IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

AT TABORA

CRIMINAL APPEAL NO. 122 OF 2019

(Original Criminal Case No. 71 of 2016 of the District Court of Urambo at Urambo)

DEUS BARNABAS @ SILVANUS ..... APPELLANT

VERSUS

REPUBLIC ..... RESPONDENT

JUDGMENT

KIHWELO, J.

The Judgment in this matter was reserved by my late brother, Bongole, J, who unfortunately did not live to compose it. Consequently, the record has been re-assigned to me.

The background to this appeal is briefly that the appellant **DEUS BARNABAS @SILVANUS** was arraigned for the offence of Rape Contrary to sections 130 (1) (2) (e) and 131 (1) of the Penal Code Cap. 16, RE. 2002 (Henceforth "the Penal Code") before the District Court of Urambo at Urambo in Criminal Case No. 71 of 2016.

Briefly the prosecution case which was found credible by the trial court was that on the fateful day the 27th day of March, 2016 at or about 20:00HRS at Mwangaza Village within Urambo District in Tabora Region the accused ***DEUS S/O BARNABAS @ SILVANUS*** did have sexual

intercourse with a girl one **XY** aged 09 Years. When the accused was called upon to answer the charge read against him he denied the charge and also in his defence he denied to have raped the victim. In a bid to prove its case the prosecution called four (4) witnesses and at the end of the trial court the accused was found guilty convicted and sentenced to thirty (30) years imprisonment.

Aggrieved, the appellant presently seeks to overturn the decision of the trial court through a petition of appeal which is comprised of six points of grievance, namely;

1. *That, the case for the prosecution was not proved against the appellant beyond reasonable doubt.*
2. *That, the trial magistrate erred when convicted the appellant without noting that the offence of Rape was recorded in the charge sheet to have committed (sic) at 20 hours but the victim of rape did failed (sic) to say how she identified the appellant at night.*
3. *That, the law was not adhered to when taking the evidence of the victim of rape PW3, and PW4 in that voire dire test was poorly conducted.*
4. *That, the medical report, PF3 (exh. P1) was wrongly admitted and acted upon by the trial court as the same was not read out in court to reveal its content to the appellant.*
5. *That, the extra judicial statement was useless, as the guidelines for the justice of peace were not complied with.*
6. *That, the judgment of the trial court was not qualified by a standard to evaluation of the body of the evidence on record but also there is no consideration of the defence case, no reasons were given as to*

why the prosecution evidence was held prove the guilty of the appellant.

At the hearing before this Court, the appellant was fending for himself, unrepresented, whereas the respondent Republic had the services Mr. Miraji Kajiru learned State Attorney.

Mr. Kajiru supported the appeal on the grounds that, the charge sheet to which the appellant stood charged was defective because, he was charged with Rape c/s 130 (1) (2) (e) and 131 (1) of the Penal Code but the particulars of the offence indicates that the victim was aged 9 years so the charge sheet ought to read Rape c/s 130 (1) (2) and 131 (3).

He forcefully submitted that by virtual of Section 135 (2) (a) of the Criminal Procedure Act Cap 20 R.E 2002 (Henceforth "CPA)) the law requires a charge to be precise so as to enable the accused to prepare his defense and since the charge sheet was defective there was no fair trial before the trial court on the part of the appellant. To buttress further his point Mr. Kajiru referred the Court to the decision of the Court of Appeal in the case of **Elisha Mussa v. R,** Criminal Appeal No. 208 of 2016 CAT at Tabora (unreported) where the Court of Appeal faced with more or less similar situation like in the instant case emphasized that the charge sheet is an integral part of the case and therefore allowed the appeal due to defectiveness of the charge. He finally strenuously argued that this appeal falls squarely in the same footing.

Mr. Kajiru argued further that, there was another anomaly before the trial court as documentary exhibits were not read in court after admission.

He referred this court to the case of **Robinson Mwanjisi vs R [2003] TLR 218**.

Having read the brief submission by the learned State Attorney I agree entirely with him that the charge sheet is defective. The learned State Attorney submitted correctly, that the charge sheet lacks the necessary particulars to enable the appellant to give his defence. The charge sheet had to be drawn in compliance with the law in particular sections 132 and 135 (a) the CPA and the second schedule to the CPA which provides the mode in which offences are to be charged. As to what a charge sheet should contain, paragraph (a) (i) and (ii) states very clearly that a charge sheet should describe the offence and should make references to the section of the law creating the offence.

A charge sheet is the foundation of the trial, it is the principle of law that the charge sheet must indicate specific provision of the law contravened otherwise it becomes defective. The defect pointed out by Mr. Kajiru is fundamental it cannot be cured under section 388 of the CPA, it renders the whole trial a nullity.

I am decidedly at one with the learned State Attorney's submission that the appellant was not properly tried for and rightly convicted in view of the glaring defect in the charge which cannot be cured under section 388 of the CPA. This position has long been settled by the Court of Appeal in number of cases and to mention a few is **Nelson Mang'ati v. The Republic**, Criminal Appeal No. 346 of 2017 (unreported), **Abdallah Ally v. The Republic**, Criminal Appeal No. 253 of 2003 (unreported) and **Antidius Augustine v. The Republic**, Criminal Appeal No. 89 of 2017

(unreported). It is pertinent to refer to what the Court of Appeal observed in the case of **Abdallah Ally** and **Antidius Augustine** which was quoted with approval from the case of **Mang'ati** (supra) in which the Court observed that:

> *"...being found guilty on defective charge based on a wrong and/or non-existent provision of 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 in court. The wrong and/or non-citation of the appropriate provisions of the Penal Code under which the charge is preferred, left the appellant unaware that he was facing a serious charge of rape.."*

Next for consideration is the complaint by Mr. Kajiru to the effect that exhibit P1 the PF3 was not read in court after admission contrary to the requirement of the law as it was emphasized in the case of **Robinson Mwanjisi (supra)** that all documentary exhibits admitted in court must be read out. Upon traversing the court records in particular page 5 of the typed proceedings exhibit P1 was not read in court after admission and this deprived the accused the opportunity of appreciating the evidence tendered in court and this omission constituted a serious error amounting to miscarriage of justice and constituted a mistrial. There is a plethora of legal authorities in this matter. In the case of **Jumanne Mohamed & 2 others v Republic**, Criminal Appeal No. 534 of 2015 (unreported) where the cautioned statement was not read after admission the Court of Appeal held that after a document is cleared for admission and admitted in evidence, it should be read out to the accused person to enable him

understand the nature and substance of the facts contained therein. The same position was held in the case of **Manje Yohana & Another v Republic**, Criminal Appeal No. 147 of 2016 (unreported).

Given a plethora of authorities on the point some of which have been discussed above, I am of the considered opinion that the omission constituted a fatal irregularity. I thus expunge exhibit P1 from the record. Having expunged from the records exhibit P1 the victim's PF3 what remains on record is not sufficient enough to prove the prosecution's case beyond reasonable doubt and therefore warrant conviction.

That said and done, I find the appeal with merits and consequently I allow it. The appellant's conviction is quashed, the 30 years imprisonment sentence is set aside with order of immediate release of the appellant from prison unless lawful held in on other cause.

P.F. KIHWELO

JUDGE

10/12/2020

Judgment to be delivered by the Deputy Registrar on a date to be fixed.

P. F. KIHWELO

JUDGE

10/12/2020

Date: 17/12/2020

Coram: Hon. B.R. Nyaki, Deputy Registrar

Appellant: Present in person

Respondent: Absent

B/Clerk: Grace Mkemwa, RMA

Court:-

Judgement delivered this 17th day of December, 2020 in the presence of the Appellant but in absence of the Respondent.

Right of appeal explained.

B.R. NYAKI

DEPUTY REGISTRAR

17/12/2020