IN THE COURT OF APPEAL OF TANZANIA

AT IRINGA

(CORAM: MJASIRI, J.A., MMILLA, J.A., AND LILA, J.A.)

CRIMINAL APPEAL NO. 512 OF 2015

CHRISTIAN SANGA ..... APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

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

(Manento, J.)

dated the 30th day of April, 2003
in
Criminal Appeal No. 45 of 2000

.....

JUDGMENT OF THE COURT

5th & 11th October, 2017

MMILLA, J. A.:

On 6.4.2000, Christian s/o Sanga was found guilty, convicted and sentenced to 35 years imprisonment term by the District Court of Songea before which he was charged with rape contrary to section 130 (2) (b) of the Sexual Offences Special Provisions Act No. 4 of 1998 (the SOSPA). He unsuccessfully appealed to the High Court at Songea, save for the sentence which was found to have been excessive and was reduced to 30 years imprisonment term. However, that court imposed corporal punishment of

12 strokes of the cane. Still aggrieved, the appellant lodged this second appeal to the Court.

Before us, the appellant appeared in person and was not defended, just as had been the case throughout his trial, and also during the appeal in the High Court. On the other hand, the respondent Republic enjoyed the services of Mr. Alex Mwita, learned State Attorney.

The Republic had filed a three point notice of preliminary objection on points of law. Those grounds were as follows:-

1. That, appellant had lodged in this Court a Petition of Appeal instead of a Memorandum of Appeal, hence contravening Rule 72 (1) and (4) of the Court of Appeal Rules, 2009.

2. That, the purported Petition of Appeal contains the name of the court which doesn't exist within the court hierarchy of the United Republic of Tanzania.

3. That, the appellant lodged the purported Memorandum of Appeal out of the prescribed time.

At the commencement of hearing of the preliminary objection, Mr. Mwita dropped the first two grounds; leaving only the third one to be proceeded with. In the course of his submission on that ground, he dropped it too after he realized, following the Court's probes, that the substance of the third ground centered on matters to which the Court has discretional powers. That paved way for the appeal to proceed on merits.

We think it is essential to begin by giving, albeit briefly, the back ground facts of the case.

Both, the appellant and the complainant were residents of Nakahegwa village in Songea Rural District in Ruvuma Region, and were close neighbours. Both of them were married persons.

On 6.9.1999 about 23:00 hours, the complainant was asleep at her house. She was alone because her husband was not yet at home. Around that time, the appellant, armed with a bucket of water, stormed into the complainant's house, poured water into the fire place, thereby extinguishing the fire she had made. Subsequent to that, the appellant caught hold of her and pinned her to the bed. The complainant made efforts to repulse him, and also persistently raised alarm, but she was

overpowered, beaten and raped. The complainant asserted that it was easy for the appellant to accomplish his wicked quest because she had not put on underwear.

Luckily however, Joseph Mbunda and Lazarus Ndauka (PW2) heard the alarm and rushed to the complainant's house. On arrival there, they found the appellant in the complainant's house seated on the bed. On seeing them, the appellant forcefully rushed out and ran away. They gave a chase and succeeded to apprehend him at his home, after which they took him back to the scene of crime. Several other villagers arrived at the scene, including the village chairman who happened to be the appellant's father. They interrogated the appellant who allegedly admitted to have raped the complainant and prayed to be forgiven. The complainant was prepared to forgive him provided the appellant paid her five chicks. However, the appellant told them that he had no chicks to pay. Upon that, the matter was reported to police at Peramiho. Subsequently, the appellant was charged in court as it were.

On the other hand, the appellant's defence was briefly that the allegations against him were false. He maintained that on the alleged date,

he was throughout the night at his home. He was firm that he never went to the complainant's house. He prayed the trial court to find him innocent.

As already pointed out, the trial court found him guilty, convicted him and sentenced him. He unsuccessfully appealed to the High Court, hence the present appeal.

The appellant's memorandum of appeal raised eight grounds which may conveniently be bridged into only five of them; **one** that, he was not properly identified; **two** that, the evidence of the prosecution witnesses was loaded with serious contradictions; **three** that, the PF3 was wrongly admitted as evidence, hence that it was wrongly relied upon; **four** that, his defence was not given deserving consideration, and **five** that, the prosecution did not prove the case against him beyond reasonable doubt.

When the appellant was called upon to argue his appeal, he elected for the Republic to begin, pledging to take the role later, if need be.

On his part, Mr. Mwita successfully sought the Court's permission to premise his submission on a point of law concerning the appropriateness of

the charge the appellant faced. He contended that if up held, the point was capable of finally disposing of the entire appeal.

Mr. Mwita's submission focused on the provisions of law on which the offence of rape in this case was anchored. Directing his mind on the charge sheet appearing at page 1 of the Record of Appeal, he submitted that the appellant was wrongly charged under section 130 (2) (b) of the SOSPA which is non-existent because that Act, now repealed, had only 30 sections. On the basis of that, he went on to submit, the appellant was improperly convicted because he was deprived the opportunity to know the nature of the offence he was charged with. He made reference to section 135 of the Criminal Procedure Act (the CPA) which instructs the statement of the offence to contain a reference to the section of the enactment creating the offence. He held the view that by basing the charge on a non-existent section, the appellant was not accorded fair trial. He secured his point with the Court's observation in the case of **Francis Simon Njavike Juma v. Republic**, Criminal Appeal No. 222 of 2014, CAT (unreported) that charging an accused under a non-existent law constitutes unfair trial. For those reasons, Mr. Mwita pressed the Court to hold that the trial in the

present case was a nullity, necessitating invocation of the provisions of section 4 (2) of the Appellate Jurisdiction Act Cap, 141 of the Revised Edition, 2002 (the AJA), resulting into nullification of the proceedings and the judgments of both courts below.

As to the way forward, Mr. Mwita was mindful that the appellant has been behind bars for about 17 years, therefore that it would be unfair for him to ask the Court to order retrial. Consequently, he urged the Court to release the appellant, but leave the matter in the discretion of the Director of Public Prosecutions (the DPP) on whether or not to recharge the appellant.

On his part, the appellant supported the submission of the learned State Attorney. He urged the Court to hold mercy on him.

We have given serious consideration to the submission advanced by the learned State Attorney; we hasten to agree with him that the charge against the appellant was fatally defective on the basis of the reasons he assigned.

To start with, we agree with Mr. Mwita that section 135 of the CPA lays out the mode in which offences are to be charged. The relevant part for the purposes of the present case is paragraph (a) (ii) of that section which provides that:-

> *"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.]

We underscore that the above provisions has put it clear that a statement of the offence should describe the offence **and should contain a reference to the section of the enactment creating the offence**. Of course, after the statement of the offence then the particulars of the offence should be set out.

In the present case, the charge sheet appearing at page 1 of the Record of Appeal shows that the appellant was charged under section as 130 (2) (b) of the SOSPA. We have carefully inspected the said Act, now repealed; we agree with Mr. Mwita that it had only 30 sections. Thus, section 130 (2) (b) of that Act was non-existent.

As often stressed by the Court, where a person in the shoes of the appellant may have been charged and found guilty on a on non-existent provisions of the law, it cannot be said that such a person was fairly tried in the courts below – See the cases of **Francis Simon Njavike Juma v. Republic** (supra), **Marekano Ramadhani v. Republic,** Criminal Appeal No. 201 of 2013, CAT, and **Abdallah Ally v. Republic**, Criminal Appeal No. 253 of 2013, CAT, (both unreported). In all those cases, the Court stated in common that wrong and/or non-citation of the appropriate provisions of the Penal Code, under which the charges were preferred, the omission left the appellants unaware that they were facing serious charges of rape and constituted unfair trial. In the case of **Abdallah Ally v. Republic** (supra), the Court was specific that:-

> *"...being found guilty on a defective charge, based on wrong and/or non-existent provisions of the law, it cannot be said that the appellant was fairly tried in the courts below...In view of the foregoing shortcomings, it is evident that the appellant did not receive a fair trial in court. The wrong and/or non-citation of the appropriate provisions of the Penal Code under which the charge*

was preferred, left the appellant unaware that he was facing a serious charge of rape...."

From the above, it is plain and certain that since the appellant in the present case was charged under a non-existent law, it cannot be said he was fairly tried. Thus, we are constrained to interfere under the provisions of section 4 (2) of the AJA on the basis of which we quash the proceedings and judgments of both courts below, and set aside the sentence which was meted out against the appellant. The burning question becomes; what next?

Under normal circumstances, where the proceedings and judgment are nullified and the sentence set aside, it is obligatory for the Court to order retrial. However, the Court is expected to take into consideration several other factors surrounding any particular case before making directions.

In the present case, the crucial factor is the length of period the appellant has been behind bars. The record shows that the appellant was convicted and sentenced on 6.4.2000, which means, he has been in jail for about 17 years. As properly submitted by Mr. Mwita, it will be unfair if the

Court orders retrial. Given this factor, we direct for the appellant's immediate release from prison, but we leave the matter in the discretion of the Director of Public Prosecutions on whether or not to re-arrest and re-charge him.

We accordingly order and direct.

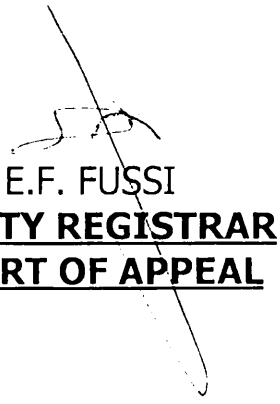
DATED at **IRINGA** this 9th day of October, 2017.

S. MJASIRI
JUSTICE OF APPEAL

B. M. MMILLA
JUSTICE OF APPEAL

S. A. LILA
JUSTICE OF APPEAL

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



E.F. FUSSI
DEPUTY REGISTRAR
COURT OF APPEAL