IN THE COURT OF APPEAL OF TANZANIA
AT DAR ES SALAAM

(CORAM: MUSSA, J.A., KITUSI, J.A., And KEREFU, J.A.)

CRIMINAL APPEAL NO. 68 OF 2017

SAMWEL LAZARO.....APPELLANT

VERSUS

THE REPUBLIC.....RESPONDENT

(Appeal from the Decision of the High Court of Tanzania at Dar es Salaam)

(Massati, J)

dated the 30th day of March, 2005
in
Criminal Appeal No. 147 of 2004

JUDGMENT OF THE COURT

15th & 25th July, 2019

KEREFU, J.A.:

In the District Court of Kibaha at Kibaha, the appellant, SAMWEL LAZARO, was arraigned, tried and found guilty of the offence of rape. It is noteworthy at the outset to state that the alleged victim was a child aged six (6) years and in order to disguise her identity, we shall henceforth refer to her by the prefix letters 'XYZ' or simply 'PW3'. The charge indicated that the offence was contrary to sections **130** and **131** of the **Penal Code** read together with Section **5 (2)(e) and 6(2)** of the **Sexual Offences (Special Provisions) Act, 1998,** ('the SOSPA').

For the sake of clarity, we deem it apposite to fully extract the charge sheet which the appellant was charged with as indicated at page 1 of the record of appeal. It goes like this:-

> " ***Offence Section and Law:*** *Rape c/s 130 and 131 of the Penal Code read together with Section 5 (2) e and 6 (2) of the sexual offence special provisions Act No. 4 of 1998.*
>
> ***Particulars of Offence****: That Samwel Lazaro charged on 19th day of April, 2004 at about 12.00hrs at Miembe saba village within Kibaha District Coast Region did rape one XYZ a girl of 6 years old without her consent."*

The appellant denied the charge, whereupon the prosecution paraded four (4) witnesses and one documentary exhibit (PF3). In a nutshell, the prosecution case as narrated by PW2, the mother of XYZ is that, since January 2004 they were living together with the appellant, who is the son of her sister in law, in their house located at Miembe Saba Village, Kibaha District in Coastal Region. On 19th April, 2004, PW2 left XYZ at home with the appellant. When she came back at around 10:00hrs she found them together, but after a while, the appellant went out to cut grass for fodder. Then, XYZ told her mother that she had hurt herself with a nail and when

asked to explain how, she said, may be she was hurt by a piece of wood or a stick. But finally, after beseeching her mother not to tell the appellant, XYZ said, the appellant laid her on a coach and put his manhood into her private parts and raped her. Upon receiving such information, PW2 checked in the XYZ's private parts and found that it smelled and there were sperms in her vagina and XYZ was complaining of pains. PW2 decided to wash her and later at night informed PW4, the victim's father on what had happened. On 20th April, 2004 PW4 reported the matter to the police, obtained PF3 and took XYZ to the hospital for medical examination which was conducted by PW1. The appellant was arrested and charged with the offence of rape as indicated above.

In his defence the appellant decided to stand mute and did not summon witnesses. As a result, the trial court was impressed and accepted the version of the prosecution's case and the appellant was found guilty, convicted and sentenced to life imprisonment. The appellant unsuccessfully appealed to the High Court where the trial court's conviction and sentence were confirmed, hence the present appeal.

In the Memorandum of Appeal, the appellant raised seven (7) grounds of appeal which for reasons that will shortly come to light, we

need not recite all of them herein. However, in our assessment the said grounds of appeal can be summarized into four points of grievance: **first,** that, the conviction was unsustainable for being based on a defective charge that cited non-existent provisions of the Penal Code and the SOSPA; **second**, the conviction was, in addition, unsustainable because the *voire dire* examination on PW3 was improperly conducted rendering PW3's evidence liable to be discounted; **third,** that, the exhibit PF3 was improperly tendered and admitted and **fourth,** the failure by the trial Magistrate to comply with the provision of the law to compose and issue a ruling on *'no case to answer'* after the persecution side had closed its case.

At the hearing of the appeal before us, the appellant appeared in person without legal representation. The respondent, though duly served did not enter appearance and as such, the hearing of the matter proceeded in the absence of the respondent under Rule 80 (6) of the Tanzania Court of Appeal Rules, 2009.

When the appellant was given an opportunity to elaborate on his grounds of appeal before the Court, he only opted to fully adopt them and invited us to consider the same, allow the appeal and set him free.

Upon being probed as to why he decided to remain mute before the trial court he said, he was confused on the way the trial proceedings were being handled, because even the charge sheet he was tried on was based on non-existent provisions of the laws.

On our part, after perusing the grounds of appeal raised by the appellant, among others, we observed that, the first ground of appeal is on the propriety or otherwise of the charge preferred against the appellant. The said ground reads as follows:-

> *"That, the 1st appellate court erred in law by upholding the appellant conviction and sentence despite it being based on a defective charge for failure to indicate the relevant subsection and worse still being based on repealed law (SOSPA 1998) and replaced by the Penal Code Cap. 16 R.E 2002"*

Considering the above ground of appeal and the fact that it is the charge sheet that lays the foundation of the trial, we find it appropriate to begin with this matter and the issue which stands for our determination is whether or not the charge sheet the appellant was charged with was defective and whether the said defects are curable under section 388 of

the Criminal Procedure Act, Cap. 20 R.E 2002 ('the CPA') or not and finally, to what extent the said defects have prejudiced the trial, conviction and sentence meted against the appellant.

It is a principle of the law that, an accused person must know the nature of the case he is facing and the sentence thereat. Therefore, it is a mandatory requirement of the law that a charge sheet should contain a statement of the specific offence or offences with which the accused is to face at the trial, so that he can well prepare his defence. The process of framing a charge sheet is governed by sections 132 and 135 (a) (ii) of the CPA. The said provisions prescribe on the mode and format in framing the charge or on the manner in which the offences are to be charged. In particular section 132 provides that:-

> *"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"*

Similarly, section 135 (a) (ii) of the CPA requires the statement of the offence to cite a correct reference of section of the law which sets out or creates a particular offence alleged to have been committed. The said provision states as follows:-

> *"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 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."*** *[Emphasis added].*

Now, in the case at hand and from the charge we have previously reproduced, it can be discerned that the appellant was charged with the offence of rape under sections 130 and 131 which do not exist in the Code. Worse enough, the other provisions of the law cited in the charge are from the SOSPA which is also not in existence, as the quoted provisions have been replicated in the Penal Code in 2002. Therefore, in 2004 when the offence of rape is alleged to have been committed SOSPA was not in existence. Since the appellant was alleged to have committed

the offence of rape to a child under the age of ten years, the charge ought to have cited sections 130 (1)(2)(e) and 131 (3) of the Penal Code, which categorically states as follows:-

Section 130 (1)

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

Section 130 (2) (e)

*"**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**,..."*

Section 131 (3)

*"Notwithstanding the preceding provisions of this section **whoever commits an offence of rape to a girl under the age of ten years shall on conviction be sentenced to life imprisonment.**"*

Thus, failure by the prosecution to cite the correct provisions of the law which created the offence, had occasioned injustice to the appellant as he could not appreciate the nature of the offence against him, so as to properly marshal his defence. The appellant also said, the defect had also prevented him from entering his defence before the trial court as indicated at page 7 of the record of appeal. Faced with a similar situation in the case of **Mathayo Kingu v. The Republic,** Criminal Appeal No. 589 of 2015 (unreported) this Court had this to say:-

> " *..the non-citation of proper provisions of the law specifying the type of rape and resulting sentence should the conviction be entered, prevented the appellant from appreciating not only what form of defence he should marshal, but the important elements of which type of the offence of rape he was going to face."*

Similarly, in the case of **Kastory Lugongo v. The Republic,** Criminal Appeal No. 251 of 2014 (unreported) the appellant was charged under sections 130 and 131 of the Penal Code as in this case. This Court, apart from observing that the said sections do not exist, it concluded that:-

> "*We are keenly aware that not every defect in the charge sheet would vitiate the trial. As to the effect the defect could lead, would depend on the particular circumstances of each case,* ***the overriding consideration being whether the defect worked to prejudice the accused person. Our particular concern here is the reality that the appellant was arraigned under a non – existent provision of the law.***" [Emphasis added].

This position of law has been held in various decisions of this Court including **Mussa Mwaikunda v. The Republic,** [2006] T.L.R 387; **Faki Said Mtanda v. The Republic,** Criminal Appeal No. 249 of 2014; **Omary Kitambo v The Republic,** Criminal Appeal No. 94 of 2014; **Bariki Isaya Urio v. The Republic,** Criminal Appeal No. 374 of 2016 and **Msuya Mjanja v The Republic**, Criminal Appeal No. 86 of 2017, (all unreported), to mention, but a few.

In considering as to whether the defect in the current charge had worked to prejudice the appellant, we have taken note of our previous decisions in **Khamisi Abderehemani v. The Republic,** Criminal Appeal

No. 21 of 2017 and **Jamali Ally @ Salum v. The Republic**, Criminal Appeal No. 52 of 2017 (both unreported), where in **Khamisi Abderehemani,** the charge sheet under which the appellant stood arraigned for rape, cited sections 130 (1) (2) (e) and 131 (1) instead of the applicable sections 130 (1), (2) (b) and 131 (1) of the Code and in **Jamali Ally @ Salum,** the charge sheet cited sections 130 and 131 (1) (e) of the Code, respectively. The Court, in addressing the said anomaly in the two cases concluded that the defects did not prejudice the appellants as the particulars of the offence on the said charge sheets were explicit enough to inform the appellants the nature of the rape offence they were facing. Finally, the Court decided that the defects were curable under section 388 of the CPA.

Applying the above two decisions in the present case, we think the situation is a distant different, as while in **Khamisi Abderehemani** and in **Jamali Ally @ Salum,** the Penal Code together with some of the provisions of the law creating the offence were properly cited, in the case at hand, as previously intimated, both, the Penal Code was not properly cited and the provisions of the law cited in the charge sheet do not exist. As such, the appellant herein was charged under a non – existent

offence. In addition, in the previous cases, the particulars of the offences were very clear to the extent that the appellants were able to give out their defence before the trial, while in the case at hand, the appellant was called upon to answer a charge in a respect of non-existent offence and could not appreciate the nature of the offence laid against him and he completely failed to enter his defence. It is therefore our settled view that, the wrong and non-citation of the proper provisions of the law under which the charge was preferred against the appellant in this case had obviously prejudiced the appellant and he was not accorded a fair trial. In the result, we agree with the appellant that the charge sheet laid before him was defective for non disclosure of the offence and the same cannot be cured under section 388 (1) of the CPA. Therefore, since the appellant was arraigned for a non- existing offence under the law, the trial was a nullity and so was the appeal before the High Court, because it stemmed on a nullity charge. In the premises, we are inclined to invoke the revisional powers under section 4 (2) of the Appellate Jurisdiction Act, Cap. 141 R.E.2002 (*'the AJA'*) and nullify the entire proceedings and judgement of the trial court and the High Court, quash the conviction and set aside the sentence imposed on the appellant.

After arriving at that position, we now move to consider the way forward on this matter. There are two options which are, either to order for a retrial or to set the appellant free. As regards the first option, we are mindful of various decisions of this Court on when it is feasible and justifiable to order for a retrial. See for instance **Fatehali Manji v. The Republic**, (1966) EA 343; **Timoth Sanga and Another v. The Republic,** Criminal Appeal No. 80 of 2015; **Mayala Njigailele v. The Republic,** Criminal Appeal No. 490 of 2015 and **Said Mohamed Mwanatabu @ Kausha and Another v. The Republic**, Criminal Appeal No. 161 of 2016 (both unreported). Specifically in **Fatehali Manji** the Court provided guidance in determining the proper situations, when a retrial can be ordered by an appellate court and concluded that "...*each case must depend on its own facts and circumstances and an order for retrial should only be made where the interest of justice require it.*" In **Mayala Njigailele,** which is more relevant in the case at hand, the Court held that:-

> "*Normally an* ***order of retrial is granted in criminal cases, when*** *the basis of the case namely,* ***the charge sheet is proper and is in existence. Since in this case the charge sheet is incurably defective,*** *meaning it is*

not in existence, the question of retrial does not arise. *" [Emphasis added].*

Following the above authorities, it is clear that an order for a retrial is not feasible in the case at hand, as the charge sheet herein is incurably defective and there is no charge upon which the Court could order a retrial against the appellant. Consequently, we order for the immediate release of the appellant from prison custody unless he is held for some other lawful cause. It is so ordered.

DATED at **DAR ES SALAAM** this 18th day of July, 2019.

K. M. MUSSA
JUSTICE OF APPEAL

I. P. KITUSI
JUSTICE OF APPEAL

R. J. KEREFU
JUSTICE OF APPEAL

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

THE COURT OF APPEAL OF TANZANIA

E. F. FUSSI
DEPUTY REGISTRAR
COURT OF APPEAL