IN THE COURT OF APPEAL OF TANZANIA
AT IRINGA

(CORAM: LUANDA, J.A., LILA, J.A., And MKUYE, J.A.)

CRIMINAL APPEAL NO. 122 OF 2016

CHENGA S/O NYAMAHANGA ..... APPELLANT
VERSUS
THE REPUBLIC ..... RESPONDENT

(Appeal from the Decision of the High Court of Tanzania at Iringa.)

(Kihiyo, J.)

Dated the 17th day of June, 2011
in
DC Criminal Appeal No. 30 of 2010

JUDGMENT OF THE COURT

29th May & 5th June, 2018

MKUYE, J.A.:

In the District Court of Iringa at Iringa, the appellant Chenga s/o Nyamahanga was charged with an offence of rape contrary to sections 130 (1) and 131 of the Penal Code, Cap 16 RE 2002. The statement and the particulars of offence which we deliberately reproduce herein ran as follows:

STATEMENT OF OFFENCE

Rape contrary to section 130 (1) and 131 of the Panel Code as amended by section 5 and 6 of the Sexuai Offences Special Provisions Act No. 4 of 1999.

PARTICULARS OF OFFENCE

That Chenga s/o Nyamahanga charged on 3rd day of April 2007 at about 12.30 hours at Kitapilimwa Village in Iringa Rural District and Iringa Region did have carnal knowledge of one Sauda D/O Mtati, a girl of 12 years old".

The appellant pleaded not guilty to the charge.

Trial commenced whereby the prosecution marshalled five witnesses to prove the case and produced two exhibits. For the defence the appellant was the lone witness. At the end of the trial the appellant was found guilty, convicted and sentenced to thirty years imprisonment; a corporal punishment of eight strokes; and in addition he was ordered to pay shillings 300,000/= as compensation to the victim. Aggrieved, he

appealed to the High Court where the appeal was dismissed (Kihiyo, J.). Still protesting for his innocence, he has brought this second appeal to this Court. He has fronted 11 grounds of appeal which for reason to be revealed later we do not wish to reproduce them.

But before embarking on the merits of the appeal we feel apt to state albeit briefly the facts of the case leading to this appeal. They run as follows:

On 3/4/2007 at about 12.00 noon, Sauda Mtati (PW2) who was twelve years old by then, was sent by her mother to a farm to pick vegetables commonly known as "Mkalifya". While picking the said "Mkalifya" the appellant emerged. He pushed PW2 down, strangled her neck, stripped off her underwear and after he had taken off his trouser, he inserted his manhood into her (PW2) vagina. Meanwhile, PW2's mother, one Zawadi d/o Nyavili (PW1) who had sent PW2 to the farm after realizing that PW2 was taking too long, followed her to the farm. To her astonishment she witnessed the appellant who had unzipped his trouser ravishing PW2. PW1 testified that after seing that she shouted for help but the appellant ran away. Thereafter they went home and reported the matter at PW2's school, to the Village Executive Officer and

then to the police station where they were issued with a PF3 (Exh P1). Thereafter the victim (PW2) was taken to hospital where she was admitted for five days. PW3, Delphina d/o Molo testified to have examined PW2 and saw blood stains in her vagina. PW5, one Magreth Giringa who was a doctor also testified to have examined PW2 and observed that her virgin had been recently tempered with as she saw fresh bruises on the victims vagina. The appellant was arrested by Savio Mwano (PW4) and then arraigned before the Court.

In his defence, the appellant denied involvement in the commission of the offence. He testified that while he was on his way from Hoho river where he had gone to take bath, he saw PW2 being beaten by her mother. He said he was arrested by Savio Mwano and John Nyavile when he was going home from Ikingo village where he had gone to visit his brother.

As was stated earlier on, the trial court found that the prosecution proved its case beyond reasonable doubt and convicted the appellant.

When the appeal was called on for hearing the appellant appeared in person and unrepresented; whereas the respondent Republic enjoyed

the services of Mr. Alex Mwita and Ms. Alice Thomas learned State Attorneys.

When the appellant was given an opportunity to elaborate his grounds of appeal, he opted to hear the submission from the learned State Attorney first and reserved his right to respond later if such need would arise.

On his part Mr. Mwita, in the first place sought and leave was granted to address us on a point of law which he discovered after the time of raising a preliminary objection had lapsed. Submitting on the said point of law, Mr. Mwita contented that the charge sheet as shown at page 1 of the record of appeal which initiated the proceedings against the appellant was incurably defective. He pointed out that, the appellant who was alleged in the particulars of the offence to have raped a girl who was aged 12 years old was charged under section 130 (1) and 131 of the Penal Code, Cap 16 RE 2002 (the Penal Code) which essentially define the offence of rape and provide for punishments respectively. He elaborated further that the provisions of the law under which the appellant was charged did not show the category of the offence of rape the appellant had committed. The learned State Attorney went on to

submit that according to the facts of the case the appellant ought to have been charged under section 130 (1) and (2) (e) of the Penal Code. Under those circumstances, Mr. Mwita, while relying on the cases of **Christian Sanga Vs Republic,** Criminal Appeal No. 512 of 2015; and **Francis Simon Njavike Juma Vs Republic,** Criminal Appeal No. 222 of 2014, submitted that the appellant was not afforded a fair trial. Hence, he urged the Court to invoke section 4 (2) of the Appellate Jurisdiction Act, Cap 141 RE 2002 (the AJA) and nullify all the proceedings and judgments of the trial court and the High Court and leave the matter to the Director of Public Prosecutions (DPP) to decide on whether to re-charge him or not.

After the appellant was asked to respond, he did not have any useful contribution except to agree with what was submitted by the learned State Attorney.

From the outside we wish to preface by pointing out that every criminal trial is commenced by a charge sheet. The charge sheet lays down the complaint against the accused. The manner in which the charge sheet is to be framed is provided for under section 135 (a) (ii) of the Criminal Procedure Act, Cap 20 RE 2002 (the CPA) which reads:

*"(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**".*

[Emphasis added]

This stance was reiterated in the case of **Charles Makapi Vs Republic**, Criminal Appeal No. 85 of 2012 (unreported) where the Court stated as hereunder.

*"Section 135 of the CPA imposes a mandatory requirement that a charge sheet **must describe the offence and make reference to the section and the law creating the offence".***

[Emphasis added]

In the case at hand the appellant was charged with a offence of rape. The statement of offence made reference to section 130 (1) and 131 of the Penal Code which ideally defines the offence of rape and provides for different punishments for a person who commits an offence of rape respectively. For clarity we quote the said section 130 (1) as follows:

> *"130 (1) It is an offence for a male person to rape a girl or a woman".*

As it can be seen, the above cited provision defines and creates the offence of rape. It does not show the categories of the offence of rape which can be committed by a male person as shown in subsections (2) and (3) of the said section. On this, we think, we subscribe to the observation we recently made in the case of **Shabani Masawila Vs Republic** Criminal Appeal No. 358 of 2008 (unreported) that:

> *"Our understanding of section 130 cited above is that; **One**, it creates the offence of rape. **Two**, it is not a stand alone provision. **Three**, it **provides for ten categories of rape as***

predicated under paragraphs 2 (a) to (e) and (3) (a) to (e) of that section. *It, therefore, follows that each offence of rape must fall under one of the categories shown above"*

[Emphasis added]

In this case, in the particulars of the offence it was stated that the appellant had carnal knowledge of Sauda d/o Mtati who was a girl of 12 year old. Under such circumstances, we fully agree with Mr. Mwita that the appellant ought to have been charged under section 130 (1) and 2 (e) of the Penal Code which provides as follows:

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

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

(a) .....

(b) .....

(c) .....

(d) .....

(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".

As we have alluded earlier on, in this case the statement of offence did not make reference to a specific provision creating the offence the appellant was alleged to commit. This amounted to rendering the charge incurably decective.

This Court when was faced with a similar situation in the case of **Christian Sanga** (supra) stated as follows:

"As often stressed by the Court, where a person in the shoes of the appellant may have been charged and found guilty on a non–existent provision of the law, it cannot be said that such person was fairly tried in the courts below. See

also the case of ***Francis Simon Njavike*** *(supra)."*

But again in the case of **Abdallah Ally Vs Republic**, Criminal Appeal No. 253 of 2013 (unreported) where the appellant was charged under a wrong provision of the law, the Court held that the omission left the appellant unaware of the serious offence he was facing and thus it constituted unfair trial. In particular the Court stated as follows:

"..... being ***found guilty on a defective charge based on wrong and/or non existent provision of the law, it cannot be said that the appellant was fairly tried in the courts below.*** *In view of the foregoing short coming,* ***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 .....*

(see also ***Mussa Mwaikunda Vs Republic,***

[2006] TLR 387"

[Emphasis added]

We subscribe to the observation in the above cited cases. Even in this case, since the appellant was charged under a provision of the law which did not prescribe the specific category of the offence of rape he was alleged to commit, it cannot be said that he was fairly tried. We are also, increasingly of the view that the appellant could not be in a position to know the nature or seriousness of the offence he was facing.

Given the circumstances, we are, constrained to invoke the provisions of section 4(2) of the AJA and quash the proceedings and judgments of both courts below and set aside all the sentences which were imposed against the appellant.

We are mindful of the way forward suggested by Mr. Mwita that the matter be left in the hands of the DPP to decide on whether to re-charge the appellant or not. However, in our view, since the charge sheet which was the foundation of the complaint against the appellant is incurably defective, then there cannot be a charge on which the

appellant can be re-charged. Allowing the DPP to decide on the course of action to take would amount to changing or amending the charge which would ultimately prejudice the appellant. Any amendment of the charge sheet could have been properly made at any stage during trial. For that matter we do not go along with Mr. Mwita's proposition.

All said and done, we order that the appellant be released forthwith from prison unless he is otherwise held for other lawful reason(s).

DATED at **IRINGA** this 4th day of June, 2018.

B. M. LUANDA
JUSTICE OF APPEAL

S. A. LILA
JUSTICE OF APPEAL

R. K. MKUYE
JUSTICE OF APPEAL

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

P. W. BAMPIYA
SENIOR DEPUTY REGISTRAR
COURT OF APPEAL