IN THE COURT OF APPEAL OF TANZANIA

AT MBEYA

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

CRIMINAL APPEAL NO. 609 OF 2015

OBEDI MWASILA ..... APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

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

(Levira, J.)

dated the 30th day of September, 2015
in
Criminal Appeal No. 73 of 2014

.....

JUDGMENT OF THE COURT

26th November, & 3rd December, 2018

MUGASHA, J.A.:

In the District Court of Rungwe at Tukuyu, the appellant was arraigned as hereunder:

> ***OFFENCE SECTION AND LAW:*** *Rape c/s 130 (1) (e) and 131 (3) of the Penal Code Cap 16 RE.2002*
>
> ***PARTICULARS OF THE OFFENCE:*** *That OBEDI S/O MWASILA charged on 28th day of July, 2012 at about 19.00hrs at Mpandapanda Kiwira village within*

Rungwe District in Mbeya Region, unlawfully have (sic) carnal knowledge of one O.I a girl aged 5 yrs.

The appellant denied the charge subsequent to which to establish its case, the prosecution paraded seven witnesses and one documentary exhibit (Police Form No. 3).

A brief account of the prosecution case is as follows: On 28th July, 2012, at Mpandapanda Kiwira village, Rungwe District in the Region of Mbeya, O.I (PW1) had accompanied **TUNOSISYE D/O ALLEN** (PW2) to her father's house to collect some clothes.When they reached Mtoni area, they met a man who was a stranger to them. He asked PW2 to go and buy meat while the man remained with PW1 and raped her. When PW2 came back, PW1 told her what had befallen her. However, in their testimonial account none of them had identified the culprit and throughout their evidence they referred the culprit as a certain man they had seen at Ipinda who was not their relative. Besides, they both remained silent about the rape incident. On the evening of the following day, PW1's mother one **VICTORIA W/O IMAN** (PW3) sawher daughter crying complaining that her private parts were aching. Upon the advice of her husband she inspected and found PW1's private parts with stains. According to PW3, on the third day,after having

seen her daughter walking in a strange manner, this prompted her to ask PW1 what had befallen her. PW1 replied to have been raped by an unknown person. This was confirmed by PW2. Five days after the fateful incident, the matter was reported to the Police and PW1 was taken to the hospital where it was confirmed that she was actually raped.Apparently, during the trial the name of the appellant fared for the first time that he was the culprit in the sole testimonial account of **WP 7067 DC TWITIKE**PW7, the investigator who told the trial court to have identified the victim after the appellant was already arrested. However, in the entire evidence of PW7 there is no clue as to howthe Police managed to arrest the appellant considering that, he was neither identified nor mentioned by the victim or PW2 who were together when they initially met the culprit on the fateful day.

In his defence, the appellant denied each and every detail of the prosecution account. Moreover, he denied knowing the victim and claimed not to have been at Kiwira on the fateful day when PW1 was raped. He added that, his arrest was perpetrated by a rumour that, he wanted to murder children in order to be rich.After a full trial, appellant was convicted as charged and sentenced to thirty years imprisonment as well as eight strokes of the cane and pay PW1 Tshs. 500,000/=.

Aggrieved, the appellant unsuccessfully appealed to the High Court which did not vary the verdict of the trial court, thus, this second appeal.

In the Memorandum of appeal he has filed nine grounds which we have considered not to reproduce because of the reasons which will become apparent.

When the appeal was called on for hearing, the appellant was unrepresented whereas the respondent Republic was represented by Mr. Offmedy Mtenga, learned State Attorney.

The appellant adopted the grounds of appeal and opted to initially hear the submission of the learned State Attorney.

On the other hand, in his focused submission, Mr. Mtenga pointed out that, the appellant was charged with rape under section 130 (1) (e) which is nonexistent in the Penal Code. The learned State Attorney pointed out this to be contrary to sections 132 and 135 of the Criminal Procedure Act, Cap 20 R.E.2002 (the CPA) which categorically require the charge to disclose the ingredients of the offence in order to enable an accused person to prepare a defence. He thus argued that,since the appellant has been charged on a nonexistentmatter that is tantamount to not being charged at all. To back up his argument, the learned State Attorney referred us to the case of

MAYALA NJIGAILELE VS REPUBLIC, Criminal Appeal No. 490 of 2015 (unreported). On the way forward, he urged us to invoke our revisional jurisdiction under section 4 (2) of the Appellate Jurisdiction Act, Cap 141 RE.2002 (the AJA) quash the proceedings of the courts below and set aside the conviction,thesentence and order the release of the appellant.

The appellant rejoined by supporting the submission of the learned State Attorney.

At the outset, we wish to restate the obvious that, it is the charge sheet which lays a foundation of a trial because the principle has always been that, an accused person must know the nature of the case facing him before making his defence. What constitutes a proper charge was addressed in **CHARLES S/O MAKAPI VS THE REPUBLIC,** Criminal Appeal no. 85 of 2012 (unreported) whereby, faced with a situation almost similar to the one at hand, the Court reiterated that, section 135 of the CPA, imposes mandatory requirements that a charge sheet should describe the offence and make reference to the section and law creating the offence.

At the beginning of this judgment we extracted the charge sheet to establish that in the first place, the appellant was arraigned under sections

130 (1) (e) and 131 (1) of the Penal Code. Section 130(1) of the Penal Code which creates the offence of rape categorically states as follows:-

> *"It is an offence for a male person to rape a girl or woman"*

Moreover, the circumstances under which a male person commits rape are classified under section 130(2) (a) to (e) of the Penal Code in terms of the following description:

> *"(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."

In the light of the stated position of the law, in the case under scrutiny, apart from the fact that the category of rape was not disclosed, the appellant was arraigned under a nonexistent provision of the law. This unduly prejudiced the appellant in his defence on account of sufficient lacking particulars on the description in section 130(2) (a) to (e) under which the offence he faces falls. See- **SIMBA NYANGURA VS REPUBLIC,**

Criminal Appeal No. 144 of 2008 (unreported). Furthermore, we are fortified in that regard because the mode in which the statement of the offence ought to have been framed is clearly stated under the provisions of section 135 (a) (ii) of the CPA which states:

> *"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].*

The Court was confronted with a situation like the one under scrutiny in**ABDALLA ALLY VS REPUBLIC,** Criminal appeal no. 253 of 2013(unreported). The Court held:

> *"...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."

Similar remarks were earlier made by the Court in **MAREKANO RAMADHANI VS THE REPUBLIC,** Criminal Appeal No. 201 of 2013, **KASTORY LUGONGO VS THE REPUBLIC,** Criminal Appeal No 251 of 2014 and**DAVID HALINGA VS THEREPUBLIC,** Criminal Appeal No. 12 of 2015 (all unreported) where the Court categorically held that, the defective charge sheet unduly prejudiced the appellant in his defence. We are of a similar view in the case under scrutinywhereby, it is obvious that the appellant was charged, tried and convicted on non-existent provisions of the law which cannot be said to create any offence.

We agree with the learned State Attorney that, since the charge sheet lacked sufficient particulars constituting the offence of rape, it cannot be safely vouched that, the appellant was made to understand the nature of charges facing him in order to prepare an informed or rational defence. This

resulted into an unfair trial on account of an incurably defective charge sheet. As such, the defective charge vitiated the trial which was indeed a nullity and so was the appeal before the High Court because it stemmed from a nullity.

In view of the aforesaid, we therefore invoke the provisions of section 4(2) of the AJA and hereby nullify the entire proceedings and judgment of the trial and the High Court in Criminal Appeal No. 73 of 2014. We further quash the conviction and set aside the sentence meted out to the appellant arising from the incurably defective charge sheet. Having quashed the conviction and set aside the sentence, we order the immediate release of the appellant from custody unless if he is held for some other lawful cause.

DATED at **MBEYA** this 30th day of November, 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