IN THE COURT OF APPEAL OF TANZANIA
AT BUKOBA

(CORAM: MMILLA, J. A., MZIRAY, J. A. And KWARIKO, J. A.)

CRIMINAL APPEAL NO. 425 OF 2018

FRANK KANANI ..... APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

(Appeal from the decision of the High Court of Tanzania, at Bukoba)

(Kairo, J.)

dated the 13th day of September, 2018
in
Criminal Appeal No. 29 of 2016
.....

JUDGMENT OF THE COURT

2nd & 10th December, 2019

MZIRAY, J.A.:

In the District Court of Ngara at Ngara, Frank Kanani, the appellant herein, was arraigned and convicted of two offences namely, rape contrary to section 130 (1), (2) (e) and 131; and the second offence was grievous harm contrary to section 225 both of the Penal Code [Cap 16 R.E. 2002]. It was alleged that on 5/8/2015 at around 19:00 hours at Kanazi village

within Ngara District in Kagera Region, the appellant did have carnal knowledge of one AJ (name withheld to hide her identity) and on the same date, time and place he did cause grievous harm to AJ.

To prove the two counts of the charge, the prosecution called seven witnesses and tendered five exhibits, while the appellant was the only witness for the defence side.

The brief facts of this case were that on 5/8/2015 at about 19:00 hours, PW1 who was the victim left her home and visited PW2 Rehema Zacharia, her aunt, for the purpose of borrowing a hand set phone to talk to her husband who was far from the village. She failed to talk to him as a result she decided to go back to her home. On her way back, she met the appellant who is her brother-in-law who suddenly caught her and questioned her where was she coming from. She replied him that he had no mandate to ask her such question as she was not his wife. The appellant then took a stick and started to assault her. She managed to escape but before reaching far he caught her, fell her down and stripped her naked. He carried her clothes by hand and paraded her naked direct to his house where he raped her the whole night and on the next day at

around 12 o'clock she managed to escape from the appellant. Immediately upon her release, she narrated the ordeal to PW3 Thereza Jason, her mother-in-law and PW2 who had been searching her for the whole night. The incident was reported to PW4 Gibson Ernest, the sub village Chairman of Nyamateke and then to police where she was issued with a PF3 for medical examination. It was PW6 Kalisti Karongo, a Clinical Officer who examined her. Upon examination he found her to have bruises on the right hand and on the face. Her vagina also had bruises and discharged blood. These injuries are reflected in the PF3 (exhibit P2) tendered. The investigation was done by Detective Corporal Dickson (PW5) who searched for the appellant and upon his arrest he interrogated him and subsequently charged him with the two offences.

In his defence, the appellant made evasive denial of the allegations against him. He also denied to have been 19 years of age at the time of the alleged offence. He maintained that he was 16 years old. His evidence prompted the trial magistrate to summon Cyprian Steven Biherere, the Ward Executive Officer of Kanazi Ward as court witness to ascertain the age of the appellant. He asserted in his testimony that the appellant registered himself in the voters register book (exh. P5) on 4/8/2015 in the

name of Frank Kanani Zacharia, born on 27/2/1992, something suggesting that he was of the age of majority at the time of the commission of the offence.

After a full trial, the trial court was more inclined on the evidence of the prosecution side. It convicted the appellant on both counts and for the first count the appellant was sentenced to serve a jail term of thirty years and for the second count he was sentenced to serve a jail term of one year; the two sentences were ordered to run concurrently.

Being aggrieved by the decision of the trial court, the appellant unsuccessfully appealed to the High Court where the first appellate court upheld the conviction and sentence imposed. Before the conviction, the first appellate court observed that the appellant was charged under section 130 (2) (e) which was in respect of statutory rape, an offence which is specifically for under aged victims, while the victim in this case was an adult. The trial court conceded that the charge was defective but rectified the error by invoking the provision of section 388 of the Criminal Procedure Act [Cap 20 R.E. 2002] (the CPA), so that the charge sheet in this count reads section 130 (1) (2) (a) and 131 (1).

The appellant was aggrieved by the findings of the first appellate court hence this appeal on which five complaints are raised as follows:-

"1. *That the correction of the section of the rape offence at the appeal stage occasioned miscarriage of justice.*

2. *That the charge was imperfect as it did not specify the age of the victim which was an essential element to be proved.*

3. *That the prosecution evidence which was based on a defective charge and wrong provisions is null with consideration that the appellant was cross-examined by the witnesses for the said evidence only.*

4. *That the prosecution evidence had several basic unsolved contradictions and discrepancies which makes the evidence to be incredible and unreliable.*

5. *That, the rest of the evidence of the witnesses were not signed by the trial magistrate with consideration that the signatures for section 210 (3) of CPA were not section 210 (2) of the same Act."*

During the hearing of this appeal the appellant was present in person, unrepresented and he fully adopted his grounds of appeal whereas; the

respondent Republic enjoyed the legal services of Ms. Chema Maswi, learned State Attorney. The appellant preferred to let the learned State Attorney to submit first on the grounds of appeal, reserving his right to reply thereafter.

At the outset, Ms. Maswi supported the appeal on the first count of rape and opposed the appeal in respect of the offence of grievous harm. She submitted first on the defective charge of rape before the trial court and the sentence imposed taking into account the appellant's age at the time of the commission of two offences. It was her contention that the charge sheet under section 130 (1) (2) (e) and 131 of the Penal Code was defective taking into consideration that at the material time the victim was aged 24 years old. She submitted that the preferred charge is in respect of statutory rape where the victim is below 18 years old. In her view, the appropriate provisions would have been section 130 (1) (2) (a) and section 131 (1) of the Penal Code. She added that in the charge under controversy, sub-section (1) of section 131 was not specified adding another ailment to the charge.

On the particulars of the offence, she submitted that they were not exhaustive by failing to mention the age of the victim who was above 18 years old on which the ingredient of consent was relevant to be specifically stipulated in the charge sheet. According to her, the importance of explaining the ingredients of the offence in a charge sheet is not far fetching as it enables the accused person to prepare for his defence and is in line with the whole concept of fair trial. To buttress her argument she referred us to the case of **Mussa Mwaikunda V. R**, [2006] TLR 387. She submitted that the defect was detected by the first appellate judge as clearly seen at page 73 of the record of appeal but she misdirected herself by purporting to cure the charge under section 388 of the CPA. The defect in the charge was incurable, she argued. She submitted further that due to the nature of the defect, this Court is incapable of exercising its powers by giving effect to the overriding objective principle specified in section 3 (A) and 3 (B) of the Appellate Jurisdiction Act [Cap 141 R.E. 2002] (the AJA) simply because if the Court attempts to cure such anomaly, will obviously prejudice the appellant. To bolster her position she cited the case of **Jamal Ally @ Salum V. R**, Criminal Appeal No. 52 of 2017 (unreported).

In response to ground four, the learned State Attorney was very brief. She submitted that the evidence of PW1, the victim and that of PW6 together with the medical examination report (exhibit P2 - the PF3) had proved the charge of grievous harm and there was nothing to suggest as alleged that such evidence had some contradictions and discrepancies to render it incredible and unreliable. She argued that the evidence of PW1 was clear that the appellant assaulted her using a stick and the same was corroborated by the evidence of PW6 at page 11 last paragraph up to page 12 of the record of appeal where he stated that the victim specified injuries as shown in the PF3. She cited the case of **Goodluck Kyando V. R** [2006] to cement the position that every witness is entitled to credence. She further submitted that even assuming that contradictions existed, then they were minor and did not go to the root of the case.

The learned State Attorney in supporting the charge of grievious harm did not end here. She referred at page 7 of the record of appeal in the evidence of PW1 where it shows that the period the victim had the appellant on observation from 19:00 hours to 12:00 hours the next day, was sufficient to identity him regard being that she knew the appellant prior to the incident. She went on to submit that PW1 narrated the

incident to PW2, PW3 and PW4 immediately after the incident and named the appellant as the culprit, which in her view, is an assurance of her reliability. To strengthen her position, she cited to us the case of **Godfrey Yahe and Another V. R**, Criminal Appeal No. 277 of 2010 (unreported).

When provided with an opportunity to give his response to the respondent/Republic's submissions, the appellant readily supported the submission in respect of the offence of rape but completely disassociated himself on whatever was submitted in respect of the second offence of causing grevious harm. He completely denied to have assaulted the victim and he contended that the stick allegedly used in the commission of the offence was not tendered in the trial court as exhibit. He concluded by stating that the evidence adduced was weak to sustain a conviction of grievious harm.

On our part, in the light of the submissions from the appellant and Ms. Maswi, learned State Attorney, on the grounds of appeal and the legal points of law arising thereto, the issue for determination is whether the pointed out defects in the charge sheet prejudiced the appellant in the trial, and to what extent?

We have noted with concern that except for the fourth ground, the rest of the grounds of appeal raised are new as the same were not raised during the first appeal to the High Court. However, it is settled that where grounds of appeal are raised in the Court for the first time, it will not entertain and determine them simply for lack of jurisdiction. (See **Jafari Mohamed V. R**, Criminal Appeal No. 112 of 2006, **Hassan Bundala @ Swaga V. R**, Criminal Appeal No. 416 of 2013 and Hussein **Ramadhani V. R**, Criminal Appeal No. 195 of 2015 (all unreported). In **Hussein Ramadhani** (supra) it was stated that:-

> *"It is now settled that as a matter of general principle this Court will only look into the matters which came up with lower courts and were decided; and not on new matters which were not raised nor decided by neither the trial court nor the High Court on appeal."*

In our considered view, despite the fact that grounds 1, 2, 3 and 5 are new but on closely looking at them they raise points of law in which this Court cannot ignore them on account of the fact that we have jurisdiction to entertain them.

For convenience, we will combine and determine grounds 1, 2 and 3 jointly because they all point to defects in the charge sheet. As it appears in the first count, the appellant was charged under section 130 (1) (2) (e) and section 131 of the Penal Code. There is no doubt that having regard to the evidence adduced during the trial, the relevant provision which should have been cited was sections 130 (1) (2) (a) and 131 (1) of the Penal Code as rightly submitted by the learned State Attorney. It was also expected in the particulars of the offence for the age of the victim and consent to be stated. It is instructive at this juncture to reproduce the particulars of the offence in the rape charge.

> *"**PARTICULARS OF OFFENCE**: that FRANK s/o KANANI charged on 5th day of August, 2015 at about 19:00 hrs at Kanazi village within Ngara District in Kagera Region did have carnal knowledge of one "AJ"."*

The above information in our view does not give such particulars as may be necessary for giving reasonable details as to the nature of the offence charged in compliance with section 132 of the CPA which 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."

In the instant case, since the victim was 24 years of age, it was imperative for the information in respect of her age to appear in the particulars of the offence and such particulars to expressly state that there was no consent given by the victim in the forced sexual intercourse. In the absence of that vital information in the particulars of the offence, the charge was defective and obviously it prejudiced the appellant.

In a situation where an accused is charged under a wrong provision of the law with insufficient particulars of the offence, such deficiency denies him the right to a fair trial because he will not be in a position to know the nature or seriousness of the offence he was charged with. In **Jackson Venant V. R**, Criminal Appeal No. 118 of 2018 (unreported) we stated that:-

"Any criminal trial, a charge is an important aspect of the trial as it gives an opportunity to the accused to understand in his own language the allegations which are sought to be made against him by the prosecution. It is thus important that the law and the section of the law against which the offence is said to have been committed be mentioned and stated clearly in a charge."

In **Abdallah Ally V. R**, Criminal Appeal No. 253 of 2013 (unreported) we stated that:-

"...being found guilty on a defective charge based on wrong and or non-exitent provision of the law, it cannot be said that he appellant was fairly tried in the below courts."

Apart from what is stated herein above, a defective charge will deny the accused person chance to properly prepare his defence. (See **Kashima Mnadi V. R**, Criminal Appeal No. 78 of 2011; **Magesa Chacha Nyakibali and Another V. R**, Criminal Appeal No. 307 of 2013 and **Peter Kombe V. DPP**, Criminal Appeal No. 12 of 2016 (all unreported).

In the first appeal before the High Court, at page 73 of the record of appeal, the first appellate judge tried to rectify the defects by bringing into aid the provisions of section 388 of the CPA and upheld the conviction and sentence under section 130 (1) and 131 (1) of the Penal Code. The immediate question we ask ourselves is whether a defective charge can be cured at the appellate stage? The answer to this is in the negative as correctly submitted by the learned State Attorney. In **Mussa Mwaikunda** (supra) at holding No. (V) this Court stated that:-

> *"The defect of the charge in this case was not curable under section 388 (1) of the Criminal Procedure Act..."*

Since section 388 of the CPA cannot cure this kind of defect, then the first appellate judge lacked jurisdiction to amend and correct the charge at the appellate stage as stated in **Antidius Augustine V. R**, Criminal Appeal No. 89 of 2017 (unreported) that:-

> *"We have indicated that the charge which was laid before the trial court was defective and therefore it could not have been corrected at an appellate stage."*

We now move to discuss count No. 2 on which the appellant was convicted of grievious harm and sentenced to one year imprisonment. The evidence which crucially implicated the appellant was that of PW1 and PW6 to the effect that PW1 was assaulted and sustained injuries as specified in exhibit P2 – the PF3 tendered in the trial court. The alleged injuries included bruises at the right hand, face and on her back with a swelling on the left hand wrist. In exhibit P2 tendered, PW6 termed the injuries sustained as harm. This finding is at variance with the charge on which the appellant was charged with. Also when we revisit the evidence of PW1 she merely stated that she was assaulted by the appellant with a stick. Her evidence does not go deep to show under what circumstances the alleged injuries were inflicted to her. As rightly conceded by the learned State Attorney, the said evidence is weak to sustain a conviction. We find that the conviction was unsafe. Accordingly we quash it and set aside the sentence of one year imposed.

Let us now speak briefly about the uncertainty in the age of the appellant. He asserted that he was 16 years old at the material time but in the evidence of the WEO he maintained that he was above the voting age.

The exhibit he tendered (exh. P5), a copy of the voters registration book was admitted as evidence without the same being read over to the appellant after admission. This was unprocedural, rendering the same liable to be expunged, as we hereby do. Having expunged this document, we are left to believe the version of the appellant that he was 16 years old at the material time. If that is the case, in terms of section 119 of the Law of the Child Act, 2009 the appellant was not supposed to be imprisoned. The said section reads:-

"S. 119 (1) A child shall not be sentenced to imprisonment

(2) Where a child is convicted of any offence punishable with imprisonment, the Court may in addition or alternative to any other order which may be made under this Act –

(a) discharge the child without making any order;

(b) order the child to be repatriated at the expenses of the Government to his home or district of origin if it within Tanzania; or

(c) order the child to be handed over to the cause of a person or institution named in the order, if the person or institution willing to undertake such care."

From the above, assuming the conviction was proper, then the punishment of one year imprisonment was excessive and illegal.

Having discussed as herein above, we find merit in the appeal. We quash and set aside the conviction and the sentence of thirty years imprisonment and order the immediate release of the appellant from jail unless otherwise held for some other lawful cause.

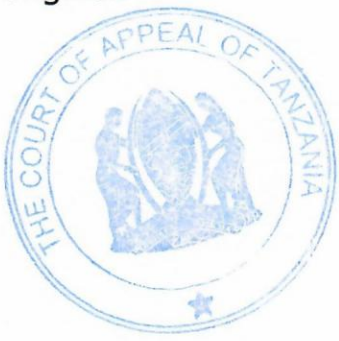
DATED at **BUKOBA** this 9th day of December, 2019.

B. M. MMILLA
JUSTICE OF APPEAL

R. E. S. MZIRAY
JUSTICE OF APPEAL

M. A. KWARIKO
JUSTICE OF APPEAL

The Judgment delivered this 10th day of December, 2019 in the presence of the appellant appeared in person and Ms. Suzan Masule, learned State Attorney for the Respondent/Republic is hereby certified as a true copy of the original.



B. A. MPEPO
DEPUTY REGISTRAR
COURT OF APPEAL