

**IN THE COURT OF APPEAL OF TANZANIA
AT MBEYA**

(CORAM: MMILLA, J.A., MUGASHA, J.A., And MWAMBEGELE, J.A.)

CRIMINAL APPEAL NO. 116 OF 2016

JUSTINE MAEMBE APPELLANT

VERSUS

THE REPUBLIC..... RESPONDENT

(Appeal from the decision of the High Court of Tanzania, at Sumbawanga)

(Sambo, J.)

dated the 20th day of May, 2014

in

Criminal Appeal No. 55 of 2013

JUDGMENT OF THE COURT

30th November & 6th December, 2018

MMILLA, J. A.:

The appellant was charged before the District Court of Sumbawanga at Sumbawanga, with the offence of rape contrary to section 130 (1) of the Penal Code Cap. 16 of the Revised Edition, 2002 as amended by sections 1 and 2 of the Sexual Offences Special Provisions Act, No. 4 of 1998 (the Penal Code). It was alleged that on 12.4.2004 at about 18:00 hrs at Katuka Village within the District of Sumbawanga in Rukwa Region, he raped PW1 (name withheld) who was then seven (7) years old. After full trial, he was

found guilty, convicted and sentenced to thirty (30) years' imprisonment. Dissatisfied, he appealed to the High Court of Tanzania, Sumbawanga Registry, whereat his conviction was upheld and the sentence enhanced from thirty (30) years which was imposed by the trial court to life imprisonment. The appellant was the more aggrieved, hence this second appeal to the Court.

The facts of the case were briefly that on 12.4.2004 at about 18:00 hrs, the appellant went to the home of PW2 Natalia Nyami to collect fire intended to assist him to clear his farm which was not very far from the former's home. Around that time PW2's granddaughter (the victim child) was at that house. Before the appellant left PW2's home, he allegedly enticed that child to accompany him to the farm on the pretext that they would prepare fire and roast maize. Then, PW2 was inside the house and unaware that the appellant left with her grandchild. On arrival at the farm however, the appellant ordered that child to remove her clothes, which she did amid cries, and began raping her.

On the other hand, PW2 noticed a short while after the appellant had left that her grandchild was not there. She decided to trace her. She headed to the river in that vicinity. A little bit later, she heard a child crying

in the bush. She followed that direction. It was then that she saw the appellant on top of that child raping her. Determined, she courageously intervened and caught him. Of course, the appellant fought back but luckily, PW2 was unexpectedly joined by his brother and succeeded to apprehend him. The matter was reported to police. The police prepared a PF3 for the victim child and instructed her relatives to send her to hospital for medical examination. Meanwhile, after conducting initial investigation, the appellant was eventually charged before the District Court of Sumbawanga as above-mentioned.

The appellant's defence constituted a general denial that he did not commit the charged offence. However, he burged during cross examination and admitted that he indeed raped the said child after she followed him at his farm. He purported that he was confused. As already intimated, the trial court convicted him, a decision which was upheld by the first appellate court.

The memorandum of appeal filed by the appellant raised five (5) grounds as follows:-

- (1) That the evidence of PW2 one Natalia Nyami was wrongly believed and relied upon on the ground that she was not an eye witness, also that one important witness, who was PW2's brother, was not called as a witness;
- (2) That exhibit "PA" (the cautioned statement) was not freely given, therefore that it was wrongly believed and relied upon;
- (3) That the evidence of PW4 Dr. Sichawe was wrongly believed and relied upon, so also exhibit "PB" (the PF3) which he tendered as evidence;
- (4) That the first appellate court improperly varied the sentence from thirty (30) years imposed by the trial court to that of life imprisonment; and
- (5) That the prosecution did not prove the case against him beyond all reasonable doubts.

When the appeal came for hearing before us on 30.11.2018, the appellant appeared in person and fended for himself. He urged the Court to

adopt his grounds of appeal and elected for the Republic to respond, but reserved his right to rejoin if need would arise.

On the other hand, the respondent/Republic was represented by Ms Catherine Paul, learned State Attorney. At the outset, she informed the Court that she was supporting the appeal, but for different reasons from those raised by the appellant through the memorandum of appeal.

Ms Paul's brief submission focused on the charge sheet which she said was defective because it cited section 130 (1) of the Penal Code without more. She contended that the section defines rape, but it does not create any offence, or explain the categories of rape as envisaged by law. She illustrated that since the evidence on record shows that the appellant raped a girl below the age of 10; the charge sheet ought to have cited the subsection creating the offence, also the paragraph reflecting the appropriate category of rape under which the said offence fell. She added that the charge ought similarly to cite the section prescribing the obligatory sentence.

As the record will show, the trial court took note of that defect, but resolved that it was minor, therefore that it did not occasion miscarriage of

justice, a stand which was upheld by the first appellate court. Ms Paul submitted that the trial court's finding was erroneous, and that the first appellate court slipped into the same error in upholding that finding. She maintained that, the defect was incurably fatal because it denied the appellant the opportunity to properly prepare his defence. She urged the Court to invoke the provisions of section 4 (2) of the Appellate Jurisdiction Act, Cap. 141 of the Revised Edition, 2002 (the AJA), quash the proceedings and judgments of both lower courts, set aside the sentence and order appellant's release from prison.

The appellant submitted shortly that he was in full agreement with the learned State Attorney. He pressed the Court to allow the appeal and release him from prison.

We have carefully weighed the submission endeavoured by the learned State Attorney. We wish to point out at the very beginning that her observation that the charge was defective is valid. The charge sheet under consideration was framed as follows:-

***"OFFENCE SECTION AND LAW: Rape c/s 130 (1)
of the Penal Code, Cap. 16, Vol.1 of the Laws as***

amended by sections 1 and 2 of the Sexual Offences Special Provisions Act No. 4/1998.

PARTICULARS OF THE OFFENCE: *That Justine s/o Maembe is charged on 12th day of April, 2004, at 18:00 hrs at Katuka village within the District of Sumbawanga, Rukwa Region, did have carnal knowledge of one (DS) a girl aged 7 years.*

STATION: SUMBAWANGA."

As already pointed out, we agree with Ms Paul that section 130 (1) of the Penal Code merely defines rape. It does not create any offence, or reflect the many categories of rape envisaged by the law. In our firm view, for the sake of completeness, the charge sheet involving the offence of rape, apart from citing section 130 (1) of the Penal Code, it must as well cite the relevant sub-section creating the offence, the paragraph identifying the category of rape an accused person may have committed, and also the relevant section prescribing the appropriate sentence to be meted out against the accused in case of a conviction. This is in view of the fact that the purpose of framing a charge is to give intimation to the accused of a clear, unambiguous and precise notice of the nature of the accusation he is

called upon to meet in the course of a trial. As reflected in the above quoted charge sheet, these qualities are lacking in the present case because only the definition section was indicated.

As was expressed in the case of **Makoye s/o Masanya & 3 Others v. Republic**, Criminal Appeal No. 29 of 2014, CAT (unreported), one of the principles of fair trial in our system of criminal justice is that an accused person must know the nature of the case facing him, and that this can only be achieved if the preferred charge discloses the essential elements of an offence - See also the cases of **Mussa Mwaikunda v. Republic** [2006] T.L.R. 387, among others.

It is likewise imperative to point out that a requisite charge must embrace the demands of section 135 (a) (ii) of the Criminal Procedure Act, Cap. 20 of the Revised Edition, 2002 (the CPA). That section provides that:-

*"(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 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.” [The emphasis is added].

This requirement is geared at affording an accused person an opportunity to fully appreciate the nature of the allegations against him and give him a proper opportunity to present his or her own case.

As intimated by Ms Paul, the several categories of rape are provided for under section 130 (2) of the Penal Code which provides that:-

"(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.”

The evidence on record in the present case reveals that the victim of rape was 7 years old. That entails that a proper charge ought to have cited section 130 (1), (2) (e) and 131 (3) of the Penal Code. Section 131 (3) of the Penal Code provides that:-

*"(3) Notwithstanding the preceding provisions of this section **whoever commits an offence of rape to a girl under the age of ten years shall on conviction be sentenced to life imprisonment.**"*

[The emphasis is added].

As will be appreciated, this category of rape attracts a severe sentence of life imprisonment. This suggests that omission to cite the appropriate provisions embarrassed the appellant and that he was not given sufficient information to make him adequately prepare his defence. *Ipsso facto*, he did not get a fair trial. It is on this basis that we agree with Ms Paul that both courts below committed a serious error when they found in common that the defect was minor, and that it did not occasion miscarriage of justice. We are firm that such a deficiency is not curable under section 388 of the CPA.

For reasons we have assigned, we invoke the powers obtaining under section 4 (2) of the AJA, quash the proceedings and judgments of both lower courts, set aside the sentence and order appellant's immediate release from prison unless he is otherwise being continually held for some other lawful cause.

DATED at **MBEYA** this 4th day of December, 2018.

B. M. MMILLA
JUSTICE OF APPEAL

S. E. A. MUGASHA
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