) 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."*

As to what the statement should contain, s. 135 of the CPA gives the answer and it provides 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 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****."*

[Emphasis supplied]

From above, it is clear that the Charge Sheet has two shortcomings. One, the statements of offence in both counts are defective for failure to cite the

proper provisions of law. Two, the particulars of the offences are also insufficient in not stating the exact period the alleged offences were committed. Failure to cite the section creating an offence is tantamount to charging an accused person with a non-existing law. That omission is not minor defect at all; it is a major one as it goes to the very existence of the charge itself.

Mr. Iboru submitted that the defects are curable under s. 388 of the Criminal Procedure Act. With due respect to Mr. Iboru a charge sheet which in law is non-existent can never be cured. The reason for saying so is clear that you cannot cure something which is non-existent as to cure is to provide a successful remedy for an illness. A dead body is not capable of being cured.

As to the importance of narrating clearly the particulars of the offence to enable the accused person understand the case he is going to face, this Court said the following in **Isidori Patrice v. Republic**, Criminal Appeal No. 224 of 2007 (unreported):-

> *"It is now trite law that the particulars of the charge sheet disclose the essential elements or ingredients*

of the offence. The 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 charged 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."

From the foregoing, it is clear that the Charge Sheet is incurably defective. It cannot be salvaged by invoking s. 388 of the CPA. Since the Charge Sheet is incurably defective, it cannot be taken the appellant to have had pleaded to the charge, which did not disclose offences known to law. Exercising our revisional powers as they are provided under s. 4(2) of the Appellate Jurisdiction Act Cap. 141 R.E. 2002, we quash both the trial Court proceedings as well as those of the High Court and set aside the convictions and sentences meted out.

We have thought over the idea whether or not to order a retrial in view of the principles enunciated in **Fatehali Manji v Republic** (1966) EA

343. We have noted the appellant has spent 3 years in jail and taking the prevalence of these offences in our society, we think in the interest of justice it is appropriate, in the circumstances of this case, to order a retrial. We order the appellant to be tried *de novo* before another magistrate of competent jurisdiction.

Order accordingly.

DATED at TANGA this 14th day of July, 2017.

B. M. LUANDA
JUSTICE OF APPEAL

R.E.S. MZIRAY
JUSTICE OF APPEAL

G. A. M. NDIKA
JUSTICE OF APPEAL

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

E. Y. MKWIZU
DEPUTY REGISTRAR
COURT OF APPEAL