IN THE COURT OF APPEAL OF TANZANIA

AT MTWARA

(CORAM: MWARIJA, J.A., MZIRAY, J.A. And WAMBALI, J.A.)

CRIMINAL APPEAL NO. 127 OF 2017

OMARY ABDALLAH @ MBWANGWA..... APPELLANT

VERSUS

THE REPUBLIC.....RESPONDENT

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

(Mlacha, J.)

dated the 27th day of February, 2017

in

Criminal Appeal No. 07 of 2016

JUDGMENT OF THE COURT

15th February & 5th March,2019

WAMBALI, J.A.:

The appellant, Omary Abdallah @ Mbwangwa appeared before the District Court of Ruangwa at Ruangwa where he was charged with the offence of rape contrary to sections 130 (2) (e) and 131 of the Penal Code, Cap. 16 R.E 2002 (The Penal Code).

The particulars laid in the charge was to the effect that on unknown date and time of July, 2015 at about day time at Mkaranga village within Ruangwa District in Lindi region, the appellant did have

carnal knowledge of one "AS", a girl of five years old. It is on the record that the appellant denied the allegation that was laid in the charge.

The prosecution therefore paraded five witnesses including the victim who testified as PW3. The appellant gave his defence after the trial court determined that a *prima facie* case had been established. He consistently denied to have committed the offence. Nevertheless, at the end of the trial, the trial District Court of Ruangwa was fully convinced that the prosecution had proved its case beyond reasonable doubt. It therefore convicted him of the offence of rape and imposed a sentence of life imprisonment.

The appellant's appeal to the High Court was dismissed and the conviction and sentence of the trial court was confirmed. The appellant did not give up as he lodged the present appeal before this Court, still protesting the conviction and the sentence that was imposed on him by the trial court. The appellant lodged three grounds of appeal before this Court, namely:-

> *1) That, the learned appellate judge erred in law and fact when he upheld conviction and sentence while the prosecution failed to prove the case beyond reasonable doubt;*

2) *That, the learned appellate judge erred in law and fact by upholding the sentence while the trial court did not enter conviction; and*

3) *That, the appellate trial judge erred in law and fact by failure to evaluate the contradictions among the prosecution witnesses.*

At the hearing of the appeal before us, the appellant was represented by Mr. Rainery Songea, learned advocate, while Mr. Wilbroad Ndunguru, learned State Attorney, appeared for the respondent Republic.

We wish to note that although the original memorandum of appeal contains three grounds of appeal reproduced above, Mr. Songea abandoned the third ground. However, before the hearing Mr. Songea sought the Court's permission which we granted him to add one supplementary ground of appeal which was not raised in the memorandum of appeal earlier on. This is in respect of a point of law concerning the appropriateness of the charge of which the appellant was charged and convicted.

Submitting on ground one, Mr. Songea stated that the prosecution did not prove the case against the appellant because of the following matters. First, that the name of the victim PW3 which is indicated in the charge is different with the name shown in the PF3. Moreover, Tausi

With regard to ground two, Mr. Songea submitted that having gone through the judgment of the trial court, it comes to light that the appellant was not properly convicted. He argued that this offends the provision of section 235(1) of the Criminal Procedure Act, Cap 20 R.E. 2002 (the CPA) and section 312 of the CPA. To bolster his argument on this point, Mr. Songea referred us to the decision of the Court in **Abdallah Ali v. The Republic, Criminal Appeal No. 253 of 2013** (unreported). He concluded his submission on this ground by urging us to remit the file to the trial court to enter a proper conviction.

In reply, Mr. Ndunguru firstly did not support the appeal. He categorically supported the conviction and sentence of the appellant by the trial court and as confirmed by the High Court on first appeal.

Responding to the first ground, Mr. Ndunguru stated that the prosecution proved the case against the appellant beyond reasonable doubt. He argued that the evidence of PW4, PW3 and PW5 left no doubt that the offence of rape occurred and that it was the appellant who was responsible with raping the victim (PW3). He further stated that the appellant was well known to PW3 and PW4 and that there is no dispute that identification of the appellant was watertight as the same was not a subject of complaint before this Court.

Moreover, Mr. Ndunguru submitted that exhibit P1 was tendered and admitted without objection from the defence and no cross-examination was made on the authenticity and reliability of the said document. In this regard, he argued that the appellant cannot complain at this stage of the second appeal, while this was also not a subject of appeal in the first appeal before the High Court. He added that it is on record that PW5, the doctor who examined the victim (PW3) found that she had lost her hymen which suggested that she had been carnally known by a man. In his view, that person is the appellant. He, thus castigated the complaint on this matter as baseless and should be rejected by the Court.

On the other hand, Mr. Ndunguru submitted that some of the issues raised by Mr. Songea with regard to difference of the names of PW3 and the period taken before she was examined were not dealt with by the High Court on first appeal. He therefore argued that despite being minor issues, but the same should not be entertained as it is against the requirement of the law. To support his argument on this point, he made reference to the decision of this Court in **Denis Kayola v. The Republic,** Criminal Appeal No. 142 of 2012, (unreported). He thus urged us to disregard the complaints on this matter and also find that the first ground has no merit.

Responding to the second ground, Mr. Ndunguru submitted that the record of appeal is categorical that the appellant was properly convicted by the trial Court as required by the law. He wondered why this complaint has been made part of the ground of appeal. In the event, he urged us to dismiss it.

On our part, having gone through the record of appeal, we agree with Mr. Ndunguru that some of the issues which have been submitted in respect of the first ground by Mr. Songea as part of the arguments to show that the prosecution did not prove the case against the appellant were not raised when the first appeal before the High Court was heard and determined. We are therefore of the decided view that these cannot be the subject of complaint before this Court. We thus disregard them.

Furthermore, having gone thoroughly through the record of appeal, we entertain no doubt that the prosecution proved the case against the appellant beyond reasonable doubt. PW3 who knew well the appellant before the incident, explained categorically and without any hesitation how the appellant raped her in his mother's house. PW3 was consistent on what she stated about the conduct of the appellant on the fateful day during examination in chief and she remained unshaken during cross examination. In our view, PW3 offered the best evidence which could not have been stated by any other person.

Nevertheless, PW3 testimony was fully supported by the evidence of PW4 who was playing with her outside the house. Despite being a child, PW4 explained firmly how the appellant lured and succeeded to have sexual intercourse with PW3 after he told her to go in the house and lock the door. When PW4 came out she did not find PW3 outside as the appellant had taken her into his mother's house and proceeded to have sexual intercourse with the victim.

Moreover, PW1 and PW2 testified how they discovered that PW3 was experiencing pain in her private parts and how they took initiative to have her examined and treated at the hospital. Both PW1 and PW2 testified that PW3 told them that it was the appellant who was responsible for raping her. It was that information which led to the arrest and prosecution of the appellant. Their testimonies were not seriously challenged by the appellant during cross examination.

The evidence of PW3 was further corroborated by PW5 who examined her and found that although she had no wounds on her private parts, she had no hymen which suggested that despite being a child of tender age she had been carnally known. The report of PW5 was tendered and admitted as exhibit P1 and the appellant did not object to its admission and made no cross examination of the witness.

In the event, based on our assessment, we have no doubt in our mind that the prosecution proved the case against the appellant beyond reasonable doubt. We agree with Mr. Ndunguru that the appellant was properly and conclusively identified by PW3 and PW4 as the person who raped her. We thus dismiss the first ground of appeal.

Turning to ground two, we think that the complaint on failure of the trial court to convict the appellant is of no substance. Going by the record of appeal, in convicting the appellant, the learned Resident Magistrate, R.1 Shehagilo stated:

> *".....it is proved beyond any reasonable doubt that, the accused person was the one who raped the victim one ... the girl of 5 years and he is convicted for the offence as charged".*

From the above quoted passage, we are satisfied that the trial court properly convicted the appellant. This ground of appeal is therefore without any justification. We do not find any contravention of sections 235 (1) and 312 of the CPA as stated by Mr. Songea. We dismiss it.

We now turn to consider the supplementary ground on the defect in the charge. The submission of Mr. Songea was to the effect that subsection (3) of section 131 which forms the basis of the sentence

which was imposed upon the appellant was not cited in the charge. What was cited is section 131. He further submitted that citing subsection (3) of section 131 is important because the victim was a child aged five (5) years old, and therefore upon conviction the offender is liable to be punished with life imprisonment. He further argued that the trial magistrate erred in sentencing the appellant under the provision of the law which was not cited in the charge sheet. He stressed that in essence, the trial magistrate technically amended the charge without affording the appellant and the prosecution an opportunity of being heard. For this reason, he submitted that the appellant was wrongly sentenced to life imprisonment under the provision which was introduced at the time of sentencing him, thus occasioning miscarriage of justice on his part. As a result, the appellant was prejudiced and unfairly tried by the trial court, Mr. Songea emphasized.

To support his submission, he referred us to the decisions of this Court in **Abdallah Ally v. the Republic,** Criminal Appeal No. 253 of 2013, **Charles Mlande v. the Republic**, Criminal Appeal No. 270 of 2013 and **Wiston Obeid v. the Republlc**, Criminal Appeal No. 23 of 2016 (all unreported).

In the circumstance, Mr. Songea, urged us to nullify the proceedings and judgment, quash conviction and set aside the sentence

of life imprisonment imposed on the appellant. The thrust of his prayer being that as the proceedings, conviction and sentence emanated from a defective charge the same are a nullity. He further prayed that the appellant be released from custody as the defect in the charge is incurable for causing miscarriage of justice.

In his response, Mr. Ndunguru conceded that the charge that was laid against the appellant by the prosecution at the District Court of Ruangwa, was defective. However, he quickly submitted that the defect in the charge was not serious enough to warrant the Court to nullify the proceedings and judgment, quash conviction and set aside the sentence. He firmly submitted that the irregularity did not occasion injustice because, in sentencing the appellant, the trial magistrate properly acted on sub-section 3 of section 131, notwithstanding the fact that the same was not cited in the charge sheet.

The learned State Attorney insisted that the defect in the respective charge is curable under section 388 of the CPA. He supported his contention, by referring to us the decision of this Court in **Deus Kayola** (supra). He thus invited us to hold that the defect in the said charge could not have prejudiced the appellant in anyway as the appellant was properly convicted after he made his defence, and mitigated his sentence.

It is acknowledged that this matter did not surface in the High Court on first appeal and therefore it was not dealt with. It was also not one of the appellant's grounds of appeal to this Court as stated above. However, considering that this is a matter of law and the fact that a charge sheet is the vital document that institutes a criminal charge, we think it is important to determine it.

Having heard the counsel for the parties and after perusing the record, there is no dispute that the charge that was laid against the appellant at the District Court at Ruangwa was defective. The defect is due to the fact that the relevant subsection 3 of section 131 on the type of sentence to be imposed upon conviction of appellant was not cited in the charge.

The issue which we need to resolve is whether the said defect is incurable to the extent that it prejudiced the trial, proceedings, conviction and sentence of the appellant. For the purpose of our deliberation of this issue, we think it is desirable to make reference to some relevant provisions of the law. To start with, sections 132 of the CPA provides that offences must be specified in the charge with necessary particulars. It provides that;

> *"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".

Moreover, section 135 (a) (ii) of the CPA imposes a requirement for the charge to contain specific section of the law creating the offence. The provision 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."*

On the other hand, section 131 of the Penal Code which is the center of the complaint on the defect in the charge, provides different categories for punishment of rape. This section has subsections (1), (2) and (3), of which sub section (2) has paragraphs (a) to (c). In this regard, we think it important that for purpose of clarity, the respective subsection which provides the appropriate sentence upon conviction of the accused have to be cited in the charge.

A close reading of that provision makes it is clear that, whereas under sub-section (1), the minimum imprisonment term is thirty years, under sub-section (3), it is a mandatory term of life imprisonment.

At this juncture, the question we ask ourselves is whether in the circumstances of this case, the omission to cite subsection 3 of section 131 of the Penal Code in the charge prejudiced the appellant at the trial to the extent of causing miscarriage of justice.

We do not entertain any doubt that a charge sheet or information is an important document which puts in motion a criminal trial before a trial court. The charge or information therefore is a primary accusatory instrument must plead the prosecution case with sufficient detail.

We are aware and mindful of sound principles and practice developed in a litany of authorities of this Court concerning the effect of a defective charge. Here we need to mention **Abdallah Ally, Charles Mlande, Wiston Obeid** (supra) which were referred by Mr. Songea. Certainly there are several other decisions. Nevertheless, we are of the considered opinion that every case had to be decided on its own facts and circumstances. It follows that, it is not every defect in the charge that make it incurable. Some of the defects in the charge especially at the trial stage may be remedied in certain circumstances by

the trial stage may be remedied in certain circumstances by amendment. However this should be limited to exceptional cases. The prosecution therefore cannot rely to this exception always. It is in this respect that the trial court is empowered under section 129 of the CPA to reject a defective charge before acting on it.

In our respectful opinion, we think, a charge is incurably defective for instance, where what is laid therein discloses an offence not known to law; or where upon going through the evidence in the record, the accused is taken to have been convicted of the offence which is not recognized and known by the law or he is not charged with. The same applies where it does not allege an essential ingredients of the offence with which the alleged contravention of the Act is deemed to have been done. These are just some of the examples.

Therefore, where the particulars in a charge or information are highlighted in a manner which is sufficient enough to give clear notice to the accused that his alleged act formed the basis of his criminal liability under the requisite section of the law, is a relevant factor in curing a charge. However, the prosecution must have notably clarified in evidence that it is relying on the alleged act to infer the accused *mens rea*. This, in our view, may remove the prejudice which might be deemed to have caused on the part of the accused as the clarity in the

particulars forms the basis of his reason to know about the particular offence.

We are however aware that a defective charge which is amenable to amendment can only be made at the trial stage before judgment. Amendment cannot be done at the appellate stage. We thus ask ourselves, what should be the best approach by the appellate Court where the issue of a defective charge has been raised.

In this regard, we are of the considered opinion that the test to be applicable by an appellate court is firstly, to determine the existence of the said defect in the charge and secondly, to assess its effects in the appellant's conviction. The major question being whether the conviction based on the alleged defective charge occasioned a miscarriage of justice resulting in great prejudice to the appellant. We must state that this proposition is similar to the approach which was taken by the Court of Appeal of Kenya in **Obedi Kilonzo Kevevo v. Republic** (2015) (*found at http://www.kenyalaw.org*).

In the present appeal, applying this persuasive approach and principle to the oral arguments of the counsel for the parties in this appeal, we are satisfied that the omission to cite the sentencing

provision, did not prejudice the appellant and thus no miscarriage of justice has been occasioned as a result of that omission.

It is clear to us that the particulars of the offence laid in the charge sufficiently indicated that he was alleged to have committed the offence of rape to a girl of five years old. This, in our view, as the appellant had the opportunity to hear the evidence of the prosecution witnesses who made reference to the victim who was a child below 18 years, and cross examined them, he was properly convicted with the offence with which he was charged. The appellant also defended himself while knowing that he was accused of raping a child. Thus, as the offence with which he was charged attracted imprisonment for life, failure of a charge to refer to subsection 3 of section 131 did not vitiate the charge, proceedings, conviction and the sentence which was meted on the appellant. We are satisfied as per the record that the appellant knew the offence he faced and the resulting sentence.

In the event we are prepared to hold, as we hereby do, that in the circumstance of this appeal, the said defect in the charge is curable under section 388 of the CPA. We therefore agree with the similar approach which was taken by this Court in **Deus Kayola** (supra) which was referred by the learned State Attorney for the respondent Republic. In that decision the Court was satisfied that the particulars of the

offence sufficiently informed the appellant that he was charged with the offence of raping a girl of 12 years old. Thus although the charge against the appellant was preferred under sections 130 and 131 of the Penal Code instead of sections 130(2) (e) and 131(1), the irregularity was taken to be curable under section 388 of the CPA.

Indeed, in similar situation and circumstances like in the instant appeal, this Court in **Burton Mwipabilege v. The Republic**, Criminal Appeal No. 200 of 2009 (unreported) stated as follows:

> *"As for the penalty provision, the section cited was also not proper. Since the victim was 10 years old, the proper punishment section would have been section 131 (3) where life imprisonment is the prescribed minimum sentence, and not section 131 (1) where the minimum sentence is 30 years imprisonment. On the face of it therefore, the charge is illegal in form. But, we agree with Mr. Rwegerera that this is curable under section 388 of the CPA, because the irregularity has not, in our view, occasioned a failure of justice".*

The Court made that finding after it quoted with approval the decision of the defunct East African Court of Appeal in **R v. Ngidipe Bin**

Kapirama and Others, (1939) 6 E.A. CA. 118 where it was stated that:-

> *"An illegality in the form of a charge or information may be cured as long as the accused persons are not prejudiced or embarrassed in their defence or there has* otherwise *been a failure of justice".*

Therefore, we hold a view that depending on the circumstances of each case, an error in the description of the statutory provision under which the charge is brought will not always render the proceedings null and void. This will always depend on the circumstances of each case. We thus think that at appellate stage, when a requirement to determine the defect in a charge arises, the Court should always consider whether the overall effects of the numerous defects in the charge would have certainly rendered the trial unfair in itself. It must be demonstrated through the record of proceedings that the defect is fundamental resulting in a miscarriage of justice. We wish to add that as it was stated by the Court of Appeal of Kenya in **Obedi Kilonzo Kevevo** (supra), which we subscribe to, in a criminal justice system, the law requires that the right of the appellant must be weighed against the victim right.

In the event we dismiss the supplementary ground of appeal.

From the foregoing, we are satisfied that the appellant was properly convicted and sentenced. We are therefore not prepared to fault the concurrent finding of the trial and the first appellate courts.

In the final analysis, we dismiss the appeal on it's entirety.

DATED at **MTWARA** this 5th day of March, 2019

A.G. MWARIJA
JUSTICE OF APPEAL

R.E.S. MZIRAY
JUSTICE OF APPEAL

F.L.K. WAMBALI
JUSTICE OF APPEAL

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

A.H. MSUMI
DEPUTY REGISTRAR
COURT OF APPEAL