IN THE COURT OF APPEAL OF TANZANIA

AT IRINGA

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

CRIMINAL APPEAL NO. 379 OF 2016

JOSEPH PAUL @ MIWELA ..... APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

(Appeal from the Judgment of the High Court of Tanzania at Iringa)
(Shangali, J.)

dated the 12th day of August, 2016
in
DC Criminal Appeal No. 48 of 2014

.....

JUDGMENT OF THE COURT

15th & 16th May, 2018

NDIKA, J.A.:

Joseph Paul @ Miwela, the appellant herein, was convicted by the Mufindi District Court at Mafinga of the offence of rape upon his own plea of guilty. It had been alleged that on 10th November, 2013 at 10.00 hours at Ihanzutwa Village within Mufindi District, he, unlawfully, had carnal knowledge of "LCM", a girl aged twelve years. Following conviction, he was sentenced to the mandatory term of thirty years imprisonment. His first appeal, apparently against both conviction and sentence, was dismissed in its entirety by the High Court of Tanzania at Iringa. The High Court reasoned that the appellant, having been convicted on his own unequivocal

plea of guilty, had no right to appeal against conviction in terms of section 360 (1) of the Criminal Procedure Act, Cap. 20 RE 2002 and that he could not challenge the sentence meted out as it was the statutory minimum penalty for the offence. Aggrieved, the appellant has appealed to this Court.

Before us the appellant appeared in person, unrepresented. He sought to argue his appeal upon five main grounds of appeal, which, we need not reproduce in this judgment on the reasons that will become apparent shortly. The respondent Republic was represented by Ms. Lilian Ngilangwa, learned Senior State Attorney.

Before the hearing began in earnest, Ms. Ngilangwa sought to argue two points of preliminary objection, attacking the validity of the notice of appeal and the appellant's *locus standi*. After a brief discussion with the Court, the learned Senior State Attorney abandoned the said preliminary objection, which was, then, duly marked withdrawn.

At the prompting of the Court, thereafter, the parties addressed us on the propriety or validity of the charge against the appellant, an issue that unfortunately escaped the scrutiny of the first appellate court.

Citing the charge sheet at page 1 of the record of appeal, Ms. Ngilangwa conceded that the charge of rape against the appellant was clearly defective because the alleged offence was laid under "section 130 (1) (e)" of the Penal Code, Cap. 16 RE 2002 ("the Penal Code"), which was non-existent. She submitted that the said charge ought to have been laid under sections 130 (1), (2) (e) and 131 (1) of the Penal Code. On the effect of that flaw, she argued that the said defect was fatal as it offends the provisions of section 135 of the Criminal Procedure Act, Cap. 20 RE 2002 ("the CPA") that enacts the mandatory mode in which offences are to be charged. Due to that defect, she added, the appellant was not sufficiently informed of the charge against him and that prevented him from preparing his defence properly and effectively.

In view of the defect in the charge sheet, Ms. Ngilangwa urged the Court to invoke its revisional powers under section 4 (2) of the Appellate Jurisdiction Act, Cap. 141 RE 2002 ("the AJA") to revise and nullify the lower courts' proceedings and that the appellant's conviction and sentence handed down by the trial court and confirmed by the first appellate court be quashed and set aside. Nonetheless, recalling that the appellant did not go through a full trial as he was convicted upon his own plea of guilty and that he has been in prison for a rather short period of four years, the

learned Senior State Attorney pressed that the appellant be tried afresh on a new proper charge.

The appellant, being a person untrained in the law, had nothing much to say in reply. He unpretentiously urged the Court to release him from prison in view of the defect in the charge against him.

In order to determine the question whether the impugned charge sheet was proper or not, we find it vital to reproduce the said charge sheet for ease of reference:

"TANZANIA POLICE FORCE

CHARGE SHEET

PARTICULARS OF THE ACCUSED PERSON CHARGED:

NAME: *JOSEPH PAULI @ MIWELA*

TRIBE: *HEHE*

AGE: *19 YEARS*

OCCUPATION: *PEASANT*

RELIGION: *CHRISTIAN*

ADD: *IHANZUTWA VILLAGE*

OFFENCE, SECT AND LAW: *RAPE C/S 130 (1) (e) AND 131 OF THE PENAL CODE, CAP. 16 OF THE LAWS RE 2002.*

PARTICULARS OF THE OFFENCE: *That JOSEPH S/O PAUL @MIWELA charged on 10th of Nov 2013 at about 10.00 Hrs at Ihanzutwa Village within Mufindi District in Iringa Region, did unlawfully have carnal knowledge of [name withheld], a girl aged 12 years.*

Station: Mafinga *(Sgd)*

Date: 18/11/2013 *P.P."*

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. What is especially relevant 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 emphasize that every statement of offence in a charge sheet must contain a reference to the section of the law creating the offence charged.

Having examined the charge sheet in this matter, we agree with Ms. Ngilangwa that the said charge is defective in that its statement of offence predicates the offence of rape upon section "130 (1) (e)" of the Penal Code, which is obviously non-existent. The statement of offence would

have been correct or proper if, besides citing section 130 (1) of the Penal Code, it had made reference to one of the categories of rape created by subsection (2) of section 130 of the Penal Code (i.e., categories (a), (b), (c), (d) and (e)). We wish to emphasise that since each category of rape has its own ingredients and peculiarities, it is of the highest significance that the specific category of that offence charged be clearly disclosed in the statement of offence.

On the effect of the flaw in the charge, we agree with Ms. Ngilangwa that it is fatal as it cannot be cured under section 388 of the CPA. Indeed, there is a plethora of the decisions of this Court on this position: see, for instance, **Isidori Patrice v. The Republic,** Criminal Appeal No. 224 of 2007 (unreported); **Khatibu Khanga v. The Republic**, Criminal Appeal No. 290 of 2008 (unreported); **Mussa Mwaikunda v. The Republic** [2006] TLR 387; **Sylvester Albogast v. The Republic,** Criminal Appeal No. 309 of 2015(unreported); **Nassoro Juma Azizi v. The Republic**, Criminal Appeal No. 58 of 2010 (unreported); **Maulid s/o Ally Hassan v. The Republic**, Criminal Appeal No. 439 of 2015 (unreported); and **Mohamed Kaningo v. The Republic** [1980] TLR 279. We find it instructive to recall what this Court observed in **Abdalla Ally v. The Republic**, Criminal Appeal No. 253 of 2013 (unreported) that:

"Being found guilty on a defective charge, based on a wrong and/or non-existent provisions of the law, is evident that the appellant did not receive a fair trial. The wrong and/or non-citation of the appropriate provisions of the Penal Code under which a charge was preferred, left the appellant unaware that he was facing a charge of rape."

The appellant's situation in this matter is similar to what befell his counterpart in **Abdalla Ally** (supra). In the present case, the appellant could not enter a proper plea after the charge was read over to him as he did not know its legal foundation. The proceeding against him was, therefore, manifestly unfair and consequently a nullity. Exercising our revisional powers under section 4 (2) of the AJA, we quash all the proceedings and conviction in the trial court and the first appellate court and set aside the sentence.

The above outcome takes us to consider whether or not to order a retrial. 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 not existent, the question of a retrial does not arise. (see, for instance, the unreported decision of the Court in **Mayala Njigailele v. The Republic**, Criminal Appeal No. 490 of 2015).

In the final analysis, we accordingly order that the appellant be released from custody forthwith and set free, unless he is held for some other lawful cause.

DATED at **IRINGA** this 16th day of May, 2018.

B. M. LUANDA
JUSTICE OF APPEAL

S. A. LILA
JUSTICE OF APPEAL

G. A. M. NDIKA
JUSTICE OF APPEAL

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

E. F. FUSSI
DEPUTY REGISTRAR
COURT OF APPEAL