

IN THE HIGH COURT OF TANZANIA

AT DODOMA

(APPELLATE JURISDICTION)

DC CRIMINAL APPEAL NO. 20 OF 2017

(Original Criminal Case No. 321 of 2016 of the District Court of Kondoa at Kondoa)

PAULO HANGO@ MAJENGO.....APPELLANT

VERSUS

THE REPUBLICRESPONDENT

JUDGMENT

25/07/2017 & 04/08/2017

A. MOHAMED, J.

Paulo Hango was convicted on his own plea of guilty to the charge of rape contrary to section 130 (1) and 131 of the Penal Code (Cap 16 RE 2001) by the Kondoa District Court and sentenced to life imprisonment.

Against both against both conviction and sentence he now appeals on 7 grounds that can be consolidated into the following two;

1. That his plea was equivocal
2. That the charge sheet was defective

Briefly stated, the prosecution alleges on 14/12/2016 at about 18: 00 hours at Mlalo Village, the appellant had carnal knowledge of one Dorica Julius aged 8 years.

At the hearing, the unrepresented appellant relied on his grounds in the appeal in support thereof.

In reply to the 1st ground, Ms. Magesa for the Republic resisted the appellant's complaint that his plea was equivocal. She said when the charge was read over to him at the trial court, he pleaded that;

"It is true I raped Dorica Julius a child aged 8 years"

And again when the facts of the case were read over to him he said:

"All the facts stated before this court are true to the best of my knowledge"

Counsel submitted further that since the appellant did not object to the admission in evidence when the prosecutor tendered his cautioned statement, she was therefore of the view the appellant's plea was unequivocal.

In his 2nd ground, the Republic's counsel agreed the charge sheet did not provide the proper subsection and paragraph that the accused was charged of. However, she argued since the charge was read over as well as the facts of the case which he understood

completely, he fully understood the nature of the charge facing him. She went on to say, in his cautioned statement, he had also confessed to committing the crime. Counsel contended that section 132 of the Criminal Procedure Act (Cap 20 RE 2002) requires the section of the law an accused person is charged with to be stipulated as well the particulars of the offence. In view of the shortcoming in the charge sheet, she urged this court to substitute the offence of rape with the lesser offence of grave sexual abuse contrary 138 C (2) (b) of the Penal Code as the accused knew the nature of the offence facing him and he was not prejudiced in any way.

In rejoining, the appellant simply said he leaves the court to decide since he was beaten by the police and was told to plead guilty to the charge.

I have heard well the parties and reviewed the lower court's record and will now mull over the appeal.

In regard to the 1st ground, I am in agreement with the learned counsel the appellant's plea was unequivocal as he had pleaded guilty to the charge when it was read over to him as well had admitted to the facts of the case when they were read over to him. Consequently this ground falls.

I now turn to the 2nd and last ground complaining the charge sheet was incurably defective. Before I proceed to consider the

ground, I find it pertinent to reproduce the relevant part of the charge sheet. It reads:

TANZANIA POLICE FORCE

CHARGE SHEET

OFFENCE SECTION AND LAW:- Rape contrary to section 130 (1) and 131 of the Penal Code Cap 16 VOL. 1 of the laws, R.E. 2002

Section 132 of the Criminal Procedure Act Cap 20 RE 2002 provides:

"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.

Again, section 135 of the Criminal Procedure Act (CAP 20 R.E. 2002) gives the mode in which offences are to be charged. Paragraph (a)

(i) (ii) and (iii) is of particular relevance to the instant case which I reproduce as under:

(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;"

(Emphasis supplied.)

The Court of Appeal had occasion to consider the import of the above provision in the unreported case of *Juma Mohamed v R*, Criminal Appeal No. 272 of 2011 where Msoffe, JA (as he was then) on behalf of the court said;

"It is clear from the above provisions that a statement of offence should describe the offence and

should contain a reference to the section of the enactment creating the offence. After the statement of the offence then the particulars of the offence should be set out.

The above charge sheet has three shortcomings. First, while it is true that the statement refers to Section 130 it is also true that the section has also made classification of circumstances under which a male person could be said to have committed the offence of rape. The classifications are five of them as set out under Section 130 (2) (a) to (e). From the way the statement in the charge sheet was framed it is not known under which of those classifications or categories of rape the appellant is alleged to have committed. At best, from the facts and the rest of the particulars, one can only guess that since the victim was under the age of eighteen years the offence fell under Section 130 (2)(e) which in this case ought to have

been read together with Sub-section (3) thereof which provides for life imprisonment for the offence of rape to a girl under the age of ten years.

Third, as stated above, Section 130(2) has classified five circumstance or instances of rape. One of the instances of rape is Section 130(2) (e) which is the subject of discussion in this case. That being the case, it was imperative that the statement of offence should have also included Section 130 (3) which provides for the sentence to be imposed where one commits an offence under Section 130(2) (e)."

In the light of the statement in the above case, two issues are discerned; **first** the charge in the present case was incurably defective for failing to lay out the precise paragraph under subsection (2) of section 130 that the appellant was charged with; **secondly** it was also imperative that the statement of the offence should also have included section 130 (3) which provides for the sentence when one commits an offence under section 130 (2) (e) of the Penal code. Paragraphs (a) to (e) in section 130 (2) enumerate five situations where a male person may be charged with the offence depending on which particular circumstance fits the case. I

am content in the instant case, the appellant could not have fully understood which particular offence he was charged with. I therefore find merit in this ground and sustain it.

Another irregularity was the prosecution's failure to prove the victim's age since this was a statutory rape offence. As was said in the unreported case of *Ramadhani Jumanne v Republic*, Criminal Appeal No. 587 of 2015, CAT at Dodoma;

"The cited provision of the law makes it mandatory that before a conviction is grounded in terms of section 130 (2) (e) there must be tangible proof that the victim was under 18 years at the time of the alleged offence"

In my considered view, it was not sufficient for the prosecution to simply aver in the charge sheet the victim was aged 8 years at the material time or rely on the appellant's plea of guilty to the charge by stating he had raped a child of that age; it was obliged to prove the victim's age through evidence.

Before I part with this appeal, I wish to ponder on the respondent counsel's invitation to this court to consider substituting the offence of rape with the lesser one of grave sexual abuse contrary to 138 C (2) (b) of the Penal Code on the premise the appellant knew the nature of the offence facing him and he was therefore not prejudiced in any way. I think this is an alluring argument but after reflection I think it is not grounded in law. I

suppose this option would be open where the relevant section of the law in a charge sheet that was apt but the evidence proved the commission of a lesser offence.

In the final, I find merit in this appeal. I quash and set aside all the proceedings, conviction and sentence in the trial Court. I order that the matter be remitted to the trial District Court for a trial *de novo*. For the avoidance of doubt, the prosecution will be free to amend the charge in a manner it will deem fit with the possibility of taking into account the provisions of sections 130 (2) (e) and 130 (3) of the Penal Code.

It is so ordered.



A. MOHAMED

JUDGE

04/08/2017

The right of appeal explained.



A handwritten signature in black ink, appearing to read "A. Mohamed".

A. MOHAMED

JUDGE

04/08/2017