IN THE COURT OF APPEAL OF TANZANIA
AT MTWARA

(CORAM: MMILLA, J.A., SEHEL, J.A., And MWANDAMBO, J.A.)

CRIMINAL APPEAL NO. 157 OF 2017

KASSIMU MOHAMED SELEMANI .... APPELLANT

VERSUS

THE REPUBLIC .... RESPONDENT

(Appeal from the Conviction of the High Court of Tanzania at Mtwara)

(Mipawa, J.)

dated the 17th day of December, 2013
in
Criminal Appeal No. 71 of 2011

JUDGMENT OF THE COURT

5th & 8th November, 2019

MMILLA, J.A.:

This appeal traces its origin from Criminal Case No. 8 of 2011 in the District Court of Kilwa at Kilwa Masoko in Lindi Region, before which Kassimu Mohamed Selemani (the appellant), was charged with and convicted of the offence of rape contrary to sections 130 (1) (2) (b) and 131 (1) of the Penal Code Cap. 16 of the Revised Edition, 2002 (the PC). It was alleged that on 21.6.2009 at about 10:00 hours at Somanga village within Kilwa District in

Lindi Region, he raped one Mariam d/o Rashid Mkono. He was sentenced to thirty (30) years' imprisonment. He unsuccessfully appealed to the High Court of Tanzania, Mtwara Registry, hence this second appeal to the Court.

The facts of the case were briefly that, on 21.6.2009 around 10:00 hours, Mariam Rashid Mkono (PW4) was at her home with her daughter one Chepi Hija (PW3). Around that time, the appellant went at that homestead and entered in the house. On finding them, he forced PW4 to go into her bedroom. PW4 resisted the appellant's command, but she was beaten up and sustained injuries on her shoulder. While in the bedroom, she was stripped naked, where upon the appellant began raping her. This was happening in the presence of PW3, then 10 years old, who rushed to the home of Zainab Rashid (PW2), the younger sister of PW4, and informed her of the incident. PW2, accompanied by PW3, rushed to the scene of crime and found the appellant in bed with PW4 continuing to rape her. According to PW2, the appellant had put a cloth in his victim's mouth in order to prevent her from raising alarm. Unfortunately however, like PW3, PW2 did not effectively help the victim because she feared the appellant, but apart from crying she raised alarm though there was no response. Afterwards however, the matter was

reported to police who began investigation. They eventually traced and arrested the appellant and charged him with that offence.

The appellant denied the charge against him. He said he never went to the complainant's house on 21.6.2009, and that PW1, PW2 and PW3 were unreliable witnesses whose evidence ought not to be relied upon. He called one Joha Ahmad Hassan Urembo (DW2) as his witness. DW2 testified that on 21.6.2009 she was with the appellant at the shamba until around 6:00 hours when they returned home. That was all what she knew.

The appellant's memorandum of appeal raised 12 grounds of appeal. However, upon a point of law which was raised by the Court *suo motto* at the commencement of hearing the appeal focusing on the question of proprietary of the charge, and the content of the particulars of the offence, we think it is unnecessary to reproduce them because in our view, the defect raised is capable of disposing of the entire appeal.

In response to the point of law raised by the Court regarding whether or not the charge which was leveled against the appellant was appropriate in the circumstances, Mr. Abdulrahman Msham, learned Senior State Attorney who represented the Republic, readily admitted that the charge was defective because the particulars in the charge sheet did not disclose the ingredients of

the offence he was charged with, also that the offence charged was at variance with the evidence on record. He elaborated that while the charge was based on the provisions of section 130 (1) (2) (b) of the PC, the evidence on record focused on the offence under section 130 (1) (2) (a) of the PC, though again, it lacked the essential words "without her consent". In the circumstances, Mr. Msham went on to submit, the appellant's conviction was improper. He requested the Court to invoke the powers it has under section 4 (2) of the Appellate Jurisdiction Act Cap. 141 of the Revised Edition, 2002 (the AJA), on the basis of which we may quash the appellant's conviction, set aside the sentence and set him free.

On his part, the appellant, a layman who appeared in person and fended himself, had nothing useful to say in respect of the legal point under discussion except that he was in agreement with the submission of the learned Senior State Attorney. He requested the Court to set him free.

We have carefully considered Mr. Msham's submission, and we agree with him that the appellant in the present case was charged under section 130 (1) (2) (b) of the PC, entailing commission of the offence of **rape with the consent of the victim**, whose consent may have been obtained by the use of force, threat or intimidation by putting her in fear of death or of being

hurt or while she is in unlawful detention; but the particulars of the offence in the charge sheet against him did not reflect the ingredients of the offence under that provision. Also, the evidence adduced by the prosecution witnesses in support of the charge did not establish the offence of rape section 130 (1) (2) (b) of the PC as it ought to. The charge sheet was as follows:-

> *"STATEMENT OF THE OFFENCE*
>
> *Rape c/s 130 (2) (b) and 131 (1) of the Penal Code Cap. 16 of R.E. 2002*
>
> *PARTICULARS OF THE OFFENCE*
>
> *That Kassimu s/o Mohamed Seleman charged on 21st Day of June, 2009 at about 10:00 hrs at Somanga village within Kilwa District in Lindi Region; did (have) carnal knowledge of Mariam d/o Rashid Mkono.*
>
> *STATION: KILWA MASOKO*
>
> *DATE: 17th June, 2009"*

On the other hand, subsection (2) (b) of section 130 of the PC provides 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) ***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."***

Now, looking at the particulars of the offence which were read to the appellant at the trial on the one hand, and the contents of that section on the other hand, it becomes certain that the necessary ingredients of the offence under that provision, that is ***consent obtained by the use of force, threat or intimidation by putting her in fear of death or of being hurt or while she is in unlawful detention*** are missing.

Undoubtedly, the omission to describe the offence shortly in the statement of the offence in the circumstances of the present case contravened the provisions of section 135 (a) (ii) of the Criminal Procedure Act Cap. 20 of the Revised Edition, 2002 (the CPA). That section states 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."

It is equally undeniable that the evidence of the prosecution witnesses did not establish an offence under section 130 (1) (2) (b) of the PC. As already pointed out, PW4 (the victim), said that on arrival at her home the appellant forced her into her bedroom in which he forcefully raped her. She did not at any time say that there were reasons which compelled her to consent, though of course, force was used. Her evidence was corroborated by that of PW2 and PW3 both of whom said the appellant raped PW4, but likewise they did not say she consented after being intimidated or the like. Thus, the prosecution evidence did not establish the commission of the offence under section 130 (2) (b) of the PC. That means the charge against the appellant was **fatally defective** for the particulars of the offence disclosed a different offence from that he was charged with.

In **Joseph Marando Ikanda v. Republic**, Criminal Appeal No. 555 of 2015 (unreported), we observed that where a person may have been charged and found guilty basing on an incorrect provision of law, such a person should be considered as having not been fairly tried by the courts

below. We relied on the earlier case of **Abdalla Ally v. Republic,** Criminal Appeal No. 253 of 2013 (unreported) in which it was observed that:-

> *". . . **being found guilty on a defective charge,** based on wrong and/or no-existent provisions of law, it cannot be said that the appellant was fairly tried in the courts below. In view of the foregoing shortcomings, it 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 serious charge of rape. . . ."* [The emphasis is ours].

An equally important expression was made in the case of **Adam Rajabu v. Republic**, Criminal Appeal No. 369 of 2014, in which reliance was on the case of **Isdori Patrice v. Republic,** Criminal Appeal No 224 of 2006 (both unreported). In **Isdori's** case the Court said that:-

> *"It is now trite law that the particulars of the charge sheet should disclose the essential elements or ingredients of the offence. The requirement hinges on the basic rules of criminal law and evidence to the effect that the prosecution has to prove that the accused committed the actus reus of the offence charged with the necessary mens rea. **Accordingly***

> ***the particulars in order to give the accused a fair trial in enabling him to prepare his defence, must allege the essential facts of the offence and any intent specifically required by law."***
> [The emphasis is ours].

See also the case of **Mussa Mwaikunda v. Republic** [2006] T.L.R. 387.

Given the above position, we hold that the proceedings before the second trial District Magistrate were a nullity. Perhaps, the question becomes; where any such fundamental defects are established, what is the way forward?

In **Musa Mwaikunda's** (supra) case, it was a question of wrong citation of the provisions anchoring a charge of rape in respect of a child of tender age. After being satisfied that the charge was fatally defective, the Court said it was incurable and proceeded to quash the appellant's conviction and set aside the sentence. Seeking inspiration from **Mussa Mwaikunda's** case, it follows that the same fate befalls the present case. Thus, in terms of section 4 (2) of the AJA, the appellant's conviction in the present case is hereby quashed and the sentence thereof is set aside. In consequence, we

order the appellant to be released from prison forthwith unless he is otherwise being continually held for some other lawful cause.

Oder accordingly.

DATED at **MTWARA** this 7th day of November, 2019.

B. M. MMILLA
JUSTICE OF APPEAL

B. M. A. SEHEL
JUSTICE OF APPEAL

L. J. S. MWANDAMBO
JUSTICE OF APPEAL

The judgment delivered this 8th day of November, 2019 in the presence of the appellant in person, unrepresented and Mr. Meshack Lyabonga, learned State Attorney for the respondent/Republic is hereby certified as a true copy of the original.

S. J. Kainda
DEPUTY REGISTRAR
COURT OF APPEAL