IN THE COURT OF APPEAL OF TANZANIA

AT MTWARA

(CORAM: NDIKA, J.A., KEREFU, J.A., And KENTE, J.A.)

CRIMINAL APPEAL NO. 257 OF 2020

ABDUL MOHAMED NAMWANGA @ MADODO .... APPELLANT

VERSUS

THE REPUBLIC .... RESPONDENT

(Appeal from the Judgment of the High Court of Tanzania at Mtwara)

(Dyansobera, J.)

dated the 8th day of June, 2020
in
Criminal Appeal No. 82 of 2019

....

JUDGMENT OF THE COURT

14th & 21st March, 2022

NDIKA, J.A.:

On appeal is the judgment of the High Court of Tanzania at Mtwara (Dyansobera, J.) dated 8th June, 2020 affirming the decision of the Resident Magistrate's Court of Lindi dated 29th August, 2019 convicting the appellant, Abdul Mohamed Namwanga @ Madodo, of statutory rape and sentencing him to thirty years' imprisonment. For the appellant, Mr. Rainery Norbert Songea, learned counsel, chiefly contended that the conviction was predicated on an incurably defective charge and that, in the alternative, the charge was not amply established. Ms. Ajuaye

Bilishanga Zegeli, learned Principal State Attorney representing the respondent, valiantly opposed the appeal.

During the trial, the prosecution presented six witnesses and two documentary exhibits to establish the accusation that the appellant, on 5th July, 2019 at Mitandi area within the District and Region of Lindi, had carnal knowledge of a girl aged 17 years who, for the sake of protecting her modesty and privacy, we will refer to as "the complainant" or simply as PW1, the codename by which she testified at the trial.

The facts of the case as succinctly summarized by the learned first appellate judge are as follows: PW1 was a secondary school girl born on 25th February, 2002. At the material time, she was living in the home of her paternal aunt, Rukia Samuli Chiku (PW2), at Mitandi in Lindi. PW2 was an acquaintance of the appellant whom she affectionately called "brother" as they both originate from the Makonde community. For this reason, PW1 used to refer to the appellant rather tenderly as "Uncle Madodo".

On 5th July, 2019, PW1 was alone at home reading a newspaper after performing household chores. Out of the blue, the appellant surfaced and asked her if her adoptive parents were at home. PW1 told

him that they had gone away. The appellant left but he re-appeared rather unexpectedly a few moments later. With nails in his hands, he walked straight into PW1's room which was separated from the living room by a curtain. There and then, he warned her not to shout lest he would kill her as he pressed her shoulders and fell her on the bed. He undressed his shorts, uplifted her dress widely known as *dela* and pulled down her skintight to her knees. He then inserted his male member into her private parts and had sexual intercourse with her. All along PW1 was screaming for help.

By coincidence, PW2 came back and entered in the house. When she raised the curtain separating the complainant's room from the living room, she saw the appellant lying on top of the complainant between her legs having sexual intercourse with her. When she asked him what he was doing, he got up quickly and begged for pardon saying in Swahili, *"Dada nisamehe ... Ni shetani tu ... Niiikuja na misumari kutafuta nyundo"*, loosely meaning *"Sister forgive me ... The devil deceived me ... I came with nails looking for a hammer."* Once she saw him putting on his shorts and suspected that he would run away, she rushed to the main door and locked it from outside. Later, she called neighbours to the scene. Said Abdulrahman (PW4) and Faisal Ahmed Mussa (PW5), who

attended the scene, confirmed at the trial that they found the appellant locked inside PW2's house sitting on a chair in the lounge, begging to be pardoned while the complainant was also inside, crying.

The appellant was subsequently taken along with the complainant, PW2, PW4 and PW5 on a Bajaj tricycle to police station in Lindi where he was booked for the offence of rape. Thereafter, the complainant submitted herself to a medical examination at the Sokoine Hospital, Lindi where she was attended to by Mwanamkasi (PW3), a medical officer. According to PW3, the complainant had no bruises in her vagina but her labia minora was inflamed and that a high vaginal swab (HVS) revealed presence of spermatozoa in her vagina. She said that the inflammation could have been caused by slight penetration by a blunt object or by the complainant scratching her private parts due to itching caused by candidiasis (a fungal infection). She also had no hymen. PW3's medical examination report (PF3) was admitted as Exhibit P1.

WP2937 Detective Sergeant Siwabu (PW6), a police investigator, testified on various aspects of the investigations. She tendered PW1's clinic card (Exhibit P2) showing that the complainant was born on 25th February, 2002, meaning that on the fateful day she was 17 years old.

In his defence, the appellant denied the accusation against him. However, he admitted being at PW2's home where he met the complainant as he was seeking to borrow a hammer. He asked the complainant, who was in her room, to give him a hammer while he was standing in the lounge. When PW1 was responding that she did not know where the hammer was, PW2 entered into the house and claimed that he was a witch she was looking for. She rushed out and locked him inside the house along with the complainant. She then alerted some neighbours who came to the scene, finding him seated in the lounge.

The learned trial magistrate (Hon. J.M. Karayemaha – RM, as he then was) took the view, rightly so, that most of the facts were undisputed and that the sticking issues were two: one, whether the complainant was raped; and two, if she was indeed raped, whether the appellant was the ravisher. In determining the two issues, the learned magistrate gave full credence to the testimonies of PW1, PW2, PW4 and PW5. While accepting PW1's account as sufficiently establishing that the appellant had sexual intercourse with her, he found that tale materially corroborated by PW2's testimony that she caught the appellant amidst the commission of the bestial act on the complainant and that he subsequently begged to be pardoned in the presence of PW4 and PW5.

The learned trial magistrate rejected the appellant's defence, finding that he did not get into PW2's home for a hammer but to prey on the complainant. Accordingly, he convicted him of rape and sentenced him to the mandatory thirty years imprisonment, as we stated at the beginning. The appellant's appeal to the High Court went unrewarded, hence this second and final appeal.

The appellant initially challenged the High Court's decision on three grounds: one, that his defence was not duly considered; two, that PW3 was incompetent to tender Exhibit P1 and that his evidence did not prove penetration; and three, that the lower courts erred in failing to comply with section 127 (6) of the Evidence Act, Cap. 6 R.E. 2019 ("the EA").

At the hearing of the appeal, Mr. Songea sought and obtained leave of the Court, pursuant to rule 81 (1) of the Tanzania Court of Appeal Rules, 2009, to argue an additional ground to the effect that the charge against the appellant laid under sections 130 (1), (2) (e) and 131 (2) (a) of the Penal Code, Cap. 16 R.E. 2019 ("the Penal Code") was fatally defective. Before us, Mr. Songea mainly argued the aforesaid additional ground of appeal. As an alternative, he combined the three

original grounds, arguing them to the effect that the charge against his client was not amply established.

We propose to begin with the complaint on the charge. It was Mr. Songea's submission that the charge was fatally deficient in the statement of the offence in that it was predicated on sections 130 (1), (2) (e) and 131 (2) (a) of the Penal Code but it cited a wrong punishment provision. We understood him to mean that instead of citing section 131 (1) of the Penal Code indicating the general penalty for rape as being the mandatory thirty years' imprisonment, the charge sheet referred to section 131 (2) (a) of the Penal Code prescribing the mandatory punishment for an offender who is a boy of the age of eighteen years or less who, being a first offender, must be sentenced to corporal punishment only. Relying on our recent unreported decision in **Godfrey Simon & Another v. Republic**, Criminal Appeal No. 296 of 2018, the learned counsel boldly submitted that failure to cite the applicable punishment provision or citation of a wrong penalty provision was an incurable irregularity. In the same vein, he referred us to the case of **Geoffrey James Mahali v. The Director of Public Prosecutions**, Criminal Appeal No. 332 of 2018 (unreported).

Accordingly, he urged us to quash the appellant's conviction and set aside the sentence, ultimately releasing him from prison.

Conversely, while acknowledging that a wrong punishment provision was cited in the charge sheet, Ms. Zegeli argued that the infraction was inconsequential because the charge sheet contained all necessary information for the appellant to be aware of the nature of the charged offence and prepare his defence. In supporting her argument, she referred us to section 135 of the Criminal Procedure Act, Cap. 20 R.E. 2019 ("the CPA") and submitted that, what was required to be indicated in the charge sheet is the section of the enactment creating the offence alleged to have been committed, not the punishment therefor. It is only a matter of practice that the punishment provision is cited in the charge sheet but that aspect is never stated when the charge is read out to the accused upon his arraignment. She added that, as long as the correct punishment is ultimately levied against the accused, the omission complained of would be inconsequential. To bolster her proposition, she referred us to our recent decision in **Peter Kabi & Another v. Republic**, Criminal Appeal No. 5 of 2020 (unreported) in which we held that the omission complained of is curable under section 388 of the CPA.

We have considered the contending submissions and taken account of the authorities cited by the learned counsel. The learned counsel are in agreement, rightly so, that the charge the appellant faced was predicated on a wrong punishment provision in that, instead of citing section 131 (1) of the Penal Code indicating the general penalty for rape as being the mandatory thirty years' imprisonment, it referred to section 131 (2) (a) of the Penal Code prescribing the mandatory punishment for an offender who is a boy of the age of eighteen years or less. We are, therefore, enjoined to determine the effect of the citation of inapplicable penalty provision.

Section 132 of the CPA stipulates the contents of every charge or information. It states that every charge or information must contain a statement of the specific offence or offences charged as well as the particulars reasonably showing the nature of the offence or offences charged. For clarity, we extract the said provisions thus:

> ***"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."

Furthermore, section 135 of the CPA, which governs the mode and format of charges or informations, expressly enacts that as long as a charge or information is framed in accordance with its provisions it cannot be open to objection in respect of its form or contents. It stipulates thus:

> "***135.*** *The following provisions of this section shall apply to all charges and informations and, notwithstanding any rule of law or practice, a charge or an information shall, subject to the provisions of this Act, not be open to objection in respect of its form or contents if it is framed in accordance with the provisions of this section—*
>
> *(a) (i) a count of a charge or information shall commence with a statement of the offence charged, called the statement of the offence; (ii) the statement of 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;

(iii) after the statement of the offence, particulars of such offence shall be set out in ordinary language, in which the use of technical terms shall not be necessary, save that where any rule of law limits the particulars of an offence which are required to be given in a charge or an information, nothing in this paragraph shall require any more particulars to be given than those so required;

(iv) ***the forms set out in the Second Schedule to this Act, or forms conforming to them as nearly as may be, shall be used in cases to which they are applicable;*** *and in other cases forms to the like effect, or conforming to them as nearly as may be, shall be used, the statement of offence and the particulars of offence being varied according to the circumstances in each case;"* [Emphasis added]

We have supplied emphasis to section 135 (a) (ii) above to stress the peremptory requirement that the *"statement of offence"* in every charge or information must describe the offence concerned in ordinary language and, if the offence charged is one created by enactment, it

must contain a *"reference to the section of the enactment creating the offence."* Undoubtedly, there is no mention of a reference to the punishment provision. It seems to us that if the legislature had intended to impose the obligation to indicate in the statement of offence the applicable punishment provision along with the provision of the law creating the offence charged, it would have stated so in express terms.

Furthermore, we think that it is not fortuitous but deliberate that the forms of charges or informations set out in the Second Schedule to the CPA, prescribed under section 135 (a) (ii) above, to be used as models for drawing up charges or informations, do not cite in their respective statements of offence the applicable penalty provision along with the section creating the charged offence. The statements of offence in the prescribed forms in respect of the offences of rape, murder, accessory after the fact to murder, manslaughter, wounding and theft, to name but a few, evidently only contain a reference to the section of the Penal Code creating the offence and nothing else. To illustrate the point, we extract the prescribed forms of the information or charge for murder and rape respectively:

1. - MURDER

"Murder, contrary to section 196 of the Penal Code.

PARTICULARS OF OFFENCE

A.B. did on the ...... day of .... in the region of ...., murder J.S."

4. - RAPE

"Rape, contrary to section 130 of the Penal Code.
PARTICULARS OF OFFENCE

A.B., on the .... day of .... in the region of .... had carnal knowledge of E.F., without her consent."

It is noticeable that the above model charge for rape does not include section 131 of the Penal Code, which is the applicable punishment provision, nor is the penalty provision for murder (that is, section 197 of the Penal Code) indicated in the respective model information. In the premises, we agree with Ms. Zegeli that it is only a matter of practice that the punishment provision is cited in the charge or information along with the provision creating the charged offence. It is a practice that we endorse but we hesitate to equate it with an imperious legal prerequisite that would render a charge or information incurably defective.

We recall that, in support of his submission, Mr. Songea relied on our recent decisions in **Godfrey Simon** (*supra*) and **Geoffrey James Mahali** (*supra*), which we read along with the decisions cited therein

(notably **Said Hussein v. Republic**, Criminal Appeal No. 110 of 2016 and **Mussa Nuru @ Saguti v. Republic**, Criminal Appeal No. 66 of 2017 (both unreported)). We acknowledge that, in the aforesaid cases, we took the view that the omission to cite the applicable penalty provision warranted reversal of the conviction. However, we arrived at that conclusion having not fully considered the import of sections 132 and 135 of the CPA, which, as discussed above, do not expressly require the citation of the penalty provision.

Furthermore, besides the above cases, we have equally considered our previous decisions in **Burton Mwipabilege v. Republic**, Criminal Appeal No. 200 of 2009; **Jafari Salum @ Kikoti v. Republic**, Criminal Appeal No. 370 of 2017; **Paul Juma Daniel v. Republic**, Criminal Appeal No. 200 of 2017; and **Juma Hassan v. Republic**, Criminal Appeal No. 458 of 2019 (all unreported). In these cases, we held that such an omission was inconsequential and curable. In **Burton Mwipabilege** (*supra*), for instance, we held that:

> "... *this is curable under section 388 of the CPA, because the irregularity has not, in our view, occasioned a failure of justice.*"

Similarly, in **Jafari Salum @ Kikoti** (*supra*), while following the position in **Burton Mwipabilege** (*supra*), we excerpted from the decision of the erstwhile Court of Appeal for Eastern Africa in **R v. Ngidipe Bin Kapirama & Others** (1939) 6 EACA 118 and applied the following holding:

> *"An illegality in the form of a charge or information may be cured as long as the accused persons are not prejudiced or embarrassed in their defence or there has otherwise been a failure of justice."*

Recently, in **Peter Kabi** (*supra*), cited by Ms. Zegeli, we took the same view thus:

> *"On our part, we are inclined to agree with the learned State Attorney that the provision of the law that was invoked in charging the appellants was improper in the sense that the provision providing for punishment was not indicated. However, we find that this is no longer an incurable anomaly in the wake of the case of **Jamali Ally @ Salum v. Republic**, Criminal Appeal No. 52 of 2017 (unreported) where it was held that failure to cite the punishment provision*

in a rape case was curable under section 388 of the CPA."

The relevant passage in **Jamali Ally** (*supra*) referred to in the above quotation goes as follows:

> *"... we are prepared to conclude that the irregularities over non-citations and citations of inapplicable provisions in the statement of the offence are curable under section 388 of the CPA."*

Based on the foregoing discussion, it is our view that the citation of wrong penalty provision in the statement of offence in the instant case was not a violation of any express provision of the governing law, that is the CPA, but a necessity born out of laudable practice and caselaw. Even if it were so, it would still be curable under section 388 of the CPA as we are unpersuaded that the appellant in the instant case was prejudiced or embarrassed in preparing and mounting his defence. Nor is it discernible that a failure of justice was occasioned because the punishment which was ultimately imposed on him was levied in terms of the law as the mandatory penalty. Accordingly, the additional ground of appeal fails.

Adverting to the merits of the appeal, we should, at first, recall that Mr. Songea argued the three grounds of appeal conjointly to the effect that the offence of rape was not proven beyond reasonable doubt. It was his main contention that while PW1 adduced that the appellant did not ejaculate into her vagina during the sexual assault, PW3 stated that the HVS test indicated presence of spermatozoa in the complainant's vagina but in her report (Exhibit P1) she stated the opposite. The learned counsel went on assailing both PW1 and PW2, contending that they were not credible. He was clear-cut that the appellant's plea for pardon was not an admission of guilt.

On her part, Ms. Zegeli argued that PW1's evidence was the best evidence in the matter. She submitted that PW1 explained in detail on her ordeal, insisting that the appellant ravished her. Her evidence was supported by PW2 who found the appellant *in flagrante delicto*. She urged us to note that PW2's testimony was unchallenged as the appellant did not cross-examine her, as shown at page 17 of the record of appeal. The learned Principal State Attorney cited the case of **Jacob Mayani v. Republic**, Criminal Appeal No. 558 of 2016 (unreported) for the proposition that failure to cross-examine a witness on an important

matter or fact ideally means the acceptance of the truthfulness of the matter or fact concerned.

As regards the medical evidence, she submitted that PW3 may have contradicted what she stated in Exhibit P1 but the appellant's conviction was not anchored on that evidence. It was her contention that when the testimonies of PW1, PW2, PW4 and PW5 are knitted together, they produce a logical and coherent account upon which the courts below found that the appellant committed the offence. In bolstering her submission, she referred us to **Daffa Mbwana Kedi v. Republic**, Criminal Appeal No. 65 of 2017 (unreported) for the position that the best witness to prove commission of a sexual offence is the complainant and that contradictory medical evidence, if any, may not necessarily affect the prosecution case.

Mr. Songea made a very brief rejoinder. He reiterated that the appellant's plea of forgiveness did not amount to admission of guilt.

Insofar as this is a second appeal, we are mandated, under section 6 (7) of the Appellate Jurisdiction Act, Cap. 141 RE 2019, to deal with matters of law only but not matters of fact. However, in consonance with our decision in the **Director of Public Prosecutions v. Jaffari**

Mfaume Kawawa [1981] TLR 149 and a litany of decisions that followed, we can only intervene where the courts below misapprehended the evidence, where there were misdirections or non-directions on the evidence or where there was a miscarriage of justice or a violation of some principle of law or practice – see also **D.R. Pandya v. R.** [1957] E.A. 336.

In addition, we are alert that in view of the inherent nature of the offence of rape or any other sexual offence where only two persons are usually involved when it is committed, the testimony of the complainant is mostly crucial and must be examined and judged cautiously. Indeed, in this regard, we held, for instance, in **Selemani Makumba v. Republic** [2006] TLR 379, that the best proof of rape (or any other sexual offence) must come from the complainant. Accordingly, the complainant's credibility becomes the most important consideration. The evidence of the complainant, if believable, persuasive and consistent with human nature as well as the normal course of things, can be acted upon as the sole basis of conviction – see section 127 (6) of the EA.

The gravamen of the offence of statutory rape facing the appellant as predicated on section 130 (1) and (2) (e) of the Penal Code is a male

person having sexual intercourse with a girl, with or without her consent, if she is under eighteen years of age, unless she is his wife aged fifteen years or above and is not separated from him. To begin with, it was unchallenged that the complainant was born on 25th February, 2002 and that on the fateful day she was seventeen years old. Needless to say, she was not the appellant's wife.

We come to the issue whether the appellant had sexual intercourse with the complainant, a seventeen year-old girl. As indicated earlier, almost all the facts of the case are undisputed. The appellant admitted being inside PW2's house on the fateful day with the complainant but denied to have had sex with her. On our part, we have carefully examined the evidence of the complainant and found it to be clear, spontaneous and consistent. Her detailed account of what happened on the fateful day after the appellant had walked into her room is so coherent, compelling and unshaken. She positively adduced that the appellant, once he was in her room, threatened to kill her should she shout. He then proceeded to have sex with her. It was not suggested that she had any motive or reason to lie against him. We are cognizant that both courts below gave her full credence and her evidence was the best evidence – see **Selemani Makumba** (*supra*). Indeed, in terms of

section 127 (6) of the EA, it required no corroboration to sustain conviction against the appellant.

The complainant's incriminating testimony drew support from PW2 who found the appellant naked in bed with the complainant in the middle of committing the bestial act. We agree with Ms. Zegeli that PW2's testimony was completely uncontroverted because the appellant passed up the chance to cross-examine her. His failure to cross-examine her on this key aspect is clearly an acceptance of the truthfulness of her testimony.

Moreover, it is in evidence that the appellant admitted the claim by PW2, PW4 and PW5 that he repeatedly asked PW2 at the scene to be forgiven his undisclosed transgression. However, he claimed that his plea for forgiveness was not an acknowledgement of guilt. As did the courts below, we do not agree with him. He, yet again, did not cross-examine both PW2 and PW4 on this piece of evidence. Since he made his plea for forgiveness right after he had been caught by PW2 having sex with PW1, his words constituted an admission of guilt. Weighed against the prosecution case, the appellant's self-serving defence of general denial of

liability would naturally dissipate. It was rightly rejected by the courts below.

Before concluding, we wish to address our mind to the assailed medical evidence constituted by PW3 and Exhibit P1. Having reviewed this evidence, we find Mr. Songea's criticism quite justified. PW3's testimony materially contradicted what she documented in her report (Exhibit P1). While she testified that the HVS test indicated the presence of spermatozoa in the complainant's vagina, she stated the opposite in Exhibit P1. The two pieces of evidence also differed on whether the bruises were observed in the complainant's vagina. It is also no small matter that PW3 said that she examined the complainant on 25th July, 2019 but the findings she made in the report were posted on 5th July, 2019. It was not stated if the apparent mismatch of the dates was due to a slip of the tongue or the pen. Given these unexplained inconsistencies, we find the medic's testimony as well as Exhibit P3 unreliable. It is unsurprising, therefore, that the courts below did not rely on this evidence in convicting the appellant. Nonetheless, we are at one with Ms. Zegeli that the discounting of the aforesaid evidence would not have any deleterious effect on the cogency of the prosecution case – see **Daffa Mbwana Kedi** (*supra*).

All told, we find without demur that the charge against the appellant was proven beyond all reasonable doubt. The three grounds of appeal under consideration fall by the wayside.

In the final analysis, we find the appeal unmerited. We dismiss it in its entirety.

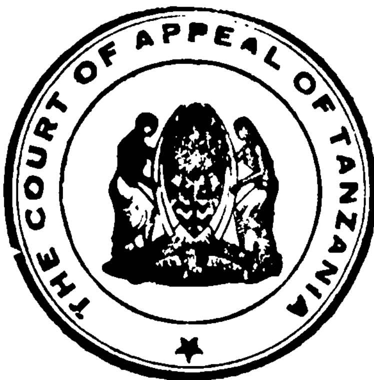
DATED at **MTWARA** this 19th day of March, 2022.

G. A. M. NDIKA
JUSTICE OF APPEAL

R. J. KEREFU
JUSTICE OF APPEAL

P. M. KENTE
JUSTICE OF APPEAL

The Judgment delivered this 21st day of March, 2022 in the presence of the Appellant in person, unrepresented and Mr. Abdulrahman Msham, Senior State Attorney learned counsel for the respondent/Republic is hereby certified as a true copy of original.



D. R. Lyimo
DEPUTY REGISTRAR
COURT OF APPEAL