IN THE COURT OF APPEAL OF TANZANIA
AT DAR ES SALAAM

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

CRIMINAL APPEAL NO 198 OF 2018

RAMADHANI MWANAKATWE.....1ST APPELLANT
STEPHEN LAMECK @JOHN .....2ND APPELLANT
HAMIS ABDALLAH @ CHINGA.....3RD APPELLANT
LEONARD RESPICHI NYONI @ KADO.....4TH APPELLANT

VERSUS

REPUBLIC .....RESPONDENT

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

(Mgeyekwa, J.)

dated the 4th day of July 2018
in
(DC) Criminal Appeal No. 98 of 2017

JUDGMENT OF THE COURT

16th September & 7th October 2020

MWANDAMBO, J.A.:

The District Court of Temeke District at Temeke tried the appellants herein and convicted them of gang rape contrary to sections 130 (1) (2) (e) and 131A (1) and (2) of the Penal Code, [Cap. 16 R.E. 2002] now R. E. 2019] henceforth, the Penal Code. Upon such conviction, it meted out to each of the appellants three sentences, namely; life imprisonment, compensation of TZS 1,000,000.00 to the victim of the offence and corporal

punishment of 12 strokes of the cane. Dissatisfied, the appellants appealed to the High Court of Tanzania sitting at Dar es Salaam in Criminal Appeal No. 98 of 2017 but in vain. They have now appealed to this Court on a second appeal.

The appellants' arraignment and eventual conviction have their genesis from events alleged to have taken place on the night of 26th April, 2016 at Tungi Primary School in Temeke District. The prosecution alleged that the appellants jointly and together had carnal knowledge of a girl aged 15 years whose identity is withheld and we shall refer to her as 'AJM' or PW1. It was alleged that on the same date and time and the same place, the appellants had carnal knowledge of AJM against the order of nature. From the above complaints, the prosecution instituted Criminal Case No. 259 of 2016 before the District Court initially on gang rape contrary to section 130(1)(2) (e) and 131 A (1) and (2) of Penal Code to which the appellants pleaded not guilty. Subsequently, the appellants were asked to plead to a substituted charge containing not only gang rape to which they had already denied involvement, but also to an additional count of unnatural offence contrary to section 154(1) (a) and (2) of the Penal Code.

After the preliminary hearing, the trial ensued involving four prosecution witnesses who testified on both counts followed by defence witnesses after the trial court had ruled that the appellants had a case to answer on both counts. At the end of it all, the trial court (Hamza, RM) found the appellants guilty of gang rape. He convicted and sentenced them as aforesaid. However the trial court's judgment said nothing in relation to the second count involving unnatural offence. Be it as it may, the appellants preferred an appeal before the first appellate court against the conviction and sentence premised on 15 grounds of appeal which Mgeyekwa, J. found no merit in any of them and dismissed their appeal. Despite the fact that the appeal to the High Court was premised on conviction and sentence on only one count involving gang rape, the notice of appeal to this Court made reference to both gang rape and unnatural offence.

Initially, the appellants lodged their joint memorandum of appeal on 11th December, 2018 containing 6 grounds of appeal. On 11th October 2018, they lodged a first supplementary memorandum of appeal containing 4 grounds followed by a second one on 14th September, 2020 with 6 grounds.

When the appeal was called on for hearing on 16th September 2020, the appellants were connected through video link facility from prison.

Apparently, they had engaged Mr. Nehemiah Nkoko, learned advocate who appeared before us and argued the appeal on their behalf. For its part, the respondent/Republic appeared through Ms. Jenipher Mark Masue, learned Senior State Attorney assisted by Ms. Ashura Ibrahim Mnzava, learned State Attorney.

Out of 14 grounds in the memorandum and two supplementary memoranda of appeal, Mr. Nkoko elected to argue only a few namely; validity of the charge sheet reflected in ground 1 in the original memorandum of appeal repeated in ground 2 in the first supplementary memorandum of appeal; grounds 2, 5 and 6 in the second memorandum of appeal and ground 1 in the first supplementary of memorandum of appeal. For reasons which will become apparent shortly, we shall not narrate the gist of the grounds Mr. Nkoko opted to argue.

The learned advocate argued ground 1 in the memorandum of appeal and ground 2 in the first supplementary memorandum. Striped of the details, essentially, the appellants fault the first appellate judge in ground one for sustaining conviction based on a defective charge. On the other hand, the appellants fault the first appellate court through ground 2 in the first supplementary memorandum for sustaining conviction based on an incurably

defective charge whose particulars stated that they jointly and together had carnal knowledge of the victim of the offence which rendered it impossible for them to commit the offence charged at the same time.

In the course of submissions, Mr. Nkoko changed gears by predicating his attack on the duplicity of the charge and on the alleged conviction based on a non-existing charge. With regard to duplicity, the learned advocate contended that the charges with which the appellants faced were similar in that they attracted the same punishment; life imprisonment and so it was improper to be included in the same charge. According to the learned advocate, the prosecution ought to have either charged them in the alternative or just one of them. Under the circumstances, he argued, the appellants were prejudiced in the preparation of their defence by the manner in which they were charged. On this ground alone, the learned advocate invited the Court to find the conviction invalid and quash it resulting in setting aside the sentences that followed from it.

Regarding the second limb of his contention, Mr. Nkoko argued that whereas the substituted charge admitted on 5th August 2016 contained two counts of gang rape and unnatural offence, the trial court's judgment is premised on only one count involving gang rape saying nothing in relation

to unnatural offence. To him, the trial court must have predicated its decision on the charge instituted on 18th May 2016 which had only one count involving gang rape. Mr. Nkoko impressed upon us to find that under the circumstances, the appellants were not tried fairly. He urged the Court to hold that the proceedings before the trial court as well as the first appellate court were a nullity so were the judgment and sentences. By reason of the foregoing, Mr. Nkoko invited the Court to quash the conviction and set aside the sentences meted out to the appellants resulting into their immediate release. Believing that he had sufficiently convinced the Court to uphold his arguments towards nullification of the lower courts' proceedings and judgments, Mr. Nkoko abandoned the rest of the grounds at that stage and prayed for necessary orders.

For her part, Ms. Masue did not agree that the charge against the appellants suffered from duplicity as contended by Mr. Nkoko. The learned Senior State Attorney argued that the offences with which the appellants stood charged were distinct and so it was quite proper to charge them in two separate counts in one charge as it were. She accordingly urged the Court to reject the invitation to hold the proceedings before the trial Court a nullity. As to the conviction from a non-existent charge, Ms. Masue conceded

as such agreeing with the appellants' learned advocate that the irregularity in the judgment of the trial court was fatal and incapable of any cure under section 388(1) of the Criminal Procedure Act [Cap. 20 R.E. 2019] (the CPA).

Whilst welcoming the prayer for nullification of the trial courts' judgment and that of the first appellate court together with its proceedings, the learned Senior State Attorney took a different stance regarding the proceedings before the trial court. Ms. Masue argued that since there is nothing wrong with the proceedings of the trial court, the Court can only remit the record of that court and direct it to compose a fresh judgment based on the substituted charge.

In his rejoinder, Mr. Nkoko reiterated his stance that the charge suffered from duplicity which had adverse impact on the proceedings of the trial court and hence his arguments for nullifying them.

Having heard arguments from the learned counsel and upon our examination of the proceedings and judgment of the trial court, we take the view that the determination of the first limb of Mr. Nkoko's contention turns on incomplete judgment rather than on the alleged conviction based on a non-existent charge. We say so because there is nothing in the judgment to support the proposition advanced by the learned advocate supported by Ms.

Masue. We are mindful that at the beginning of the judgment the trial Magistrate made reference to the first count in the substituted charge regardless of the fact that the conviction was predicated on that count only but, with respect, that by itself is not sufficient to conclude that the trial court's judgment was a product of a non-existing charge. In saying so we are not suggesting that the judgment was free from difficulties which might have influenced the learned advocate's line of argument. Much as section 312(1) of the CPA does not require recitation of the charge in a judgment, it seems to us that that duty is implicit when one examines the import of the section particularly as it relates to the contents of the judgment one of them being points for determination. In our view, the points for determination must have reference to the charge and where there are more than one counts as it were, reference should be made to each, albeit in brief. The trial magistrate ought to have made reference to both counts at the beginning of his judgment followed by points for determination. If he had done so, he would have avoided glossing over determination on the second count bearing in mind his reference to the testimony by PW3 thus:-

> *"That her private parts were examined too and found her with blood stains and semen at the vagina and her [arms] anus was found to be open and had bruises too. From his opinion, there*

was penetration of blunt object in both ways of her private parts." [at page 62 of the record of appeal].

What emerges from the foregoing is that the trial Court had in mind the substituted charge containing two counts of gang rape and unnatural offence. However, instead of making his determination on both counts, the learned trial Magistrate dealt with the first count only. Apparently, that was the only count in the first charge which instituted the case before the trial court. Be it as it may, apart from that omission there is nothing suggesting that the trial magistrate determined the case on the basis of a charge which had already been substituted by another one.

On the basis of the foregoing, we are satisfied that the learned trial magistrate composed an incomplete judgment by omitting to make a determination on the second count involving unnatural offence. Consequently, we are constrained to agree with the learned counsel on the validity of the judgment albeit for a different reason. To that extent, the purported judgment was a nullity for incompleteness in that it failed to deal with the whole case by omitting to pronounce itself on the second count which has remained undetermined. The appellants were neither convicted nor acquitted on that count. We shall pause for a moment on the way

forward and deal with the issue whether the substituted charge was bad on account of duplicity.

Ms. Masue had a different opinion from her learned friend and we think she was right. The term duplicity does not feature in the CPA but section 133 (1) thereof stipulates:-

> *"(1) Any offences may be charged together in the same charge or information if the offences charged are founded on the same facts or if they form or are a part of, a series of offences of the same or a similar character."*

We had occasion to discuss this term in one of our previous decisions in which we held that a charge is said to be duplex if two distinct offences are contained in the same count or where an actual offence is charged along with an attempt to commit the same offence- See: **Director of Public Prosecutions v. Morgan Maliki & Nyaisa Makori**, Criminal Appeal No. 133 of 2013 (unreported).

There is no dispute in this appeal that gang rape and unnatural offence were distinct offences which formed two separate counts in the substituted charge sheet. Under the circumstances, Mr. Nkoko is not right in his submission that the charge was bad for duplicity. We thus reject his

argument and hold that the charge was valid. Consequently, the proceedings before the trial court were not affected by the ailments in the judgment we have held to be a nullity. It is now opportune for us to discuss the way forward.

After holding that the trial court's judgment was a nullity, the appeal to the High Court and proceedings from it as well as the judgment dismissing the incompetent appeal were also a nullity. Inevitably, we quash the proceedings before the High Court and set aside the judgment dismissing the purported appeal. As the proceedings of the trial court were not affected by the invalid judgment, we order that the record of those proceedings be remitted back to it with a direction to compose a fresh judgment based on both counts in the substituted charge sheet. It is further directed that the judgment shall be composed by the same magistrate unless he is prevented from doing so by compelling reasons in which case another magistrate with competent jurisdiction shall compose the judgment as soon as practicable. Pending the delivery of the judgment, the appellants shall remain in custody as remand prisoners.

For the foregoing reasons, the appeal is allowed to the extent indicated.

Order accordingly.

DATED at **DAR ES SALAAM** this 6th day of October, 2020.

A. G. MWARIJA
JUSTICE OF APPEAL

M. A. KWARIKO
JUSTICE OF APPEAL

L. J. S. MWANDAMBO
JUSTICE OF APPEAL

Judgment delivered this 7th day of October, 2020 in the presence of the Appellants in person - linked via video conference from prison and Ms. Janeth Magoho, learned State Attorney for the respondent/Republic, is hereby certified as a true copy of the original.

E. G. MRANGU
DEPUTY REGISTRAR
COURT OF APPEAL