IN THE COURT OF APPEAL OF TANZANIA

AT MBEYA

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

CRIMINAL APPEAL NO. 11 OF 2016

RICHARD MLINGWA ..... APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

(Appeal from the Judgment of the High Court of Tanzania at Sumbawanga)

(Sambo, J.)

dated the 21st day of October, 2016
in
DC Criminal Appeal No. 20 of 2015

.....

JUDGMENT OF THE COURT

7th & 19th February 2018

NDIKA, J.A.:

Richard Mlingwa, the appellant herein, was charged with and convicted of the offence of attempted rape contrary to section 132 (1) of the Penal Code, Cap. 16 of the Revised Edition of 2002 before the District Court of Sumbawanga. Upon conviction, he was sentenced to a term of thirty years' imprisonment with twelve strokes. His first appeal to the High Court of Tanzania sitting at Sumbawanga against conviction and sentences was unsuccessful. Undeterred, he has now preferred this appeal.

The prosecution case against the appellant stood on the "evidence" adduced by three witnesses. In the evening of 8th July 2012, PW2 Noel Hamisi rushed from his home to a nearby banana plantation where he was alerted to the cries of his granddaughter, Martha d/o Fungameza, a girl of unsound mind aged 9 years. He found the appellant, barely clad in his underpants, lying on top of Martha, who was naked and clearly at the mercy of the appellant. On seeing PW2, the appellant fled from the scene. The matter was immediately reported to the village authorities and Martha was subsequently taken to hospital for medical examination. The prosecutrix's father, PW1 Richard Fungameza, came back home a while later and joined a team that searched for and caught the appellant that very evening. The appellant was turned over to the Police officers a short while later.

In his defence, the appellant completely disassociated himself from the prosecution's accusation, maintaining that in the fateful evening he was not at the scene of the crime.

On the whole of the evidence, the trial court found it established beyond doubt that the appellant committed the offence. The court relied heavily upon the evidence of PW2, which it believed to be true, and rejected the appellant's defence. As already indicated, the High Court, on the appellant's first appeal, sustained the impugned conviction and sentence.

The appellant has predicated his appeal to this Court on a memorandum of appeal consisting of nine grounds of grievance. As it shall be demonstrated herein below, we think we need not reproduce the appellant's grounds of appeal.

At the hearing before us, the appellant appeared in person, unpresented. When invited to address the Court on his appeal, he opted to hear the respondent's reaction to his points of grievance reserving his right to rejoin should need arise.

Ms Catherine Gwaltu, learned Senior State Attorney, appeared for the respondent Republic. She indicated at the very outset that she supported the appeal on two fundamental procedural legal errors. First, she submitted that the charge sheet against the appellant was defective in that while the statement of the offence cited the offence of attempted rape, the particulars of the offence did not allege or describe the said offence charged but the offence of rape. The said defect, Ms Gwaltu submitted, was a contravention of the provisions of sections 132 and 135 of the Criminal Procedure Act, Cap. 20 of the Revised Edition of 2002. Relying upon this Court's decision in **Isidori Patrice v. The Republic**, Criminal Appeal No. 224 of 2007 (unreported), the learned Senior State Attorney urged us to find the charge sheet incurably defective because it failed to duly inform the appellant of the charge he faced. The appellant's trial, she argued, was rendered unfair and, on that reason, his conviction was unsustainable.

Secondly, the learned Senior State Attorney drew our attention to the omission by the trial Resident Magistrate to swear or affirm all the three prosecution witnesses

as well as the appellant before they gave their testimonies. She submitted that the recording of the prosecution witnesses without oath or affirmation was an irredeemable violation of section 198 of Cap. 20 (supra) and that it rendered the whole of the prosecution evidence of no value. She also added that even if the said evidence had been recorded according to the dictates of the law, it was too weak to found conviction against the appellant.

On being asked by the Court to comment on other procedural infractions apparent on the trial record, Ms Gwaltu acknowledged that the trial proceedings were beset by yet another catalogue of contraventions as follows: first, that the trial court did not record the prosecution case as formally closed after the prosecution had prayed to have its case closed; secondly, following the closure of the prosecution case the trial court omitted making a ruling on whether or not a case had been made out against the appellant; thirdly, the appellant was not addressed in terms of the mandatory provisions of section 231 (1) of Cap. 20 (supra) on his right to give evidence whether or not on oath or affirmation as well as calling witnesses in his defence; and finally, the trial court closed the defence case unilaterally without having been requested or prompted to do so by the appellant.

As regards the way forward, Ms Gwaltu urged us to invoke our revisional powers under section 4 (2) of the Appellate Jurisdiction Act, Cap. 141 of the Revised Edition of 2002 to nullify all the proceedings and decisions of the lower courts. As a

result, she said, the conviction and sentence against the appellant be quashed and that the appellant be released.

In view of the position taken by the respondent, the appellant, quite understandably, made no rejoinder.

Having heard the parties, we propose to address the issue whether the charge sheet was materially and incurably defective. We think it would be instructive to reproduce the operative part of the charge sheet as follows:

"IN THE DISTRICT COURT OF SUMBAWANGA

AT SUMBAWANGA

CRIMINAL CASE NO. 94 OF 2012

REPUBLIC

VERSUS

RICHARD S/O MLINGWA

CHARGE

STATEMENT OF THE OFFENCE

ATTEMPTED RAPE contrary to section 132 (1) of the Penal Code, [CAP. 16 RE 2002]

PARTICULARS OF THE OFFENCE

RICHARD S/O MLINGWA on 8th day of July, 2012 at Ntendo village within Sumbawanga Municipality in Rukwa Region did have sexual intercourse with **MARTHER D/O FUNGAMEZA**, a girl of unsound mind aged 9 years.

Dated at Sumbawanga this 11th day of July 2012

Sgd.

SENIOR STATE ATTORNEY"

For a charge in a subordinate court to be valid it must comply with, among others, the requirements of sections 132 and 135 of Cap. 20 (supra). While section 132 enacts a mandatory requirement that every charge must not only contain a statement of the specific offence with which the accused is charged but also a description of particulars as may be necessary for giving reasonable information as to the nature of the offence charged, section 135 stipulates the mode in which offences are to be charged. For the sake of clarity, we reproduce the relevant part of section 135 thus:

> *"135. The following provisions of this section shall apply to all charges and informations and, notwithstanding any rule of law or practice, a charge or an information shall, subject to the provisions of this Act, not be open to objection in respect of its form or contents if it is framed in accordance with the provisions of this section–*
>
> *(i) A count of a charge or information shall commence with a statement of the offence charged, called the statement of the offence;*
>
> *(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****;*
>
> (iii) *after the statement of the offence,* ***particulars of such offence shall be set out*** *in ordinary language, in which the use of technical terms shall not be necessary, save that where*

any rule of law limits the particulars of an offence which are required to be given in a charge or an information, nothing in this paragraph shall require any more particulars to be given than those so required." [Emphasis added]

We find it imperative to recall that in **Isidori Patrice** (supra), this Court stressed that:

"It is now trite law that the particulars of the charge shall disclose the essential elements or ingredients of the offence. This requirement hinges on the basic rules of criminal law and evidence to the effect that the prosecution has to prove that the accused committed the ***actus reus*** *of the offence charged with the necessary* ***mens rea****. Accordingly, the particulars, in order to give the accused a fair trial in enabling him to prepare his defence, must allege the essential facts of the offence and any intent specifically required by law."*

The offence of attempted rape that the appellant faced is created by section 132 (1) and (2) of Cap. 16 (supra) thus:

"132 (1) Any person who attempts to commit rape commits the offence of attempted rape and except for the cases specified in sub-section (3) shall be liable upon conviction to imprisonment for life, and in any case shall be liable to imprisonment for not less than thirty years with or without corporal punishment.

(2) A person attempts to commit rape if, with intent to procure prohibited sexual intercourse with any girl or woman, he manifests his intention by: -

a) threatening the girl or woman for sexual purposes;

b) being a person of authority or influence in relation to the girl or woman, applying any act or intimidation over her for sexual purposes;

c) making any false representations to her for the purpose of obtaining her consent;

d) representing himself as a husband of the girl or woman, and the girl or woman is put in a position where, but for the occurrence of anything independent of that person's will, she would be involuntarily carnally known;

(3) [Omitted]"

As held in **Isidori Patrice** (supra), a charge of attempted rape contrary to section 132 (1) and (2) must state factual circumstances corresponding with any of "those specified in paragraphs (a), (b), (c) and (d) of sub-section (2)" in addition to the mentioned specific intent to procure prohibited sexual intercourse.

Applying the above exposition of the law, we find the charge sheet the subject of this appeal more deficient than what Ms Gwaltu had suggested. First, while the statement of the offence cites the offence of attempted rape contrary to section 132 (1) of Cap. 16 (supra), it does not specify any of the paragraphs (a), (b), (c) and (d) of sub-section (2) of that section to indicate the specific intent to procure the prohibited sexual intercourse. In view of the evidence on the record, the charge sheet ought to have been predicated upon section 132 (1) and (2) (a) of Cap. 16 (supra). Secondly, as rightly submitted by Ms Gwaltu, the charge sheet was defective in the particulars of the offence in that it alleged that the appellant had raped the

prosecutrix instead of particularizing essential facts that would have indicated that the appellant committed attempted rape on the prosecutrix. The charge ought to have alleged to the effect that "the appellant, with intent to procure prohibited sexual intercourse, threatened the complainant for sexual purposes." On this basis, we are of the firm view that the appellant was tried and convicted on a defective charge. This conclusion requires us to determine the effect of the defects we have pointed out.

We provided the answer to the above question in our decision in **Mussa Mwaikunda v. The Republic**, [2006] TLR 387, which involved a more or less defective charge of attempted rape. We held, at page 392-3, that:

> *"It is interesting to note here that in the above charge sheet the particulars or statement of offence did not allege anything on threatening which is the catchword in the paragraph.*
>
> *The principle has always been that an accused person must know the nature of the case facing him. This can be achieved if a charge discloses the essential elements of an offence. Bearing this in mind the charge in the instant case ought to have disclosed the aspect of threatening which is an essential element under paragraph (a) above. In the absence of disclosure it occurs to us that the nature of the case facing the appellant was not adequately disclosed to him. The charge was, therefore, defective in our view."*

In the above decision, the Court, as a final point, held that the said defect in the charge sheet rendered it incurable under the provisions of section 388 of Cap.

20 (supra). We subscribe to that reasoning and find the charge sheet in this case incurably defective. See also **Isidori Patrice** (supra), **Oswald Abubakari Mangula v. The Republic**, [2000] TLR 271; **Khatibu Khanga v. The Republic**, Criminal Appeal No. 290 of 2008; and **Nasoro Juma Azizi v. The Republic**, Criminal Appeal No. 58 of 2010 (both unreported).

We now deal with the omission to swear or affirm all three prosecution witnesses (as well as the appellant) to which the learned Senior State Attorney drew our attention. Having examined the record, we entirely agree with her submission that, indeed, the three prosecution witnesses (as well as the appellant) gave evidence without having been sworn or affirmed and that the said anomaly was a serious contravention of section 198 (1) of Cap. 20 (supra), which stipulates:

> *"Every witness in a criminal cause or matter shall, subject to the provisions of any other written law to the contrary, be examined upon oath or affirmation in accordance with the provisions of the Oaths and Statutory Declarations Act."*

With the exception of the evidence given without oath or affirmation by a child of tender years or an accused person who opts out of giving sworn or affirmed testimony under section 231 (1) or section 293 of Cap. 20 (supra), any evidence given without oath or affirmation is of no evidential value: see, for example, **Mwita Sigore @ Ogora v The Republic**, Criminal Appeal No. 54 of 2008; **Mwami Ngura v. The Republic**, Criminal Appeal No. 63 of 2014; **Emmanuel Charles @ Leonard v. The Republic**, Criminal Appeal No. 369 of 2015 and **Laurent Msabila v. The**

Republic, Criminal Appeal No. 109 of 2016 (all unreported). It is, therefore, our firm view that the totality of the evidence on the trial record is worthless and that this procedural infraction, too, renders the entirety of the trial a nullity.

Finally, we deal, albeit briefly, with the infractions of the criminal procedure that we invited the parties to address us on. In examining the trial record, we found it particularly disquieting to notice that the trial court failed to comply with certain basic procedural requirements. We agree with Ms Gwaltu as follows: first, the trial court contravened sections 230 and 231 of Cap. 20 (supra) by failing to record that the prosecution case was formally closed after the prosecution had prayed to have its case closed and then by omitting to rule on whether or not a *prima facie* case had been made out against the appellant. Secondly, the trial court flouted the mandatory provisions of section 231 (1) of Cap. 20 (supra) by not addressing the appellant on his right to defend himself by giving evidence whether or not on oath or affirmation as well as calling witnesses; and finally, the trial court appears to have breached the appellant's right of hearing by closing his defence case unilaterally without having been requested or prompted to do so by the appellant. Nonetheless, we think these infractions did not vitiate the trial in view of the circumstances of this case.

All said, we came to a firm conclusion, on the basis of our findings in respect of the incurable defects in the charge sheet and the contravention of section 198 of Cap. 20 (supra), that the trial was a nullity. We have thought over the idea of whether or not to order a retrial in view of the principles set out in **Fatehali Manji v.**

Republic [1966] EA 343. As rightly argued by the learned Senior State Attorney, a retrial would not be in the interests of justice because the prosecution evidence, even if it had been given on oath or affirmation, was too weak to found a conviction.

In the final analysis, in the exercise of our revisional powers enshrined under section 4 (2) of Cap. 141 (supra), we nullify all the proceedings and decisions of the lower courts and proceed to quash and set aside the appellant's conviction and sentence. We order that the appellant be released forthwith unless he is otherwise lawfully held.

DATED at **MBEYA** this 16th day of February 2018

B.M. LUANDA
JUSTICE OF APPEAL

B.M. MMILLA
JUSTICE OF APPEAL

G.A.M. NDIKA
JUSTICE OF APPEAL

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

P.W. Bampikya
SENIOR DEPUTY REGISTRAR
COURT OF APPEAL