IN THE COURT OF APPEAL OF TANZANIA
AT TABORA

(CORAM: MKUYE, J.A. WAMBALI, J.A. And SEHEL, J.A.)

CONSOLIDATED CRIMINAL APPEALS NOS. 46 AND 428 OF 2019

1. ROBERT S/O MADOLOLYO
2. MASUNGA DUDU @ MLEKWA ..... **APPELLANTS**

VERSUS

THE REPUBLIC ..... **RESPONDENT**

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

(Mwita, J.)

Dated the 30th day of October, 2001
In
DC. Criminal Appeal No. 15 of 2001

JUDGMENT OF THE COURT

8th & 17th December, 2020

MKUYE, J.A.:

At the District Court of Bariadi at Bariadi, the appellants ROBERT MADOLOLYO and MASUNGA DUDU @ MLEKWA (the 1st and 2nd appellants respectively) were charged with the offence of gang rape contrary to section 131 A (1) and (2) of the Penal Code, Cap 16, R.E. 2002 (the Penal Code). It was alleged that on 1st day of February, 2000 at about 20:00hrs at Bariadi area, within the District of Bariadi, in Shinyanga Region, the appellants did unlawfully have carnal knowledge of one A d/o M (name

withheld) knowing that she was an idiot person without her consent. Upon a full trial, they were convicted as charged and sentenced to life imprisonment.

Aggrieved, the appellants appealed separately to the High Court but their appeals were dismissed in their entirety. Still protesting their innocence, they have appealed to this Court. It is noteworthy that, initially the appellants appealed separately whereby the 1st appellant in Criminal Appeal No. 46 of 2019 lodged a substantive memorandum of appeal and a supplementary memorandum of appeal consisting a total of nine (9) grounds of appeal. The 2nd appellant lodged his appeal registered as Criminal Appeal No. 428 of 2019 in which he raised five (5) grounds of appeal.

When the 1st appellant's appeal was placed before this Court on 6th May, 2020, he made a prayer for his appeal to be heard together with the 2nd appellant's appeal and the Court granted the prayer recommending that the two appeals be cause listed at the same time in view of consolidating them in order to avoid conflicting decisions.

At the inception of the hearing of the appeals on 8/12/2020, the learned State Attorney sought and we granted leave for the two appeals to

be formally consolidated in terms of Rule 69 (1) of the Tanzania Court of Appeal Rules, 2009 so as to be referred as Consolidated Criminal Appeals Nos. 46 and 428 of 2019. The appellants, in their said memoranda of appeals, have basically raised five (5) similar grounds of appeal which can be extracted as follows:

1. The charge sheet was defective as there was an omission to mention section 130 of the Penal Code which is the substantive provision creating the offence of rape and further that the particulars of the offence lacks the essential element of the offence of gang rape namely, joint sexual inter course.

2. The charge was not read over to the appellants before the first prosecution witness could give evidence.

3. That the description of the 1st appellant as being an albino was not raised by evidence such that he was not positively identified.

4. That the two courts did not take into consideration the state of mind of the victim in light of the allegation of idiocy.

5. The evidence of visual identification of the appellants was not watertight in view of the fact that the evidence of the intensity of light was given during cross examination which amounts to an afterthought, the distance between the source of light and the locus in quo was not stated and lastly there was no evidence that the victim and the appellant were drinking together at the club.

6. That there was non-compliance with section 240 (3) of the Criminal Procedure Act, Cap. 20 R.E. 2002 (the CPA) during the admission of Exh P1 (PF3) and the same was not read out in court.

When the appeal was place before us for hearing, both appellants appeared in person and unrepresented; whereas the respondent Republic was represented by Mr. Miraji Kajiru, learned Senior State Attorney.

Upon being given the floor to elaborate their grounds of appeal, the appellants sought to adopt their memoranda of appeal and left to the Court to decide. On the other hand, we invited the learned Senior State Attorney to address us on the ground of appeal concerning defectiveness of the charge as, in our view, it has the effect of disposing of the entire appeal without necessarily dealing with the remaining grounds of appeal.

In the first place, Mr. Kajiru declared his stance of supporting the appeal. With regard to the complaint that the charge was defective for failure to cite section 130 of the Penal Code which creates the offence of rape; and that the particulars of offence lacked the essential element of the offence of gang rape, the learned counsel readily conceded to it. He contended that the appellants were charged with an offence of gang rape under section 131A (1) (2) of the Penal Code only without citing section

130 of the Penal Code. It was his argument that failure to indicate section 130 of the Penal Code which creates the offence of rape rendered the appellants not to understand the nature of the offence they were facing.

Upon prompting by the Court whether the cited provision related to idiocy of the victim which was reflected in the particulars of the offence, he equally, conceded that it did not. He was of the view that perhaps section 137 of the Penal Code also ought to have been cited. In that regard, he said, the charge sheet did not comply with sections 132 and 135 of the CPA as it did not enable the appellants understand the nature of the offence they were facing and be in a position to prepare their defences. For that anomaly, Mr. Kajiru argued that the proceedings and judgments of the two courts below are nullity. He then, urged the Court to invoke the provisions of section 4 (2) of the Appellant Jurisdiction Act Cap 141 RE 2019 (the AJA) and nullify both the proceedings and judgments of the two courts below, quash the conviction, set aside the sentences meted against them and release them from custody unless held for other lawful reasons.

On their part, both appellants welcomed the stance taken by the learned Senior State Attorney without more and left the matter to the Court to decide.

We have considered the appellants' ground of appeal relating to the defectiveness of the charge and the submission made by the learned Senior State Attorney. We hasten to agree with both sides that indeed, the charge sheet was defective for failure to include in the charging part, section 130 (1) and (2) (a) of the Penal Code which is the basic provision in creating the offence of rape. Unfortunately, this anomaly escaped the mind of the first appellate court.

Perhaps at this juncture it is important to know how the charge is supposed to be framed. Sections 132 and 135 (a) (ii) of the CPA provide for the manner in which the charge is to be preferred. For instance, section 132 of the CPA provides:

> *"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."*

Yet, section 135 (a) (ii) of the same Act provides as follows:

"135 (a) (ii) the statement of the 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."

The emphasis in section 132 of the CPA is that it provides for a requirement for the offence with which the accused is charged to be specified in the charge or information together with such particulars as may be the necessary for providing a reasonable information regarding the nature of the offence (See also **Mussa Mwaikunda v. Republic** [2006] TLR 387). In relation to section 135(2) (ii) of the CPA, the emphasis is that the charge must contain the essential elements of the offence and the specific section of the enactment or the law creating the offence. These requirements are vital so as to enable the accused person to understand the nature of the offence he is facing and thereby prepare his defence (See **Mohamed Koningo v. Republic,** [1980] TLR 279) and **Isidori Patrice v. Republic,** Criminal Appeal No. 224 of 2007 (unreported)). For instance, in the latter case of **Isidori Patrice** (supra), the Court stated: -

"It is a mandatory statutory requirement that every charge in a subordinate court shall contain not only a statement of the specific offence with which the accused is charged but such particulars as may be necessary for giving reasonable information as to the nature of the offence charged. It is now trite law that the particulars of the charge shall disclose the essential elements or ingredients of the offence. This 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 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."

In this case, the charge which was preferred against the appellants reads as follows:

"OFFENCE SECTION AND LAW:

Gang rape c/s 131 A (1) (2) of the Penal Code, Cap 16 vol. 1 of the laws *as amended by Sexual Offences Act, No. 4 of 1998.*

PARTICULARS OF OFFENCE:

That Robert s/o Madololyo and Masunga Dudu @ Mlekwa are jointly charged on 1st day of February 2000 at about 20:00 hrs at Bariadi area within the District of Bariadi on Shinyanga Region did unlawfully ***have carnal knowledge with one A d/o M knowing that she is an idiot person without her consent.***

Station – Bariadi..... Date 05/7/2000

Sgd

Public Prosecutor"

[Emphasis added].

From the above excerpt, it is clear that only section 131 A (1) (2) of the Penal Code which describes gang rape was cited while section 130 (1) and (2) of Penal Code which creates various categories of offences of rape was not cited. Section 131 A (1) (2) of the Penal Code to which the charge was predicted and the appellants were convicted with provides as follows: -

"131A. (1) Where the offence of rape is committed by one or more persons in a group of persons, each person in the group committing or abetting the commission of the offence is deemed to have committed gang rape.

(2) Every person who is convicted of gang rape shall be sentenced to imprisonment for life, regardless of the actual role he played in the rape."

Our understanding from the above provisions of the law is that it specifically describes gang rape which is a more serious type of the offence of rape and together with its punishment. As it is, it explains the circumstances under which an offence of rape can be categorised to be gang rape. As such offence of rape cannot stand on its own under this provision without citing any of the provisions under section 130 (1) (2) (a) to (e) of the Penal Code which specifically provide for specific offences of rape. In this regard, it is our considered view that, in the circumstances of this case the charge against the appellants ought to have not only predicated under section 131A of the Penal Code but also under section 130 (2) (a) of the same Code which states as follows:-

"(1) It is an offence for a male person to rape a girl or a woman.

(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) not being his wife, or being his wife who is separated from him without her consenting to it at the time of the sexual intercourse."

But again, that was not the only shortcoming in the charge. According to the particulars of the offence, the purported offence of gang rape was alleged to have been committed to a person who was an idiot. However, this was not among the ingredients of the offence under the provision used to charge the appellants. In other words, no provision which addresses such kind of the offence to idiots was cited. We are aware that section 130 (2) which creates different categories of rape does not provide for the category of rape to a person who is an idiot. It rather provides for the commission of such an offence to a person of unsound mind as per paragraph (c) of subsection (2) of that section. On the other hand, the only provision which deals with the offences of unlawful sexual intercourse to idiots or imbeciles is section 137 of the Penal Code which provides:-

"137. Any person who, knowing a woman to be an idiot or imbecile, has or attempts to have unlawful sexual intercourse with her in circumstances ***not amounting to rape,*** *but which prove that the offender knew at the time of the commission of the offence that the woman*

was an idiot or imbecile, is guilty of an offence and is liable to imprisonment for fourteen years, with or without corporal punishment." [Emphasis added]

What comes out from the above cited provision is that, one, it relates to the offence of defilement of an idiot or imbecile and not rape. Two, the accused, at the time when he commits the offence of unlawful sexual intercourse or attempts to commit such an offence should have known that the woman was idiot or imbecile; and three, it must be shown that the circumstances in which the offence was committed do not amount to rape.

In the instant case, we think, the ingredients of the offence of defilement of imbecile or idiot which we have tried to explain above do not apply. Neither were they established at the trial court. We wonder how and why such aspect was included in the particulars of the offence. It is in this regard, we find that it was wrong to include in the particulars of the offence that the victim was an idiot without citing the relevant law which creates an offence to that effect.

That said and done, it is our considered view that, the omission to cite any of the provisions under section 130 (2) of the Penal Code in the charge rendered it to be fatally defective which defect cannot be cured

under section 388 of the CPA. It is now a settled law that a defective charge leads to unfair trial to the accused. (See also **Mussa Mwaikunda (supra); Mohamed Koningo (supra); Isidori Patrice** (supra); and **Abdallah Ally v. Republic,** Criminal Appeal No. 253 of 2013 (unreported). In fact, in the latter case to which we subscribe, the Court went a step further and stated as follows:-

> *"Being found guilty on a defective charge based on a wrong or non-existent provision of the law 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 severe charge of rape."*

Even in this case, given that the charge was fatally defective, we find that the appellants were not accorded a fair trial. For that anomaly, we agree with Mr. Kajiru that the proceedings and judgments of the two courts below are nullity. As we had hinted earlier on, we think this ground sufficiently disposes of the appeal without dealing with others.

Consequently, in terms of the provisions of section 4 (2) the AJA, we nullify both the proceedings and judgments of both courts below, quash

the conviction, set aside the sentences meted against the appellants and order their release from custody unless held for other lawful reasons.

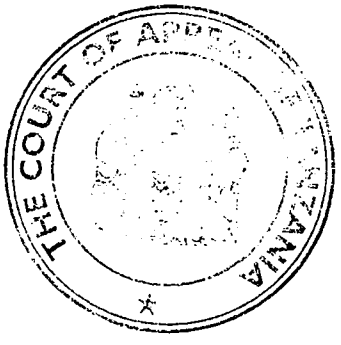
DATED at **TABORA** this 16th day of December, 2020.

R. K. MKUYE
JUSTICE OF APPEAL

F. L. K. WAMBALI
JUSTICE OF APPEAL

B. M. A. SEHEL
JUSTICE OF APPEAL

The Judgment delivered this 17th day of December, 2020 in the presence of the Appellants in person and Mr. Tumaini Pius Ocharo, 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