IN THE COURT OF APPEAL OF TANZANIA

AT DAR ES SALAAM

(CORAM: MMILLA, J.A., MWANGESI, J.A., And NDIKA, J.A.)

CRIMINAL APPEAL NO. 16 OF 2013

BOP S/O MRISHO @ NUNDA ..... APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

(Appeal from the Judgment of the High Court of Tanzania at Dar es Salaam)
(Mushi, J.)

dated the 23rd day of October, 2012
in
Criminal Appeal No. 56 of 2011

.....

JUDGMENT OF THE COURT

28th August & 13th September 2018

NDIKA, J.A.:

Bop s/o Mrisho @ Nunda, the appellant herein, was charged with and convicted by the District Court of Bagamoyo at Bagamoyo of the offence of rape committed on Furaha d/o Rajabu on 28th August 2006 at or about 16.00 hours at Mtoni area within Bagamoyo District. He was, consequently, sentenced to thirty years' imprisonment. His first appeal to the High Court of Tanzania sitting at Dar es Salaam, challenging the conviction and sentence, was to no avail. Undaunted, he now appeals to this Court.

The essential facts of the case are, briefly, as follows: On the fateful day at or about 16.00 hours, the appellant approached PW1 Furaha

Rajabu, a woman aged 50 years at the time, as she was on her way home from her farm. After expressing his demands for sex, which she rebuffed, he suddenly fell her to the ground, tore her undergarment and then raped her for almost half an hour. She all along raised an alarm. Responding to PW1's cry for help, PW2 Kasian Damas rushed to the scene of crime. He found the appellant on top of PW1; still in the act of raping the victim. Nonetheless, the appellant managed to run away from the scene. Both PW1 and PW2 were firm that they knew the appellant before the incident and that they recognized him at the scene as the rapist.

The complainant was subsequently examined and attended to at a hospital after a formal report of the incident had been made to the police. The medical examination report – PF.3 (Exhibit P.1) that she tendered stated that she suffered bruises in her genitalia. There was further evidence from PW3 E.3987 D/C Yohana, a police officer, on the manner of the appellant's arrest in October 2006, about two months after the incident.

After the trial court had closed the prosecution case on 9th July 2007, it adjourned the matter on several occasions until on 20th August 2007 when it ruled that a prima facie case had been made out against the

appellant. The court then addressed the appellant on his rights in terms of section 231 of the Criminal Procedure Act, Cap. 20 RE 2002 (CPA). At page 14 of the record of appeal, the appellant's reply to the court was "I will defend as my own", whatever that means. The case was then set for defence hearing but on about eight occasions the scheduled hearing was adjourned for reasons, which are not relevant to the disposition of the matter at hand. A bolt from the blue set in on 26th November 2007 when the matter came up for defence hearing on the ninth occasion as the appellant declined to proffer any evidence. Upon that, the Public Prosecutor moved for judgment as follows:

> *"P.P.: Your Honour, the accused elected to defend by keeping silent; an adverse inference is made against him. He failed to use this opportunity to raise his defence. I pray for judgment."*

The trial court agreed to that prayer. Accordingly, it proceeded to compose and hand down its judgment on 31st December, 2007 solely upon the basis of the evidence adduced by the prosecution. On the whole, the court was impressed that the appellant was unmistakably identified at the scene as the assailant who raped PW1. As hinted earlier, the said court convicted the appellant of the charged offence and sentenced him to thirty

years' imprisonment. Again, as indicated earlier, the appellant's first appeal before the High Court bore no fruit; it was dismissed in its entirety.

The appellant lodged eleven grounds of appeal against the High Court's decision. As it will become obvious later in this judgment, we need not replicate herein all the grounds of appeal except the first ground which contends, in effect, that the High Court erred in law and in fact in sustaining the appellant's conviction upon a defective charge.

At the hearing of the appeal before us the appellant appeared in person, unrepresented. The respondent Republic had the services of Ms Esther Martin and Ms Nancy Mushumbusi, both learned State Attorneys.

The appellant's address to the Court was very brief. In essence, he adopted his grounds of appeal and then prayed that his appeal be allowed.

On the other hand, Ms Martin conceded, unreservedly, that the charge sheet was incurably defective for failing to specify, in the statement of the offence, the category of rape under which the charge was laid against the appellant. Going into detail, she said that, it was not sufficient that the charge was drawn under sections 130 (1) and 131 (1) of the Penal Code, Cap. 16 Revised Edition 2002 (the Penal Code). Since the victim of the alleged offence was aged 50 years, she said, the charge should have

been preferred under sections 130 (1), (2) (a) and 131 (1) of the Penal Code. She submitted that the omission to cite the specific category under subsection (2) (a) of section 130 of the Penal Code was contrary to the mandatory provisions of section 135 of the Criminal Procedure Act, Cap. 20 RE 2002 (the CPA), which govern the mode in which charges should be drawn. The learned State Attorney supported her position by referring to a recent decision of the Court in **Fredy Mwakajilo v. Republic,** Criminal Appeal No. 252 of 2011 (unreported). In that case, this Court held that by omitting to state "a particular paragraph of section 130 (1) (2) of the Penal Code, the charge offended section 135 (a) (ii) of the CPA" and that such an omission was fatal. In the premises, the learned State Attorney urged us to uphold the first ground of complaint and, accordingly, allow the appeal.

In response, the appellant supported Ms Martin's submission and reiterated his prayer that his appeal be allowed and that he be released from prison.

Ahead of determining whether the impugned charge sheet was proper or not, we deem it apposite to reproduce the said charge sheet for easy reference:

"TANZANIA POLICE FORCE

CHARGE SHEET

NAME AND TRIBE OR NATIONALITY OF THE ACCUSED PERSON CHARGED:

NAME: *BOP S/O MRISHO @ KUDRA S/O MRISHO NUNDA*

TRIBE: *ZARAMO*

AGE: *20 YRS*

REL: *MOSLEM*

OCC: *PEASANT*

RES: *SOKO JIPYA BAGAMOYO*

STATEMENT OF THE OFFENCE:

RAPE c/ss 130 (1) and 131 (1) of the Penal Code, Cap. 16 of the Laws as amended by section 5 of the Sexual Offences Special Provisions Act No. 4 of 1998.

PARTICULARS OF THE OFFENCE:

That Bop s/o Mrisho @ Kudra s/o Mrisho Nunda charged on 28th day of August, 2006 at or about 16.00 hrs at Mtoni Area within Bagamoyo District in Coast Region, did [have] carnal knowledge of one Furaha d/o Rajabu without her consent.

STATION: *POLICE BAGAMOYO* *(Sgd)*

DATE: *8.11.2006* *PUBLIC PROSECUTOR"*

It is trite that for a charge sheet to be valid under the law, it must be drawn in accordance with the provisions of sections 132 and 135 of the CPA. Briefly, the said provisions enact that every charge must contain a statement of offence and particulars of offence. Of particular relevance to this appeal is paragraph (a) (ii) of section 135. It requires 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 added]

We have made bold the text above to underline that every statement of offence in a charge sheet must contain a reference to the section of the law creating the offence charged. We broadly interpret the word "section" in the above provisions to include a reference to a specific subsection or paragraph where the relevant section creates more than one category of a particular offence.

Having examined the charge sheet at hand, we subscribe to Ms Martin's submission that the said charge is defective in that its statement of offence predicates the offence of rape upon sections 130 (1) and 131 (1) of the Penal Code without any reference to a category of rape befitting the age and circumstances of the complainant. The statement of the charged offence would have been correct if, besides citing section 130 (1) of the Penal Code, it had made reference to one of the categories of rape created

PARTICULARS OF OFFENCE

MANSOUR KHAMIS ULUNGI @ SIMBA DUME, *on the 25th day of August, 2011 at Tandale kwa Mtogole area within Kinondoni District in Dar es Salaam Region, stole Cash TShs. 1,200,000.00, one laptop make DELL valued at TShs. 900,000.00, 4 mobile phones of different makes the property of one* ***EVODIUS ALEX*** *and immediately before such stealing did use weapons namely a bush knife and a gun in order to obtain the same.*

3RD COUNT

STATEMENT OF OFFENCE

ARMED ROBBERY: *Contrary to Section 287A of the Penal Code [Cap. 16 RE 2002] as amended by Act No. 3 of 2011*

PARTICULARS OF OFFENCE

MANSOUR KHAMIS ULUNGI @ SIMBA DUME, *on the 25th day of August, 2011 at Tandale kwa Mtogole area within Kinondoni District in Dar es Salaam Region, stole one mobile phone make* ***TECNO*** *valued at TShs. 75,000.00 the property of one* ***NURATHY JUMA*** *and immediately before such stealing did use weapons namely a bush knife and a gun in order to obtain the same.*

Dated at Dar es Salaam this 13th day of April 2012

(Sgd)

STATE ATTORNEY"

It is settled that for a charge sheet to be valid under the law, it must be drawn in accordance with the provisions of sections 132 and 135 of the CPA. Briefly, section 132 requires that, apart from a statement of the specific offence charged, every charge or information must contain such particulars as may be necessary for giving reasonable information as to the

nature of the offence charged. In addition, section 135 provides for the mode in which offences are to be charged. What is particularly relevant to this appeal is paragraph (a) (iv) of section 135. It requires the charge sheet in general to conform, as nearly as possible, to the forms set out in the Second Schedule to the CPA. Part 8 of that Schedule provides a form for the charge of robbery; it compels indication of the person against whom violence or threat of violence was perpetrated. By dint of logic, that requirement extends to the offence of armed robbery.

As indicated earlier, the appellant was charged with the offence of armed robbery, on three counts, contrary to section 287A of the Penal Code, as amended by Act No. 3 of 2011. The above-cited section provides:

> *"A person who steals anything, and at or immediately before or after stealing is armed with any dangerous or offensive weapon or instrument and at or immediately before or after stealing* ***uses or threatens to use violence to any person in order to obtain or retain the stolen property,*** *commits an offence of armed robbery and shall, on conviction be liable to imprisonment for a term of not less than thirty years with or without corporal punishment."* [Emphasis added]

We have made bold the text above to highlight one of the prerequisites of the crime of armed robbery (or any other kind of robbery), which is that there should be use of violence or threat of use of violence to the person of the complainant. In **Kashima Mnadi v. Republic**, Criminal Appeal No. 78 of 2011 (unreported), the Court held that:

> *"Strictly speaking for a charge of any kind of robbery to be proper, it must contain or indicate actual personal violence or threat to a person on whom robbery was committed. Robbery as an offence, therefore, cannot be committed without the use of actual violence or threat to the person targeted to be robbed.* ***So, the particulars of the offence of robbery must not only contain the violence or threat but also the person on whom the actual violence or threat was directed.***" [Emphasis added]

[See also the unreported decision of the Court in **Zubell Opeshutu v. Republic**, Criminal Appeal No. 31 of 2003; and **Baltazar Gustaf** (supra)].

Having reflected on the charge sheet at hand, we agree with the appellant and Ms Munishi that the said charge is defective in all three counts in that the particulars of offence do not specify the alleged victims

of the use or threat of use of actual violence by the assailants in order for them to obtain the properties allegedly stolen at PW3's shop. We thus find that an essential ingredient of the charged offence of armed robbery was omitted and that the charge in the whole was fatally defective. That is so because the said omission meant that the charge failed to give the appellant reasonable information as to the nature of the charged offence thereby negating fairness in the criminal trial. As rightly submitted by Ms Munishi, the said defect could not be cured under section 388 of the CPA. Accordingly, we find merit in the first ground of appeal.

We are cognizant that the case at hand involves a trial that was subverted by a defect for which the prosecution bears the blame. In **Ahmedi Ali Dharamsi Sumar v. Republic** [1964] EA 481, at p.483, the predecessor to this Court stated on an appeal from the High Court of Tanganyika that:

> *"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 retrial.*** *"*[Emphasis added]

Ordinarily a retrial would be ordered, in criminal cases, when the charge sheet, which is the foundation of the case, is proper and in existence. Since in this case the charge sheet is incurably defective, implying that it is legally non-existent, the question of a retrial does not arise. See, also, the decision of the Court in **Mayala Njigailele v. Republic**, Criminal Appeal No. 490 of 2015 (unreported).

In the final analysis, we allow the appeal, quash the conviction and set aside the sentence against the appellant. We order that the appellant be released from custody and set free forthwith unless he is held or detained for any other lawful cause.

DATED at **DAR ES SALAM** this 11th day of September, 2018.

B. M. MMILLA
JUSTICE OF APPEAL

S. S. MWANGESI
JUSTICE OF APPEAL

G. A. M. NDIKA
JUSTICE OF APPEAL

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

S.J. KAINDA
DEPUTY REGISTRAR
COURT OF APPEAL