IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
(IN THE DISTRICT REGISTRY OF ARUSHA)
AT ARUSHA
CRIMINAL APPEAL NO. 52 OF 2017

(Originating from Kiteto District Court Criminal Case No. 96/2016)

EZEKIEL ROBERT..... 1st APPELLANT

EDWARD WILSON..... 2ND APPELLANT

VERSUS

THE REPUBLIC.....RESPONDENT

JUDGMENT

24/9/2018 & 2/11/2018

MZUNA, J.:

EZEKIEL ROBERT and **EDWARD WILSON** were charged in the District Court of Kiteto at Kibaya with two counts, the first one was for Rape C/S 130 (1), (2) (e) and 131 (1) of the Penal Code, Cap 16 R.E 2002; and another count was for Conspiracy C/S 384 of the Penal Code. **EZEKIEL** was convicted for both counts and was sentenced to 30 year's imprisonment with twelve strokes of the cane and seven years respectively, the sentences which were ordered to run concurrently.

On the other hand, **EDWARD** was convicted on the second count which they were jointly charged with one **STELLA AINEA** who moved scot-free. Consequently, he was sentenced to seven year's imprisonment.

Aggrieved they have appealed to this court on the following grounds: -

1. *That, the trial District Court erred in law and fact in convicting and sentencing the appellant while the facts before him did not prove beyond reasonable doubt the offence which the appellant was (sic) charged.*
2. *That, the District Magistrate erred in law and fact by relying upon the hearsay evidence that Doctor failed to conduct test to examine the victim as she was on her days.*
3. *That, the trial District Magistrate erred in law and in fact when he failed to consider the appellants defense which was never contradicted.*
4. *That, in his judgment, the trial District Magistrate failed to evaluate the evidence before him, and thus failed to state the facts that were proved by the prosecution.*
5. *That, the trial District Magistrate erred in law and in fact in failing to consider the fact that the 1st appellant was mutual agreed (sic) by the said victim or complainant to have sexual intercourse with her free consent.*

Before me the appellants appeared in person unrepresented while Respondent/ Republic was represented by Mr. Kombe, the learned State Attorney.

The first appellant argued his grounds of appeal jointly. He said that this case was not a Rape case. PW1 Winnie David and himself had opted to do sex after paying her some money. It was for payment of Tshs 20,000/= as consideration, that he was to ejaculate but after his attempt to do so she refused and removed his penis alleging that she was in her days. He said he paid her Tshs. 5,000/= (Five Thousands) the rest was to be paid latter. It was his argument that, although the witness denied to have consented that was the way she wanted to frame up her case. There was no evidence showing that she raised an alarm.

He further argued that, he was convicted for Conspiracy. The evidence from PW1 did not prove the offence he was convicted with, even the witness who was a relative of Stela Vero never came to testify. PW2 alleged that he had a nondo. However the same was not tendered in Court. Even PW1 alleged that he possessed a screw driver which was not tendered in Court. He said, the Doctor never testified in Court. He could have clarified whether

she was raped or that she was within her period. He prayed for this appeal to be allowed.

The 2nd Appellant's argument was that he was convicted and sentenced to 7 year's imprisonment allegedly that he conspired to this offence, he said, there was no evidence showing that, he conspired with the 1st Appellant. He prayed for the Court to set aside the judgment and the imposed sentence.

In reply thereto, Mr. Kombe, the learned State Attorney supported the conviction and sentence. His argument was that after going through the evidence and that of PW3, there is no doubt that the 1st appellant raped the victim. That there was a collusion. Further that ex-parte opinion is not binding so the absence of the Doctor is only slight omission so long as there is the evidence of the victim.

In his quick rejoinder, the 1st appellant insisted that the victim consented and that can be seen even in her evidence that is why she never raised an alarm for help.

The second appellant had nothing more to add in rejoinder.

Issues for determination are:-

First, whether the charge was defective, if so what are the consequences?

Second, if the first issue is answered in the negative, whether the charge was proved to the required standard of proof? Alternatively, if it is answered in the positive, whether the second count had been proved to the required standard of proof?

Third, whether the appeal should be allowed?

Let me start with the first issue. A close scrutiny of the record shows that the first appellant was charged under section 130(1) 2 (e) and 131 of the Penal Code -:

1st count for the 1st accused person:-

Offence, section and Law

Rape contrary to section 130 (1) (2) (e) and 131 (1) of the penal code Cap 16 R.E 2002.

Statement of the offence

Ezekiel S/O Robert charged on 1st day of September 2016 at about 23:15hrs at Soweto Matui Village within Kiteto District in Manyara Region did have carnal knowledge with one WINI D/O DAVID a girl of 23 years without her consent.

From the charge sheet it is clear that the statement of the offence contradicted with the particulars of the offence in the sense that, the

statement of the offence shows that, the first appellant was charged with statutory rape while the particulars of the offence describes that he raped the girl aged 23 years without her consent.

The law is settled. It is mandatory requirement under section 135 of the CPA that a charge sheet should describe the offence and should make reference to the section of the law creating the offence. Section 135 (a) (ii) of the CPA provides that:-

> " *the statement of the offence shall describe the offence shortly in ordinary language avoiding as far as possible the use of the 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.***" (Emphasis mine).

In the instant case the first appellant was charged with section 130(1) (2) (e) and 131 (1) of the Penal Code although trial Magistrate purports to make reference to the description under section 130 (1), 2 (a) and 131 (1) of the Penal Code.

Section 130(1) (2) (e) of the Penal Code refers to Statutory Rape not Rape for an adult as the particulars purports to say so. The charge was

therefore defective and therefore the appellant was not given opportunity to understand the nature of the charge he was facing. Where a charge is defective as in our case, the first appellant must have been prejudice thereby.

In the case of **Abdalah Ally v. Republic**, Criminal Appeal No 253 of 2013 (unreported), the Court of Appeal held that:-

> *".....being found guilty on a defective charge based on a wrong and/or non-existent provision of the law, it cannot be said that the appellant was fairly tried in the court below. In view of the foregoing shortcoming, it is evident that the appellant did not receive a fair trial. The wrong and/or non citation of the appropriate provision of the penal code under which the charge was preferred, left the appellant unaware that he was facing a serious charged of rape."*

In the instant case the appellant was convicted notwithstanding the fact that the reference made to the law creating an offence contradicted with the particulars, this was prejudicial to the appellant. It was held in the case of **Shaban Rahis v. R,** Cr. Appeal No. 207 of 2015 CAT at Mtwara (unreported) at page 5 that:-

"It is now settled that a person accused of an offence must know the nature of the charge facing him as per a principle of a fair trial. The prosecution and the trial court are duty bound in making sure that the charge against the appellant is correct before the commencement of the hearing."

The charge was defective and therefore not curable under section 388 of the Criminal Procedure Act, Cap 20 RE 2002. The defects are so substantial to the extent of depriving the appellant a right to know the gist of the charge. He could not therefore make his defence properly. The first count is bound to fail. The first issue is answered in the positive, the charge was defective

I revert to the second count of Conspiracy. The relevant provision S. 384 of the Penal code reads:-

"Any person who conspires with another to commit any offence, punishable with imprisonment for a term of three years or more, or to do any act in any part of world which if done in Tanzania would be an offence so punishable, and which is an offence under the laws in force in the place where it is proposed to be done, is guilty of an offence, and is liable if no other punishment is provided, to imprisonment for seven years or, if the greatest punishment to which a person convicted of the offence in question is liable is less than imprisonment for seven years, then to such lesser punishment.

That provision was interpreted in the case of **John Paul @ Shinda and Another vs The Republic,** Criminal Appeal No 335 of 2009, CAT at Tanga, unreported, where it was held that:-

> ***"...conspiracy is an offence consisting in the agreement of two or more persons to do an unlawful act, or to do a lawful act by unlawful means. So, unless two or more persons are found to have combined to do the act there can be no conviction..."***

(Emphasis mine).

So for the offence of conspiracy to stand there must be evidence to show that the appellants had prior arrangements to commit an offence. Reading from the prosecution evidence there are a lot of doubts as to whether the appellants had prior arrangements. I resolve the doubt in favor of all the appellants.

That being the case, both the Charge of Rape and that of Conspiracy are bound to fail. The appeal is allowed. I quash the conviction and set aside the sentence against all the appellants. They should be set at liberty unless otherwise lawfully held. Order accordingly.

HIGH COURT OF TANZANIA

M. G. MZUNA,

JUDGE.