**IN THE COURT OF APPEAL OF TANZANIA**

**AT ARUSHA**

**(CORAM: MBAROUK, J.A., NDIKA, J.A., And MWAMBEGELE, J.A.)**

**CRIMINAL APPEAL NO. 295 OF 2016**

**QAINI HIARY ..... APPELLANT**

**VERSUS**

**THE REPUBLIC ..... RESPONDENT**

**(Appeal from the Judgmentof the High Court of Tanzania at Arusha)**
**(Opiyo, J.)**

**dated the 24th day of February, 2016**
**in**
**Criminal Appeal No. 49 of 2015**

.....

## JUDGMENT OF THE COURT

27th June & 6th July 2018

**NDIKA, J.A.:**

Qaini Hiary, the appellant herein, was convicted by the District Court of Hanang at Kateshof the offence of rape committed on "NJ", a girl aged 13 years, on 30th January 2014 at or about 19.00 hours. That conviction earned him a thirty years' term of imprisonment. Aggrieved, he unsuccessfully appealed to the High Court of Tanzania sitting at Arusha, challenging the conviction and sentence. Still dissatisfied, he now appeals to this Court.

The factual background to this appeal is, briefly, as follows: it was the prosecution case that the appellant, on 30th January 2014 at about

19.00 hours, accosted PW1 (name withheld), aged 13 years, as she was on her way home in Diling'a Village. He fell her to the ground, tore her undergarmentand then ravished her. She all along raised an alarm as she experienced severe painswith blood oozing from her vagina. Responding to PW1's distress call, PW2 Gilagen Gidamuksa and PW4 Dahaye Mayumba rushed to the scene of crime. They found the appellant on top of PW1; still in the act of raping the victim. Although PW2 and PW4 apprehended the appellant at the scene, he subsequently fled the scene upon the intervention of his brother, a certain Tarmo Hiary. According to PW5 D.5303 D/Sgt Raphael, a police officer, the appellant was subsequently arrested and presented to him for interrogation on 2nd February 2014. The appellant recorded a cautioned statement (Exhibit P.2) in which he admitted to have had sexual intercourse with PW1 in the fateful evening.

There was further evidence of PW6 Kanuti Emmanuel Binet, a Clinical Officer-in-Charge at Bassotu Dispensary, who examinedPW1 at the dispensary in the fateful evening after a formal report of the incident had been made to the police. He tendered a medical examination report (PF.3) which was admitted as Exhibit P.3 indicating that the victim's genitalia had fresh blood stains with a perforated hymen and bruises in the labia minora and majora.

In his sworn defence evidence, the appellant denied the charge against him. He claimed that he was at his home at the material time, meaning that he was not at the scene of crime when the victim was raped. The charge, he said, was cooked against him by the victim's father (PW3)with whom he had crossed swords in the past.

On the basis of the evidence of PW1, PW2, P4 and PW6 as well as the appellant's cautioned statement (Exhibit P.2), the trial court found the charge against the appellant proven beyond reasonable doubt. In particular, the court held that the appellant was positively identified at the scene of crime even though he subsequently escaped and that his statement in Exhibit P.2 that he had sexual intercourse with PW1, then aged below 18 years, amounted to a confession. As we have already intimated, the High Court was completely unconvinced by the appellant's first appeal; it was dismissed in its entirety.

The appellant lodged five grounds of complaint against the High Court's decision, which can be condensed into three points of grievance thus: one, the evidence of visual identification was doubtful, discrepant and contradictory; two, the charge sheet was defective for failing to cite the specific category of the offence under which the appellant was charged;

and three, all exhibits admitted as documentary evidence were not properly scrutinized.

Before us the appellant appeared in person, unrepresented. The respondent Republic was represented by Ms. Sabina Silayo, learned Senior State Attorney, along with Ms. Rose Sulle, learned State Attorney.

The appellant adopted his grounds of appeal but deferred his elaboration on them to a later stage, if need be, after the submissions of the respondent Republic.

On her part, Ms. Silayo, learned Senior State Attorney, chose to address the second ground of appeal only, as enumerated above, which, contends that the charge against the appellant was defective. We pause here to interject a remark that this ground, too, featured as one of the points of grievance before the High Court. Briefly, in its judgment the High Court agreed with the appellant's contention that the charge was defective for lacking the specific provision of the law for the category of rape matching the age of the complainant. Nonetheless, relying on the decision of this Court in **Octavian Moris v.Republic**, Criminal Appeal No. 254 of 2015 (unreported), the High Court held that the defect was curable as it

was not prejudicial. That conclusion was particularly premised upon the following holding in **Octavian Moris** (supra):

> *"...since the particulars of the offence specified that the appellant did have carnal knowledge of a girl, those particulars were sufficient to enable the appellant know the nature of the offence he was facing notwithstanding the omission to specify the provision that covered the age of the victim of rape."*

Before us Ms. Silayo conceded, with laudable forthrightness, that the charge sheet wasincurably defective for failing to specify, in the statement of the offence, the category of rape under which the charge was laid against the appellant. She elaborated that, it was not sufficient that the charge was drawn under sections 130 and 131 of the Penal Code, Cap. 16 RE 2002 (the Penal Code). It was her view that since the victim of rape was aged 13 years, the charge should have been preferred under sections 130 (1), (2) (e) and 131 (1) of the Penal Code. She submitted that the omission to cite the specific category under subsection (2) (e) of section 130 of the Penal Code was contrary to the mandatory provisions of section 135 of the Criminal Procedure Act, Cap. 20 RE 2002 (the CPA), which govern the mode in which charges should be drawn. The learned Senior State Attorney supported her position by referring to a recent decision of

the Court in **Frank Saul Mushi @ Omary v.Republic**, Criminal Appeal No. 250 of 2016 (unreported). In that case, the Court held a similar charge of rape fatally defective for omitting to state the specific category of the offence under which the appellant was arraigned. The Court, then, took the view that the appellant was unfairly tried and convicted upon an incurably defective charge. In the premises, the learned Senior State Attorney urged us to uphold the second ground of complaint and, accordingly, allow the appeal.

Understandably, the appellant, being a person untrained in the law, had nothing much to say in reply. Still, he unpretentiouslysupported Ms. Silayo's submission and urged the Court to releasehim from prison in view of the defect alluded to earlier.

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(S) CHARGED:***

***NAME:*** *QAINI S/O HIARY*

***TRIBE:*** *IRAQW*

***AGE:*** *21 YRS*

***OCC:*** *PEASANT*

***REL:*** *CHRISTIAN*

***RESD:*** *DILING'A VILLAGE*

***STATEMENT OF THE OFFENCE:***

*Rape c/ss* ***130 and 131*** *of the Penal Code, Cap. 16 of the Laws RE 2002.*

***PARTICULARS OF THE OFFENCE:***

*That* ***QAINI S/O HIARY*** *charged on 30th day of January, 2014 at or about 19.00 hrs at Diling'a Village within Hanang District in Manyara Region, did have unlawfully carnal knowledge of one[name omitted], a girl aged 13 years.*

***STATION:*** *KATESH POLICE* *(Sgd)*

***DATE:*** *04.02.2014* *PUBLIC PROSECUTOR"*

It is settled that for a charge sheet to be valid under the law, it must be drawn in accordance with the provisions of sections132 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 inordinary 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 chargedis one created by enactment, shall contain a reference to thesection of the enactment creating the offence.*** *"*[Emphasis added]

We have made bold the text above to lay emphasis that every statement of offence in a charge sheet must contain a reference to the section of the law creating the offence charged. We broadly interpret the word "section" in the above provisions to include a reference to a specific subsection or paragraph where the relevant section creates more than one category of a particular offence.

Reflecting on the charge sheet at hand, we agree with Ms. Silayo that the said charge is defective in that its statement of offence predicates the offence of rape upon sections130 and 131 of the Penal Code without any reference to a category of rape befitting the age of the complainant. The statement of offence would have been correct 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 130of the Penal Code, that is, 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 highestsignificance that the specific category of that offence charged be clearly disclosed in the statement of offence.

Onthe effect of the flaw in the charge, we agree with Ms. Silayo that it is fatal as it cannot be cured under section 388 of the CPA. Indeed, while we acknowledge that in**Octavian Moris** (supra) the Court took a different

position, there is a plethora of the decisions of this Court handed down before and after **Octavian Moris** (supra) was decided that consistently maintained the position that such an omission was fatal. For decisions pre-dating **Octavian Moris** (supra), see, for instance,**Khatibu Khanga v.Republic**, Criminal Appeal No. 290 of 2008; **MarekanoRamadhani v. Republic**, Criminal Appeal No. 210 of 2013; **Juma Mohamed v. Republic**, Criminal Appeal No. 272 of 2011; and **Kastory Lugongo v. Republic**, Criminal Appeal No. 251 of 2014 (all unreported). Decisions made after **Octavian Moris** (supra) was rendered include **Frank Saul Mushi @ Omary** (supra), which Ms. Silayo cited to us in her submissions;**Sylvester Albogast v. Republic,** Criminal Appeal No. 309 of 2015; **David Halinga v. Republic**, Criminal Appeal No. 12 of 2015; **Paulo Kumburu v. Republic**, Criminal Appeal No. 98 of 2016; and**Nassoro Juma Azizi v.Republic**, Criminal Appeal No. 58 of 2010(all unreported), to name just a few.

We find it instructive to recall what this Court observed in **Abdalla Ally v.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."*

Without a doubt, that is what precisely happened to the appellant in this matter. He could not effectively prepare his defence as he did not know the charge he faced. His trial was, therefore, manifestly unfair and consequently a nullity. He was wrongly convicted. Accordingly, we find merit in the second ground of appeal.

We have considered the idea whether or not to order a retrial in consonance with principles enunciated in **Fatehali Manji v. Republic** [1966] EA 343. The general principle in determining whether to order a retrial is that a retrial should be ordered when the original trial was illegal or defective. It would not be ordered when conviction is set aside on account of insufficiency of evidence or for the purpose of enabling the prosecution to fill up gaps in its evidence at the first trial. At the end of the day, a retrial should only be ordered if it is in the interests of justice to do so depending upon the circumstances of the case concerned.We are also cognizant that 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 legally not existent, the question of a retrial does not arise. See, for instance, the decision of the Court in **Mayala Njigailele v.Republic**, Criminal Appeal No. 490 of 2015 (unreported).

In the final analysis, we allow the appeal, quash the conviction and set aside the sentence. We order that the appellant be released from custody forthwith and set free, unless he is held for some other lawful cause.

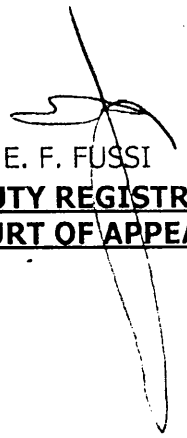
**DATED** at **ARUSHA** this 5th day of July, 2018.

M.S. MBAROUK
**JUSTICE OF APPEAL**

G. A. M.NDIKA
**JUSTICE OF APPEAL**

J.C.M. MWAMBEGELE
**JUSTICE OF APPEAL**

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



E. F. FUSSI
**DEPUTY REGISTRAR**
**COURT OF APPEAL**