IN THE COURT OF APPEAL OF TANZANIA
AT IRINGA

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

CRIMINAL APPEAL NO. 119 OF 2016

SWALEHE ALLY .....APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

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

(Chikoyo, J.)

dated the 11st day of April, 2016
in
DC. Criminal Appeal No. 4 of 2016

JUDGMENT OF THE COURT

28th May & 4th June, 2018

LILA, J.A:

Swalehe Ally, the appellant, was arraigned before the district court of Namtumbo of the offence of rape. He was convicted and sentenced to serve thirty years imprisonment. Aggrieved, he unsuccessfully appealed to the High Court. Still aggrieved, he filed the present appeal before the Court.

The appellant raised twelve grounds of appeal seeking to impugn the High Court decision. But, for a reason that the determination of the appeal does not depend on the grounds of appeal, we see no reason to reproduce them.

At the hearing of the appeal, the appellant appeared in person and unrepresented. The respondent Republic, enjoyed the services of Mr. Shabani Mwegole, learned State Attorney.

At the outset, Mr. Mwegole rose and informed the Court that there is a preliminary point of law he had raised, a notice of which was filed on 25/5/2018, which he wished to argue on first. He said the copy of it was served to the appellant.

In compliance with a well-established practice that a preliminary point of law should be argued first, we permitted Mr. Mwegole to argue on the point of objection he had raised. That preliminary point of law states:-

> *"The notice of appeal is defective for being not mention (sic) the number of the case which the appellant appeal against."*

In his arguments, Mr. Mwegole was emphatic that the notice of appeal does not indicate the number of the case the appellant appeals against to the Court. He accordingly condemned it for not complying with the requirements of Rule 68(2) of the Tanzania Court of Appeal Rules, 2009 (the Rules) which requires every notice of appeal to show the nature of conviction the appeal is against. He stated that sub-rule (7) of Rule 68 of the Rules, mandatorily requires the notice of appeal to be substantially in Form B in the First Schedule to the Rules and that one such requirement under it is indication of the case number sought to be appealed against.

For that reason, the Notice of appeal is defective and as it is the one which, under Rule 68(1) of the Rules, initiates an appeal, then the appeal is incompetent. To bolster his arguments he referred the Court to its decision in the case of **The Director of Public Prosecutions Vs. ACP Abdallah Zombe and 8 Others**, Criminal Appeal No. 254 of 2009 (Unreported). He accordingly urged the Court to strike out the appeal.

Before retiring, the Court wished to satisfy itself from Mr. Mwegole on the propriety or otherwise of the charge sheet that was placed at the door of the appellant during his arraignment.

Mr. Mwigole readily conceded that the charge sheet is defective for indicating that the appellant was charged with the offence of rape contrary to section 130(1) and 131(1) of the Penal Code. He said as the particulars of the offence indicated that the victim of rape was only eight (8) years old, the charge ought to have had indicated the category of rape committed by citing section 130(2) (e) of the Penal Code. He said,bearing in mind that the charge is the foundation of the trial the appellant was subjected to, then the appellant did not receive a fair trial. He urged the Court to invoke its powers of revision provided under Rule 4(2) of the Appellate Jurisdiction Act, Cap 141 R.E 2002 (AJA) and revise the lower courts proceedings and judgment and thereby quash them, set aside the sentence and release the appellant from prison. Having taken this view he opted to withdraw his preliminary objection and the submissions thereof. We granted that prayer.

On his part, the appellant had nothing to say as the issue involved was purely a legal one with which he was not conversant. He left it for the Court to decide.

We, indeed, fully associate ourselves with the submissions made by the learned State Attorney. It is settled law that it is the charge which commences lawful criminal proceedings against an accused person. The practice is that at the commencement of trial the accused is asked to plead to a charge which must sufficiently disclose the offence he is accused of having committed and the particulars thereof. (See **Oswald Mangula Vs. Republic,** Criminal Appeal No. 153 of 1994, **Hassan Jumanne @ Msingwa Vs Republic,** Criminal Appeal No. 290 of 2014 and **Abdallah Ally Vs Republic,** Criminal Appeal No. 253 of 2013 (all unreported) as well as **Naoche Mbile Vs. Republic,** (1993) TLR 253 and **DPP Vs Ally Nur Dire and Another** (1988) TLR 252). The basic Principle of our Criminal practice is that the accused person must know clearly what the charge against him is so that he can prepare his defence accordingly. (See **Mohamed Koningo Vs The Republic** [1980] TLR 279).

Alive of the above legal position, we hereby proceed to consider the charge that commenced the appellant's trial.

For ease of reference, we hereunder reproduce the charge.

" STATEMENT OF THE OFFENCE: RAPE C/S 130 (1) and section 131 (1) of the Penal Code Cap 16 of the laws R:E 2002.

PARTICURALS OF OFFENCE:- That SWALEHE S/O ALLY is charged on 23rd day July 2015 at or about 1600 hrs at Migeregere village within Namtumbo District in Ruvuma Region, did carnal knowledge one FATUMA D/O SWALEHE a girl aged eight years old.

Station – Namtumbo

Date 27/07/2015 ----------

Public prosecutor."

The format and mode in which offences are charged are governed by sections 132 and 135 of the Penal Code. In terms of section 132 of the Penal Code offences must be specified in the charge with necessary particulars. That section states:-

"132. Every charge or information shall contain, and shall be sufficient if it contains, a statement of the specific offence or offences with which the accused person is charged, together with such particulars as may be necessary for giving reasonable information as to the nature of the offence charge."

In respect of the offence section, the provisions of section 135(a) (ii) of the Penal Code, mandatorily requires the charge to contain the specific section of the enactment creating the offence. That section states:-

" 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 supplied].*

Gauged on the above governing law, it is quite clear that the charge under scrutiny is wanting in the offence section. It states that:

*"**Rape c/s 130 (1)** and **Section 131 (1)** of the Penal Code Cap 16 of the Laws R.E. 2002"*

For avoidance of doubts, section 130(1) of the Penal Code states:-

"It is an offence for a male person to rape a girl or a woman."

Quite clearly, that section creates the offence of rape generally and, at its best, defines what constitutes the offence of rape.

Bearing in mind that the particulars of the offence in no uncertain terms show that the victim was aged eight (8) years, then the charge ought to have had indicated the relevant category of rape the appellant was accused to have had committed as are outlined under section 130 (2) of the Penal Code. Relevant in our case is section130 (2) (e) of the Penal Code which states that;

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

(a) N/A

(b) N/A

(c) N/A

(d) N/A

(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."*** *[Emphasis Supplied]*

Further, the charge under consideration cited section 131 (1) of the Penal Code as a sentencing section. That section states:-

"Any person who commits rape is, except in the cases provided for in the renumbered subsection (2), liable to be punished with imprisonment for life and in any case for imprisonment of not less than thirty years with corporal punishment and with a fine, and shall in addition be ordered to pay compensation of an amount determined by the court to the person in respect of whom the offence was committed for the injuries caused to such person."

Definitely, section 131 (1) of the Penal Code provides for general punishment to whoever is found guilty of the offence of rape. In our case, the victim being under the age of ten years the proper sentencing section is 131(3) of the Penal Code where the statutory sentence is life imprisonment.

All said, the appellant in the present case, was entitled to know under which category of rape he was charged and the obtaining sentence in case he could be found guilty. This was insisted by the Court in the case of **Simba Nyangura Vs Republic,** Criminal Appeal No. 144 of 2008(unreported) where the Court stated that:-

> *"We think that in a charge of rape an accused person must know under which of the descriptions (a) to (e) in section 130 (2) of the Penal Code, the offence he faces falls, so that he can prepare for his defence. These particulars are missing in the present case. We agree with Mr. Mwipopo that, this lack of particulars unduly prejudiced the appellant in his defence..."*

In the circumstances, we fully agree with the learned State Attorney that the offence section did not disclose a specific category of rape and a specific and relevant sentencing section. The charge is fatally defective and the appellant cannot be said to have had a fair trial as the court stated in **Mussa Mwaikunda Vs Republic** (2006) TLR. 387 and **Abdallah Ally Vs Republic,** Criminal Appeal No. 253 of 2013 (unreported). In the latter case the Court categorically stated that:-

"Being found guilty on a defective charge based on a wrong and or non-existent provision 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 the charge was preferred left the appellant unaware that he was facing a severe charge of rape."*** [Emphasis added]

We are inclined to invoke the powers of revision under section 4(2) of AJA, and hereby quash and nullify the proceedings and judgments of both courts below, quash the conviction and set aside the sentence.

On the way forward, we are in agreement with the learned State Attorney that since the foundation of the trial, the charge, is incurably defective, then there is no charge in existence on which the appellant can be re-tried (See **Mayala Njigailele Vs Republic,** Criminal Appeal No. 490 of 2015 (unreported). We accordingly refrain from ordering a retrial.

Ordinarily we would have ended here but given the recurrence of appeals with defects in the charge, we find it necessary to remind those concerned with the conduct of criminal trials the all-important remark made by the Court in the case of **Mohamed Koningo Vs Republic** (supra) that:

"It should be pointed out that while it is the duty of the prosecution to file the charges correctly, those presiding over criminal trials

should, at the commencement of the hearing, make it a habit of perusing the charge as a matter of routine to satisfy themselves that the charge is laid correctly and if it is not to require that it be amended accordingly."

For the foregoing reasons, we hereby order the appellant be released from prison forthwith unless held for any other lawful cause.

DATED at **IRINGA** this 2nd 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. BAMPIKYA
SENIOR DEPUTY REGISTRAR
COURT OF APPEAL