**IN THE COURT OF APPEAL OF TANZANIA**

**AT SHINYANGA**

**(CORAM: MKUYE J.A., GALEBA, J.A., And KAIRO, J.A.)**

**CRIMINAL APPEAL NO. 342 OF 2018**

**LUCAS SAMSON ..... APPELLANT**

**VERSUS**

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

**(Appeal from the decision of the High Court of Tanzania at Shinyanga)**

**(Makani, J.)**

**dated 7th day of September, 2018**

**in**

**Criminal Appeal No. 83 of 2017**

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# JUDGMENT OF THE COURT

15th & 22nd July, 2022

**MKUYE, J.A.:**

In this case, initially, the appellant, Lucas Samson, was charged before the District Court for Kahama District with the offence of rape contrary to section 130 (1), (2) (b) and (3) (1) of the Penal Code, [Cap 16 R.E. 2002; now R.E. 2022] (the Penal Code). The trial commenced and four (4) witnesses testified for the prosecution. During determination as to whether or otherwise the appellant had a case to answer, the trial court made a finding that a *prima facie* case was not made out on the offence of rape but rather on the offence of grave sexual abuse contrary to section 138 C (1) (a) and (2) (b) of the Penal

Code. Then, after a full trial, the trial court convicted the appellant on a lesser offence of grave sexual abuse and sentenced him to twenty (20) years imprisonment. Dissatisfied by the trial court's decision, the appellant appealed to the High Court but his appeal was dismissed. Still protesting his innocence, he has preferred his appeal to this Court.

Before embarking on the merit of the appeal, we find it appropriate to narrate the facts leading to his imprisonment as follow:

The victim A A (name withheld to conceal her identity) (PW1) lived at Ikinda village with her sister Marietha Adam (PW2) and her brother in law to whom her sister was married. On 16th December, 2016 at about 4:00 p.m. PW1 was at home. Taking advantage of the victim's sisters having gone to fetch water from a nearby well, the appellant availed himself at the residence of her sister. On his arrival, he took the victim to the kitchen where he undressed her underpants and himself and then laid over the victim while putting his male organ on her (PW1) female genitalia.

Luckily enough, while PW2 was on her way to the water well and before reaching there, she met on the way a sardine vendor and wishing to purchase some, she made a u-turn back home. On reaching home, she called out PW1 who replied back from the kitchen while crying and stating that there was a man lying over her. This reply

prompted PW2 to go straight to the kitchen and, to her astonishment, she saw PW1 who stood up naked and holding her underpants in her hands while the appellant was seated naked with his trousers down to his ankles.

PW2 courageously made a brief inquiry from the appellant as to why he had done what he did, for which he admitted to have done a wrong thing. PW2 then raised alarm and a crowd of people responded. PW2 inspected the victim and observed presence of watery-like substance on her female genitalia. Thereafter, the appellant was put under restraint by the local militia and later was taken to the police station. On the other hand, PW1 was also taken to the police station then to Lungunya Health Centre where she was medically examined by PW4 who also claimed to have observed the presence of watery-like substance at her genitalia and thighs with no bruises in her vagina.

In defence, the applicant opted to defend himself by keeping silent.

Before this Court, the appellant has fronted two grounds of appeal which for a reason which will shortly become apparent, we do not intend to reproduce them.

When the appeal was called on for hearing, the appellant appeared in person and unrepresented; whereas the respondent Republic was represented by Ms. Verediana Peter Mlenza, learned Senior State Attorney assisted by Ms. Edith Tuka and Ms. Rehema Sakafu, both learned State Attorneys.

Upon being availed an opportunity to elaborate his grounds of appeal, the appellant sought to adopt them and opted to let the learned State Attorneys respond first while reserving his right of rejoining later, if need arises.

In response, Ms. Tuka, prefaced by declaring their stance that they supported the appeal based on the irregularities occasioned during the trial of the case. She contended that, in the ruling as to whether or otherwise the appellant had a case to answer, the trial magistrate made his opinion that a *prima facie* case was not made against the appellant on the offence of rape but rather on the offence of grave sexual abuse contrary to section 138 C (1) (a) read together with section 138 C (2) of the Penal Code. However, she submitted that, it was wrong for the trial court to substitute the offence of rape to the offence of grave sexual abuse because under section 304 (1) of the Criminal Procedure Act, [Cap 20 R.E. 2022] (the CPA) the offence of grave sexual abuse is not among the offences which could have been

substituted for the offence of rape. She elaborated that, under the said provision of the law the offences which could be substituted for the charge of rape are only those under section 135 relating to sexual assault; section 140 relating to procuring rape; and section 158 relating to incest by males. It was, therefore, her submission that it was wrong for the trial court to require the appellant to defend himself on the grave sexual abuse offence since it was not a cognate offence to the offence of rape.

In addition to that, Ms. Tuka submitted that although the appellant was addressed in terms of section 231 (1) of the CPA, the trial magistrate did not explain the substance of the new charge to the appellant as required by the law. She was of the view that, that was a contravention of section 231 (1) of the CPA as was held in the case of **Emmanuel Thomas @ Kasamwa v. Republic,** Criminal Appeal No.183 of 2019 (unreported) at page 10.

Ms. Tuka concluded that since the substituted offence was not a cognate offence to the offence of rape; and given the fact that it's substance was not read over and explained to the appellant, the omissions amounted to fatal irregularities which vitiated the proceedings. In this regard, she implored the Court to allow this appeal, quash the conviction and set aside the sentence and order for

immediate release of the appellant unless otherwise held for other lawful reasons.

In rejoinder, the appellant concurred with the submission made by the learned State Attorney. He, then, urged the Court to allow the appeal and set him free from prison.

We have examined the submissions from both parties and considered the record of appeal and, we think, the issue for our determination is whether the charge against the appellant was wrongly substituted and, if so, whether the appellant was prejudiced by such anomaly.

The determination of whether or otherwise the case against the accused is made out so as to acquit or require him to give his defence after the prosecution has closed its case, is governed by sections 230 and 231 of the CPA. In particular, section 230 of the CPA deals with a situation where after the prosecution has closed its evidence, the case is not made out against the accused to require him to make a defence in relation to the offence to which he stands charged or in relation to other offences under the provisions of section 300 to 309 of the CPA. On the other hand, section 231 of the CPA deals with a situation where after the closure of the prosecution evidence, the court finds that a case has been made against the accused to require him to make his

defence in relation to the charged offence or in relation to any other offence under the provisions of section 300 to 309 of the CPA. It also requires the court to explain the substance of the charge and inform him his rights pertaining to his defence. The said section provides as follows:

> *"231 (1) At the close of the evidence in support of the charge, if it appears to the court that a case is made against the accused person sufficiently to require him to make a defence either in relation to the offence with which he is charged or in relation to the offence of which, under the provisions of section 300 to 309 of this Act, he is liable to be convicted the court shall again explain the substance of the charge to the accused and inform him of his right –*
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> *(a) to give evidence whether or not on oath or affirmation, on his own behalf; and*
>
> *(b) to call witness in his defence,*
>
> *and shall then ask the accused person or his advocate if it is intended to exercise any of the above rights and shall record the answer; and the court shall then call on the accused person to enter on his defence save where the accused person does not wish to exercise any of those rights."*

In this case, as was rightly submitted by Ms. Tuka, after the closure of the prosecution evidence as shown at page 16 of the record

of appeal, the trial court made a finding on a case to answer after having been asked to do so by the Public Prosecutor. For ease reference, we take the liberty to reproduce what was stated as hereunder:

> *"Court: The way I have seen and heard the prosecution evidence I have been of the opinion to find the accused to have a case to answer. However, I have been of the opinion to find the* ***accused to have a case to answer not in respect of the offence he is charged but with the offence of grave sexual abuse contrary to section 138 C (1) (a) of the Penal Code read together with section 138 C (2) (b) of the Penal Code."***
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> [Emphasis added]

As it can be gleaned from the above excerpt, it is true that the trial magistrate substituted the offence of rape to that of grave sexual abuse. It appears that the trial magistrate made such a finding while having in mind the provisions of section 304 (1) of the CPA which states as follows:

> *"304 (1) Where a person is charged with an offence under section 130 or 132 of the Penal Code and the court is of the opinion that he is not guilty of that offence but is guilty of an offence under section 135,*

*140 and 158 of the Penal code, he may be convicted of that offence although he was not charged with it."*

According to the above cited provision of the law, the alternative verdicts for the offence of rape under section 130 and attempted rape under section 132 of the Penal Code can only be entered to the offences stipulated under sections 135, 140 and 158 of the same law. The offence of grave sexual abuse under section 138 C (1) and (2) of the Penal Code is not mentioned under section 304 of the CPA.

In this regard, we agree with Ms. Tuka that the offence of grave sexual offence under section 138 C (1) and (2) which was taken by the trial magistrate as a cognate offence to the offence of rape was not correct. It was therefore, not proper or rather wrong for the trial court to substitute the offence of rape to that of grave sexual abuse as it was not included in section 304 of the CPA. This being the case, it follows that it was also wrong to require the appellant to defend himself on the offence which was not a cognate offence to rape which he was initially charged.

But what was the first appellate court's view on this aspect. As it can be gathered from page 42 to 43 of the record of appeal, it dealt with it and concurred with the trial court for the reasons that: **One,** the trial court had mandate to reduce the charge from rape to a minor

offence of grave sexual abuse. **Two,** the trial magistrate in his judgment explained in details the reason for substituting the charge from rape to grave sexual abuse offence. **Three,** the evidence of PW1, PW2 and PW4 did not establish penetration; and **four,** the appellant admitted to have committed grave sexual abuse offence because of the circumstances he was found alone with the victim while the victim was naked and the appellant's trousers was down to his ankles.

When faced with almost similar scenario in the case of **Samwel Thomas @ Kasamwa** (supra) which was cited by Ms. Tuka, the Court stated as follows:

> *"We are of the settled opinion that, even if it was true as stated by the learned High Court Judge that the substitution was made during composition of judgment, which was not,* ***still it was a misdirection on her part to hold that the trial magistrate was right to apply section 304 of the CPA to substitute the charge of attempted rape to grave sexual abuse.*** *The reason being that grave sexual abuse is neither one of the offences mentioned under that provision of the law nor a cognate offence of attempted rape."* [Emphasis added].

Even in the case at hand, being guided by the above cited authority, we agree with the learned State Attorney that it was wrong

for the first appellate court to hold that the trial court correctly substituted the offence of rape to grave sexual abuse offence under section 138 C (1) and (2) of the Penal Code since it was not among the offences mentioned under section 304 of the CPA.

Besides that, we have considered the other limb of the irregularity that after having substituted the charge, the trial magistrate did not explain the substance of the charge to the appellant. According to section 231 (1) which we have reproduced earlier on, it is a mandatory requirement for the trial court, after having found that a case is made against the accused to require him make a defence, to explain the substance of the charge and inform him about his rights pertaining to his defence. However, as correctly submitted by Ms. Tuka, that was not done as the record of appeal is silent if that step was taken by the trial magistrate. Since the appellant was subjected to defend himself on a substituted offence whose substance was not explained to him it means that the appellant was accorded an unfair trial which, eventually, must have prejudiced him.

Regarding prejudice to the appellant, this Court in the case of **Richard Estomihi Kimei and Another v. Republic,** Criminal Appeal No. 375 of 2016 (unreported), while being inspired by the decision of the High Court in the case of **Elmi bin Yusufu v. Rex,** TLR (R) 181

(1) where, section 181 (1) of the Repealed Criminal Procedure Code which is in *pari materia* with section 300 (1) of the CPA was interpreted, stated that:

> *"Though a magistrate [or judge] has power under this section to convict the accused of different offence from what he was originally accused of, still this must be done only in cases where the accused is not in any way prejudiced by the conviction on the new charge.* ***The accused person is entitled to know with certainty and accuracy the exact nature of the charge brought against him, and unless he has this knowledge, he must be seriously prejudiced in his defence."***
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> [Emphasis added].

In the event, in view of what we have discussed above, we agree with the learned State Attorney that, the trial magistrate's failure to explain to the appellant the substance of the substituted offence was a fatal irregularity which was prejudicial to him as he could not have been in a position to know with certainty and accuracy the exact nature of the new charge and give or make an informed defence.

Ultimately, on the basis of what we have endeavored to explain above, we allow the appeal. And, hence, in exercise of our revisional powers under section 4 (2) of the Appellant Jurisdiction Act [Cap 141

R.E. 2019], we nullify the proceedings of both courts below, quash the conviction and set aside the sentence thereof. We further order for the immediately release of the appellant from prison unless otherwise he is held for other lawful cause(s).

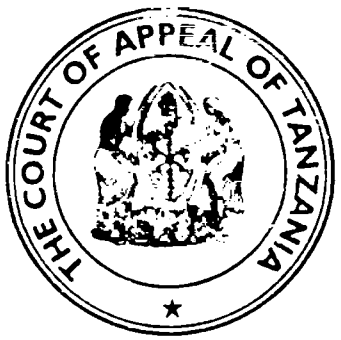
**DATED** at **SHINYANGA** this 22nd day of July, 2022.

R. K. MKUYE
**JUSTICE OF APPEAL**

Z. N. GALEBA
**JUSTICE OF APPEAL**

L. G. KAIRO
**JUSTICE OF APPEAL**

This Judgment delivered this 22nd day of July, 2022 in the presence of Mr. Lucas Samson, the Appellant in person and Ms. Caroline Mushi, State Attorney for the Respondent, is hereby certified as a true copy of the original.




W. S. NG'HUMBU
***For:*** **DEPUTY REGISTRAR**
**COURT OF APPEAL**