IN THE COURT OF APPEAL OF TANZANIA

AT DAR-ES-SALAAM

(CORAM: MUGASHA, J.A., WAMBALI, J.A., And KEREFU, J.A.)

CRIMINAL APPEAL NO. 49 OF 2018

CHARLES KAKUBO @ KOLIN..... APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

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

(Mushi, J.)

Dated 14th April, 2011
in
HC Criminal Appeal No. 87 of 2008

JUDGMENT OF THE COURT

20th July, & 5th August, 2020

MUGASHA, J.A.

In the Resident Magistrates' Court of Dar-es-salaam at Kisutu, the appellant was arraigned as hereunder:

"TANZANIA POLICE FORCE
CHARGE SHEET
NAME, TRIBE AND NATIONALITY OF PERSON(S) CHARGED
NAME: Charles s/o KAKUBO @ KOLIN
Tribe- Haya
Age: 20 yrs.

Occ: Watchman

Religion: Christian

Res: Victoria Near Mwenge

OFFENCE, SECTION AND LAW- Rape C/S 130 (1) and 131 (3) of the Penal Code as repealed and replaced by Section 4 and 5 of the Sexual Offences Special Provision Act No. 4/1998.

PARTICULARS OF THE OFFENCE: - That Charles s/o Kakubo on 22nd day of March, 2004 at unknown time at Makumbusho area within Kinondoni District in Dar es salaam Region did have carnal knowledge of D.P a girl of 11 years of age.

Station: - CID O' BAY

DATE: - 26/03/2004.

The appellant denied the allegation. Subsequently to support its claims, the prosecution paraded four witnesses namely: Pinson Rwetunga (PW1); N.D 2910 DC Emmanuel (PW2); D.R the victim who testified as (PW3) and W.P 3209 D Mwashuhuru (PW4). Also, the prosecution tendered one documentary exhibit P.1, Police Form No. 3 (PF3).

In a nutshell, a brief prosecution account from a total of four witnesses was to the effect that: Sometimes in March, 2004 the victim together with her friend one M.A who were all school pupils were seen in

the vicinity of the appellant's house by other pupils who reported the matter to the school teachers. The school teachers summoned PW1, the victim's father. At school, the teachers told PW1 that, her daughter was regularly absent from school and instead, used to visit the appellant's house. On being jointly probed by her father and the teachers, she disclosed that it is her friend who initially took her at the appellant's residence and later, on her own continued to visit the appellant's house where she was sexually abused for several times and given TZS. 500/=. Then, the teachers advised PW1 to report the matter to the Police and he obliged. At Oyster Bay Police, PF3 was issued to the victim who was accompanied to the hospital by her father (PW1). Upon examination, it was established that she was not a virgin and the PF3 was returned to the Police. Subsequently, three police officers were assigned to investigate the matter. In the course of the investigation, on 23/3/2004, the victim accompanied by her father (PW1), led the Police to the appellant's residence. According to one of the investigators (PW2), since the victim had earlier on described the graphics in the appellant's room such as, a mattress without a bed, the description matched with what was found in

the appellant's residence who after being identified by the victim, was arrested and arraigned in court.

Apart from denying to have committed the offence, the appellant admitted to know the victim claiming that, she used to visit his residence in search of drinking water. Moreover, he testified that on 23/3/2004 while at his grandmother's residence, certain people surfaced claiming to be looking for a landlady. Having replied that the landlady was at Mwenge, the appellant was asked but declined to take those people to Mwenge. Then, he was arrested on accusation that he had robbed TZS. 500/=; taken to the police and charged with rape. He also told the trial court that, the victim had fabricated the case against him because he had earlier on punished her for destroying his flowers.

On the whole of the evidence, the trial court accepted as truthful the prosecution version and found the appellant guilty. Then, the appellant was convicted and sentenced of rape contrary to sections 4 and 5 of SOSPA which were non-existent by then as the relevant provisions had been incorporated in Cap 16 RE.2002. The appellant was given a jail term of thirty years. The appellant unsuccessfully appealed to the High Court

where the conviction and the sentence were confirmed on the basis of the charge of rape as presented at the trial. Still aggrieved, the appellant has preferred the present appeal with the following grounds of complaint:

1. That the High Court erred in holding to the appellant's conviction predicated on a defective and a floating Charge.

2. That the High Court erred in failing to realize huge contradiction between PW2 and PW4 as from where the appellant was apprehended.

3. That the first appellate court erred in holding to a PF3 Exh. P1 tendered by PW4 and admitted un-procedurally.

4. That the learned first appellate court erred in holding that the prosecution proved its case against the appellant beyond reasonable doubt.

On 30/10/2019, the appellant lodged a supplementary Memorandum of Appeal comprised of one ground which states:

1. That, the proceedings of the successor magistrate were nullity as the proceedings were conducted without jurisdiction and it was contrary

to provision of section 214(1) of the Criminal Procedure Act, Cap 20 R: E 2002.

To prosecute the appeal, vide a virtual link with Ukonga Prison where the appellant was serving jail term, the appellant appeared in person unrepresented whereas the respondent Republic had the services of Ms. Janeth Magoho and Ms. Monica Ndakidemi, learned State Attorneys.

At the hearing the appellant raised the following additional grounds of appeal to the effect that: **One,** that, at the trial, both the prosecution and defence cases were not closed. **Two,** that, the trial court did not make a Ruling on a case to answer; **three,** that, he was not addressed on the manner of giving his defence and the right to call witnesses.

The appellant asked the Court to consider his grounds of appeal whereby in a nutshell, he faulted the first appellate court for upholding the trial court's conviction despite the unreliable testimonies of the prosecution witnesses and the procedural irregularities which include a trial based on a defective charge sheet.

Ms. Magoho, initially conceded to the complaint on the procedural irregularities save for the one touching on the defective charge sheet. She

submitted that, the matter was not fairly tried on account of trial court's failure to close both the prosecution and defence cases; make a ruling on a case to answer and addressing the appellant on the manner of making his defence including the right to call witnesses, which resulted into the matter not being fairly tried. She thus urged the Court to quash the subsequent irregular proceedings and judgment of the two courts below and direct the case file to be returned to the subordinate court for the trial to continue from the end of the testimony of the last prosecution witness.

Regarding the complaint on the defective charge, relying on the case of **JAMALI ALLY @ SALUM VS REPUBLIC**, Criminal Appeal No. 52 of 2017 (unreported) the learned State Attorney initially argued that, despite the defect in the charge the appellant was made to understand the nature of charges and made his defence. However, following a brief dialogue with the Court, she conceded that the appellant was convicted on the basis of the defective charge and thus, urged the Court to allow the appeal and set the appellant free.

The appellant rejoined by supporting the submission of the learned State Attorney and prayed that the appeal be allowed.

We are aware that, this being a second appeal, the Court rarely interferes with the concurrent findings of fact by the Courts below. This was emphasized in the case of **DIRECTOR OF PUBLIC PROSECUTIONS VS JAFARI MFAUME** [1981] TLR 149 where the Court among other things, held:

> *"... This is a second appeai brought under the provisions of section 5 (7) of the Appellate Jurisdiction Act, 1979. The appeal therefore lies to this Court only on a point or points of law. Obviously this position applies where there are no misdirections or non-directions on the evidence by the first appellate Court. In cases where there are misdirections or non-directions on the evidence a Court is entitled to look at the relevant evidence and make its own findings of fact."*

[See also **FELEX KICHELE** and **EMMANUEL TIENYI @ MARWA VS. REPUBLIC,** Criminal Appeal No. 159 of 2005 (unreported)].

We have carefully considered the record before us and the submission of both sides which hinges on the issue of the defective charge and its effects on the trial which constitutes the first ground in the

Memorandum of Appeal and a point of law for the Court's determination. On this account, we had earlier on reproduced the charge sheet which shows that, the appellant was charged with rape contrary to sections 130 (1) and 131 (3) as repealed and replaced by section 4 and 5 of the Sexual Offences Special Provision Act No. 4 of 1998 which is not in existence. We say so because, sections 4 and 5 of the SOSPA was in force for the purposes of amending among others, the provisions under which the appellant was charged and it ended there. However, even if we were to assume that the appellant was charged under sections 130 (1) and 131 (3) of the Penal Code, the said provisions stipulate as follows:

Section 130 (1)

> *"It is an offence for a male person to rape a girl or a woman".*

Section 131 (2) and (3) categorically states as follows:

> *"Any person who commits rape is, except in the cases provided for in the renumbered subsection (2), liable to be punished with imprisonment for life, and in any case for imprisonment of not less than thirty years with corporal punishment, and with a*

fine, and shall in addition be ordered to pay compensation of an amount determined by the court, to the person in respect of whom the offence was committed for the injuries caused to such person.

(3) Notwithstanding the preceding provisions of this section whoever commits the offence of rape to ***a girl under ten years shall on conviction be sentenced to life imprisonment."***

In the light of the bolded expression of the cited provision, the exact or correct age of the victim is a crucial element in the offence which must be stated in the particulars of the charge in order to enable the accused person to understand the nature of the charged offence. However, this was not the case because the charge shows the age of the victim to be eleven years. While the burning issue is as to what is tied to the said shortcoming, it should be recalled that, Ms. Magoho contended that the omission is incurably defective.

In the case of **KHAMISI ABDEREHEMANI VS REPUBLIC**, Criminal Appeal No.21 of 2017 (unreported), the Court was confronted with a

situation whereby, the statement of offence in the charge under which the appellant was arraigned for rape cited sections 130 (1) (2) (e) and 131 (1) instead of the proper sections 130 (1), (2) (b) and 131 (1) of the Penal Code. The Court concluded that, the defect was curable under section 388 of the CPA as it did not prejudice the appellant because the particulars of the offence in the charge were sufficient enough to inform the appellant of the nature of the offence he was facing. Therefore, in the light of what we said in **KHAMISI ABDEREHEMANI VS REPUBLIC** (supra), in the present case, the issue for our consideration is whether the appellant was prejudiced by the particulars of the offence which indicate that the victim was eleven years old.

In our serious considered view, as the particulars of the offence state that the victim was eleven years, that was an omission of a crucial description on the age of the victim falling under the category of the offence of rape in section 131 (3) of the Penal Code under which the appellant was charged. Thus, the present case is distinguishable from the case of **KHAMISI ABDEREHEMANI VS REPUBLIC** (supra). We say so because the circumstances of the matter under scrutiny are close to what transpired

in the case of **MUSSA MWAIKUNDA VS REPUBLIC** [2006] T.L.R 387 where the particulars of the charge sheet omitted to allege 'threatening' which is an essential ingredient to the offence of attempted rape. Having pondered on the effect of such omission the Court concluded as follows:

> *"...the issue is whether the charge facing the appellant was curable under section 388 (1) of the Criminal Procedure Act, 1985. With respect, we do not think that it was curable. We say so for two main reasons.* ***One, since threatening was not alleged in the particulars of the offence the effect was that an essential element of the offence of attempted rape missed in the case against the appellant. Two, at any rate, as already stated, the complainant did not state anywhere in her evidence that she was threatened by the appellant. If she had alleged any threat may be there could have been room for saying that the appellant knew the nature of the case that was facing him."***
>
> [Emphasis ours]

Also the Court considered the importance of disclosing essential elements of the offence in the charge having said thus:

"The principle has always been that an accused person must know the nature of the case facing him. This can be achieved if a charge discloses the essential element of the offence".

It is settled law that the charge is the foundation of the trial and that in terms of sections 132 and 135 of the Criminal Procedure Act [CAP 20 RE.2002] (the CPA), every charge or information must be sufficient containing 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. The importance of framing a proper charge was emphasized in the case of **ISIDORI PATRICE VS REPUBLIC,** Criminal Appeal No. 224 of 2007 (unreported) as follows: -

"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 the law".

In the case under scrutiny, as earlier stated, the particulars of the offence in the charge show the age of the victim to be eleven years. This was an omission to state the correct age which is a crucial element constituting the category of rape of a girl below the age of ten years as prescribed under section 131 (3) of the Penal Code. Since the detail of age was an essential element in the offence of rape to which the appellant stood arraigned, it follows that the age of eleven years in the particulars of the charge did not make the appellant aware of the charged offence for

him to make an informed or rational defence. Besides, this was not remedied in the testimony of the victim or PW1 who as parent was in a better position to give evidence and substantiate the age of the victim who was his daughter see - **EDWARD JOSEPH VS REPUBLIC,** Criminal Appeal No. 19 of 2009 and **IDDI S/O AMANI VS REPUBLIC,** Criminal Appeal No.184 of 2013 (both unreported).

Since the charge is the foundation of the trial, in the case at hand as earlier stated, the charge preferred under non-existent provisions of the law and particulars which failed to provide sufficient element of the crime on the age of the victim which was not remedied in the evidence, the appellant was unduly prejudiced as he was not fairly tried. This vitiated the trial, the proceedings and the judgments of the two courts below. The omission is fatal and it cannot be cured by the provisions of section 388 (1) of the CPA. Besides, the case of **JAMALI ALLY @ SALUM VS REPUBLIC,** (supra) is not applicable here because the particulars sufficiently informed the appellant of the offence charged despite an omission to include one of the paragraph in the substantive section.

In view of the aforesaid, conviction and the sentence against the appellant are hereby quashed and set aside respectively. We also nullify the proceedings and judgment of the first appellate court which stem on null trial proceedings. In the result, the first ground of appeal raised is sufficient to dispose the entire appeal and we shall not proceed to determine the remaining grounds. We thus allow the appeal and order the release of the appellant unless he is held for some other lawful cause.

DATED at **DAR-ES-SALAAM** this 3rd day of August, 2020.

S. E. A. MUGASHA
JUSTICE OF APPEAL

F. L. K WAMBALI
JUSTICE OF APPEAL

R. KEREFU
JUSTICE OF APPEAL

Judgment delivered this 5th day of August, 2020 in the presence of appellant in person-linked via video conference and Ms. Doroth Massawe, learned Senior State Attorney for the respondent/Republic, is hereby certified as a true copy of the original.

THE COURT OF APPEAL OF TANZANIA

G. H. HERBERT
DEPUTY REGISTRAR
COURT OF APPEAL