IN THE COURT OF APPEAL OF TANZANIA

AT TABORA

(CORAM: LILA, J.A., LEVIRA, J.A. And MWAMPASHI, J.A.)

CRIMINAL APPEAL NO. 520 OF 2017

YOHANA JOHN ..... APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

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

(Kaduri, J)

dated the 25th day of August, 2007
in
Criminal Appeal No. 8 of 2007

.....

JUDGMENT OF THE COURT

25th & 29th October, 2021

LEVIRA, J.A.:

In the District Court of Maswa at Maswa, the appellant, Yohana John was charged with rape contrary to sections 5 (1), 2 (e) and 6 (1) of the Sexual Offences Special Provisions Act No. 4 of 1998 (the SOSPA). He was convicted on his own plea of guilty and sentenced to life imprisonment on allegation that he raped MY (name withheld) a girl of 6 years old, whom we shall refer as the victim. The provisions under which he was charged and his plea, are the subject of this appeal.

The background of this case, albeit briefly, is to the effect that, the prosecution alleged that on 20th May, 2006 at about 16:00 hours at Kizungu village within Maswa District in Shinyanga Region, the appellant did unlawfully have sexual inter course with the victim. The facts of the case revealed that on the material date and time the appellant took the victim to unfinished house where he carnally knew her. The appellant's act came into light when the victim's mother saw him running away from the said unfinished house after she had raised her voice calling the victim. She moved up to that house only to find the victim therein, already raped. She raised an alarm, people responded and the appellant was apprehended and taken to the Village Executive Officer.

The victim was taken to Maswa Police Station where she was issued a PF3 for examination, which was admitted in court as exhibit P1. It is also on record that the appellant's cautioned statement was recorded by a police officer No. D/Cpl. Madaraka, in which, he admitted raping the victim and the same was admitted as exhibit P2. Later, the appellant was charged with the offence of rape before Maswa District Court, convicted and sentenced as indicated above. Aggrieved by both the conviction and sentence, the appellant appealed unsuccessfully to the High Court of

Tanzania (Kaduri, J) in Criminal Appeal No. 8 of 2007 and hence, this second appeal.

Basically, the appellant's grounds of appeal fault the decision of the first appellate Judge for not considering: -

1. *That the charge sheet was defective for wrongly citing provisions of Sexual Offences Special Provision Act.*
2. *That his plea was equivocal.*

The appellant entered appearance, unrepresented at the hearing of this appeal, whereas the respondent Republic was represented by Mr. John Mkony, learned State Attorney.

Submitting in support of his appeal, the appellant first adopted his grounds of appeal and thereafter denied to have had unambiguously pleaded guilty to the charge of rape. In substantiating his argument, he stated that he faced language barrier as he does not understand well Swahili language used in court. As a result, he found himself responding "*it is true*" to the charge while he intended to say "*it is not true*". He added that, he as well did not understand the facts which were read in court as a result when asked whether they were correct he just responded that they were correct. It was his conclusion that it is not true that he raped the victim and thus prayed to be set free.

Mr. Mkony fully supported the appeal right away while making his reply submission. He submitted in respect of the first ground of appeal to the effect that, the charge sheet appearing at page 1 of the record of appeal is defective having been preferred under sections 5 (1), 2 (e) and 6 (1) of the SOSPA. This, he said is because the appellant was charged in 2006 while the provisions of SOSPA creating the offence of rape had already been replicated under sections 130 and 131 of the Penal Code, Cap 16 RE 2002 [now RE 2019] (the penal code). As such, he said, the appellant was supposed to be charged under sections 130 (1), (2) (e) and 131 (3) of the Penal Code. Therefore, he was of the view that the charge sheet did not disclose the offence with which the appellant was charged and thus, incurably defective. He cited the case **Samwel Lazaro v. Republic**, Criminal Appeal No. 68 of 2017 (unreported) to bolster his argument.

According to Mr. Mkony, since the appellant in the present case was charged under a fatally defective charge, the decisions of Maswa District Court and the first appellate court are a nullity. Based on the decision of **Samwel Lazaro** (supra), Mr. Mkony urged us not to order for trial of the appellant because there is no charge under which he can be tried. Therefore, he further urged us to allow the appeal, nullify proceedings of

both courts below, quash conviction, set aside the sentence and order immediate release of the appellant from prison.

In the alternative, he submitted in respect of the second ground of appeal to the effect that, if we find that the charge was proper, then we should consider that the appellant's plea was equivocal. He gave reasons for his assertion by arguing that, first, although the record of appeal shows that the purported charge was read over to the appellant together with the facts of the case, his response to those facts was ambiguous. He referred us to page 4 of the record of appeal where when the court asked the appellant whether the facts are correct, he responded: "*The facts are correct*". Mr. Mkony argued that the appellant's response was not sufficient to show that he admitted to have committed the charged offence.

Second, he stated that the record of appeal was supposed to show that the appellant admitted to all the elements of offence but this is not the case. In addition, he contended that there is nothing on record indicating that the presiding magistrate explained to the appellant the facts of the case and identified to him the elements of the offence and accordingly recorded his response thereof.

Finally, Mr. Mkony supported the appeal on account that the appellant's plea was equivocal. However, he was hesitant to pray for the Court to order the appellant to stand trial under the circumstances of this case because, doing so, will not be in the interest of justice. His reasons were that, it has been a long time since when the incident took place, about 16 years now, if the appellant will be rearraigned before the District Court of Maswa, it will be difficult for the prosecution to get witnesses including the victim who is now an adult. Besides, he said, if the witnesses will be available their memories on what happened might not be sharp. He as well considered that the appellant has already served 15 years in prison, a period of time which he thought is enough for him (the appellant) as an old man of 65 years now to learn a lesson. For those reasons, he reiterated that it will not be in the interest of justice for the Court to order the appellant to stand trial. Eventually, he prayed that the appellant be set free.

The appellant made a very brief rejoinder supporting the learned State Attorney's prayer. He added that the period of 15 years which he has so far spent in prison is enough. Thus, he prayed to be set free.

We have two issues to determine in this appeal; to wit, whether the charge sheet was incurably defective and whether the appellant's plea was equivocal.

Starting with the first issue on the propriety of the charge preferred against the appellant, we wish to observe, just as parties did, that the appellant was charged with the offence of rape under the provision of sections 5 (1), 2 (e) and 6 (1) of the SOSPA without citing any other law and that was in the year, 2006. Nonetheless, it should be noted that in the year 2002 the provisions of the SOSPA creating sexual offences were replicated in the Penal Code making rape offence to a child under the age of ten years chargeable under sections 130 (1) (2) (e) and 131 (3) of the Penal Code, as correctly submitted by Mr. Mkony.

It is a requirement of the law in terms of sections 132 and 135 (a) (ii) of the CPA that every charge must contain a statement of specific offence or offences with which the accused is charged and the said statement must make reference to the specific provision of the law creating such offence; together with particulars of offence. The aim being to give an accused person reasonable information as to the nature of the offence for him to prepare his defence.

In the current case, it is not in dispute that the appellant was charged under non-exiting provisions of the law and thus the charge was defective. Now the question that follows is, whether that defect denied the appellant a right to know the nature of the offence he was facing and thus prejudiced. The answer to this issue is not far fetched. The particulars of the offence in the charge under consideration provided as follows: -

> *"**Particulars of the Offence**: That Yohana s/o John charged on 20th day of May, 2006 at about 16:00 hrs at Kizungu village within Maswa District in Shinyanga Region, did unlawfully have **sexual inter course with (the victim)** a girl of six years old."* [Emphasis added].

As it can be seen from the above excerpt, particulars of the offence disclosed, when, where, how and to whom the offence was committed. In addition, when the appellant was arraigned before Maswa District Court, the facts of the case which contained more elaborative information about what happened on material date were also read over. The appellant was accorded an opportunity to respond to both the charge and the facts; his responses were; "it is true" and "the facts are correct" respectively. In the circumstances, it cannot be ruled out that the appellant was not

given reasonable information as to the nature of the offence with which he was charged. We are satisfied that the particulars of offence and the facts of the case disclosed all the ingredients of the offence of rape to the extent of enabling the appellant understand the nature of the charged offence and thus, the issue of prejudice does not arise. We are fortified with the decisions of the Court in **Elia John v. Republic**, Criminal Appeal No. 306 of 2016 and **Jamali Ally @ Salum v. Republic**, Criminal Appeal No. 52 of 2017 (both unreported). In the latter case, the Court held that where the particulars of offence and the evidence give detailed account on how the appellant committed the offence charged, any irregularities over non-citations and citations of inapplicable provisions in the statement of offence are curable under section 388 (1) of the CPA. Equally, since the appellant in the present case was well informed about the nature of the offence he was facing, we find and hold that the charge laid against him was not incurably defective; hence, curable under section 388 (1) of the CPA.

In passing we take note that, the first appellate Judge did not address himself on the issue of defective charge, instead, we think, having seen that the charge was defective he decided to correct it by indicating proper provisions of the law under which the appellant ought to have been

sentenced while upholding his sentence. However, this anomaly, does not change the fact that the appellant understood the nature of the charge he was facing. With that quick remark, we reiterate what we have endeavoured to state above that the identified defect in the charge did not make it incurably defective. Thus, the first ground of appeal fails.

We now turn to consider the second ground of appeal. We think this ground need not detain us much. We fully agree with Mr. Mkony that the appellant's plea was equivocal having been entered without full explanation and itemization of the ingredients of the offence and recording of the appellant's response thereto as nearly as possible to his own words. The question posed by the court to the appellant, to wit, "whether the facts are correct" and his response that; "the facts are correct" were not sufficient. Although the record is silent as regards the appellant's difficulties in understanding Swahili language, in his rejoinder before us, he stated that he is not conversant with Swahili language. In fact, he stated that although the record of appeal shows that he positively responded to the charge and facts of the case, his intention was in the contrary. He insisted that he did not commit the offence with which he was charged. The appellant's rejoinder leaves a lot to be desired. His short response to the narrated facts on page 4 of the record of appeal

quoted above left his plea to be imperfect, unfinished and ambiguous as it cannot be said with certainty that he admitted to have raped the victim who was six years old by then, at the mentioned place on the material day and time. In **The Director of Public Prosecutions v. Salum Madito**, Criminal Appeal No. 108 of 2019 (unreported) the Court quoted the decision in **Adan v. Republic** (1973) E.A 445 where it was stated that:

> *"When a person is charged, the charge and particulars should be read out to him, so far as possible in his own language, but if that is not possible then in a language which he can speak and understand. The magistrate should then explain to the accused person all essential ingredients of the offence charged. If the accused then admits all those essential elements, the magistrate should record what the accused has said as nearly as possible in his own words, and then formally enter a plea of guilty.* ***The magistrate*** *should next ask the prosecutor to state the facts of the alleged offence and* ***when the statement is complete, shouid give the accused an opportunity to dispute or to explain the facts or to add any relevant facts.*** *If the accused does not agree with the statement of facts or asserts additional facts which*

if true, might raise a question as to his guilty, the magistrate should record the change of plea to "not guilty" and proceed to hold a trial. If the accused person does not deny the alleged facts in any material aspect the magistrate should record a conviction and proceed to hear any further facts relevant to sentence. Statement of facts and the accused's reply must, of course, be recorded." [Emphasis added].

In the current appeal, after the facts of the case were stated by the prosecutor, the magistrate did not give the appellant an opportunity to dispute or to explain the facts or to add any relevant facts, instead he asked him *"whether the facts are correct"* as intimated above. We are compelled to state that the procedure adopted by the magistrate was improper as it did not comply with procedure stated in the cited case. As a result, on the face of record, the appellant's plea was ambiguous and could not lead the magistrate to record the plea of guilty and proceed to convict and sentence him; in lieu thereof, he was supposed to enter a plea of not guilty and order the appellant to stand trial. We thus find merit in the second ground of appeal.

As to what will be the way forward in the circumstances of his case, Mr. Mkony has urged us to nullify the proceedings of the lower courts,

quash conviction and set aside the appellant's sentence. Among the reasons he advanced is that, it will be difficult for the prosecution to find witnesses who will testify before the court to prove their case. We think, this reason alone is very valid because it will not be of any useful purpose for the Court to order trial of the appellant while it was made aware that, chances of success in that exercise are very minimal due to the anticipated non availability of witnesses including the victim. According to the record of appeal, the victim was 6 years old when the offence was committed in 2006; which means currently, she is 21 years old. With that age we do not think that it will serve any useful purpose to make her revive that awful moment in her life when called as a witness; as it was decided in **Juma Mhagama v. Republic,** Criminal Appeal No. 71 of 2011 (unreported), where, having considered the age of the victim after lapse of 8 years from when the offence was committed, the Court refrained from ordering a retrial of the appellant. (See also, **Alkard Mahai v. Republic,** Criminal Appeal no. 113 of 2013 and **Barnabas Leon v. Republic**, Criminal Appeal no. 309 of 2014 (both unreported). We are aware that the appellant was sentenced to life imprisonment, but we think, it is also in the interest of justice to consider his age which is currently 65 years old and up to now he has spent 15 years in prison. If

the old man (appellant) will be subjected under improbable trial, we think, it will amount to unfair trial.

On the basis of the foregoing reasons, we refrain from ordering the appellant to stand trial. We allow the appeal, nullify proceedings of courts below, quash conviction and set aside the appellants' sentence. We further order immediate release of the appellant prison unless he is detained for some other lawful cause.

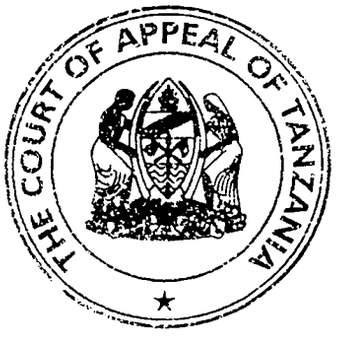
DATED at **TABORA** this 28th day of October, 2021.

S. A. LILA
JUSTICE OF APPEAL

M. C. LEVIRA
JUSTICE OF APPEAL

A. M. MWAMPASHI
JUSTICE OF APPEAL

The Judgment delivered this 29th day of October, 2021 in the presence of Appellant in person and Mr. Deusdedit Rwegira, learned Senior State Attorney for the Respondent/Republic, is hereby certified as a true copy of the original.



D. R. LYIMO
DEPUTY REGISTRAR
COURT OF APPEAL