IN THE COURT OF APPEAL OF TANZANIA
AT DAR ES SALAAM

(CORAM: LILA, J.A., WAMBALI, J.A., And KOROSSO, J.A.)

CRIMINAL APPEAL NO. 218 OF 2017

1. ISSA JUMA IDRISA
2. MALIKI JUMA IDRISA ..... **APPELLANTS**

VERSUS

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

(Appeal from the decision of the High Court of Tanzania at Dar es Salalam)

(Kitusi, J)

Dated 15th day of March, 2017
in
(Criminal Appeal No. 206 of 2016)

JUDGMENT OF THE COURT

11th Feb. & 5th May, 2020

LILA, J.A.:

The two appellants, Issa Juma Idrisa and Maliki Juma Idrisa, who are brothers, were jointly and together charged and convicted by the District Court of Bagamoyo at Bagamoyo with the offence of gang rape. We shall refer the victim of the offence as simply the Victim or PW1 so as to hide her identity. The charge read as follows:-

"STATEMENT OF THE OFFENCE

GANG RAPE C/S 130 [3] [d] and 131 A [1] and [2] of the Penal Code Cap. 16 R.E. 2002

PARTICULARS OF THE OFFENCE: That Issa s/o Juma Idrisa and Maliki s/o Juma Idrisa are jointly and together charged on 22nd day of March, 2014 at about 23.00 hrs at Yonabo Village within Bagamoyo District in Coast Region did carnal knowledge of the Victim without her consent."

Notwithstanding that the appellants denied the charge, they were each convicted as charged and sentenced to serve life imprisonment. Aggrieved, they preferred a joint appeal to the High Court against both conviction and sentence. As it were, their appeal was unsuccessful and their convictions and sentences were sustained. Still dissatisfied, they lodged this joint appeal.

The prosecution case against the appellants was premised on the evidence of three witnesses, the victim inclusive.

The facts of the case can be summarized as follows; before the incident the victim told the trial court that she previously never knew the appellants. It was her friend one Nadia, who introduced her to the appellants as witchdoctors who were able to cure her demons / evil spirit

problem. Moved by that information, in March, 2014, she travelled to Kiwangwa area in Bagamoyo to meet the witchdoctors. Thereat, she was received by 2nd appellant at the bus stand and was taken to the appellants' office. The treatment began by reading Quran to her. Thereafter she was taken by the first appellant to the nearby bush for treatment while the second appellant continued reading Quran. That session ended at 01:00am. As part of treatment, PW1 was asked by the second appellant to bring a sheep and she was asked to pay TZS. 210,000/=which included TZS. 60,000/= as the cost of a sheep. The victim paid that money.

On 21/3/2014 the victim, again, went to Bagamoyo and at about 22.00 hrs., the appellants took her to another bush called "Yombo", Bagamoyo and while on their way the 1st accused told her to take about 1/2 liter of traditional medicine which was in liquid form. After taking that medicine she started to lose conscious. The appellants asked her to sleep on the ground and while the 2nd accused held her shoulders and hands the 1st accused removed her underwear. When she asked why she was being undressed, the 1st accused told her to calm down, penetrated his penis into her vagina saying that he was injecting medicine. Thereafter, PW1 fell unconscious until the next day (22/ 3/2014) when she found herself in the

accused house. Again, on that date (22/3/2014) although she insisted that she should take the medicine orally, the appellants gave her traditional medicine and she lost conscious until the next morning. When she recovered, she requested to be given her phones but the appellants resisted and she insisted her guest to return back to Dar es salaam. The appellants took her to unknown place ahead Bagamoyo and when in the bus she screamed for help and those people inside the bus commanded the driver to take the car to Mapinga police station. PW1 reported the whole saga, the accused were arrested and they returned back her phones. Later, while in Dar, her lover one Januar noted pornographic photographs (exhibits P1, P2, P3, P4 and P5) involving her in her phone which she said were taken by appellants when she was being raped. She also gave a medical form (PF3) which was filled at Mwananyamala Hospital to WP. 5814 D/C Rose. One WP 10401 Harda (PW2), who received the victim at Mapinga Police Station told the trial court that the victim complained of being raped and her phones being taken by the appellants and she issued her with a PF3 for the purpose of being examined on rape and injury on her thighs. She said the appellants said the victim was a mental case and had gone to them for treatment. She further said she recorded the victim's statement in which she complained of injury and drafted a charge of

assault. She also said another statement was taken by WP 1514 D/C Rose (PW3). PW3, who investigated the case, said that on 23/3/2014 at about 14:00hrs she received the victim who complained of being raped by the appellants who were witchdoctors. That at Mapinga Police Station she complained that she was bruised on her thighs, her mobile phones and her "dela" and "mtandio" being taken by the appellants. She said she saw bruises on the victim's thighs and at her back and as a consequence she prepared a charge of assault causing bodily harm contrary to section 241 of the Penal Code. She issued her with a PF3.The victim was medically examined at Mwananyamala Hospital in Dar es Salaam where she was referred to after Dr. Nyambari of Mapinga dispensary had advised them so and, according to PW3 the PF3 which was prepared by Dr. Mohamed Mikidadi revealed sperms, bruises and blood in the victim's secret parts.

On their part, both appellants distanced themselves from the accusation of gang raping the victim. They, however admitted treating the victim who was introduced and brought to them by one Nadia, their esteemed client. Moreover, the second appellant claimed that the victim was his longtime lover (since 2012) but they parted ways when she found him with another woman one Amina Hamadi in his room at Mbagala

Charambe. In addition, they admitted being arrested after the bus they had boarded on the way to Dar es Salaam was stopped on accusations raised by the victim. In all, they contended that the victim had framed up a case against them.

At the conclusion of the trial the trial court was satisfied that the prosecution had proved the charge, found both appellants guilty, convicted them and sentenced each of them to a life imprisonment.

Aggrieved by the findings of the trial court, the appellants preferred an appeal to the High Court, where in their joint memorandum of appeal they fronted 13 grounds of appeal. The High Court dismissed the appeal in its entirety.

The appellants, still protesting their innocence, further appealed to this Court challenging both the convictions and sentences.

Initially, in a joint memorandum of appeal lodged on 20/11/2017, the first appellant lodged four (4) grounds of appeal and the second appellant had seven (7) grounds of appeal. Subsequently, on 19th December, 2019 they lodged a supplementary memorandum of appeal comprising of three (3) grounds. The appellants, also, took trouble to prepare and lodge written submissions in support of their appeal which they later on 7/1/2020 lodged

a letter withdrawing them. However, for a reason soon to be unfolded, we will not recite those grounds of appeal.

At the hearing of the appeal, both appellants appeared in person and were unrepresented. Ms Clara Charwe, Senior State Attorney joined efforts with Ms Neema Moshi to represent the respondent Republic.

At the inception of the hearing both appellants intimated to the Court that they were withdrawing ground three (3) of the supplementary grounds of appeal and we marked the same withdrawn. Afterwards, the appellants urged the Court to first let the learned Senior State Attorney respond to their grounds of appeal reserving their right to make a rejoinder later on.

Ms Charwe, after taking us through various pages of the proceedings and the evidence by the prosecution witnesses, supported the appeal on the basis that on the whole the prosecution failed to prove its case against the appellants. This stance was based on the fact that the victim was not reliable in various aspects. First and foremost, on the evidence on record it cannot be ascertained as to what exactly the victim complained upon arrival at Mapinga police station between being raped and being assaulted. Secondly, the evidence revealed that the victim was raped by each accused separately hence it was improper to charge them with gang rape. The

learned Senior State Attorney also argued that the PF3 issued to the victim by PW3 was for the purpose of being examined whether she was assaulted and not being raped. Arguing further, she said, it was not certain, on the facts on record, when the victim complained of being raped and issued with another PF3 for the purpose of being examined on whether she was raped. She was also stunned as to how two PF3 could be issued to the victim.

Before Ms Charwe could rest her case, we wanted to satisfy ourselves on two legal issues; **first**, whether the second appellant's grievance in ground six (6) of the memorandum of appeal that the charge was not proper was valid. The complaint in that ground is that the first appellate court failed to note that the charge was defective for not citing section 130(2)(c) of the Penal Code which creates an offence of rape committed to a woman of an unsound mind or who was in a state of intoxication induced by drugs or any other thing by an accused person. **Second**, the anomaly we noted in the course of perusing the record which concerned failure by the learned trial magistrate to comply with the requirements of section 210(3) of the Criminal Procedure Act, Cap. 20 R. E. 2002 (the CPA).

When called upon to submit on the first legal issue, Ms Charwe unhesitatingly, argued in effect, that looking at the offence section in the charge sheet, it is plain that **two** distinct offences were charged in one count. Elaborating, she argued that section 130(1),(3)(d) of the Penal Code, makes reference to the offence of rape committed by persons who, being traditional healers, take advantage of their position to have carnal knowledge with a woman or girl who is his client for healing purposes. In the present case, it was undisputed that the appellants were witchdoctors and that PW1 visited them for purposes of being healed of the demons. She, however, added that the appellants were not charged under section 130(2)(c) of the Penal Code although the evidence on record was to the effect that the victim was under intoxication induced by traditional medicine when she was raped.

Ms. Charwe went further to submit that the provisions of section 131A (1) (2) of the Penal Code reflected in the same count imply that the same appellants were facing a charge of rape which 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 which offence is generally termed as gang rape.

In view of the above, Ms Charwe argued that it was not clear to the appellants whether they were charged for committing rape as traditional healers or gang rape. Two separate and distinct offences were lumped in one count rendering the charge to be problematic in that it suffered from duplicity, Ms Charwe charged. In the end Ms Charwe was unequivocally of the view that the charge was bad.

Submitting in respect of the second legal issue, Ms Charwe conceded that the record of appeal is clear that there was no indication by the trial magistrate that section 210(3) of the CPA was complied with hence the witnesses' evidence was not properly recorded. She was however quick to point out that the appellants were not thereby prejudiced.

On their part, the appellants had virtually nothing material to tell the Court for very obvious reasons that the issues under consideration entailed sufficient knowledge on legal matters, which they were, unfortunately, not conversant with.

The major issue for our deliberation is whether the charge was proper.

We understand that this is not a virgin area for our discussion. The issue was sufficiently discussed in the case of **Director of Public Prosecutions vs. Morgan Maliki and Another**, Criminal Appeal No. 133 of 2013 (unreported) in which, with lucidity, the Court stated that:-

> *"In our view, the situation is governed by sections 133(1) and 135(b)(1) of the Criminal Procedure Act, Cap 20 R. E. 2002 (the CPA). And sections 337 and 342 of the Penal Code Cap 16 R. E. 2002. The total effect of these provisions is that any offences may be charged 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 similar character. If an enactment constituting an offence consists of the doing of any different acts in the alternative, the charges may state any one of those others in alternative counts. In the present case save for the punishments, the offences of forgery and uttering false documents are distinct offences; and there is nothing in the wording of sections 337 and 342 of the Penal Code, to suggest that, they were intended to be alternatives to each other.*
>
> ***A charge is said to be duplex if, for instance, 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." (Emphasis added)

The underscored words provide us with a good guidance in that they provide for the criteria for determining whether or not a charge is duplex.

From the clear wordings of section 130(1)(2) of the Penal Code, it is patently clear that there are various categories of rape offences one being rape committed by traditional healers (section 130(2)(d) of the Penal Code. In addition, section 131A (1)(2) of the Penal Code creates another category of rape which is committed by a group of persons termed as gang rape. It is patently clear therefore that rape committed by traditional healers is quite a distinct offence from the offence of gang rape. The two offences could not therefore be charged in the same count. We accordingly share the learned Senior State Attorney's view that the charge was duplex. Unfortunately, the anomaly went unnoticed by both the trail and the first appellate courts.

We now turn to consider what would be the consequences of a charge being duplex. Our starting point is that the charge is the

foundation of all criminal trials. To ensure that a trial is fair, any person accused of committing an offence is entitled to know the nature and substance of the accusations levelled against him so as to enable him arrange for a focused defence. Taking cognizant of that right, the Court in the case of **Mohamed Koningo vs. Republic**, [1980] TLR 279, in no uncertain terms, reminded both the courts and the prosecution of their regular duty in these words:-

> *" It is the duty of the prosecution to file the charges correctly, those presiding over criminal trials should, at the commencement of the hearing, make it a habit of perusing the charge as a matter of routine to satisfy themselves that the charge is laid correctly, and if it is not to require that it be amended accordingly."*

In our present case, no amendment was effected to the charge sheet. We, in the circumstances, agree with the learned Senior State Attorney that the charge was bad as was stated by the Court in the case of **Kauto Ally vs. Republic**, [1985] TLR 183 that lumping of separate and distinct offences in a single count renders a charge bad for duplicity.

Admittedly, the effect of a charge being duplex has been a subject of discussion as to whether or not the defect is curable. For instance, in the case of **Horace Kiti Makupe vs. Republic** [1989] eKLR, various decisions of the former Court of Appeal for Eastern Africa were cited giving different positions on the effects of a charge being duplex. To mention but a few, first, in **R. vs. Odda Tore and Another** [1934] 1 EACA 114 (CA-U) where two acts led to two deaths but one count was preferred, after finding that the charge was duplex, it was said that the defect was curable. In another case of **R. vs. Mongela Ngui** [1934] EACA 152 (CAK) in which one act of setting fire to a house with six people asleep in it led to six deaths and one count of murder was leveled against the suspect, that court found the charge was duplex but thereafter held that if the accused had not been embarrassed or prejudiced in fact when making his defence then his conviction ought to stand which finding, in effect, meant the defect was not curable.

In our jurisdiction, as alluded to above, an omnibus charge offends the principle of fair hearing and the usual consequence has been to quash the proceedings and judgments of the lower

courts.[See **Abdallah Mohamed @ Kilo and Two Others vs. Republic**, Criminal Appeal No. 9 of 2012 (unreported)]. And, in the case of **The Director of Public Prosecutions vs. Pirbaksh Ashraf and Ten Others,** Criminal Appeal No. 345 of 2017 (unreported), the Court in unambiguous words held that the anomaly renders the charge fatally defective. In both cases, the reason given was that an accused person must know the specific charge (offence) he is facing so that he can prepare his focused defence which, in the event of a duplex charge, cannot be accomplished. We think such a position is in line with the decision of the former Court of Appeal for Eastern Africa in **R. vs. Mongela Ngui** (supra) that in determining whether the defect is fatal and incurable, we should find out whether the charge under consideration embarrassed or prejudiced the accused such that he could not arrange for a focused and proper defence. That is the yardstick we set in the case of **Jumanne Shaban Mrondo vs. Republic**, Criminal Appeal No. 282 of 2010 (unreported) where we stated that the fatality of any irregularity is dependent upon whether or not it occasioned a miscarriage of injustice.

The issue that crops up for our immediate resolution is therefore whether the appellants were prejudiced by the omnibus charge leveled against them.

We have seriously examined the defence evidence. Both appellants, apart from admitting that they were traditional healers (witchdoctors) and the Victim was their client who also regularly directed various patients to them for treatment, they distanced themselves from the accusation of rape. None of them seemed to have understood that they were being accused of committing the offence of gang rape or that they had taken advantage of being traditional healers to have carnal knowledge of the Victim. Even, the second appellant claimed that the Victim used to be his lover before they parted ways. Such line of defence taken by the appellants is sufficient evidence that the appellants were not certain of the real accusation against them. They were prejudiced by the duplicity of the charge and their inability to marshal their defence in accordance with charge of gang rape thereby occasioned injustice. The defect, in the circumstances, cannot be cured under section

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388 of the CPA. We are therefore satisfied, in this particular case, that the appellants were not fairly tried.

In respect of the second issue, we think the position is settled that, in terms of section 210(3) of the CPA, it is the witness who has the right to question the authenticity of the record and the appellant being one of the witnesses did not raise such complaint. In the absence of such complaint such anomaly is not fatal [See **Republic vs. Hans Aingaya Macha**, Criminal Appeal No. 449 of 2016 (unreported) in which the case of **Jumanne Shaban Mrondo vs. Republic** (supra) and **Athumani Hassan vs. Republic**, Criminal Appeal No. 84 of 2013 (unreported) were cited]. We, therefore, agree with the learned Senior State Attorney that no miscarriage of justice was thereby occasioned. The infraction is curable under section 388 of the CPA.

We lastly resort to determine, in the circumstances of this case, what is the just way forward. In so doing we shall be guided by the principles set in **Fatehali Manji vs. R.** [1966] E. A. 343 where it was insisted that a retrial will be ordered only when the original trial was illegal or defective but not so as to enable the

prosecution fill the yawning gaps in their former trial at the appellants' prejudice. It was also stressed that each case has to be determined according to its particular facts and circumstances and that an order for retrial should be made where the interest of justice require without occasioning injustice to the appellant. These principles were followed by the Court in the case of **Selina Yambi and Others vs. Republic**, Criminal Appeal No. 94 of 2013 (unreported) in which the Court stated:-

> *"We are alive to the principle governing retrials. Generally a retrial will be ordered if the original trial is illegal or defective. It will not be ordered because of insufficiency of evidence or for the purpose of enabling the prosecution to fill up gaps. The bottom line is that, an order should only be made where the interest of justice require."*

Ms Charwe was not in favour of an order of retrial being made for, according to her, the prosecution evidence on record was shaky and no conviction could be founded on it. She pointed out that although it is settled law that the best evidence in sexual offences comes from the victim, in this particular case the victim was not a

reliable witness. She argued that the victim gave two different reports to the police on the same incident. According to PW3 who received her at Mapinga Police Station, the victim complained of being raped, assaulted at her thighs such that she sustained bruises and her mobile phones and clothes famously called "dela" were taken by the appellants. That caused PW3 to record her statement to that effect and prepared a charge of assault and issued a PF3 for examination of the injuries sustained. The PF3 issued was not for examining if the victim was raped. But according to PW2, the victim complained of being raped and her two mobile phones being taken by the appellants. According to Ms Charwe, had the victim been raped then PW3 would have issued a PF3 for checking if the victim was raped. Instead PW3 was clear that the victim did not complain to have been raped when she reported the matter at first at Mapinga Police Station. She, accordingly, expressed doubt on the Victim's complaint of being raped jointly by the appellants, her second statement being taken and being issued with another PF3 which revealed that the Victim was raped. Ms Charwe also showed her dissatisfaction on the prosecution evidence for not being clear as to exactly where the offence of gang rape was committed. She argued that according to the Victim's evidence at page 16 of the record

of appeal, she was carnally known by the first appellant on 21/3/2014 and on 22/3/2014 she was raped by the second appellant. She insisted that there was therefore no evidence on gang rape. The two shortfalls are serious which if retrial is ordered, the prosecution is prone to rectify, Ms Charwe argued.

On our part, we see no reason to disagree with the learned Senior State Attorney. The record of appeal bears out that the only evidence regarding the involvement of the appellants in the commission of the offence came from the Victim. There was no other person who eye-witnessed the commission of the offence. Therefore, the prosecution relied solely on the evidence of the Victim. Like the learned Senior State Attorney, we are alive of the settled principle that the best evidence in cases of this nature comes from the victim (See **Selemani Makumba vs. Republic**, [2006] TLR 384). However, such evidence should not always be taken wholesome and believed for innocent persons may end up in jail in the event of untruthful complaints by unscrupulous victims. The victim's evidence therefore need be treated with great care so as to determine her credibility. It is trite law that in assessing a witness' credibility, his or her evidence must be looked at in its entirety, to look for inconsistencies,

contradictions and/or implausibility; or if it is entirely consistent with the rest of the evidence on record: See, for instance, **Shabani Daudi vs. R.,** Criminal Appeal No. 28 of 2000 (unreported) and **Soda Busiga @ Sumu ya Mamba vs. Republic,** Criminal Appeal No. 58 of 2012 (unreported). It appears that both courts below were satisfied that the victim was a credible witness. But, notwithstanding the fact that the trial court's findings on credibility is binding on the appellate court on the reason that a trial court had the opportunity of observing and assessing her credibility, the Court may interfere with such finding and make its own assessment bearing in mind the circumstances apparent on the record of appeal as we stated in the case of **Omari Ahmed vs. Republic [1983]** TLR 52 that:-

> *"The trial court's finding as to the credibility of witnesses is usually binding on an appeal court unless there are circumstances on an appeal court on the record which call for reassessment of their credibility."*

In the present case, we entirely agree with the learned Senior State Attorney that the Victim was not a reliable witness. It is evident that she gave inconsistent reports to the police on what befell on her. As rightly argued by the learned Senior State Attorney, PW3 told the trial court that the Victim reported being assaulted and her mobile phones and clothes

being taken by the appellants to the police station quite different with what she latter on told her that she was only raped. PW3 told the Court she issued a PF3 so as to be examined on how she was assaulted. PW2, on her part, told the trial court that the victim reported being raped and her two mobile phones being taken by the appellants and a PF3 was issued so as to be medically examined on the issue of rape and the bruises sustained. The victim did not report her clothes being taken by the appellants to PW2. It is logical and sensible that had the victim been a woman of truth, she would have reported to PW3 exactly what she had reported to PW2. There would therefore be no need to be issued with two PF3 as it seems to have been the case. We cannot be certain as to which PF3 was acted on. In addition, in her evidence during examination in chief she said she was raped by the first appellant when the second appellant was holding her shoulders but when answering questions from the court she is recorded to have said:-

> *"COURT:*
> *-I knew that it was 1st accused who raped me because we went there (msituni) only with the 1st and 2nd accused.*
> *-On 22/3/2014, 2nd accused raped me during night in his room after giving me traditional medicine."*

The Victim's inconsistent reports to the police, issuance with two PF3, her evidence during examination in-chief and responses to questions by the court on what befell on her do not add up. Those inconsistences point to an irresistible inference that she was not trustworthy. Had the learned trial magistrate and the first appellate Judge directed themselves to these patent inconsistences they would have not taken the word of the Victim in its face value and relied on it to found the appellants' convictions.

In the circumstances of this case, an order of retrial will not serve the interest of justice. The apparent deficiencies and inconsistences are most likely to be rectified by the prosecution in the event an order of retrial is made to the prejudice of the appellants. We accordingly take up the course advocated by the learned Senior State Attorney and hereby desist from making such order.

We think the above discussed deficiencies sufficiently dispose of the appeal. We shall, therefore, not delve to consider the other grounds of appeal for the same will not serve any useful purpose.

For the reasons we have endeavored to demonstrate, we entirely agree with the learned Senior State Attorney that the appellant's appeal is meritorious and we allow it. In consequence, we invoke the powers of

revision under section 4(2) of the Appellate Jurisdiction Act, Cap. 141 of the Revised Edition of 2019, and hereby quash both the proceedings and judgments of both courts below and the convictions. We also set aside the sentences. The appellants be released from prison forthwith unless held therein for another justifiable cause.

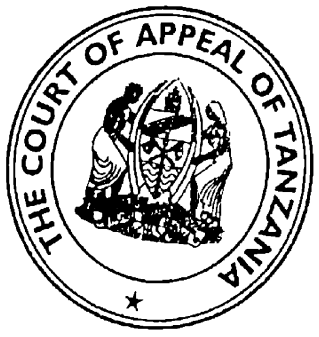
DATED at **DAR ES SALAAM.** this 27th day of April, 2020.

S. A. LILA
JUSTICE OF APPEAL

F. L. K. WAMBALI
JUSTICE OF APPEAL

W.B. KOROSSO
JUSTICE OF APPEAL

The Judgment delivered this 5th day of April 2020, in the Presence of the Appellants in person-linked via video conference and Ms. Chesensi Gavyole State Attorney for the Respondent is hereby certified as a true copy of the original.



B. A. MPEPO
DEPUTY REGISTRAR
COURT OF APPEAL