IN THE COURT OF APPEAL OF TANZANIA

AT IRINGA

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

CRIMINAL APPEAL NO. 98 OF 2016

PAULO KUMBURU ..... APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

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

(Uzia, J.)

dated the 14th day of July, 2008
in
DC Criminal Appeal No. 1 of 2008

JUDGMENT OF THE COURT

14th & 16th May, 2018

NDIKA, J.A.:

Paulo Kumburu, the appellant herein, was charged with the offence of rape of a woman aged sixty-three years that occurred on 27th October 2006 at Mipotopoto Village within Mbinga District in Ruvuma Region. Having convicted him as charged, the District Court of Mbinga at Mbinga ("the trial court") sentenced to thirty years' imprisonment and ordered him to pay the prosecutrix the sum of TZS. 800,000.00 as compensation. His first appeal to the High Court of Tanzania sitting at Songea, against both conviction and sentence, was, in the main, unsuccessful as it was just about wholly

dismissed except that the court reduced the amount of compensation to TZS. 400,000.00. The reduction was based on the need for the quantum of compensation to be proportional to injuries suffered by the victim as well as the economy and the ability of the appellant to pay it.

The facts as found concurrently by both courts below are briefly as follows: on 27th October 2006 at 13.00 hours or thereabout the prosecutrix (PW1) left her home in Mipotopoto Village in Mbinga District for her farm. On the way she passed through the appellant's home, who, upon seeing her, followed her behind. When she reached at a hut in her farm, the appellant approached her and suddenly fell her to the ground while he threatened to kill her if she persisted resisting. Having forcibly removed PW1's underwear, the appellant ravished her to the point of ejaculation and then disappeared from the scene of the crime. A short while later, PW1 reported the matter to the Village Executive Officer (PW2 Analia Sungano) who, being a woman, took the pains of examining PW1's private parts. Upon confirming the sexual attack on PW1, PW2 issued her a letter (Exhibit P.2) that she (PW1) took to Liparamba Health Centre where she was, then, hospitalized for four days. After being discharged from the hospital, she reported the matter to the police and was issued with a PF 3 form (Exhibit P.1) which she took to the District Medical Officer, Mbinga. According to Exhibit P.1, although PW1 was

examined by a Medical Officer twenty days after the occurrence of the sexual assault she was found with bruises and pains in her genitalia that were caused by a blunt object.

In his sworn defence evidence, the appellant raised an *alibi*. He adduced that on the fateful day he was at a mine in Mozambique and that he only came back home in November 2006 whereupon he was surprised to find himself arrested and charged with an offence he had not committed.

Both the trial court and the first appellate court found, on the basis of the evidence of PW1 and PW2, supported by Exhibit P.1, that the prosecutrix was, indeed, raped on the fateful day. As to who raped PW1, both courts found it proven, based on PW1's testimony, that the appellant was the guilty party. The courts accepted PW1 as a credible and reliable witness upon the reasoning that her graphical description of the ugly incident could only be made by a person who was not only present at the scene of the crime but actually suffered the agony.

Before us the appellant appeared in person, unrepresented, to argue his three main grounds of appeal, which, we need not reproduce in this judgment on the reasons that will become apparent shortly. On the other

hand, the respondent Republic was represented by Ms. Kasana Maziku and Ms. Tulibake Juntwa, both learned State Attorneys.

At the hearing, Ms. Juntwa prayed, at the very outset, for the withdrawal of a preliminary objection the respondent had lodged vide a notice dated 7th May 2018 to the effect that the appellant's notice of appeal instituting the present appeal was defective. After the Court had marked the said objection withdrawn as prayed, Ms. Juntwa promptly invited the Court's attention to the apparent defects on the charge sheet, which, unfortunately, escaped the scrutiny of the first appellate court.

Referring to the charge sheet at page 1 of the record of appeal, Ms. Juntwa stated that it was apparent that the charge of rape against the appellant was laid under "section 130 (1) (2) C of the Penal Code, Cap. 16 as repealed and replaced by sections 5 and 6 of the Sexual Offences Special Provisions Act, 1998". In her view, that charge was defective in that it was predicated upon "section 130 (1) (2) C", which was non-existent in the Penal Code. She submitted further that the said defect was fatal as it offends the provisions of section 135 (a) (ii) of the Criminal Procedure Act, Cap. 20 RE 2002 ("the CPA") enacting the mode in which offences are to be charged. In support of her position, she cited two unreported decisions of the Court in **Isidori Patrice v. The Republic**, Criminal Appeal No. 224 of 2007 and **Cpl.**

Jabili Maulid v. The Republic, Criminal Appeal No. 147 of 2005. On that basis, she 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 be quashed and set aside.

On the way forward, Ms. Juntwa urged that no order be made for a retrial on the ground that the evidence on the record was deficient and that the appellant had been incarcerated in prison for a substantial period (i.e., twelve years) since November 2011 when he was arraigned before the trial court.

The appellant, a self-declared layperson, had nothing much to say in reply. He simply pressed to be released 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 imperative to reproduce the said charge sheet for ease of reference:

"TANZANIA POLICE FORCE

CHARGE SHEET

Name, Tribe or Nationality of the Person(s) charged:

Name : *PAULO S/O KUMBURU*

Tribe : *MATENGO*

Age : *27 YEARS OLD*

Religion : *CHRISTIAN*

Occupation : *PEASANT*

Residence : *MIPOTOPOTO VILLAGE*

Offence, Section and Law: *Rape contrary to section 130 (1) (2) C of the Penal Code, Cap. 16 Vol. I of the Laws as repealed and replaced by sections 5 and 6 of the Sexual Offences Special Provisions Act, 1998.*

Particulars of the Offence: *That PAULO S/O KUMBURU charged on 27th day of October, 2006 at or about 13.00 hours at Mipotopoto Village within Mbinga District in Ruvuma region willfully and unlawfully did have carnal knowledge of one [name withheld], a woman of 63 years of age.*

Station: Police Mbinga *(Sgd)*

Date: 17/11/2006 *Public Prosecutor."*

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 particularly relevant to this matter is paragraph (a) (ii) of section 135, which was also cited to us by Ms. Juntwa. 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 supplied emphasis to the above text to stress that every statement of offence in a charge sheet must contain a reference to the section of the law creating the offence charged.

As rightly submitted by Ms. Juntwa, the charge sheet in the instant case is deficient in that its statement of offence predicates the offence of rape upon section "130 (1) (2) C" of the Penal Code, which is obviously non-existent. The statement of offence would have been correct or proper if, apart from citing section 130 (1) of the Penal Code, it had made reference to one of the categories of rape created by section 130 (2) of the Penal Code (i.e., categories (a), (b), (c), (d) and (e)). Since each category of rape has its own peculiarities and ingredients, it is of utmost importance that the specific category of that offence that is charged must be clearly disclosed.

The above deficiency apart, we wish to observe the charge sheet in this matter is manifestly faulty in its particulars of the offence in that it simply alleges that the appellant willfully and unlawfully had carnal knowledge of the complainant aged 63 years, without more. In view of the complainant's

age being above 18 years, it can be implied that the charge of rape on her could only have been laid under any of categories (a), (b), (c) and (d) of section 130 (2) of the Penal Code, which, then, would have required the particulars of the offence to indicate, among others, whether the alleged rape was committed on her without her consent or if it was committed with her consent the said consent was procured by the use of force or threats, or whether she was of unsound mind at the time of the commission of the offence such that she could not give her consent.

Before determining the effect of the defects, we wish to observe that at the beginning of its judgment the trial court indicated that the appellant was charged with rape contrary to sections 130 (2) (a) and 131 of the Penal Code, which is not what the appellant pleaded to as shown by the charge sheet that we reproduced herein earlier on. This course taken unilaterally by the trial magistrate in the course of composing his judgment, with respect, amounted to an improper amendment or alteration of the charge. If the trial court found the charge defective either in form or substance and felt the need to amend or alter it, it ought to have ordered an amendment or alteration or substitution in accordance with the provisions of section 234 of the CPA. As this Court held in **Sylvester Albogast v. The Republic**, Criminal Appeal No. 309 2015 (unreported), it is highly irregular for a trial

court to amend or alter a charge at the judgment stage. An amendment or alteration of a charge can only be ordered subject to making the defence aware of it and extending to the accused person an opportunity to recall witnesses (see subsections (4) and (5) of section 234 of the CPA).

Reverting to the effect of the defects alluded to above, we agree with Ms. Juntwa that they are fatal; they cannot be cured under section 388 of the CPA: see, for instance, **Isidori Patrice** (supra); **Khatibu Khanga v. The Republic**, Criminal Appeal No. 290 of 2008 (unreported); **Mussa Mwaikunda v. The Republic** [2006] TLR 387; **Sylvester Albogast** (supra); **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."

Indeed, that is what exactly happened to the appellant in this matter. He could not prepare his defence as he did not know the charge he faced. His trial was, therefore, manifestly unfair and consequently a nullity. In exercise of 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.

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. Ultimately, 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.

In the present case, we agree with Ms. Juntwa that it is in the interests of justice that no order be made for a retrial on the grounds she stated. We are also mindful 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 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