IN THE COURT OF APPEAL OF TANZANIA

AT ARUSHA

(CORAM: LILA, J.A., KWARIKO, J.A., And MWANDAMBO, J.A.)

CRIMINAL APPEAL NO. 530 OF 2016

BARIKIEL AKOO BATANA..... APPELLANT

VERSUS

THE REPUBLIC.....RESPONDENT

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

(Maghimbi, J.)

dated the 27th day of July, 2016
in
(DC) Criminal Appeal No. 48 of 2015

JUDGMENT OF THE COURT

14th & 27th August, 2019

KWARIKO, J.A.:

Barikiel Akoo Batana, the appellant, was arraigned before the District Court of Karatu with the offence of rape contrary to section 130 (e) and 131 of the Penal Code [CAP 16 R.E. 2002] (the Penal Code). For the purpose of hiding the identity of the victim of the sexual offence we shall only refer to her initials 'KSB'. The particulars of the offence were that; on the 29th day of June, 2014 at about 00:30 hours at Changarawe Village within Karatu District in Arusha Region the appellant had knowledge (sic!) of one 'KSB' without her consent.

The appellant denied the charge where he was fully tried. At the end, the appellant was convicted and sentenced to thirty (30) years imprisonment and to pay a compensation of TZS 200,000.00 to the victim of the offence. Aggrieved, the appellant unsuccessfully appealed to the High Court. The appellant has come before this Court on a second appeal.

At this juncture we find it apposite to summarise the evidence adduced at the trial. It is as follows. The victim, 'KSB' (PW1) was asleep at her home at about 00:30 hours on 29/6/2014 when a person she identified to be the appellant broke and entered therein. After he had entered the house, the appellant demanded money from PW1. When PW1 said she had no money, the appellant beat and fell her down, torn her clothes including underwear and raped her. After he had finished ravishing PW1, the appellant fell asleep therein. Thereafter, PW1 went out and reported the matter to her neighbours, including Emmanuel Bura (PW3) and Godlisten Sipto (PW4). The two responded to the call for help and apprehended the appellant who was drunk. They sent him to the police station.

Upon information of the incident, No. 6419 Detective Sergeant Victor (PW2) was given the case file to investigate. He interrogated the

appellant who confessed to have committed the crime and recorded a caution statement which was admitted as exhibit P1. At the hospital, PW1 was examined by Dr. Anamwikwira Samwel (PW5) who testified that, the victim had bruises in the vagina walls with no blood or spermatozoa but found it difficult to prove penetration as the victim was of an old age. A PF3 was received as exhibit P2.

In his defence, the appellant denied the offence and said that he had agreed with PW1 for him to look for her cattle in return of being given one cow yearly. However, PW1 did not heed to her side of the bargain and when he went to claim for his right, PW1 accused him of raping her. With the foregoing, the appellant was convicted and sentenced as such. As shown earlier, his appeal to the High Court was dismissed.

Before this Court, the appellant raised four grounds of appeal which we have summarized as follows:

1. *That, the prosecution failed to prove penetration being the essential element of rape.*

2. *That, the prosecution evidence contained inconsistencies and contradictions.*

3. *That, the charge was at variance with the prosecution evidence.*

4. *That, the appellant was convicted on the basis of the defective charge.*

At the hearing of the appeal, the appellant appeared in person unrepresented, whereas the respondent Republic was represented by Ms. Janeth Sekule, learned Senior State Attorney assisted by Ms. Grace Madikenya, also learned State Attorney.

Upon hearing submissions from both parties, we find it convenient to start with the fourth ground of appeal which raises a point of law and if decided in the affirmative it will dispose of the appeal.

Submitting in relation to the fourth ground of appeal, the appellant argued that, the charge was defective because it did not mention sub-sections (1) and (2) (e) of section 130 of the Penal Code. On her part, initially, Ms. Sekule, admitted that the charge omitted to cite sections 130 (1) (2) (e) and 131 (1) of the Penal Code. She argued that instead, the charge cited section 130 (e) of the Penal Code which is non-existent. Ms. Sekule was however quick to argue that, the omission was not fatal as it could be cured by the particulars of the offence where the offence charged and the name of the victim were mentioned.

However, upon being probed by the Court, Ms. Sekule agreed that in the particulars of the offence the word *'carnal'* was missing. In that case she pointed out that the particulars of the offence cannot cure the omission to mention the non-existent provisions of the law. The learned Senior State Attorney conceded that the charge was fatally defective and for that reason she supported the appellant's appeal and found no need to argue the other grounds of appeal. Following the learned Senior State Attorney's stance, the appellant had nothing to add in rejoinder.

We have considered the submissions by the parties in relation to the defectiveness of the charge. It need not be overemphasized that the charge is a foundation of a criminal trial. Hence, those who are responsible in formulating the charges and any court admitting them in court must ensure that they are drawn in conformity with the law. To underscore the importance of the charge, the following provisions of the law give direction on how it should be drawn and its contents. Section 132 of the Criminal Procedure Act [CAP 20 R.E. 2002] (the CPA) provides thus: -

> *"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."

Also, section 135 (a) (i) of the CPA provides: -

> *"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."*

As it can be gathered from the wording of the cited provisions, every charge should contain a statement of the specific offence, describing it in a clear language together with the particulars of the offence so as to give an accused necessary and reasonable information and a clear picture of what he is being accused of so that he can properly prepare his defence.

For better understanding, we find it appropriate to reproduce the charge that was laid before the appellant's door. It reads: -

> ***"OFFENCE SECTION AND LAW**: RAPE C/S 130 (e) AND 131 OF THE PENAL CODE CAP 16 VOL. 1 OF THE LAWS AS REVISED EDITION 2002.*

***PARTICULARS OF OFFENCE**: That Barikiel Akoo Batana charged on the 29th day of June 2014 at about 00:30 hrs at Changarawe Village within Karatu District Arusha Region did have knowledge (sic) of one 'KSB' without her concert (sic)."*

Having gone through the charge, there is no dispute that the prosecution cited a non-existent provision of law under the Penal Code. The offence of rape is created under section 130 (1) (2) of the Penal Code which provides thus: -

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

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) not being his wife, or being his wife who is separated from him without her consenting to it at the time of the sexual intercourse;

b) with her consent where the consent has been obtained by the use of force, threats or intimidation by putting her in fear of death or of hurt or while she is in unlawful detention;

c) with her consent when her consent has been obtained at a time when she was of unsound

mind or was in a state of intoxication induced by any drugs, matter or thing, administered to her by the man or by some other person unless proved that there was prior consent between the two;

d) with her consent when the man knows that he is not her husband, and that her consent is given because she has been made to believe that he is another man to whom, she is, or believes herself to be, lawfully married;

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.

Considering that the victim of the alleged rape in this case was an adult, the appropriate charging provision ought to have been section 130 (1) (2) (a) and 131 (1) of the Penal Code.

It is a trite law that, a charge which does not disclose an offence is incurably defective. There is a plethora of pronouncements of the Court in that respect. Some of them are; **Isidore Patrice v. R,** Criminal Appeal No. 35 of 2001, **Christian Sanga v. R,** Criminal Appeal No. 512 of 2015, **Chenga Nyamahanga v. R,** Criminal Appeal No. 122 of 2016, **Julius Mgawo v. R,** Criminal Appeal No. 79 of 2016, **Deogratius**

Philipo & Another v. R, Criminal Appeal No. 326 of 2017 and **Fred Nyenzi v. R,** Criminal Appeal No. 121 of 2016 (all unreported).

However, of recent the Court has held that not every defect in the charge sheet will be fatal. In the case of **Jamali Ally @ Salum,** Criminal Appeal No. 52 of 2017 (unreported), the Court held that although the charge was short of the requirements of the law, it did not render it fatally defective because the appellant was not prejudiced. In that case the appellant was charged with the offence of rape under sections 130 and 131 (1) (e) of the Penal Code. The appellant complained that section 131 (1) (e) is non-existent making the charge defective. The Court decided thus: -

> *"In the instant appeal before us, the particulars of the offence were very clear and, in our view, enabled the appellant to fully understand the nature and seriousness of the offence of rape he was being tried for. The particulars of the offence gave sufficient notice about the date when the offence was committed, the village where the offence was committed, the nature of the offence, and the name of the victim and her age."*

Having found that the particulars of the offence gave the appellant sufficient information about the charge against him, the Court held that the omission was not fatal to the charge. The question which follows here is whether, in the instant case, the particulars of the offence gave the appellant sufficient information of what he was facing so that he could properly plead to it and marshal his defence. We are inclined to answer this question in the negative. This is because, the particulars of the offence did not contain sufficient ingredients of the offence of rape.

As seen earlier, the particulars of the offence show that the appellant was accused to have *'knowledge'* of 'KSB' without her consent, this means that he knew the victim without her consent. To constitute the offence of rape the phrase *".....carnal knowledge of...."* should feature in the particulars of the offence. It is our considered view that the particulars of the offence did not sufficiently disclose the ingredients of the offence of rape and thus could not cure the anomaly of citing non-existent law pursuant to section 388 (1) of the CPA. See also the pronouncement of the Court in the case of **Fred Nyenzi v. R,** Criminal Appeal No. 121 of 2016 (unreported).

It is our view that, failure by the prosecution to cite the relevant provision of law which created the offence occasioned injustice to the

appellant as he could not appreciate the nature of the offence against him, so that he could properly marshal his defence. We get support in this standpoint in the decision of the Court in **MATHAYO KINGU v. R,** Criminal Appeal No. 589 of 2015 (unreported).

It is clear therefore, that the appellant pleaded to a fatally defective charge, hence did not get a fair trial rendering the whole trial a nullity. It follows thus that, the appeal proceedings before the High Court lacked legs upon which to stand as they originated from null proceedings. We therefore nullify the proceedings of the two courts below, quash the conviction and set aside the sentence imposed on the appellant.

Having nullified and quashed the proceedings of both courts below, under normal course of things we would have ordered a retrial of the appellant. However, such a move cannot be taken because upon scrutiny of the evidence relied upon by the trial court in convicting the appellant, that evidence was, in our view, below the standard of proof in criminal cases. For instance, PW1 never raised any alarm for help when the appellant was allegedly beating her and fell her down. She only raised alarm after the appellant 'raped' her. It is therefore doubtful if her story has anything to go by when taken together with her evidence that

the appellant was drunk. There is no indication of what resistance she exerted on the appellant.

Further, it is trite law that rape should be proved. This means that the victim of the offence should state what the accused did to her to constitute the offence of rape. It is not enough for one to say that she was raped without more. In the instant case, PW1 said thus;

> *".....he started beating me and fell me down, he torn away my clothes i.e my bukta and T shirt and he started raping me."*

In the case of **Ex- B 9690 SSGT Daniel Mshambala v. R,** Criminal Appeal No. 183 of 2004 (unreported), the Court held as follows: -

> *"PW1 ought to have gone further to explain whether or not the appellant inserted his penis into her vagina, whether or not the penetration was slight etc. In general PW1 ought to have been more forthright and thorough in her evidence on the alleged rape. It was not enough to make assertion that she was raped, without more. She ought to have been more forthcoming in her evidence in order to enable the court to make a meaningful finding whether or not rape was committed."*

For the foregoing shortcomings in the prosecution evidence, we are settled in our mind that the order of retrial will not be appropriate because it would only amount to enabling the prosecution to fill up gaps in its evidence at the trial (**FATEHALI MANJI v. R** [1966] EA 341).

Finally, we find merit in the fourth ground of appeal which is sufficient to dispose of the appeal. Consequently, we allow the appeal and order the immediate release of the appellant from prison unless he is otherwise lawfully held.

DATED at **ARUSHA** this 26th day of August, 2019.

S. A. LILA
JUSTICE OF APPEAL

M. A. KWARIKO
JUSTICE OF APPEAL

L. J. S. MWANDAMBO
JUSTICE OF APPEAL

The Judgment delivered this 27th day of August, 2019 in the presence of the Appellant in person and Ms. Riziki Mahanyu, learned State Attorney for the Respondent is hereby certified as a true copy of the original.

A. H. MSUMI
DEPUTY REGISTRAR
COURT OF APPEAL