IN THE HIGH COURT FOR ZANZIBAR

HOLDEN AT VUGA

CRIMINAL APPEAL NO.14 OF 2016

FROM CRIMINAL CASE NO.53 OF 2012

DIRECTOR OF PUBLIC PROSECUTIONS... ... APPELLANT

VERSUS

NASU KASSIM CHANDE ... ... RESPONDENT

JUDGEMENT

The Respondent, Nasu Kassim Chande was charged with the offence of incest by male contrary to section 160 (1) and 160 (2) of the Penal Act No. 6 of 2004 of the Laws of Zanzibar. The Regional Magistrate Mwera, (Hamisa S. Hemed (RM)) acquitted the appellant under section 219 of the Criminal Procedure Act No. 7 of 2004. The DPP being aggrieved with the order of acquittal appealed to this Court in Criminal Appeal No. 14 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 Jazaa Siasa Haji, a woman aged 20 years who was living at Muyuni "C" in the Southern District of Zanzibar with her biological mother and a step father who is the Respondent in this appeal. The Prosecution alleged that in November 2011 at about 1.30 pm while every person in the house was asleep the Respondent approached the bed of Jazaa Siasa Haji who was sleeping in the sitting room with his two brothers. He took off Jazaa's undergarment and had sexual intercourse with her. The respondent was arrested and charged with the offence of incest by male.

In this appeal the Appellant was represented by learned State Attorney, Ms. Sara Omar Hafidh and the Respondent was represented by learned advocates, Mr Rajab A. Rajab, and Mr. Jambia S. Jambia. The Appellant filed a memorandum of appeal which contained three grounds of appeal as follows.

1. That the learned Regional Magistrate erred in law and fact by not taking into consideration the evidence of identification given by PW2.
2. That the learned Regional Magistrate erred in law and fact by relying on the evidence of alibi given by the Respondent against the requirements of law.
3. That the learned Regional Magistrate erred in law by failing to interpret correctly section 160(1) and 160(2) of the Act No. 6 of 2004.

The learned State attorney argued the grounds of appeal seriatim. She started with the first ground of appeal and she took us to line 5 on page 5 of the proceedings. She submitted that there are three things in this page. First is the closeness between the Respondent and the victim who used the words "he slept on me", and this in fact is what has awakened her. The victim and Respondent were step father and step daughter. They are close related and the incident happen at zero distance. This shows the possibility of the victim understanding the Respondent though it was night. Second, there was also a communication, when the victim wanted to shout, the Respondent told her he would do something to her. The Respondent's voice is not strange to her. Third, there was an issue of time. The incident took place at 1.30 pm when the people were asleep, and there was no possibility of somebody entering the house. Ms. Sara submitted that it was the Respondent who committed the act, as the victim could easily recognise the Respondent. She cited the case of ***Fadhil Gumbo alias Malota & 3 Others*** V. ***Republic*** [2006] TLR 50 where the Court of Appeal held that identification of name cannot be faulted. She added that there was no need in this case for identification parade as the accused was well known to the victim.

Mr. Rajab, on the other hand, does not agree that there was proper identification or the identification was water tight. He submitted that the incidence took place at night. PW2 did not explain clearly that there was light and it was not mention the time they were together. PW2 also did not say that she recognised him by his voice. He submitted that the Court has already said that voice identification is not reliable. Further, PW2 awoke

from her sleep, and she was sleeping with two boys who could also do such a thing. He cited the case of ***Rashid Seba*** V. ***Republic*** Criminal Appeal No. 95 of 2005 (Unrep.) where the Court on page 8 said if there is no enough light a person can honestly believe, but can be mistaken. PW2 was required to explain how she identified the accused and that the act was committed at Muyuni "C".

With respect to the second ground of appeal, Ms Sara submitted that the learned RM mislead herself in the concept of alibi. On page 19 of the proceedings the Respondent claimed to be in Paje and not Muyuni on the material day. But this defence was raised while giving his defence. She argued that although the duty of proving the criminal case is on the prosecution, but the duty of proving what is on the defence is on the Respondent. She said section 188(1), (2) and (3) of Criminal Procedure Act lays down the provisions regarding alibi. Notice has to be given before the hearing of the case, or before the close of prosecution case, and subsection (3) provides that the court may accord no weight on that defence. She cited the case of ***Mwita s/o Mhere & Ibrahim Mhere*** V. ***Republic*** [2005] TLR 107 where the Court of Appeal defined the term judicial discretion. The Court in this case exercised the discretion without basing it on the guidelines. She did not provide reasons for basing her decision on alibi. In addition, she added that the prosecution were expected a witness would have been brought to corroborate his alibi. She cited the case of ***Sijali Juma Kocho*** V. ***Republic*** [1994] TLR 206 where the Court of Appeal held that prior notice of defence of alibi is required under the law, and the accused is expected to bring a person he was with.

Mr. Rajab, on the other hand, submitted that the court is not barred to consider the defence of alibi. Again, he cited the case of ***Rashid Seba*** (supra) at page 11 where the Court of Appeal said the court should not ignore the defence even if defence of alibi is not disclosed. Mr. Rajab added that the learned RM did not base her decision on alibi, even the charge-sheet does not show the date of incidence, or the time when the act was committed contrary to section 165 (f) of the Criminal Procedure Act which says the charge should be clear on the date and time. He submitted that the decision of the learned RM was based on section 160 which mentioned daughter, and step daughter is not included.

With respect to the third ground of appeal the learned State Attorney submitted that the term incest has been defined in Oxford dictionary as sexual intercourse of near relation.

It has also been defined in Black's dictionary as the sexual relation between family members or close relatives including children related by adoption. She submitted that section 160(1) used the words "any male person", "female person" and "daughter" which have not been defined in the Act, but plain English it applies to any men. She added that section 3 of the Criminal Procedure Act gives a room to the Court to look at the other common law jurisdiction when our law is silent. She referred to the ***Journal of Criminal Law and Criminology*** on page 323 and referred to the US case of ***Target*** V. ***State*** which explained that intercourse between father and step daughter amount to incest even after the death of the mother.

She submitted that this is the position in the common law and even in Kenya where in the offence of incest step daughter has been added as well as adopted children She concluded that the reason for criminalising incest is to protect members of the family particularly women, and hence, the contribution of the Court is very crucial in this matter. He quoted Lord Denning in ***Parker*** V. ***Parker*** when he said "if we don't do anything which has never been done before we will get nowhere". She also referred to the case of ***C 7884 D/Cpl Juma Msiwa & E 3479 DC Mataba Matiga*** V. ***Republic*** [2000] TLR 147 where the Court held that when there is a gap in the codified law resort should be made to the common law. She prayed that this appeal should be allowed, the decision of RM should be quashed and the Respondent should be convicted and sentenced according to law.

With respect to this ground of appeal, Mr. Rajab argued that the learned RM did not err in interpreting the law. The definition of daughter is clear that she is an offspring of a person; they are blood related. There is a difference between daughter and step daughter. Mr. Rajab added that in this case the charge-sheet is defective as one of the ingredient of the offence of incest under section 160(1), which is knowledge, was missing in the charge-sheet. There is no evidence that he knew that it was his daughter. He cited the case of ***Isidori Patrice*** V. ***Republic*** Criminal Appeal No. 224 of 2007 (Unrep.) where the Court of Appeal talked about the necessary ingredient of the offence. He added that section 160 talks about daughter which means blood-related daughter and does not include step daughter. There is no iacunae in this provision, and the legal system here is different with that of USA. Hence, he urged this Court not to consider the US decision. He prayed that this Court should dismiss this appeal.

Ms. Sara on her reply she submitted that a step daughter is derived from a daughter. Regarding the charge-sheet she submitted that it mentioned that the incident took place in November 2011. The charge-sheet is very clear and it shows that the Respondent had intercourse with a daughter of his wife, which means he knew it was his daughter. The victim was sent to the doctor and it was confirmed that there was intercourse. She submitted each case has its own merit, and the case of Waziri Amani is different with this case in hand, which has peculiar matters which made the victim identify the accused. With regard to alibi she submitted that the RM looked at all issues in reaching her decision. She reiterated her prayers.

In determining this appeal, this Court will start with the third ground of appeal which is centred on the issue of interpretation of section 160 and also will determine the issue of whether the charge sheet is defective or not. To start with section 160 (1) and (2) provides:

> *"160. (1) Any male person who has carnal knowledge of a female person, who is to his knowledge his granddaughter, daughter, sister or mother, is guilty of a felony, and is liable to imprisonment for a term not less than twenty-five years.*
>
> *Provided that if it is alleged in the information or charge and proved that the female person is eighteen years of age or below, the offender shall be liable to imprisonment for life.*
>
> *(2) it is immaterial that the carnal knowledge was had with the consent of the female person.*

The object of this provision is to criminalise the sexual intercourse of people having close relationship, or to use the words used in section 158 (1) of the Mainland Penal Code "the prohibited sexual intercourse". In our society sexual intercourse in a particular degree of relationship is totally prohibited and any person who engaged in such sexual intercourse is offending not only the law but also the morals of our society. It is something which is abhorred and not tolerated. that is why consent is immaterial for the

commission of this offence. This means even when people consent to it they will still be liable for punishment under our Penal Act.

The degree of prohibited relationship is found in section 160(1) and 160(3). It is an offence for a male person to have carnal knowledge of a female person knowing that she is his granddaughter, daughter, sister or mother. Also it is an offence for a female person to allow a male person to have a carnal knowledge of her knowing that he is her grandfather, father, brother or son. It is submitted that the words used: "granddaughter, daughter, sister or mother, grandfather, father, brother or son" are inclusive and they represent not only one person but a class of relationship falling into that category. For instance, sister includes full sister, half sister as well as step sister. Similarly, the word ***"daughter"*** includes biological daughter, step daughter as well as adopted daughter. To interpret otherwise would bring moral degradation in our society and in my view that was not the intention of the legislature. For instance, to exclude an adopted daughter or step daughter, it would mean a father can have consentual sexual intercouse with his adopted daughter or step daughter above the age of minority without attracting any criminal sanction. This would bring havoc in our society.

This Court is of the view that the learned RM erred in her interpretation that the step daughter was not included in the word daughter. The word daughter is inclusive of people falling into that category of prohibition who are biological daughter, step daughter as well as adopted daughter. The learned RM should have taken inspiration from section 162 which provides:

> ***"162. In section 160 and 161 the expressions "brother" and "sister", respectively, include half-brother and half-sister, and the provisions of the said sections shall apply whether the relationship between the persons charged with an offence and the person with whom the offence is alleged to have been committed is or is not traced through lawful wedlock.***

This provision though dealt with words "brother and sister" but it shows that the words used are inclusive of people falling into that particular class or category. This section went further and recognised even people born out of lawful wedlock. A daughter or sister born out of wedlock is recognised as a daughter and sister and any sexual

intercourse with her would amount to incest. Therefore, the third ground of appeai has merit and the learned RM erred in that regard.

With respect to the offence of incest by male, carnal knowledge, and knowledge that a female person is his granddaughter, daughter, sister or mother are the essential ingredients of the offence. If a male person has carnal knowledge of a girl who is a minor, the offence committed is rape. But if at the time of having carnal knowledge of her he knows that it is his granddaughter, daughter, or sister, then it would be an incest by male. Hence, knowledge is the essential ingredient of this offence. Mr. Rajab has argued forcefully that this ingredient was missing in the charge-sheet filed against the Respondent. I found it wise to reproduce the particulars of offence as they are in the charge-sheet filed by DPP on 12.10.2010. it reads:

> ***"NASU KASSIM CHANDE kwenye mwezi wa Novemba 2011 huko Muyuni "C" Unguja, ulimwingilia kimwili Jazaa Siasa Hassan, miaka 20 mshirazi wa Muyuni C ambae ni mtoto wa mke wako wa ndoa na kumsababishia kupata ujauzito jambo ambalo ni kosa kisheria".***

After reading the particulars of offence, there is no doubt in my mind that the word "knowledge" or "***knowingly***" has been omitted in the particulars of offence, and I agree with Mr. Rajab on this. Mr. Rajab went further and said the charge-sheet does not show the date of the incidence and the time the act was committed, and this offends section 165(f) of the Criminal Procedure Act. This Court again agrees with Mr. Rajab that the charge-sheet just mention November 2011, it was not specific on the date and time. But the issue for determination here is what is the effect of this omission.

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".

Kelkars added that :

> ***"Of course the rules should and ought to be punctually observed. But judges and magistrate are fallible and make mistakes and the question what is to be done in the exceptional class or case in which there has been a disregard of some express provisions... some irregularities vitiate the proceedings and some do not. In the end it all narrows down to this: some things are illegal that is to say, not curable because the code expressly make them so; others are struck down by the good sense of judges who, whatever expressions they may use, do so because those things occasion prejudice and affect their sense of fair play and justice".***

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, if it has occasioned a failure of justice".***

Our jurisdiction is also teaming up with authorities regarding defective charge To mention few:

1. Mussa Mwaikunda V. Republic [2006] TLR 387
2. Mohamed Muumin Mussa V. Republic [2004]TLR1
3. Oswald Abubakar Mangula V. Republic [2000] TLR 271
4. Republic V. Titus Petro [1998] TLR 395
5. Ahmada Mussa Ntimba & another V. Republic [1998] TLR 268.
6. Isidori Patrice V. Republic Criminal Appeal No: 224 of 2007 (Unrep.)
7. Nizareno Kihanga V. The Republic Criminal Appeal No. 12 of 2012 (Unrep.)

The Court of Appeal in ***Mussa Mwaikunda*** V. ***Republic*** [2006] TLR 387 quoting with approval the case of ***Regina*** V. ***Henley*** (2005) NSWC CA 126 held that there must be

minimum standards which have to be complied with if an accused person is to undergo a fair trial. These standards are:

a) To understand the nature of a charge;

b) To plead to the charge and to exercise the right to challenge;

c) To understand the nature of the proceedings, namely, that it is an inquiry as to whether the accused committed the offence charged;

d) To follow the course of the proceedings;

e) To understand the substantial effect of any evidence that may be given in support of the prosecution, and

f) To make a defence or to answer the charge.

Hence, a charge sheet is the important document in this perspective and has to clearly specify the offence in which the accused is charged, and the particulars of the offence has to be clear showing the place, and time the offence was committed to enable the accused to answer to that charge and also make a defence

In Isidori case (supra) the Court of Appeal held that:

> ***"it is now trite law that the particulars of the charge shall disclose the essential elements or ingredients of the offence. This requirement hinges on the basic rules of criminal law and evidence to the effect that the prosecution has to prove that the accused committed the actus reus of the offence charged with the necessary mens rea... We take it as settled law also that where the definition of the offence charged specifies factual circumstances without which the offence cannot be committed, they must be included in the particulars of the offence".***

In this case the Appellant was charged with attempted rape and in the charge-sheet the word "threatened" which was an essential ingredient of the offence was missing. The Court quoted the Mwaikunda case which dealt with identical issue and held:

> "*.... it is interesting,to note here that in the above charge sheet the particulars or statement of offence did not allege anything on threatening which is the catchword in the paragraph.*
>
> *The principle has always been that an accused person must know the nature of the case facing him. This can be achieved if a charge discloses the essential elements of an offence. Bearing this in mind the charge in the instant case ought to have disclosed the aspect of threatening which is an essential element under paragraph (a) above. In the absence of disclosure it occurs to us that the nature of the case facing the appellant was not adequately disclosed to him. The charge was, therefore, defective in our view".*

After having found that the charge-sheet is defective what would be the fate of this case. In ***Isidori case*** the Court followed the path taken in the ***Mwaikunda case*** and held that: a charge which did not disclose any offence in the particulars of offence was manifestly wrong and could not be cured under section 388 of the Criminal Procedure Code (the equivalent of our section 394 of the Criminal Procedure Act)

In Nazareno case (supra) which was decided in 2016, the Court of Appeal was again faced with the issue of defective charge-sheet. The Court referred to various unreported previous decisions 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. Hence, the key in the determination of the case of this nature is to look on whether the accused had a fair trial and whether the accused was prejudiced by the omission, error or irregularity in the charge-sheet.

But the importance of framing a proper charge sheet is not a duty of a prosecutor alone, even Magistrates have the duty to see that the charge sheet is properly framed. The Court of Appeal in ***Oswald Abubakar Mangula*** V ***Republic*** [2000] TLR 271 on page 276 emphasised on the compliance to section 129 of the Mainland Criminal Procedure Act, 1985, which reads:

> ***"129. Where the magistrate is of opinion that any complaint or formal charge made or presented under section 128 does not disclose any offence, the magistrate shall make an order refusing to admit such complaint or formal charge and shall record his reasons for such order".***

The Court of Appeal in strong words said:

> ***"We wish to remind the magistracy that it is a salutary rule that no charge should be put to an accused person before the magistrate is satisfied, inter alia, that it discloses an offence known in law. It is intolerable that a person should be subjected to the rigours of a trial based on a charge which in law is no charge. It should always be remembered that the provisions of section 129 of the Criminal Procedure Code are mandatory".***

Unfortunately, in our Criminal Procedure Act, 2004 we do not have a similar provision like section 129. But it is submitted that this is a sound practice and should be followed by all magistrates. In addition, section 218 of our Criminal Procedure Act, 2004 emphasises on the above sound practice. It provides:

> ***"218.(1) Where, at any stage of a trial before the close of the case for the prosecution, it appears to the court that the charge is defective, either in substance or form, the court may make such order for the alteration of the charge either by way***

of amendment of the charge or by the substitution or addition of a new charge as the court thinks necessary to meet the circumstances of the case.

This provision emphasises that an order for alteration of the charge by way of amendment, substitution or addition of a new charge may be made at any stage of a trial before the close of the case for the prosecution if it appears to the court that the charge is defective, either in substance or form. The words "at any stage of a trial" include the beginning of a trial when the charge sheet is lodged in Court. Hence, the magistrate has to scrutinise the charge at the beginning and during the trial to see if it is not defective. Once he finds it defective he can allow alteration of the same.

From the above decisions of the Court of Appeal, the Court of Appeal has been categorical that the Court should refuse to admit a charge which does not disclose the offence, and if a charge which does not disclose an offence is admitted the trial becomes a nullity. It is also clear that when an essential ingredient of the charge-sheet is omitted, the charge-sheet is incurably defective and the Court would not have to look on whether or not the accused was prejudiced by such omission. Section 394 will kick in only when there are minor irregularities in the charge-sheet. In the upshot, this appeal ought to be dismissed on this ground alone without canvassing the remaining two grounds of appeal. I therefore, dismissed this appeal.

It is so ordered.

(Sgd) ABDUL-HAKIM A. ISSA

JUDGE

9/1/2017

COURT:

This judgment was read in Chamber on this 9.1.2017 in the presence of Ms. Sara Omar for the Appellant and in presence of Mr. Rajab A. Rajab for the Respondent.

(Sgd) ABDUL-HAKIM A. ISSA

JUDGE

9/1/2017

COURT:

The right of appeal was explained.

(Sgd) ABDUL-HAKIM A. ISSA

JUDGE

9/1/2017

I certify that this copy is true from the original.

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YESAYA KAYANGE

DEPURTY REGISTRAR

HIGH COURT ZANZIBAR.

/HALLY/