IN THE COURT OF APPEAL OF TANZANIA
AT MWANZA

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

CRIMINAL APPEAL NO. 261 OF 2010

MABULA MASHAURI..... APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

(Appeal from the Judgment of the Resident Magistrate's Court of Mwanza at Mwanza)

(Somi, PRM-Extended Jurisdiction)

dated the 23rd day of March, 2002
in
(DC) Criminal Appeal No. 219 of 2000

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JUDGMENT OF THE COURT

08th & 14th December, 2020

KWARIKO, J. A.:

The appellant, Mabula Mashauri stood before the District Court of Sengerema at Sengerema charged with the offence of grave sexual abuse contrary to section 138 (2) (a) and (b) of the Sexual Offences (Special Provisions) Act No. 4 of 1998. It was alleged by the prosecution that on the 10th day of October, 1999 at about 13:00 hours at Nyatukara village within Sengerema District in Mwanza Region, the

appellant had carnal knowledge of a girl aged six years (name withheld).

Having denied the charge, the appellant was fully tried. In the end, the trial court found that the evidence on record did not prove the offence of grave sexual abuse against the appellant. It instead, found him guilty of the offence of rape. He was sentenced to life imprisonment, a corporal punishment of 24 strokes of a cane and payment of a fine of TZS. 20,000.00. He was also ordered to pay compensation to the victim of the offence at the tune of TZS.100,000.00.

Aggrieved by that decision, the appellant appealed before the High Court. The appeal was however transferred to the Resident Magistrate's Court of Mwanza to be heard by Hon. Somi, PRM Ext. Jur. The appeal was dismissed for want of merit.

During the trial, the prosecution called three witnesses to prove the charge while the defence had a total of four witnesses including the appellant. In this judgment, in order to hide the identity of the complainant as the victim of the sexual offence, we shall refer to her as 'the victim' or simply 'PW2'.

The following are the salient facts which arose out of the evidence adduced at the trial from both sides. On 10/10/1999, whilst PW2 was at a water well, she saw the appellant whom she knew before. When the appellant stared at her she took to her heels but he followed her until she reached her home.

Whilst there, the appellant inquired the whereabouts of her parents and she told him that her father had travelled. Thereafter, he carried her to her mother's bed and offered her TZS. 20.00 which she declined to take. The appellant lifted her to the bed and had sexual carnal knowledge of her. According to her evidence, PW2 felt pain as she was injured. Shortly thereafter, PW2's mother, Pilly Zagaraza (PW1) appeared and the appellant ran away.

The incident was reported to the ten-cell leader Selemani Bundala (PW3) who asked his wife to inspect the victim but did not find anything abnormal with her. Meanwhile, PW1 reported the incident to the Police where a PF3 (exhibit P1) was given to the victim for her to go to hospital for medical examination. The appellant was later arrested and charged as indicated above.

In his defence, the appellant raised a defence of alibi which was supported by his three witnesses to the effect that he had spent the whole of the material day doing construction work at the building site of one Gedion Ngerageza (DW2) together with two others, namely Chimani Mashauri (DW3) and Kazimiri Gimbishi (DW4).

Before this Court, the appellant has raised ten grounds of appeal which for reasons to be apparent soon, we do not intend to reproduce them herein.

At the hearing of the appeal, the appellant was linked from Butimba Prison through a video conferencing facility whilst the respondent Republic was represented by Ms. Mwamini Joram Fyeregete, learned Senior State Attorney assisted by Ms. Sabina Choghogwe, learned State Attorney.

In the course of hearing, we asked the learned State Attorney to explain whether it was proper for the trial Magistrate to substitute the offence of rape for grave sexual abuse in the course of writing the judgment. In response thereof, Ms. Fyeregete submitted that although the trial Magistrate found that the evidence on record and particulars of the offence established the offence of rape, he erred to substitute the

offence of rape for grave sexual abuse without calling the appellant to plead to that charge as required under section 234 of the Criminal Procedure Act [CAP 20 R.E. 2019] (the CPA).

The learned Senior State Attorney submitted further that, in principle, the trial Magistrate erred to substitute the graver offence for the lesser offence charged thus subjecting the appellant to a greater punishment. She argued that because there was variance between the evidence and the charge, the trial Magistrate ought to have ordered amendment as per section 234 of the CPA. Since that was not done, the judgment of the trial court was a nullity and so are the proceedings and judgment of the High Court which she urged us to quash them.

On the way forward, Ms. Fyeregete acknowledged the fact that the appellant has been in custody for about twenty years now and that he would have completed his sentence had he been convicted of the charged offence and sentenced to a minimum sentence which is twenty years imprisonment. In the circumstances, the learned Senior State Attorney left the fate of the appellant to be decided by the Court.

The appellant being a lay person did not have much to say. He only urged us to do justice which has been delayed for a long time and that he has been in custody for twenty years now.

We have considered the trial Court's judgment and the submissions by the parties. The issue which calls for our determination is whether the trial Magistrate was right in substituting the offence which the appellant was charged with in the course of composing the judgment.

It is in record that, when the appellant was arraigned before the trial court the charge of grave sexual abuse was read over and explained to him before he was called upon to plead to it. This procedure was followed in compliance with section 228 (1) of the CPA which provides thus:

> *"The substance of the charge shall be stated to the accused person by the court, and he shall be asked whether he admits or denies the truth of the charge".*

Notwithstanding the above provision, section 234 of the CPA allows alteration or amendment of the charge at any stage of the trial. It provides as follows:

"Section 234-

(1) Where at any stage of a trial, it appears to the court that the charge is defective, either in substance or form, the court may make such order for alteration of the charge either by way of amendment of the charge or by substitution or addition of a new charge as the court thinks necessary to meet the circumstances of the case unless, having regard to the merits of the case, the required amendments cannot be made without injustice; and all amendments made under the provisions of this subsection shall be made upon such terms as to the court shall seem just.

(2) Subject to subsection (1), where a charge is altered under that subsection–

(a) the court shall thereupon call upon the accused person to plead to the altered charge."

It is clear that whereas the law allows amendment or alteration of the charge at any stage of the case, the court is required to call upon the accused to plead to the new or altered charge. This provision is not discretionary because it is couched in mandatory terms, as such it does not give room to the Magistrate to amend, substitute or alter the charge at will without calling upon the accused to plead to it. This Court has had occasions to interpret this provision in its decisions; some of

which are; **No. A 5204 WRD Viatory Paschal v. R,** Criminal Appeal No.195 of 2006 and **Hassan Said Twalibu v.R,** Criminal Appeal No.91 of 2019 (both unreported). For instance, in the first case, where the trial Magistrate amended the charge in the course of writing judgment, the Court stated thus,

> *"Apparently the trial magistrate had amended the charge in the course of writing the judgment. The accused persons, therefore, were not accorded an opportunity to enter their pleas as required under section 234 (2) of the Criminal Procedure Act..."*

Likewise, in the instant appeal, the trial Magistrate strayed into an error when he purportedly amended the charge in the course of writing the judgment without calling upon the appellant to plead to the new charge and defend himself. Addressing a similar scenario in the case of **CPL. Jabil Maulid v. R,** Criminal Appeal No.147 of 2005 (unreported), the Court said thus:

> *"But the question we have asked ourselves is whether it was proper at the time of writing judgment to make such amendment. We think the answer to the question is that, it is not proper at the time of writing judgment for the judge to make such amendment of the charge. This is because at that*

stage the accused person will be deprived of his right to answer the amended charge. Furthermore, the accused would have no opportunity to defend himself."

Following the authorities referred above, we are in all fours with the learned Senior State Attorney that the contravention of the law rendered the judgment of the trial court defective and so the proceedings and judgment of the High Court were rendered a nullity. As such, in the exercise of our revisional powers envisaged under section 4 (2) of the Appellate Jurisdiction Act [CAP 141 R.E. 2019], we quash the judgment of the trial court, the proceedings and judgment of the High Court and set aside the sentence meted out against the appellant.

Under normal course of things, the said nullification would have been followed by an order of remittance of the case file to the trial court to comply with the law. However, in the circumstances of this case we find that move not proper because as the record shows and conceded by the learned Senior State Attorney, the appellant has been in custody for about twenty years now. He would have completed his sentence had he been found guilty of the charged offence of grave

sexual abuse and sentenced to imprisonment of twenty years, the minimum term of imprisonment provided thereof.

In the event, we order the immediate release of the appellant from prison unless he is otherwise held for a lawful cause.

DATED at **MWANZA** this 14th day of December, 2020.

A. G. MWARIJA
JUSTICE OF APPEAL

M. A. KWARIKO
JUSTICE OF APPEAL

R. J. KEREFU
JUSTICE OF APPEAL

The Judgment delivered this 14th day of December 2020, in the Presence of the Appellant in person via video link and Ms. Dorcas Akyoo, learned State Attorney for the Respondent, is hereby certified as a true copy of the original.

THE COURT OF APPEAL OF TANZANIA

G. H. HERBERT
DEPUTY REGISTRAR
COURT OF APPEAL