IN THE COURT OF APPEAL OF TANZANIA

AT ARUSHA

(CORAM: MUGASHA, J.A. SEHEL, J.A. And KAIRO, J.A.)

CRIMINAL APPEAL NO. 296 OF 2018

GODFREY SIMON..... 1ST APPELLANT

MASAI YOSIA.....2ND APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

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

(Maghimbi, J.)

dated the 31st day of August, 2018

in

Criminal Appeal No. 19 of 2017

JUDGMENT OF THE COURT

8th & 11th February, 2022

MUGASHA, J.A.:

In the District Court of Karatu the appellants were charged with the offence of unnatural offence contrary to section 154 (a) of the Penal Code, Cap 16 RE 2002. It was alleged in the particulars of the offence that, on the 27/12/2016 at about 1900 hours at Dofa village within Karatu District in Arusha Region, the appellants did have carnal knowledge of a boy aged nine (9) years' old against the order of nature. In this appeal, for the purposes of concealing the identity of the victim we shall refer him as PW3

or DJ. They denied the charge and in order to prove its case, the prosecution paraded four witnesses and one documentary account (PF3 exhibit P3). The appellants were the only witnesses for the defence case.

The factual account underlying the conviction of the appellants is to the effect that: on the fateful day, DJ was sent by his mother Loveness Josephat (PW1) to collect mobile phone batteries. It is alleged that, while on the way back home, he encountered the appellants who carried him to the bush and sodomised him in turns. Later, came one Florian who upon inquiring as to what the appellants were doing to DJ, the appellants ran away. Apparently, Florian was not among the prosecution witnesses. Then PW3 stood up and began to cry because he was feeling so painful. The victim's mother troubled that PW1 had delayed to return home, made a follow up and initially heard the victim crying and later saw him coming home holding his pair of trousers. He probed the victim who revealed to have been initially sodomised by Josephat and later by the appellants. Then, upon being inspected by his father the victim's anus was found to be covered by faeces. The matter was reported to the village chairman and later to the police and the victim was taken to the hospital. Upon being examined by Dr. Amanuel William Msemo (PW4), the anal area was found to be reddish and covered with faeces.

The appellants denied the prosecution accusations and raised the defence of alibi claiming that they were not at the scene of crime on the fateful day. The 1st appellant, claimed to have been at Kambi ya Nyoka on the fateful day and returned at Njia Panda at 20.00 hrs. On the following day he went to prepare blocks and on 28/12/2016 was arrested by the police while he was waiting for his boss. On the part of the 2nd appellant, besides claiming not to have been at the scene of crime, he alleged that, on 28/12/2016 at 18.00hrs he was followed by militia and told about the incident relating to the victim's whereabouts being unknown and that his mother was tracing him.

After a full trial, the appellants were convicted and sentenced to life imprisonment. They unsuccessfully appealed to the High Court, hence the present appeal. In the memorandum of appeal, the appellants have raised six grounds which are conveniently summarized into mainly two namely: **One,** that the conviction is based on a defective charge and **two,** first appellate Court erred to dismiss the appeal relying on evidence of the prosecution which did not prove a charge beyond reasonable doubt.

The appellants were unrepresented and the respondent Republic had the services of Ms. Rose Sule, learned Senior State Attorney and Misses Naomi Mollel and Upendo Shemkoe, both learned State Attorneys.

The appellants first main complaint is that; the charge sheet was defective having not cited a proper provision creating the offence and in addition the punishment provision that is section 154 (2) of the Penal Code is omitted. It was the appellants' contention that the omission to cite proper provisions occasioned a miscarriage of justice on their part because apart from not understanding the nature of the offence charged, they were also not aware of the consequential punishment of life imprisonment.

On the other hand, apart from the concession by the learned State Attorney that the charge sheet suffered wrong citation and non-citation, she was of the view that, since the appellants were aware of the charged offence from the particulars of the offence, the omission is curable under the provisions of section 388 of the Criminal Procedure Act CAP 20 R.E 2019 (the CPA). To support her proposition, he cited to us the case of **JUMA HASSAN VS REPUBLIC,** Criminal Appeal No. 458 of 2019 (unreported), the Court made a following observation:

> *"The charge in the present case, discloses that the appellant was charge with unnatural offence contrary*

to section 154 (1) (a) and (c) of the Penal Code. That was proper. As the particulars of the offence were to the effect that the appellant had carnal knowledge of PW3, the offence section was supposed to include subsection (2) which is the sentencing provision instead of subsection (c). That is to say the [charge] should read 154 (1) (a) and (2) of the Penal Code. However, as the particulars of the offence clearly explained the offence charged, the defect is curable under section 388 of the CPA. See Jamali Ally @ Salum v Republic, Criminal Appeal No. 52 of 2017 and Omary Abdalla @ Mbwangwa v Republic, Criminal Appeal No. 127 of 2017 (both unreported) ...."

Since it is settled law that, the charge is the foundation of any trial, the mode of framing the charge is prescribed and regulated by the provisions of section 132 and 135 (a) (ii) of the CPA. While the former provision requires the offence to be stated in the charge along with specific particulars stating the nature of the charged offence, the latter one requires the statement to be described together with the essential elements of the offence and reference to the section creating the offence. In addition, the punishment provision must be stated in the charge. Having explained the manner in

which the charge must be framed, for clarity, we deem it pertinent to reproduce the charge under which the appellants were arraigned:

> ***"OFFENCE SECTION AND LAW**: UNNATURAL OFFENCE C/S 154 (a) OF THE PENAL CODE CAP 16 VOL. 1 OF THE LAWS RE 2002.*
>
> ***PARTICULARS OF OFFENCE**: That GODFREY SIMON, JOSEPHAT JOSEPH and MASAI YOSIA are jointly and together charged that 27th day of December, 2016 at about 19:00 hrs at Dofa village within Karatu District in Arusha Region had carnal knowledge against the order of nature with DJ 9 years a pupil of standard 3 at Njia panda primary School.*
>
> ***STATION**: CRIME KARATU*
>
> ***DATE**: ....."*

At the outset, we agree with the learned State Attorney that, from the particulars of the offence the appellants were aware that the victim in the offence charged was nine (9) years old. However, that brings into scene the essence to cite the provisions of section 154 (2) of the Penal Code which prescribes the punishment of life imprisonment for a person convicted of

such an offence to a child aged below the age of eighteen (18) years the provision states as follows:

> *"154 (2) Where the offence under subsection (1) of this section is committed to a child under the age of 18 years the offender shall be sentenced to life imprisonment."*

The essence of citing a provision which prescribes the sentence was emphasized by the Court in a number of cases including the cases of **SAID HUSSEIN VS REPUBLIC,** Criminal Appeal No. 110 of 2016, **GEOFREY JAMES MAHALI VS THE DIRECTOR OF PUBLIC PROSECUTIONS**, Criminal Appeal No. 332 of 2018 and **MUSSA NURU @ SAGUTI VS REPUBLIC**, Criminal Appeal No. 66 of 2017 (all unreported). In the latter case, confronted with a similar scenario, whereby punishment provision was not cited in the charge sheet, the Court stated the consequences as follows:

> *"Even in this case, we think, the appellant was required to know clearly the offence he was charged with together with the proper punishment attached to it.* ***We are of a settled mind that by failing to cite sub section (2) of section 154 which is a specific provision for punishment to a person who committed an offence of unnatural offence to a person below the age of [eighteen] might have led the appellant not to***

appreciate the seriousness of the offence which was laid at his door. On top of that, he might not have been in a position to prepare his defence. *(See- Simba Nyangura's case).* ***The end result of it is that he was prejudiced. "***

[Emphasis supplied]

It is thus settled law that, the punishment/sentencing must be specified in the charge so as to enable an accused person to understand the nature of the charged offence and the requisite punishment. In the present case, the omission to state the punishment provision prejudiced the appellants who was not made aware of the serious implications of the offence charged, the gravity of the impending sentence and as such, they were unable to make an informed defence. See – **GEOFREY JAMES MAHALI VS THE DIRECTOR OF PUBLIC PROSECUTIONS** (supra), **JOHN MARTIN MARWA VS REPUBLIC**, Criminal Appeal No. 20 of 2014 and **ABDALLA ALLY VS REPUBLIC,** Criminal Appeal No. 253 of 2013 (all unreported).

We found the case of **JUMA HASSAN VS REPUBLIC** (supra) distinguishable from the present matter. In that case, the Court dealt with the manner of remedying the charge which has omitted to cite properly a

provision of the law which creates an offence and the proper manner of framing the charge for unnatural offence to child under eighteen (18) years. However, the Court did not consider the cases of **MUSSA NURU @ SAGUTI VS REPUBLIC**, Criminal Appeal No. 66 of 2017 and most recent case of **GEOFREY JAMES MAHALI VS THE DIRECTOR OF PUBLIC PROSECUTIONS** (supra) which addressed on the adverse consequences and related prejudices on the accused person where a punishment provision is omitted in the charge sheet.

We asked ourselves if the omission could have been remedied. Apparently, this was possible before the conclusion of the trial if the prosecution had sought leave of the trial court to amend the charge in terms of section 234 (1) of the CPA. In the event, this did not happen, it follows that, the charge remained defective throughout the pendency of the proceedings. This vitiated the trial rendering the proceedings and judgments of the courts below to be a nullity.

Since the determination of the said ground of complaint is sufficient to dispose of the appeal, ordinarily we would have ended here and should not have bothered ourselves to look into evidential matters. However, we shall do so in the light of what raised by the appellants in relation to the variance

of the place of occurrence of the offence in the charge and the prosecution account. On this, Ms. Mollel was of the view that the omission to amend the charge to remedy the variance between the charge and the evidence on the place where the offence was committed was uncalled for as it did not occasion a failure of justice. With respect, we found this wanting and we shall give our reasons.

Where in the course of trial it transpires that there is variance between the charge and the evidence, the prosecution may amend the charge with leave of the trial court as provided under the provisions of section 234 (1) of the CPA which stipulates as follows:

> *"234 (1) Where at any stage of a trial, it appears to the court that the charge is defective, either in substance or form, the court may make such order for alteration of the charge either by way of amendment of the charge or by substitution or addition of a new charge as the court thinks necessary to meet the circumstances of the case unless, having regard to the merits of the case, the required amendments cannot be made without injustice; and all amendments made under the provisions of this subsection shall be made upon such terms as to the court shall seem just."*

In view of the stated position of the law, it was prudent to amend the charge. As this did not happen, the prosecution account regarding the place where the offence was committed did not support the charge. We say so because while the prosecution account from PW1 and PW3 revealed that the offence was committed at Matofarini as reflected at pages 10 and 15 of the record of appeal, the charge shows that it was committed at Dofa village. This had the effect of weakening the prosecution case and in the absence of requisite amendment. In the case of **BAINTH AND ANOTHER VS REPUBLIC,** Criminal Appeal No.339 of 2013 (unreported), faced with akin situation, the Court held thus:

> *"... where there is a variation in the place where the alleged armed robbery took place, then the charge must be amended forthwith,* ***if no amendment is effected the charge will remain unproved and the accused shall be entitled to an acquittal as a matter of right. Short of that a failure of justice will occur."***

[Emphasis supplied]

In the light of the bolded expression, in this particular case the omission to amend the charge not only occasioned a miscarriage of justice but also it rendered the prosecution case not proved at the required

standard. In the premises, assuming that the charge had no flaws as earlier pointed out, still the charge against the appellants was not proved to the hilt.

All said and done we find the appeal merited and it is hereby allowed. In the result, the conviction is quashed and sentence set aside and the appellants should be set free unless if held for some other lawful cause.

DATED at **ARUSHA** this 10th day of February, 2022.

S. E. A. MUGASHA
JUSTICE OF APPEAL

B. M. A. SEHEL
JUSTICE OF APPEAL

L. G. KAIRO
JUSTICE OF APPEAL

This Judgment delivered this 11th day of February, 2022 in the presence of Appellants in person unrepresented and Ms. Rose Sule, learned Senior State Attorney and Misses Naomi Mollel, Upendo Shemkole and Ms. Blandina both learned State Attorneys.

J. E. FOVO
DEPUTY REGISTRAR
COURT OF APPEAL