IN THE COURT OF APPEAL OF TANZANIA
AT TABORA

(CORAM: MUSSA, J.A., LILA, J.A., AND MWAMBEGELE, J.A.)

CRIMINAL APPEAL NO. 284 OF 2016

MUSTAPHA KIEGE ..... APPELLANT

VERSUS

THE REPUBLIC.....RESPONDENT

(Appeal from the Judgment of the High Court of Tanzania at Shinyanga)

(Makani, J.)

Dated the 10th day of June, 2016
in
DC Criminal Appeal No. 95 of 2015

.....

JUDGMENT OF THE COURT

5th & 7th September, 2017

MWAMBEGELE, J.A.:

Before the District Court of Kahama sitting at Kahama the appellant Mustapha Kiege was arraigned for the offence of rape. It was alleged that on 05.08.2015, at Nyasubi area within Kahama District in Shinyanga Region, he had sexual intercourse with a certain Salha Issah; a girl aged 23 years of age without her consent. He denied the charge and after a fully-fledged trial, he was found guilty as charged, convicted and awarded the

mandatory minimum sentence of thirty years in jail. His first appeal to the High Court proved futile hence this second appeal before us.

For reasons that will become apparent shortly we will not belabour to narrate the factual background of the case.

At the hearing of the appeal before us on 05.09.2018, the appellant entered appearance and was ably represented by Mr. Godwin Simba Ngwilimi, learned advocate. The respondent Republic appeared through Ms. Margareth Ndaweka, learned Senior State Attorney and Mr. Shaban Juma Masanja, learned State Attorney.

At the hearing of the appeal, at the very outset, Mr. Ngwilimi urged us to disregard the Supplementary Memorandum of Appeal which was filed 23.06.2017 without leave of the Court. The learned counsel also sought to abandon all the grounds in the Memorandum of appeal filed on 28.02.2017, except for the first and sixth which he argued in the alternative. For easy reference, we take the liberty to reproduce the first and sixth grounds:

"1. That, the trial magistrate and the High court judge erred in law and in fact to find conviction and sentence in the case, where the prosecution evidence were not so convincing to warrant conviction and sentence.

6. That, the trial magistrate and the high court judge erred in law and in fact when they decided the case in favour of the republic just for the reason that appellant did not well defended his case."

On the sixth ground of grievance, with which Mr. Ngwilimi started, he argued that the charge sheet on which the appellant was convicted was incurably defective in that it refers to sections 130 (1) and 131 (1) of the Penal Code, Cap. 16 of the Revised Edition, 2002 (hereinafter referred to as the Penal Code). The proper citation of the section in respect of the present charge should have been sections 130 (1) & (2) (a) and 131 (1) of the Penal Code, he charged. In the premises, he submitted, the charge was incurably defective and prejudiced the appellant. For the ailment, the learned advocate, initially, beckoned upon us to use our discretionary powers of revision bestowed upon us by section 4 (2) of the Appellant

Jurisdiction Act, Cap. 141 of the Revised Edition, 2002 (hereinafter referred to as the AJA). The learned advocate buttressed the arguments with our decision in, *inter alia*, the cases of **Shabani Masawila v. Republic**, Criminal Appeal No. 358 0f 2008 (unreported) wherein we articulated that failure to specify a specific category of the provision of the law upon which one is charged with an offence of rape is incurably defective. However, at our prompting, Mr. Ngwilimi moved goalposts and stated that as the complaint appears in the ground of appeal, a resort to the revisional powers of the Court will not be appropriate. He thus prayed that the appeal be allowed on this ground of appeal only and, consequently, quash the judgment of both courts below and set aside the sentence and release the appellant from custody.

The learned counsel argued the sixth ground of appeal as an alternative to the first ground. However, as we think the first ground of appeal disposes of the appeal, we do not find it appropriate to go into the arguments and determination in its respect.

For the respondent Republic Ms. Ndaweka, supported the appeal for the main reason that the charge sheet was defective. The learned Senior

State Attorney, like Mr. Ngwilimi, submitted that the proper provisions should have been sections 130 (1) & (2) (a) and 131 (1) of the Penal Code. Failure to cite in the charge sheet the provisions of subsection (2) (a) of section 130 of the Penal Code was fatally defective as the anomaly goes to the root of offence, she elaborated. She added that the trial was unfair and therefore the appellant was prejudiced. She added that as the matter was not raised in the grounds of appeal, the Court must resort to section 4 (2) of the AJA to revise the proceedings by quashing the judgment and conviction and setting aside the sentence and setting the appellant free. The learned Senior State Attorney was of the view that a retrial will not be appropriate. The learned Senior State Attorney did not argue the alternative sixth ground of complaint.

Given the response of the learned Senior State Attorney which supported Mr. Ngwilimi's stance, the latter had, naturally, nothing in rejoinder.

We have dispassionately considered the arguments of Mr. Ngwilimi as supported by Ms. Ndaweka. We are inclined to agree with both trained minds that, indeed, the charge sheet appearing at the very first page of

the record of appeal is defective for not citing section 130 (2) (a) of the Penal Code. By only citing sections 130 (1) and 131 (1) of the Penal Code, we are certain, was not sufficient and made the charge incurably defective. We shall demonstrate.

The offence of rape is created by section 130 (1)) of the Penal Code. For easy reference, we let the section speak for itself:

> *"it is an offence for a male person to rape a girl or a woman."*

Thereafter the provisions of section 130 (2) of the Penal Code under paras (a), (b), (c), (d) and (e) enumerate circumstances under which the offence may be committed. It reads:

> *"(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."

When we were confronted with an akin situation in **Shabani Masawila v. Republic** (supra), the case referred to, and supplied, by the

learned advocate for the appellant, we stated at page 8 of the typed judgment:

> *"our understanding of section 130 cited above is that; **one**, it created the offence of rape. **Two**, it is not a standalone provision. **Three**, it provides for ten categories of rape as predicated under paragraphs (2) (a) to (e) and (3) (a) to (e) of the section. It therefore follows that each offence of rape must fall under one the categories shown above"*

Likewise, in **Simba Nyangura v. Republic**, Criminal Appeal No. 144 of 2008 (unreported) we grappled with the same point. In that case the appellant was charged with rape contrary to sections 130 (1) and 131 of the Penal Code. We made the following observation at page 6 of the typed judgment:

> *"... in a charge of rape, an accused person must know under which of the descriptions (a) to (e) in section 130 (2) the offence he faces falls, so that he can be prepared for his defense....this lack of particulars unduly prejudiced the appellant in his defence...."*

[See also: **Josephat Shongo v. Republic**, Criminal Appeal No. 62 of 2012 (unreported)].

Given the foregoing authorities, we are of the well-considered view that the appellant in the case at hand ought to have known which category of rape under section 130 (2) of the Penal Code faced him, failure of which, as we said in **Mussa Mwaikunda v. R.** [2006] TLR 387 and reiterated in **Simba Nyangura v. Republic** (supra), it cannot be said that he was fairly tried. The ailment, as per the above cases, vitiates the trial and the judgment of the trial court as well as the judgment of the first appellate court. We therefore agree with Mr. Ngwilimi and Ms. Ndaweka that the ailment was fatal and rendered the proceedings and judgments of both lower court a nullity.

As to the way forward, with due respect, we do not agree with Mr. Ngwilimi that the ailment was part of the grounds of grievance so that we could uphold it, with equal due respect, we agree with Ms. Ndaweka that the ailment was not part of the grounds of complaint and, therefore, a resort to the revisional powers of the Court under section 4 (2) of the AJA will be inescapable. If anything, Mr. Ngwilimi smuggled-in the argument into the sixth ground of appeal which had a different subject altogether.

Like Mr. Ngwilimi and Ms. Ndaweka, we are loathe to order a fresh trial given that the ailment was occasioned by the respondent Republic. As the erstwhile Court of Appeal for East Africa observed in **Ahmed Sumar v. Republic** [1964] EA 481 and uninterruptedly followed in number of decisions of the Court including the unreported **Adam Selemani Njalamoto v. Republic**, Criminal Appeal No. 196 of 2016, in which it was observed that in the event of such an eventuality, the interest of justice will not prefer a retrial. In **Ahmed Sumar v. Republic** (supra), for instance, it was observed at p. 483:

> ***"It is true that where a conviction is vitiated by a gap in the evidence or other defect for which the prosecution is to blame, the court will not order a re-trial.*** *But where a conviction is vitiated by a mistake of the trial court for which the prosecution is not to blame it does not in our view follow that a re-trial should be ordered."* [Emphasis supplied].

While still on the same point, we wish to reproduce the first holding in the headnote to the above case:

> *"Whether an order for re-trial should be made depends on the particular facts and circumstances of each case but should only be made where the interests of justice require it and where it is not likely to cause an injustice to an accused person"*

With the foregoing in mind, we do not think it will be in the interest of justice to order a fresh trial of the appellant given that it is the prosecution which is to blame for the shortcoming which rendered the proceedings and judgments of both courts below a nullity. Justice, in our considered opinion, will smile if no retrial is ordered, for, taking a different course, like remitting the record to the trial court for a fresh trial, may be tantamount to persecuting the appellant.

In view of what has been stated above, as the appellant did not raise the complaint in the Memorandum of Appeal, we exercise our powers of revision bestowed upon us by the provisions of section 4 (2) of the AJA and quash the proceedings and judgment of the trial court as well as those of the first appellate court. We also quash the conviction and set aside the sentence of thirty years meted out to the appellant by the trial court and upheld by the first appellate court. Consequently, we order that the

appellant Mustapha Kiege should be released from prison custody unless otherwise held for some other lawful cause.

Order accordingly.

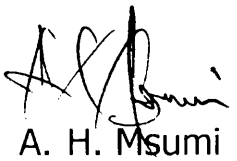
DATED at **TABORA** this 6th day of September, 2018.

K. M. MUSSA
JUSTICE OF APPEAL

S. A. LILA
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 (T)