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. 202 OF 2011

SYLIVESTER JANGAMA ..... APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

(Appeal from the decision of the High Court of Tanzania at Dar es Salaam)

(Mushi, J.)

dated the 4th day of May, 2011

in

HC. Criminal Appeal No. 68 of 2009

JUDGMENT OF THE COURT

29th August & 27th September, 2018

MWANGESI, J.A.:

At the District Court of Kilosa in Morogoro Region, the appellant herein stood arraigned for the offence of rape contrary to the provisions of section 130 (1) (2) (b) and 131 (1) of the Penal Code **(the Code)**, as amended by the Sexual Offences Special Provisions Act, No. 4 of 2002. The particulars of the offence were to the effect that, on the 15th day of May,

2008 at unknown time, at Nyamvisi village within Kilosa District and Morogoro Region, the appellant did rape one CC, a child of six years.

When the charge was read over to the appellant, he protested his innocence and thereby, compelling the prosecution to parade four witnesses to establish the commission of the offence by the appellant. On his part in defence, the appellant relied on his own sworn testimony, and had no witness to call. At the end of the day, after the trial magistrate had evaluated the evidence placed before him, she was convinced beyond doubt that, the prosecution had established its case. Conviction was therefore entered against the appellant, who was sentenced to the mandatory term of thirty years' imprisonment. The challenge of the conviction and sentence by the appellant in the High Court of Tanzania at Dar es Salaam registry, proved futile and hence, the second appeal to this Court.

To have a proper perspective of the case against the appellant albeit in brief, we give a short account of what transpired, as could be discerned from the testimonies of the witnesses. The appellant was a younger brother of one Clarence Hilary (PW3), who was the biological father of the victim of the incident (PW1). Previously, the appellant was staying at the

premises of his brother (PW3), but later they parted ways whereby, the appellant went to live somewhere else within the locality.

On the date of the incident which was on the 15th March, 2011 according to the testimony of PW1 (victim), the appellant, whom she knew well as her uncle, went to pick her up on a bicycle from the school where she was studying, telling her that, he was going to show her where he was residing. However, after arriving at his place of residence, he ravished her, and upon gratifying his lust, he took her on the same bicycle and went to drop her at her father's premises and left without talking to any person.

Upendo Ufathala, the mother of the victim who testified as PW2, informed the court that, on the material date, she noted the arrival of PW1 at home on a bicycle, which was being ridden by the appellant. She claimed to have not suspected any foul play, because the appellant was her brother in law and therefore, the uncle to PW1. When she inquired from PW1, she was told by her daughter that, the appellant had gone to pick her up from school and taken her to his place, with a view of letting her know his new place of residence, after he had shifted from his brother's place. Thereafter, things continued as usual.

However, after the lapse of about five days that is, on the 15th August, 2008, she was astonished by a foul smell, which was coming from her daughter (PW1). When she asked her as to what was amiss, PW1 told her that, on the date when the appellant took her to his new place of residence, he raped her. Indeed, on checking at the private parts of her daughter, she noted that there were some bruises. From then, the necessary steps were taken whereby, the matter was reported to the police and the victim was taken to the hospital for examination and treatment after being given a PF3. Ultimately, the appellant was traced, arrested and charged accordingly.

The testimony of Clarence Hilary (PW3), was a recapitulation of what had been deposed by PW2, while D 3292 detective constable Noel (PW4), was the police officer who investigated the case after it had been reported at the police station and arrested the appellant. The appellant was eventually charged with the offence of rape.

In his defence evidence, the appellant resisted the claim that he had raped PW1. He complained before the trial court that, the whole case was a frame up against him, which had been engineered by his sister in law (PW2) for the reason that, they were not in good terms. He testified

further that, it was the said misunderstanding which had compelled him to shift from the premises of his brother (PW3), where he had been staying before. As hinted earlier, the trial magistrate as well as the first appellate judge, did not purchase his tale. On the contrary, they were convinced that the case against him had been established to the required standard and hence, the conviction and sentence, which is the subject of this appeal.

The memorandum of appeal by the appellant to this Court is constituted of thirteen grounds of appeal. For the reasons which will become apparent soon, we find no need to reproduce all of them. The grounds of appeal which we think are pertinent to the determination of the appeal before us, are the first, second and third grounds, all of which hinge on the complaint that, the charge which was placed at the door of the appellant was defective.

During the hearing of the appeal, the appellant entered appearance in person unrepresented, and hence fended for himself, whereas the respondent/Republic, had the services of Mr. Ramadhani Kalinga, who was assisted by Ms Grace Lwila, both learned State Attorneys.

On being required to take the floor and expound his grounds of appeal, the appellant requested us to adopt his grounds of appeal in the way they appear in the record of appeal, and permit the learned State Attorney to respond to them first, reserving his right of rejoinder if need could demand so.

Mr. Kalinga on his part, declared his stance from the outset that, he was supporting the appeal. He argued further that, in responding to the grounds of appeal raised by the appellant, he would only focus on grounds 1, 2 and 3, which he believed would suffice to dispose of the entire appeal. The learned State Attorney submitted that, in the instant matter, the appellant was charged with the offence of rape which falls under the provision of section 130 of the Penal Code. Under subsection (2) of the said section, which categorizes the offence of rape, according to Mr. Kalinga, has got a number of paragraphs ranging from (a) to (e), each specifying commission of a specific category of rape. In that regard, for a charge of rape to properly stand against an accused, it has to particularize the type of rape, which he is alleged to have committed.

Looking at the charge which was framed against the appellant in the instant appeal, the category of rape allegedly committed by the appellant,

has been indicated to fall under paragraph (b) of section 130 (2) of the Penal Code. It was the submission of the learned State Attorney that, the said category of rape, does not match with the particulars of the victim of rape as contained in the particulars of the offence, who is said to be a child of six years old. Under the circumstance, the appellant was not put in a proper position to understand well the offence which he faced, so as to prepare his defence. He argued that, the said anomaly offended the provisions of sections 132 and 135 (2) (iii) both of the Criminal Procedure Act, Cap 20 R.E 2002 **(the CPA)**,

Placing reliance on the decisions of the Court in **Marekano Ramadhani Vs Republic,** Criminal Appeal No. 202 of 2013 and **Isidori Patrice Vs Republic,** Criminal Appeal No. 224 of 2007 (both unreported), Mr. Kalinga argued that, the anomaly which was occasioned in the instant case was fatal, which was not curable under the provisions of section 388 of **the CPA**. To that end, he urged us to find merit in the appeal and be pleased to allow it, and set the appellant at liberty.

For the obvious reasons that, the submission by the learned State Attorney was in his favour, the appellant had nothing substantial to submit in rejoinder other than fully supporting it. He requested the Court to allow

his appeal and set him at liberty, as he was illegally being incarcerated in prison.

In the light of the submissions made above from both sides, the issue that stands for our deliberation and determination, is whether the complaint that the charge was defective merits. To begin with, we look on the provision of section 132 and 135 (a) (ii) both of **the CAP**, which are relevant in preparing charge sheets against accused. Section 132 reads that:

> *"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."*

On the other hand, the provision of section 135 (a) (ii) bears these words:

> *"135. (a) (i) N/A*
>
> *(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 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]

Going by the particulars of the offence under which the appellant in the appeal stood charged with, the victim of the rape was said to be aged six years, while the section of law creating the offence was cited to be section 130 (2) (b) of **the Code**. However, such paragraph is not relevant to rape committed against children. In its own words the paragraph reads:

"S. 130 Rape

(1) It is an offence for a male person to rape a girl or a woman

(2) A male person commits the offence of rape if he has sexual intercourse with a girl or woman under the circumstances falling under any of the following descriptions:

(a) N/A

(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 hurt or while she is in unlawful detention."

Certainly, since the victim was aged six years, the question of consent did not arise. That was therefore, not the proper paragraph. The proper paragraph which ought to have been cited according to the particulars of the victim given as proposed by the learned State Attorney was paragraph (e) which reads:

> *"130 (2) A male person commits the offence of rape if he has sexual intercourse with a girl---*
>
> *(e) With or without 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."*

In view of the foregoing, it is evident as opined by the learned State Attorney that, the charge against the appellant was defective in that, it did not cite the proper paragraph of the section, which creates the category of rape, which the appellant had committed and thereby, denying him the chance of preparing well his defence. A situation of the like was dealt with by the Court in **Simba Lyagura Vs Republic,** Criminal Appeal No. 144 of 2008 (unreported), and it held that:

"In a charge of rape an accused person must know under which of the descriptions (a) to (e) of section 130 (2) of the offence he faces, so that he can be prepared for defence."

In another instance where the Court discussed about defective charges and the gravity of the anomaly occasioned, was in the case of **Simon s/o Mwakalinga Vs Republic,** Criminal Appeal No. 52 of 2011 (unreported), where it held in part that:

"Failure to cite clause (e) of section 130 (2) in an offence of rape against a child under eighteen years of age was fatal and vitiated the entire proceedings."

See also: **Charles Makapi Vs Republic**, Criminal Appeal No. 85 of 2012, **Gerald Morris Hugo Vs Republic**, Criminal Appeal No. 204 of 2016 (both unreported).

Since the charge sheet against the appellant in this appeal did not cite the proper paragraph of the section, which creates the offence allegedly committed by him, undoubtedly, it denied him the chance of knowing properly the offence which he stood charged with and as such, he could not properly equip himself for the defence. Unfortunately, this

anomaly escaped the eyes of the learned first appellate Judge. As the said anomaly was fatal and incurable under section 388 of **the CAP** as per the above cited authorities, we allow his appeal. We direct that the appellant be set at liberty forthwith, unless he is otherwise being legally held for some other good cause.

Order accordingly.

DATED at **DAR ES SALAAM** this 18th 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.

A.H. MSUMI
DEPUTY REGISTRAR
COURT OF APPEAL