IN THE COURT OF APPEAL OF TANZANIA
AT TABORA

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

CRIMINAL APPEAL NO. 487 OF 2015

RASHIDI IBRAHIMU.. APPELLANT

VERSUS

THE REPUBLIC.. RESPONDENT

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

(Mrango, J.)

Dated the 16th day of September, 2015
in
DC Criminal Appeal No. 77 of 2015

JUDGMENT OF THE COURT

16th & 23rd August, 2017.

LUANDA, JA.:

RASHIDI s/o IBRAHIMU (henceforth the appellant) was charged in the District Court of Kasulu at Kasulu with rape "c/ss. 130 and 131" of the Penal Code, Cap. 16 RE. 2002. It was alleged in the charge sheet that on 11th day of February, 2010 at about 15:00 hrs at Mnyegera village within Kasulu District, the appellant did have carnal knowledge of one Ziada d/o Jeremia aged 4 years.

The prosecution side called four witnesses to prove its case. The defence side had one witness, the appellant. After a full trial, the

appellant was convicted as charged and sentenced to 30 years imprisonment. The appellant was aggrieved by the finding and sentence of the trial District Court. He appealed to the High Court of Tanzania but he was not successful, hence this appeal.

The appellant has raised five grounds of appeal. However, since the Republic through Ms. Jane Mandago, learned Senior State Attorney did not oppose the appeal in respect of the first ground, and correctly in our view, we are going to dispose of this appeal on that ground.

In that ground, the appellant complained that both courts below wrongly grounded conviction on an incurable defective charge. We have shown above that the appellant was charged with rape c/ss. 130 and 131 of the Penal Code. The Penal Code does not contain such sections. Rape as an offence is defined under section 130 (1) of the Penal Code. On the other hand section 130 (2) and (3) of the Penal Code enumerates circumstances under which rape can be committed. So, in order for a charge of rape to stand, the charge must state the section creating an offence as well as its particulars. Indeed, this is a legal requirement for a charge sheet worth a name as mandated by sections 132 and 135 of the Criminal Procedure Act, Cap. 20 RE. 2002 (the CPA). The sections read:-

"132 (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."*

[Emphasis supplied].

"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].

There are a number of cases which insist the need for the charge sheets to cite the law correctly and the particulars of the offence so as to enable the accused person to be informed of the case he is going to face and prepare his defence. In **Mussa Mwaikunda vs. R.,** [2006] TLR; 387 the Court said:-

"The principal has always been that an accused person must know the nature of the case facing him."

(See **Isidori Patrice v. R.,** Criminal Appeal No. 224 of 2007 (unreported); **Richard Maginga v. R.,** Criminal Appeal No. 133 of 2016

(unreported), **Charles s/o Makapi v. R.**, Criminal Appeal No. 85 of 2012 (unreported)).

Since in our case the charge sheet is incurably defective, it did not disclose the offence known to law, it cannot, therefore, be taken that the appellant had pleaded to the charge.

We allow the appeal, quash the conviction and set aside the sentence of 30 years imprisonment. The question now is: is this a fit case to order retrial?

Generally the Court will order a retrial where the interest of justice requires. But it should not be ordered where it is likely to cause injustice to the accused person. (See **Fatehali Manji v. R.** [1966] E.A. 343).

In this case Ms. Mandago did not press for retrial because the evidence on record is wanting. She said the evidence of the key witness one Anicet Rugege (PW3) a child of 11 years of age was taken in defiance of S.127(2) of the Tanzania Evidence Act, Cap. 6. The *voire dire* test was not properly conducted. And the evidence of Therezia s/o Thomas (PW2) a grandmother of the victim of rape was not of much help.

Before PW3 gave evidence, the trial District Court conducted a *voire dire* examination as follows:

"Date: 14/6/2010

Coram: M. Paul DRM I/C

Pros: A/Insp. Baraka

Accd: Present

Court clerk: J. Balegele

PP- Your honour the Intended witnesses are children of tender years. The first one is Anicet.

VOIRE DIRE:

What is your name

My name is Anicet

What is your father's name

My father's name is Rugege

In what class are you

I am in STD III

At what school

At Munyegera Primary School

What is your age

I am 11 years old.

Do you go to church

No I do not go. But my parents do go. Not yet baptized

Do you know how to swear

No I do not know

Do you know the effect of speaking un truth"

Yes. It is wrong to state un truth.

Have you spoken any un truth

I had never spoken un truth

RULING

Having heard the answers given by the Intended witness in response to the questions put to him I am satisfied that he is intelligent enough, he knows the duty of speaking the truth. But since he is not a Christian he can affirm before giving his evidence.

M. Paul

DRM I/C

14/6/2010"

It is clear that the trial magistrate mixed up the two tests of *voire dire* examination namely whether a witness can give his evidence on oath or the witness is in possession of sufficient intelligence and understands the duty of speaking the truth.

In **Nyasani s/o Bichana v. R.,** [1958] E.A. 90 the then Court of Appeal for Eastern African stated how to conduct the *voire dire* examination. It said:-

> *"It is clearly the duty of the court under that section to ascertain, first whether a child tendered as a witness understands the nature of oath, and, if the finding on this question is in the negative, to satisfy itself that the child is possessed of sufficient intelligence to justify the reception of the evidence and understands the duty of speaking the truth."*

[See **Dhahiri Ally v. R.** [1989] TLR 27; **Hassan Hatibu v. R,** Criminal Appeal No. 71 of 2002 (unreported)].

PW3 is the one who is said to have seen the appellant taking Ziada to his house who later went with other children to buy buns at a certain shop. That evidence has no evidential value for failure on the part of the

trial magistrate to conduct the *voire dire* examination properly as shown above. On the other hand, there is the evidence of PW2 who claimed to have seen the appellant pushing Ziada out of his house. We wish to point out that Ziada did not give evidence because of her tender age. So, the prosecution relied on the evidence of PW2. Under normal circumstances one would have expected PW2 to check her grand daughter to see whether she was defiled if really PW2 saw when the appellant pushed Ziada. In her evidence in chief she did not say about checking her grand daughter. She said she checked her grand daughter in re-examination. But in cross-examination the appellant did not put any question to that effect. Further, it is not shown in the record that the court had allowed PW2 to put those questions. In any case the appellant was not afforded opportunity to cross-examine PW2 to those facts she gave during re-examination. This goes contrary to S. 147 (3) of the Evidence Act, Cap. 6 R.E. 2002 which reads:-

> *"147 (3) The examination shall be directed to the explanation of matters referred to in cross-examination; and if new matter is, by permission of the court, introduced in re-*

examination, the adverse party may further cross-examine upon the matter."

We agree with Ms. Mandago that the evidence on record is weak. So, there is no need of ordering a retrial.

In sum, we order the appellant to be released from prison forthwith unless held in connection with another matter.

Order accordingly.

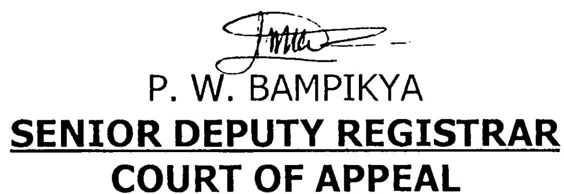
DATED at **TABORA** this 22nd day of August, 2017.

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