IN THE HIGH COURT FOR ZANZIBAR

HOLDEN AT VUGA

CRIMINAL APPEAL NO.25 OF 2016

(FROM CRIMINAL CASE NO.48 OF 2013)

IDDI RASHID KANGOJOLA ... ... APPELLANT

VERSUS

DIRECTOR OF PUBLIC PROSECUTIONS... ... RESPONDENT

JUDGEMENT

BEFORE: HON. ABDUL-HAKIM A. ISSA, J

The Appellant, Iddi Rashid Kangojola was charged with the offence of rape contrary to section 125 (1) (2) (e) and 126(1) of the Penal Act No. 6 of 2004 of the Laws of Zanzibar. The Regional Magistrate Court, Mfenesini (Nassor A. Salim /RM)) convicted the appellant and sentenced him to serve seven years in the Education Centre. The Appellant was also ordered to pay the victim Tzs 1,000,000. The appellant being aggrieved with the conviction and sentence appealed to this Court in Criminal Appeal No. 25 of 2016.

From the evidence as established in the trial, the background giving rise to the case may be briefly stated. The victim in this case is Stella Yona, a girl aged 8 years who was living at Kiwengwa-mafarasi, in the Northern Region of Zanzibar. It was alleged in the charge-sheet that on 24.8.2013 at 6.00 pm while Stella was at home the Appellant went there and asked her to follow him so that he could show her his house. Stella did follow him to his house and while inside Appellant asked her to take off her underwear which she refused. The Appellant then took it off by force and then raped her. The appellant was arrested and charged with the offence of rape.

In this appeal the Appellant was represented by learned advocates, Mr. Emmanuel Samuel and Mr. Dickson while the Respondent (DPP) was represented by learned State Attorney, Mr. Khamis Juma. The Appellant filed his memorandum of appeal which contained ten grounds of appeal, which can be summarised as follows:

1. That the evidence were produced by one family and was arranged, PW2 and PW3 are witnesses who were taught. The RM erred in law and fact in believing and giving weight to the testimonies which are not true.

2. That in the charge sheet and PW4 and PW5 mentioned 24.08.2013 as the day of the incident, but PW1, PW2, PW3 and PW6 mentioned 24.9.2013 as the day of the incident.

3. That the two important witnesses; a women and Edward who immediately saw the victim were not called to testify in Court.

4. That rape is proved by the proof of penetration and only the doctor can do that, the RM erred in convicting the Appellant without the doctor testifying that the victim was raped.

5. That the learned RM erred in law by admitting PF3 without the doctor testifying in Court.

6. That the learned RM erred by convicting the Appellant based on unsworn testimony of the victim.

7. That the learned RM was biased and did not weigh the produced evidence.

8. That Salim, PW5 testified that he found the victim in a normal state, she was talking and she was not crying of pain.

9. That the learned RM erred in believing the victim was raped, which is not possible for a 9 year old girl to be raped by a man without seeing a flow of blood since it was the victim's first time.

10. That the learned RM erred in not recognising that now there is a fashion of people fabricating cases when there is misunderstanding between them.

Mr. Dickson started his submission on this appeal, but he argued 1st, 2nd, 4th, 6th and 8th ground of appeal. He withdrew the 3rd, 5th, 9th and 10th ground of appeal. With respect to the first ground of appeal he submitted that all the evidence produced in Court came from one family and was pre-arranged. PW2 and PW3 were taught what to say, and there was no eye-witness in this case who saw what happened to the victim (PW2), Stella. He added that what was before the court was a hear-say from PW1 who testified on pg 4 and 5 that she sent Salum and Rajab to find Stella and they found her with Iddi and Edward. He said the statements are confusing about who raped Stella, Iddi or Edward. On the same page she said she ordered Edward to go and bring Stella.

Mr. Dickson added that on the side of PW2, the victim she testified that she made noise and one woman heard the noises and then called Edward who came, but none of these witnesses were called to testify This show the case has been fabricated. He added that PW2 when cross-examined she said she does not know the meaning of rape, but on pg 6 she said Iddi raped her. He submitted that this shows that she was taught. Further, Mr. Dickson said PW2 on the cross-examination she said "Iddi entered his penis in my front part", but in examination in chief she said "he entered his penis in my vagina". Mr. Dickson submitted that the same can be said about PW3 whose testimony is close to that of PW1. She was taught by PW1 and PW2.

On the side of DPP before making submission on the first ground of appeal he raised a concern that the appellant has been sentenced by the trial court, but he has not been convicted. He prayed that the file should be remitted to the RM's Coun for convicting the accused.

With respect to the first ground of appeal, he opposed it and submitted that this is an appeal and the Appellant is supposed to show where the Court has erred and not to bring allegations. He submitted that the grounds and submission do not match. The Appellant should comply with section 101 of Evidence Decree, Cap. 5 of the Laws of Zanzibar to show those facts which exist. He has to show the fabricated testimony, taught testimony and lies. What they showed are the discrepancies/inconsistencies, therefore, the first ground of appeal was not technically proved. He added that in fact there are no inconsistencies PW1 said similar things on examination in chief as well as on cross-examination on pg. 5. PW2 on the other hand insisted on both examination in chief as well as on cross-examination that it was Iddi who took her and PW3 on pg 7

said similar thing on cross-examination This does not mean they were taught as they answered during cross-examination in the presence of the advocate He submitted that it was not shown that PW2 and PW3 were coached, hence, this ground lacked merit.

Regarding those witnesses who were not summoned the learned State Attorney submitted that those are the prosecution witnesses and the DPP decides which witness to call. Section 134 of Evidence Decree says that there is no specific number of witness required to prove a fact. The prosecution brought six witnesses whom they thought are sufficient, the Court or the advocate for Appellant could have called those witnesses if they so wish. He added that the learned magistrate made a finding on this ground on pg. 23.

With respect to the second ground of appeal, Mr. Dickson submitted that there is confusion regarding the date of the incident. The charge-sheet mentioned 24.8.2013 as the day in which the Appellant committed the offence of rape. PW4 and PW5 also mentioned 24.8.2013 as the day of the incident, but PW1, PW2 and PW3 mentioned the day of the incident as 24.9.2013, the PF3 also mentioned that date. He said it was wrong to convict the accused on that confusion.

The learned State Attorney concurred with the learned advocate for Appellant on this ground of appeal. They agreed that the date on the charge-sheet is 24.8.2013, but PW1, PW2, PW3 and PW5 on the other hand said the incident took place on 24.9.2013. It was only PW4 who said the incident took place on 24.8.2013. He added that in the judgment it was recorded that the incident took place on 24.9.2013 though the charge reads 24 8.2013. He submitted that these errors were committed by the Court, and does not warrant punishing the parties. He added that the Court should also consider section 218 (4) of Criminal Procedure Act. Further, the learned State Attorney said there was no need to amend the charge-sheet, as the variation is immaterial and the Court made a finding on pg. 23.

With respect to fourth ground of appeal, Mr. Dickson submitted that in the offence of rape there must be penetration and must be proved by a doctor. In this case the doctor was absent PF3 was tendered in evidence, but it was not signed by a doctor, it was signed by Saide Ali Mussa who is a clinical officer. From this evidence the prosecution did not prove beyond reasonable doubt. He added that the PF3 said that no discharge or blood was seen, at the same time PW2 said she has done it for the first time.

The learned State Attorney on the other hand, submitted that PF3 is a document and according to section 74(a) (ii) of Evidence Decree it is a public document, and it is presumed genuine under section 80. He added that the content of PF3 was correct and the person who filled it has the required qualifications. The PF3 was dated 24.9.2013 and he said that is not a problem if the incident took place in 24.8.2013 or 24.9.2013. Further, if the doctor was not cross-examined the advocate for appellant was there in Court and did not ask for cross-examination of the witness.

With respect to the sixth ground of appeal, Mr. Dickson submitted that the testimony of PW2 had no weight as it was taken without oath, and it is also a testimony of a child The Court is required to warn itself when the evidence is that of a child of tender years. It also needs to be corroborated. He added that in this case there is no corroboration and the RM did not warn himself that it is not safe to convict on uncorroborated evidence of a complainant. He cited the case of ***Said Hemed*** V ***Republic*** [1987] TLR 117 where the Court said the evidence of a child of tender years requires corroboration

The learned State Attorney opposed this ground and stated that voire dire test is guided by section 118 of Evidence Decree and what was argued is irrelevant. The learned Magistrate was satisfied that PW2 was competent to testify, he made that finding on pg. 20. Further, section 49 of the Children's Act clearly laid down the law regarding the testimony of the child. Section 49 (4) says corroboration is not necessary and the learned RM warned himself about that. He cited the case of ***Abdulbaad Yimim*** V. ***SMZ*** [2006] TLR 180 where the Court of Appeal held that when evidence of eye-witness is trustworthy, the medical evidence is not conclusive. He prayed that the finding of guilty should be sustained, the sentence given to the Appellant is small, the Court should punish him according to section 126 of the Penal Act

With respect to the eighth ground of appeal, Mr. Dickson submitted that the testimony of PW5 says the victim when found was normal, she was not crying and she was talking. PW4 also in his testimony said PW2 was puzzled to see PW5. He prayed that this appeal should be allowed and the appellant be set free. The learned State Attorney, on the other hand did not make submission on this ground.

In determining this appeal we will start with the concern raised by the learned State Attorney, Mr. Khamis Juma that the Appellant in this case has not been convicted. He has just been sentenced. He asked the Court to remit the file to the learned RM in order

to rectify the error. This Court looked at the judgment of this case and on pg 24 it found the following words:

> ***"The above evidence which has been tendered show that the accused take Stella at his home. From the above evidence this court has find that, prosecution has proved well their case on the offence of rape which accused is charged with. Therefore, this court has find accused guilty of the offence of rape c/s 125 (1) (2) (e) and 126 (1) an offence which accused is charged with".***

The learned magistrate then heard the prosecution on previous conviction and the mitigation from the appellant, and at the end he sentenced the accused as follows: ***"Accused is sentenced to serve a punishment of seven years imprisonment term".***

From these wording it is very clear that the Appellant was found guilty of the offence of rape as charged and was sentenced to serve 7 years. But there is no conviction found in these words. This omission violates section 235 and 302 (2) of the Criminal Procedure Act which provides:

> ***"235 (1) After hearing arguments and points of law (if any), the judge shall pronounce a judgment in the case.***
>
> ***(2) if the accused is convicted, the Judge hear the accused on the question of sentence, and then pass sentence on him or her according to law".***

On the other hand, section 302 (2) provides:

> ***"In the case of conviction the judgment shall specify the offence of which, and the section of the Penal Act or other law under which, the accused person is convicted and the punishment to which he is sentenced".***

These provisions provide that hearing of the accused on the sentence should be preceded by conviction and then followed by sentence. Conviction, therefore, is one of the ingredient of the judgment and when it is missing the Court of Appeal in numerous

occasions have returned the file to the trial judge or magistrate to rectify that error Just to mention few examples:

1. ***Khamis Rashad Shaaban*** V ***DPP*** , Criminal Appeal No. 184 of 2012
2. ***Shaaban Iddi Jololo*** V. ***Republic*** , Criminal Appeal No. 200 of 2006
3. ***Degratius Mlowe*** V. ***Republic***. Criminal Appeal No. 269 of 2014

In the present case I have no hesitation in remitting the file back to the RM s Court for rectification of the error, but there is one issue which needs to be determined first. This issue is with respect to the charge-sheet. Both counsels have concurred that there is a problem regarding the date of the incident in the charge-sheet. The Charge sheet in the particulars of offence reads:

> ***"IDDI RASHID KONGOJOLA: Siku ya tarehe 24 mwezi Agosti mwaka 2013 majira ya saa 12.00 jioni huko kiwengwa Wilaya ya Kaskazini "B" Mkoa wa Kaskazini Unguja ulimbaka Stela Yona miaka 8 Mmeru wa Kiwengwa Gulioni jambo ambalo ni kosa kisheria"***

The charge-sheet was prepared on 25.9.2013 and was admitted in Court in 26.9.2013. The prosecution called six witnesses; four (PW1, PW2, PW3 and PW5) testified that the incident took place in 24.9.2013 The only witness who said the incident took place on 24.8.2013 is PW4. Similarly, the PF3 which was admitted in Court showed that the offence was committed on 24 9 2013 and the medical officer who examined the victim filled the PF3 on the same day 24.9.2013 Therefore, the only explanation of the variance of dates is that there is an error in the charge-sheet. The date should read 24.9.2013 instead of 24.8.2013. Now, the issue for determination is this error fatal and whether it affects the proceedings before the trial court.

The learned RM was aware of this error and on pg 23 of the proceedings, he wrote:

> ***"When I was writing this judgment I find that, it is true there is confusion of dates, some read 24/8 and some 24/9/2013, so the problem was either August or September. Two witnesses PW4 Rajab and PW6 Salum and the charge mention and show 24/8/2013, while other four witnesses mentioned 24/9/2013. Accused was***

brought to court on 26/9/2013 and the charge was signed on 25/9/203 at police/court. For me I have taken the error as a human error, unless otherwise, and I concentrate much on the contents and evidence of the case".

With due respect to the learned RM this is not a simple error which can be brushed off so easily. Charge-sheet is the important document which initiates the criminal proceedings. The importance of the charge-sheet cannot be over-emphasised. One basic requirement of a fair trial in criminal cases is to give precise information to the accused as to the accusation against him. In the criminal trial the charge-sheet is the foundation of the accusation and every care is taken to see that it is not only properly framed but evidence is only tendered with respect to matters put in the charge-sheet and not the other matters. The Criminal Procedure Act No. 7 of 2004 has provided guidelines to be followed in the framing of the charge-sheet; they are contained in section 162 to 165.

But failure to follow these guidelines is not fatal unless there is prejudice caused to the accused. Section 394 provides:

"*394.(1) Subject to the provisions hereinbefore contained, no finding, sentence or order passed by a court of competent jurisdiction shall be reversed or altered on appeal or revision on account -*

(a) Of any error, omission or irregularity in the complaint, summons, warrant, charge, proclamation, order , judgment or other proceedings before or during the trial or in any inquiry or other proceedings under this Act;

(b) N/A

Unless such error, omission, or irregularity has in fact occasioned a failure of justice.

The object of this section is to prevent failure of justice when there is some breach of the rules in the formulation of the charge. In order to decide whether the error or omission has resulted in a failure of justice the court should have regard to the manner in which the accused conducted his defence and to the nature of the objection.

R.V.Kelkar's Criminal Procedure, 3rd edn. (1997) on pg 286 said that:

> "***The mere omission to frame a charge or a mere defect in the charge is no ground for setting aside a conviction. Procedural laws are designed to sub serve the ends of justice and not to frustrate them by mere technicalities. The object of the charge is to give an accused notice of the matter he is charged with. That does not touch jurisdiction. If the necessary information is conveyed to him and no prejudice is caused to him because of the charges, the accused cannot succeed by merely showing that the charges framed were defective. Nor could a conviction recorded on charges under wrong provision be reversed if the accused*** was informed of the details ***of the offences committed and thus no prejudice was caused to him".***

Ratanlal and Dhirajlal in the Code of Criminal Procedure, 19th edn., (2013) also wrote:

> ***"Omission to frame a charge (S.246(1)) or any error, omission or irregularity in the charge including any misjoinder of charges will be a ground for a retrial, it has occasion a failure of justice".***

The position in Tanzania can be illustrated by the case of ***Nizareno Kihanga*** V. ***The Republic*** Criminal Appeal No. 12 of 2012 decided in 2016. The Court of Appeal was faced with the issue of defective charge-sheet. The Court referred to various unreported previous decision of the Court of Appeal such as:

1. ***Charles Mlinde*** V. ***Republic***, Criminal Appeal No. 270 of 2013
2. ***Abdalla Ally*** V ***Republic***, Criminal Appeal No 235 of 2013
3. ***Marekano Ramadhani*** V. ***Republic***, Criminal Appeal No. 202 of 2013
4. ***Kestory Lugongo*** V. ***Republic***, Criminal Appeal No. 251 of 2014
5. ***David Halinga*** V ***Republic***, Criminal Appeal No. 12 of 2015

The Court of Appeal was of the view that since the appellant was tried on a defective charge-sheet, he did not receive a fair trial. The defective charge sheet unduly prejudiced the appellant.

In the present case we have to determine whether the Appellant was prejudiced by that error or using the word used in section 394 whether the error has occasioned a failure of justice. In determining this we have to look on how the Appellant conducted his defence. On pg. 28 of the proceedings the Appellant testified as follows:

> ***"I know that I am before this court charged with two offences, rape and abduction. It was on 24.8.2013 when it is said I commit this offence. I know this girl whom I am said I commit this offence. Where I was working and their house is only one house in between.***
>
> ***On the said day I was at Mabaoni, I was going to the beach to look for my friend Miko – the Masai but I didn't see him, it was about 5.30 pm I meet with this girl at Mafarasi where I ask her and greet her, when I saw a group of people surrounding me. Mafarasi is a place where I live. We meet at the road, I ask her where she was coming from. I was beaten, my clothes were torn and then they tell me to go at Bondeni, but I refuse...".***

The way the Appellant defended himself, this Court is of the view that he knew what were the charges against him and who was the victim involved in that incident, and he narrated how they met. Therefore, this Court is of the view that the Appellant was not

prejudiced by that error in the date appearing in the charge-sheet and that error was, therefore, curable under section 394.

I now return to the previous concern raised by DPP that the Appellant was sentenced without being convicted. Having already made a finding, I hereby quash the judgment of the trial court and I set aside the sentence thereof. The file is remitted to the RM's Court for rectification of the error, and he is directed to compose a proper judgement in conformity with the directions of sections 235 and 302(2) of the Criminal Procedure Act. In the meantime, the appellant shall remain in custody pending finalisation and delivery of the judgment of the RM's Court.

It is so ordered.

COURT:

The judgement was delivered in chambers on this 24.4.2017 in the presence of Appellant and his advocate Mr. Dickson and Mr. Samwel and in the presence of Mr. Khamis Juma for DPP.

(Sgd) ABDUL-HAKIM A. ISSA

JUDGE

24/4/2017

COURT:

The right of appeal is explained.

(Sgd) ABDUL-HAKIM A. ISSA

JUDGE

24/4/2017

I Certify that this is a true copy of the original.

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YESAYA KAYANGE

DEPURTY REGISTRAR

HIGH COURT-ZANZIBAR

/HALLY/