IN THE COURT OF APPEAL OF TANZANIA

AT DAR ES SALAAM

(CORAM: LILA, J.A., MWANGESI, J.A., And SEHEL, J.A.)

CRIMINAL APPEAL NO. 371 OF 2017

NZARARILA ALFONCE ..... APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

(Appeal from the Decision of the High Court of Tanzania at Dar es Salaam)
(Teemba, J.)

dated the 16th day of February, 2015
in
Criminal Appeal No. 67 of 2014

.....

JUDGMENT OF THE COURT

13th & 27th, May, 2020

LILA, J.A.:

Nzararila Alfonce, the appellant, was charged, convicted and sentenced to thirty (30) years imprisonment by the District Court of Bagamoyo within Coast Region. The appellant was accused of raping a certain woman, who we shall be referring to as MJ or the victim in the course of this judgment so as to hide her identity. The charge laid at the appellant's door was couched thus:-

> ***"STATEMENT OF THE OFFENCE***
>
> *Rape c/s 130 (1) (2)(b), 131 (1) of the Penal Code Cap. 16 R.E. 2002.*

PARTICULARS OF THE OFFENCE:

That NZARARIRA S/O ALFONCE charged on the 24th day of December 2011 at about 23:00 hrs at Zinga kwa Awadhi within Bagamoyo District in Coast Region did had unlawful Carnal of MJ without her consent."

The appellant denied the charge whereupon the prosecution marshalled five witnesses in their verge of proving the accusations. On the other side, the appellant was the only defence witness.

The substance of the prosecution case was that the appellant and the victim were lovers who happened to live under the same roof for three years before they parted ways. Persistent beatings of the victim by the appellant were singled out as the major and sole cause of the parties to split. The victim went and lived with her parents. She stayed with her son one Ibrahim Aron (PW4) aged 5 years and nine months. On the material day (24/12/2011) at about 23:00hrs the appellant passed at her house and through the window uttered abusive words to her threatening to rape and kill her because she had affairs with another man who was teaching her to behave that way. As the victim and her son were still awake and the lamp was still on, she cried for help from her brother one Malenga (PW2) who lived nearby her house but before

PW2 turned up; the appellant who was drunk broke the door and entered into the house holding a bottle of beer and a knife. Upon finding the victim and PW4 helplessly sitting on the bed, he grabbed the victim and dragged her down, undressed his clothes and while pressing her tightly on the chest and while holding the knife, carnally knew her without her consent. After releasing himself, he threatened to kill the victim after wearing clothes. The victim seized that opportunity to push away the appellant and ran to PW2 naked. PW2 rushed to the victim's house to rescue PW4 and upon peeping through the window he saw the appellant wearing his clothes. Thereafter the appellant took the knife and two bags and made away with them. The appellant was later arrested at his house and upon being interrogated he admitted going to the victim's house but denied taking two bags. PW4 witnessed her mother being pulled down and the appellant laying on top of her. The matter was reported at the police station and a PF3 was issued to the victim and was medically examined by Hamisi Kilimila (PW5), a Clinical Officer, who found the victim's genital parts swollen with bruises and the victim was feeling pains. He made a finding that it was penetrated by a blunt object and filled a PF3 (exhibit P1).

The appellant maintained his position that he did not commit the offence in his sworn defence. He claimed to have been arrested by his brother in-laws who wanted him to sell a piece of land on which he was living so that he could give money to their sister with whom he had separated but he refused. He accordingly attributed the accusation against him with his failure to heed to his brother in-laws' wishes.

The appellant's defence did not convince the learned trial magistrate that it was able to raise doubt on the prosecution case. She accordingly convicted him and imposed a statutory minimum imprisonment sentence of thirty years to the appellant. The appellant felt aggrieved hence he preferred an appeal to the High Court. As it were, he was unsuccessful. Undeterred, he preferred the present appeal.

The appellant preferred two sets of grounds of appeal. Initially, he lodged a memorandum of appeal comprised of seven (7) grounds of appeal. That was on 16/11/2017. That was subsequently followed by a supplementary memorandum of appeal comprised of four (4) grounds of appeal which was lodged on 29/4/2019. Common to both memoranda of appeal is a ground of appeal attacking the charge sheet. That ground raises two legal issues.

Ground one of appeal in the memorandum of appeal reads thus:-

> *"1. That the first appellate court erred in law when it amended the provisions of the Penal Code that the appellant was arraigned and convicted of rather than solving it in favour of the appellant."*

In his first ground in the supplementary grounds of appeal, the appellant complains that:-

> *"1. That the learned trial court and the first appellate court erred in law and fact in convicting the appellant based on a defective charge."*

We are of the decided opinion that the above grounds of appeal sufficiently dispose of the appeal. For that reason we find it unnecessary to recite the other grounds of appeal.

At the hearing of this appeal, the appellant appeared in person; whereas the respondent Republic enjoyed the services of Ms Cecilia Mkonongo, learned Senior State Attorney who was assisted by Mr. Justus Ndibalema, learned State Attorney.

Exercising his right to first address the Court and elaborate the grounds of appeal, the appellant simply adopted the grounds of appeal and urged the Court to determine the appeal.

On her part, Ms Mkonongo initially resisted the appeal contending that the charge complied with all the requirements of sections 132 and 135 of the Criminal Procedure Act, Cap. 20 R. E. 2002 (the CPA) and she cited to us the decision in the case of **Mussa Mwaikunda vs Republic** [2006] TLR 387 to bolster her assertion. That assertion was based on her understanding that the appellant's complaint on the charge was in respect of the same having been directed to the police authority instead of the trial court. However, upon a brief conversation with the Court, it was agreed that the two points of law raised by the appellant were directed on the propriety of the charge in terms of the charged offence and its amendment by the first appellate court in its judgment.

Back to the point, Ms Mkonongo arguing in respect of the propriety of the charge, she argued that the charge and evidence were clear on the offence the appellant was charged with and the evidence supported the charged offence. There was no variance. She insisted that the appellant was charged with rape under section 130(1)(2)(b) and 131(1) of the Penal Code, Cap. 16 R. E. 2002 (the Penal Code) which prohibits procuring sexual intercourse through fear, threat and intimidation. Reading that section, she argued that in such a situation, consent is procured through fear, force, threat and intimidation which is

what the evidence by the victim told the trial court at page 7 of the record of appeal. On our prompting whether the particulars of the offence were in line with the evidence by the victim and the offence section cited, she realised that they were not because the particulars indicated that there was no consent and actually that was what the victim told the trial court. She accordingly changed course and conceded that the charge was fatally defective.

Submitting in respect of the first appellate judge amending the charge in his judgment, she readily conceded that it was irregular. Elaborating, she said while the charge levelled against the appellant was under section 130(1)(2)(b) and 131(1) of the penal Code, the learned appellate judge, in his judgment cited section 130(1)(2)(a) of the Penal Code which act amounted to an amendment of the charge. It was her view that had the trial court realized that the charge was at variance with evidence then it was upon the prosecution to amend the charge under section 234 of the CPA instead of the judge taking it herself and amend the charge. She concluded that the appellant did not plead to the new or amended charge hence the purported amendment occasioned injustice to the appellant. Given the circumstances that the charge was fatally defective and it was wrongly amended by the learned judge in his

judgment, the learned senior state Attorney urged the Court to declare both the proceedings and judgment of both courts below a nullity. Finally, Ms Mkonongo appreciated that a retrial order is not a viable option as there is no charge on which a new trial can be recommenced.

The arguments by MS. Mkonongo having centred on the two points of law, the appellant, as expected could not tell the Court anything that could add value to the discussion, for obvious reasons that he was a layman and ignorant on legal matters. However, having heard the promising arguments by the learned Senior State Attorney, he hurriedly supported her and urged his appeal be allowed and he be set at liberty.

We have purposely reproduced the charge on which the appellant was indicted. We propose to start our discussion with the complaint by the appellant which is centred on the propriety of the charge. The offence section cited in the statement of offence is section 130 (1) (2) (b) of the Penal Code. That section provides:-

> *"(2) A male person commits the offence of rape if he has sexual intercourse with a girl or a woman under circumstances failing under any of the following descriptions;*

a) .....(N/A)

b) With her consent where the consent has been obtained by the use of force, threats or intimidation by putting her in fear of death or of hurt or while she is in unlawful detention."

In terms of the above provision, the offence of rape is committed to a woman who has consented to a sexual intercourse but such consent is procured through force, threats or intimidation. So, presence of consent and use of force or intimidation are the crucial prerequisite ingredients in this category of rape. Surprisingly, the particulars of the offence indicated that the victim was carnally known without her consent which suggest that the category of the rape offence committed was under section 130(1)(2)(a) of the Penal Code which states that:-

"(2) A male person commits the offence of rape if he has sexual intercourse with a girl or a woman under circumstances failing 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."

Apart from the above, in her evidence the victim clearly stated that she was threatened with a knife and she did not consent to the sexual

intercourse. This is what she was recorded at pages 6 and 7 of the record of appeal to have told the trial court:-

> *"...Then he dragged me down from the bed, he undressed his trouser, took out the knife and had it on his right hand and left hand used to squeeze my chest saying that he will kill me that is when he had known me carnally without my consent..."*

These facts, carefully considered, seem to cover both the two categories of the rape offences. It is evident therefore that the provisions cited on the one hand and the particulars of the offence on the other hand made reference to two different offences, that is, two different categories of rape. Worse still, the particulars of the offence, like the victim's evidence, contained facts supporting the two categories of rape, that is, the facts reflect a combination of two offences. The confusion brought about by the charge were apparent even when Ms Mkonongo, at one stage, proposed that the charge covered both categories of rape hence it was proper and the appellant was not thereby prejudiced. We are, with respect, in disagreement with the learned Senior State Attorney. It is trite law that one of the fundamental principles of criminal justice system is that at the commencement of any criminal trial an accused person must be called upon to plead to a

charge and that it is the charge which initiates a lawful trial. For a trial to be fair the charge must be explicitly clear to the accused so as to enable him prepare a proper defence. Even, section 132 and 135 of the CPA enjoin the prosecution to abide by the requirements stipulated therein. That is to say the statement of offence must state the specific offence the appellant is required to plead to and the particulars of the offence must avail him/her with sufficient information of the accusation. Indeed, that was not the case in the present case. There was apparent mix up of matters which ended up in creating confusion. The appellant was thereby prejudiced.

The confusion in interpretation and applicability of sections 130(1)(2)(a) and 130(1)(2)(b) of the Penal Code is not novel. The Court, faced with a similar situation in **Kassimu Mohamed Selemani V. The Republic, Criminal Appeal No. 157 of 2017** (unreported) had this to say:-

> *"...the appellant in the present case was charged under section 130 (1) (2) (b) of the PC, entailing commission of the offence of* ***rape with consent of the victim,*** *whose consent may have been obtained by the use of force, threat or intimidation by putting her in fear of death or of being hurt or while in unlawful detention; but the*

particulars of the offence in the charge sheet against him did not reflect the ingredients of the offence under that provision. Also the evidence adduced by the prosecution witnesses in support of the charge did not establish the offence of rape section 130 (1) (2) (b) of the PC as it ought to."

Having made the above finding, the Court proceeded to say:-

"now, looking at the particulars of the offence which were read to the appellant at the trial on the one hand and the contents of that section on the other hand, it becomes certain that the necessary ingredients of the offence under that provision, that is ***consent obtained by use of force, threat or intimidation by putting her in fear of death or of being hurt while she is in unlawful detention*** *is missing"*

At the end the Court, in the above cited case, found that the charge was fatally defective for offending the provisions of section 135 (a) (ii) of the CPA.

The appellant's second fatal attack is directed to the learned first appellate judge that she amended the provisions of the Penal Code on

which he was charged. The record bears out that the judge in her judgment at page 37 indicated that:-

> *"In that memorandum, the appellant is challenging the decision of the District Court of Bagamoyo where he was charged, prosecuted and ultimately convicted with the offence of rape contrary to sections 130(1)(2)(a) of the Penal Code Cap. 16 R. E. 2002."*

It is crystal clear that the above was not what the original charge looked like. The learned first appellate judge's act, therefore, amounted to amending or altering the charge. We have times without number reminded those dealing with framing and admitting charges of their primary duty of scrutinizing the charges regularly so as to ensure that they are proper and if not amend them at any time before the prosecution case is closed under section 234 of the CPA. One such case is in **Mohamed Koningo vs. Republic**, [1980] TLR 279, where in no uncertain terms, the Court 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 during the trial. We, in the circumstances, agree with the learned Senior State Attorney that it was irregular for the learned first appellate judge to amend the charge not only at the judgment stage but also at the appellate level. The only proper avenue for amending the charge was the trial court.

The amendment was therefore done arbitrarily and there was no opportunity for the appellant to plead to and re-arrange his defence. That was contrary to the principles of fair trial. The amendment of the charge by the learned judge cannot serve the purpose of curing the defect in the charge sheet. In **Alex Medard vs Republic,** Criminal Appeal No. 571 of 2017, the Court held that:-

"In this case we are satisfied that the charge was incurably defective. Much as the trial judge amended it in the judgment, we think it could not salvage the situation in so long as the appellant was not given an opportunity to be heard on the amended charge"

The first appellate judge's judgment, therefore suffers from the natural consequences of being declared, as we hereby do, a nullity. We are reinforced in that stance by our earlier decision in No. **A 5204 WRD Viatory Paschal vs Republic**, Criminal Appeal No. 195 of 2006 (unreported) where we held that such a judgment is a nullity.

Lastly, we are obliged to consider the best way forward. The guiding principle has been to consider the best interests of justice. (See **Fatehali Manji Vs R**, [1966] EA 343). However, in situations where the charge is found to be fatally defective, as is the case herein, the court has refrained from making a retrial order on account of there being no charge on which the appellant can be retried. We have, in the past, taken a similar stance in **Swalehe Ally vs. Republic,** Criminal Appeal No. 119 of 2016 (unreported). In that case we pronounced ourselves thus:-

> *"On the way forward, we are in agreement with the learned State Attorney that since the foundation of the trial, the charge, is incurably defective, then there is no charge in existence on which the appellant can be retried (see **Mayala Njigailele Vs Republic,** Criminal Appeal No. 490 of 2015 (unreported). We accordingly refrain from ordering a retrial."*

We have no reason to depart from that well established position. We, in the circumstances, accept the invitation by the learned Senior State Attorney and hereby desist from making an order of retrial.

In fine, this appeal is allowed. The conviction is quashed and sentence set aside. The appellant is to be released from prison forthwith unless languishing therein for another justifiable cause.

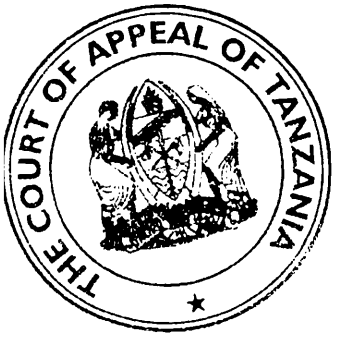
DATED at **DAR ES SALAAM** this 22nd day of May, 2020.

S. A. LILA
JUSTICE OF APPEAL

S. S. MWANGESI
JUSTICE OF APPEAL

B. M. A. SEHEL
JUSTICE OF APPEAL

The Judgment delivered this 27th day of May 2020, in the Presence of the Appellant in person and Ms. Daisy Makakala, State Attorney for the Respondent is hereby certified as a true copy of the original.



G. H. HERBERT
DEPUTY REGISTRAR
COURT OF APPEAL