IN THE COURT OF APPEAL OF TANZANIA

AT TANGA

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

CRIMINAL APPEAL NO. 66 OF 2017

MUSSA NURU @ SAGUTI..... APPELLANT

VERSUS

THE REPUBLIC.....RESPONDENT

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

(Aboud, J.)

dated the 17th day of February, 2016

in

Criminal Appeal No. 83 of 2016

JUDGMENT OF THE COURT

18th & 25th February, 2019

MKUYE, J.A.:

The appellant, MUSSA NURU @ SAGUTI, was charged before the Resident Magistrate's Court of Tanga at Tanga with the offence of unnatural offence predicated under section 154 (1) (a) of the Penal Code, Cap 16, R.E 2002. It was alleged that on different dates in July, 2012 and 22nd day of October, 2012 at Sahare area, within the City, District and the Region of Tanga, the appellant did have carnal knowledge against the order of nature

to one Abel Ngerangera who was a boy aged 7 years. Following his denial to the charge, a trial was commenced whereupon three witnesses testified for the prosecution and one exhibit was produced. For the defence, only the appellant testified. At the end, the trial magistrate convicted the appellant as charged and sentenced him to life imprisonment.

Due to the importance of what transpired in the trial court in our determination of this appeal, we find it appropriate to reproduce part of the trial court's finding as follows:

> " *In this case the evidence of the victim is corroborated with the evidence of PW2 ... I find no reason to defer (sic) with the prosecution side, and* ***the accused person is hereby convicted for the offence as charged."***
>
> [Emphasis added].

When the parties were called upon to give the antecedents of the appellant, the prosecutor stated as follows:

> " *Pros: No record of previous conviction,* ***but we pray the court to consider section 154 (2) of the Penal Code, Cap 16 of R.E 2002."***
>
> [Emphasis added]

The court record shows in mitigation, Mr. Akaro who advocated for the accused had nothing to add. Then the trial court went on sentencing the appellant as hereunder:

> *"Court: The offence which the accused has been convicted with* ***is provided under the minimum sentence and I have no other option than to sentence the accused to life imprisonment as per section 154 (2) of the Penal Code, Cap 16 R.E 2002."***
>
> [Emphasis added]

We have highlighted some portions on the parts we have quoted so as to show why we think, as will shortly be demonstrated, that the provisions used to charge the appellant and the provisions invoked in sentencing him were at variance.

Aggrieved, the appellant lodged his appeal to the High Court (Aboud, J.) challenging both the conviction and sentence, however, the same was dismissed. Still dissatisfied, he has lodged this second appeal on four grounds of appeal complaining that **one**, the *viore dire* examination test

conducted to PW1 lacked questions and answers as required by the law; **two**, both the lower courts failed to analyse the evidence on the exact date the alleged buggery took place; **three**, the courts below erroneously considered the evidence of PW3 (the Doctor) who conducted examination to PW1 (the victim) two days before the alleged offence took place, and **four**; that both lower courts erroneously acted upon a defective charge sheet which lacked the specific date when the offence was committed.

At the hearing of the appeal on 18/2/2019, the appellant appeared in person and unrepresented; whereas Mr. Waziri Mbwana Magumbo, learned State Attorney represented the respondent Republic.

When the appellant was called upon to expound his grounds of appeal, he opted for the State Attorney to submit first and reserved his right to rejoin later if need would arise.

On his part, Mr. Magumbo prefaced by not supporting both the conviction and sentence meted out against the appellant. His line of argument regarding ground no. 4 on the defectiveness of the charge sheet, was that the dates shown in the charge sheet and the evidence of PW1, PW2 and PW3 were at variance. He said, while the charge sheet shows that the

offence was committed between July, 2012 and 22nd October, 2016, in their testimonies PW1 did not state the dates when the offence was committed; and also PW2 did not specify the date in July to October 2012. He pointed out further that, PW3 (the Doctor) who examined PW1 (the victim) said he examined him on 20th October, 2012 which was before the alleged offence was committed. On that account, he was of the view that the offence was not proved beyond reasonable doubt. He referred us to the case of **Hussein Ramadhani v. Republic**, Criminal Appeal No. 195 of 2015 (unreported) to bolster his argument.

On prompting by the Court on whether or not failure to cite the sentencing provision in the charge was proper, he readily conceded that it was an anomaly which rendered the charge defective. However, as to the way forward, he decided to leave it in the hands of the Court to determine.

In rejoinder, the appellant agreed with what the learned State Attorney submitted.

On our part, bearing in mind that it is the charge which lays the foundation of criminal proceedings, we find it apposite to begin with the issue of defectiveness or otherwise of the charge though on a different

perspective from the one argued by the learned State Attorney as, in our view, it can dispose of the appeal without necessarily considering the other grounds of appeal.

At this juncture, we think, we must state that section 132 of the Penal Code and section 135 (a) (ii) of the Criminal Procedure Act, Cap 20 R.E 2002 (the CPA) are the provisions which govern on the mode and format in framing the charge or information; or rather on the manner offences are to be charged. In particular, section 132 of the Penal Code requires the offence to be specified in the charge along with its necessary particulars which will reveal the nature of the offence charged. The said provision reads as follows:

> " *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 charged."*

Likewise, section 135(a) (ii) of the CPA which is couched in imperative terms requires the statement of the offence to **cite a correct reference of**

section of the law which sets out or creates a particular offence allegedly committed. The said provision states as follows:-

> *"135 (a) (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 reference to the section of the enactment creating the offence."*

H··ing laid down the principles relating the manner the offences are to be charged we find it prudent to look at the charge sheet under consideration. For easy of reference we reproduce it as hereunder:

"CHARGE

STATEMENT OF OFFENCE

Unnatural offence contrary to section 154 (1) (a) of the Penal Code, Cap. 16 Vol. 1 of the Laws [R. E. 2002].

PARTICULARS OF OFFENCE.

MUSSA S/O NURU @ SAGUTI on different dates in July, 2012 and 22nd day of October, 2012 at Sahare area, within the City, District and Regional of Tanga

did have carnal knowledge against the order of nature to one ABEL NGERANGERA a boy of seven (7) years old.

Dated at Tanga this 29th day of October, 2012.

Sgd

.....

STATE ATTORNEY."

Going by the provisions of sections 132 (1) of the Penal Code and 135 (a)(ii) of the CPA we have cited earlier on, we entertain no doubt that the charge sheet quoted hereinabove is defective for not indicating the sentencing provision. This is so because, the charged offence is predicated under section 154 (1) (a) of the Penal Code which in essence provides for an offence known as of unnatural offence with its punishment which ranges from 30 years imprisonment to life imprisonment. As the particulars in the charge sheet show that the person to whom the unnatural offence was committed was a boy aged seven years, the charge ought to have shown the punishment attached to it under section 154 (2) of the Penal Code. It was necessary to indicate subsection (2) of the said section because it specifically provides for a punishment of life imprisonment to a person who

commits such an offence to a child under the age of 10 years. The said provisic · states as follows:

> *"154 (2) Where the offence under subsection (1) of this section is committed to* ***a child under the age of ten years the offender shall be sentenced to life imprisonment."***
>
> [Emphasis added].

This Court in the case of **Said Hussein v. Republic,** Criminal Appeal No. 110 of 2016 (unreported) expounded the importance of indicating the punishment for a specific offence as follows:

> *"Also section 131 of the Code provides for punishment for those different categories of rape.* ***This section too has subsections (1),(2) and (3), of which subsection (2) has paragraphs (a) to (c). In our view, this again, explains the reasons why it is often been emphasized by the Court that punishment of each category of the offence must be specifically indicated in the charge sheet."***
>
> [Emphasis added].

We, on our part, subscribe to the above ratio decidendi. We think, indicating the specific provision of the law creating the offence and its punishment in the charge is very crucial. We say so because, in the first place, it lays the foundation of criminal proceedings. (see **Zarau Issa v. Republic**, Criminal Appeal No. 159 of 2010 (unreported). Secondly, is to comply the requirements of section 132(1) of the Panel Code and 135(a) (ii) of the CPA-(see **John Martin Marwa v. Republic,** Criminal Appeal No. 20 of 2014 (unreported). Thirdly, and more significantly, to enable the accused understand the nature of the offence and its seriousness. On this, we are guided by the case of **Abdallah Ally v. Republic,** Criminal Appeal No. 253 of 2013 (unreported) where this Court stated among other things that wrong or non-citation of the proper provisions of the Penal Code to which the charge is predicated/preferred leaves the appellant unaware that the offence of rape he was facing was a serious one. In its words, the Court stated as follows:

> *"... The wrong and/or non-citation of the appropriate provisions of the Penal Code under which the charge is preferred, left the appellant unaware that he was facing a serious charge of rape..."*

Fourthly, is to enable the accused to be in a position to prepare an informed defence. (see **Simba Nyangura v. Republic,** Criminal Appeal No. 144 of 2008 (unreported).

Even in this case, we think, the appellant was required to know clearly the offence he was charged with together with the proper punishment attached to it. We are of a settled mind that by failing to cite subsection (2) of section 154 which is a specific provision for punishment to a person who committed an offence of unnatural offence to a person below the age of ten might have lead the appellant not to appreciate the seriousness of the offence which was laid at his door. On top of that, he might not have been in a position to prepare his defence. (see, **Simba Nyangura's case** (supra). The end result of it is that he was prejudiced.

We are, of course, alive that the sentencing provision featured for the first time (page 81 of the record) when the prosecutor was giving the appellant's antecedents as we had reproduced earlier on in this judgment. Apart from informing the Court to have no record of previous conviction, the prosecutor went along praying to the trial court to consider section 154 (2) of the Penal Code which the trial court relied on as shown at page 82 of the

record of appeal. However, much as it is not clear as to whether the prosecutor was amending the charge or not, we think, with respect to both the prosecutor and the trial magistrate that was not proper. We say so because the sentencing provision of section 154 (2) was not made clear to the appellant from the beginning of the trial to enable him understand the nature and gravity of the offence he was charged with. In our view, the prayer by the prosecutor to invoke section 154 (2) at that stage could not have cured the anomaly since by that time hearing of the case on both sides had been concluded and the appellant was already convicted on a charge which was defective.

Be it as it may, we are satisfied that as the charge sheet laid before the appellant's door was defective, it had the effect of prejudicing the appellant. As the prosecution failed to indicate the sentencing provision in the charge, it could not have been rectified and relied on at the time of giving antecedents and pronouncing the sentence on the appellant. Hence, in the totality of what we have endeavoured to demonstrate, we find that the proceedings and judgments of trial court and the High Court were a nullity.

In the final event, in terms of section 4(2) of the Appellate Jurisdiction Act, Cap. 141 R.E 2002, we invoke our revisional powers and nullify the

proceedings and the judgments of the trial court and of the High Court, quash the conviction and set aside the sentence meted on the appellant.

As to the way forward, we are of the considered view that since the charge sheet was incurably defective, there is no charge upon which the Court could order a retrial against the appellant. Consequently, we order that the appellant be released from custody unless held for other lawful reasons.

It is so ordered.

DATED at **TANGA** this 25th day of February, 2019.

K. M. MUSSA
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.

E. Y. MKWIZU
SENIOR DEPUTY REGISTRAR
COURT OF APPEAL