IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

AT TABORA

DC. CRIMINAL APPEAL NO. 37 OF 2018

(*Original Criminal Case No. 240 of 2016 of the District Court of Nzega at Nzega*)

SAIMON S/O SADO @ MADUKA.....APPELLANT

VERSUS

REPUBLIC .....RESPONDENT

JUDGMENT

Date 26/07-13/08/2021

BAHATI,J.:

The appellant **SAIMON S/O SADO @MADUKA and KABULA GUKILA** together appeared before Nzega District Court where they were charged with the offence of conspiracy to induce rape contrary to section 149 of the Penal Code Cap. 16 [R. E. 2019]. The first accused person was also charged with another offence of rape contrary to sections 130(2) (a) and 131(1) of the Penal Code, Cap. 16 [R. E. 2019]

The particulars laid in the charge was to the effect that on 16th day of August, 2016 at or about 15hrs at Nzega District Ndogo within Nzega in Tabora region fraudulently and with pretence the accused persons did

conspire to induce a victim name withheld for dignity purpose a girl of 16 years to make sexual intercourse with the first accused Sado Maduka where the first accused unlawfully had sexual intercourse with the victim. It is on record that the appellant denied the allegation that was laid in the charge.

The prosecution, therefore, paraded five witnesses including the victim. It was PW1 evidence that the co-accused person DW2, Kabula Gukila followed PW1 on her way and told her that she had a problem at her home and therefore they had to go together. That while at home place of the 2nd accused person told PW1 that the 1st accused person was looking for a woman to marry and therefore PW1 was to talk to the 1st accused Sado Maduka. The 1st accused person told PW1 that he was looking for a woman to marry. PW1 asked the 1st accused person why he did not go to their home place and replied that he was in love with her, he wanted to take her to his home place. When PW1 wanted to go out of the house, DW1, the 1st accused person pulled her and removed her T-shirt and skin-tight and took her to the room where he thrown her on the bed and removed her underwear, and raped PW1, the victim went home and reported the incidence to her mother.

The appellant gave his defence after the trial court determined the matter, at the end of the trial the District Court of Nzega was fully convinced that the prosecution had proved its case beyond reasonable

doubt and convicted the first accused, Sado Maduka, whereas Kabula Gukila was acquitted.

Aggrieved, the appellant paraded four grounds against the conviction and sentence as follows:-

1. *That, I didn't commit the alleged serious offence as established by the crown witness during the trial. Furthermore, I pleaded not guilty to the charged offence.*
2. *That, learned trial resident magistrate wrongly convicted me because the charge sheet was defective for not disclosing which category of rape the appellant was charged with, please refer to the case of* ***Michael Martini Katibu VS. Republic Criminal Appeal No. 2018 OF 2012 (CAT) (Unreported), Elias Deodidas vs Republic. Criminal Appeal No. 259 OF 2012 (CAT) Tabora Registry (Unreported) and Thomas Elias VS Republic Criminal Appeal No. 32 of 2012 (CAT) Tabora Registry Unreported,*** *(Emphasis Supplied).*
3. *That the learned trial resident magistrate erred on point of law and fact for failure to observe that the prosecution side did they failed to discharge their noble duties to file the charges correctly, those presiding over a criminal trial, this was held in the case of* ***Mohamed Kaningo Vs Republic (1980) T.L.R No. 279*** *on the instant case the prosecution side has failed to be extra careful to*

satisfy itself that the charge laid down was correct the conviction of the appellant was injustice at all. (emphasis is mine).

4. *That the trial court contravened section 135 (a) (i) (ii) of the Criminal procedure Act, Cap. 20 [R.E. 2019]. My lord Judge, it is a mandatory requirement under section 135 (a) (i) (ii) of the Criminal Procedure Act, Cap. 20 [R. E 2019], That the charge sheet should describe the offence and should make reference to the section of the law creating the offence. In the instant case, apart from the non-compliance with Section 135 (a) (i) (ii) of the Act for not being clear as to the classifications or categories of the offence of Rape alleged against the appellant rendered the charge sheet defective and may have been curable under Section 388 (1) of the Criminal Procedure Act Cap 20 [R. E 2002]. Please refer to the case of Isumba Huka vs. Republic, Criminal Appeal No. 113 of 2002 (Unreported) and in the case of* ***Thuway Akonaay Vs Republic (1987) T.L.R. No. 93****.*
5. *That, from the above grounds of appeal I therefore humbly pray that this appeal be allowed conviction and the meted sentence of thirty (30) years in goal be quashed out and order to my immediate release from the prison wait forthwith. Lastly, I wish to be present at the hearing of this appeal. That is all.*

The appellant also prayed to this court on an additional supplementary petition of appeal as follows;

1. *That, the prosecution case was not proved against the appellant beyond reasonable doubt as required by the law.*
2. *That, Section 130 (1) (2) (a) of the Penal Code Cap 16 [R. E 2002] which the appellant was charged, tried, and convicted of, requires the victim of the offence to be the age of 18 years, which in this case it was not established by evidence.*
3. *That, the learned trial magistrate did not address her mind to the inconsistency in the testimonies of PW1 and PW3 regarding the issue of penetration which the essential ingredient of the offence of rape is a requirement by section 130 (4) of the Penal Code, Cap.16 [R.E 2019] while PW1 testified that the appellant inserted his penis in her vagina, PW3 though exhibit P1 did not see evidence of penetration save typical sexual assault which is not synonymous without rape.*
4. *That exhibits P2 and P3 were made upon expiry of the time prescribed by section 50 and 51 of the Criminal Procedure Act, Cap. 20 [R. E. 2019].*
5. *That, the testimony did not in her defence, does not come anywhere close to the rape of PW1 by the appellant.*
6. *That, the prosecution did not summon the person who arrested the appellant to shade light whether his arrest had any connection with the commission of the offence. This more so considering that*

the appellant in his defence told the trial that he was arrested in connection with the offence of stealing.

During the hearing of this appeal, the appellant appeared in person, while Mr. John Mkonyi, learned State Attorney appeared for the Respondent.

The appellant in his submission urged this court to adopt the memorandum of appeal and additional grounds of appeal and prayed for the respondent to begin first.

In his submission, the learned State Attorney objected to the appeal and submitted that the 1st ground of appeal does not suffice to be called the ground of appeal. Hence has no merit.

On the 2nd, 3rd, and 4th grounds with leave of the court, he submitted them collectively since they rest on a charge sheet. He submitted that the charge sheet is not void although he conceded that section 135 (a) i, ii of the Criminal Procedure Act, Cap. 20 [R. E. 2019] has stated clearly that;

(ii) the statement of the 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".

Although the State Attorney conceded with the position of law he submitted that the charge sheet which is at issue started with two counts. The 1st charge was for both accused persons that are conspiracy to induce rape contrary to section 149 of the Penal Code, Cap.16, and the second count was for rape contrary to sections 130(2)(a) and 131(1) of the Penal Code, Cap 16 against the appellant. The co-accused person was then acquitted.

He acknowledged that it is true on the statement of the charge sheet on the offence of rape and the charge sheet did not show the category of the offence. He further submitted that upon reading section 130 (2) (a) it explains the circumstances but the category of rape was not there. He admitted that there was improper categorization which was wrongly placed.

He vehemently stressed that since the victim was 16 years old, the proper section was Section 130 (2) (e) of the Penal Code, Cap. 16. The proper categories were Section 130 (2)(e) and not Section 130 (2)(a). Apart from those irregularities, there was no citation of section 130 (1) of the Penal Code and this was not in the statement of offence. Still, he submitted that the absence of subsection has not prejudiced the appellant as it does not create offence of rape. The proper citation was section 130 (2) a- e that is where the offence of rape is created. Therefore, it was his submission that, absence of that (1) did not

prejudice the appellant to understand which offence and which category of offence he was charged with.

He also contended that the victim PW1, was 16 years and PW2, Pilly Mhoja on her evidence explained that the victim was born in 2000. Therefore, the appellant knew that he was alleged for the offence of statutory rape. He further submitted that on 6/10/2016 the appellant was informed of his alleged offence and had knowledge. There is no dispute that he knew and the proper citation was Section 130(2)(e). The absence of a proper section had not made him not understand the offence.

The defect on the charge sheet did not prejudice the right of the appellant and this is curable under Section 388 (i) of the Criminal Procedure Act, Cap. 20.

He contended that in the most recent case of **Chobaliko Sospeter V Republic, Criminal Appeal No.218 of 2016, CAT, Tabora** on page 6 where the court held that,

> *"The omission to cite paragraph (a) to section 130 (2) of the Penal Code did not in any way prejudice the appellant as he knew the charge he was facing as indicated in the particulars of the offence. In terms of section 388 of the Criminal Procedure Act, Cap.20 the defect was curable.*

On the supplementary grounds of appeal, he submitted that on the 1st ground the case was proved beyond reasonable doubt. He submitted that the evidence which convicted the appellant was that of PW1, the victim explained what happened to her. She explained how DW1 raped her. She informed her parents and she was admitted to the hospital for 3 days and this evidence was corroborated by PW2, her mother, PW3, and PW5, the doctor. The lower court in its judgment considered the tendered evidence.

Equally, he contended that the Court of Appeal in the case of **Seleman Makumba versus Republic [2006] TLR 376** has set the following principle that;

> *"True evidence of rape has to come from the victim, if an adult, that there was penetration and no consent, and in any case of any other woman where consent is irrelevant, that there was penetration."*

On the 3rd ground of appeal, there was no inconsistency in PW1 and PW3 testimonies. PW1 explained clearly who raped her as depicted in the trial court's records.

As to the 4th ground, exhibits P2 and P3 were made upon expiry of the time prescribed. He submitted that this is an afterthought. He does not see the reason for talking to the 2nd accused who was acquitted since

the lower court did not do trial within a trial; there was inconsistency he prayed that to be expunged from the court record too.

Regarding the 6th ground of appeal, no one among the prosecution witnesses indeed arrested him. He contended that the only issue was whether the appellant was raped. He contended that for the rape to be proved there must be evidence that the victim was penetrated. This ground has no merit because even in his evidence DW1 explained that he was arrested. There is no dispute on the arrest of the appellant. He urged this appeal be dismissed and uphold the decision of the lower court.

In rejoinder, the appellant reiterated his submission in chief.

I have objectively examined the grounds of appeal raised and the submissions by the appellant in support of the same and also considered the submissions made by the State Attorney opposing the appeal. I will only deal with one ground of appeal since it will dispose of the matter.

At the outset, I wish to restate the obvious that, it is the charge sheet that lays the foundation of a trial because the principle has always been that, an accused person must know the nature of the case facing him before making his defence. What constitutes a proper charge was addressed in **Charles s/o Makapi v Republic, Criminal Appeal No. 85 of 2012 (Unreported)** which is pari materia to the case

at hand, the court reiterated that section 135 of the Criminal Procedure Act, Cap.16 imposes mandatory requirements that a charge sheet should describe the offence and make reference to the section and law creating the offence.

In this matter at hand, the appellant was arraigned under sections 130(2) (a) and 131(1) of the Penal Code, Cap. 16. Section 130(2) of the Penal Code, Cap.16 which creates the offence of rape. The issue is whether the defects are curable or not will depend on the circumstances of each case.

In the case of **Alex Medard V Republic, Criminal Appeal No. 571 of 2017, Mkuye J.A**, the Court of Appeal fully subscribed to the stance taken in **Isidory Patrice V Republic, Criminal Appeal No 224 of 2007** when the court was faced with a situation like the one at hand it emphasized that a defective charge is incurable under section 388 of the Criminal Procedure Act, Cap.20 [R.E 2019]. It stated as follows;

> *" A charge which did not disclose any offence is manifestly wrong and cannot be cured under section 388 of the Criminal Procedure Act, 1985" and also in the case of* ***Joseph Paul Miwela V Republic, Criminal Appeal No 379 of 2016 the Court stated that ;***
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> *"On the effect of the flaw in the charge, we agree with Ms. Ngilangwa that it is fatal as it cannot be cured under section 388 of the CPA."*

As alluded to earlier, the appellant was charged with the offence of rape contrary to section 130(2) (a) and section 131 (1) of the Penal Code, Cap. 16. The said section is couched as follows;

2) A male person commits the offence of rape if he has sexual intercourse with a girl or a woman under circumstances falling under any of the following descriptions;

a) Not being his wife, or being his wife who is separated from him without her consent to it at the time of the sexual intercourse.

Therefore as conceded by the respondent, Section 130 of the Penal Code, Cap. 16 has not shown the category of the offence it only explains the circumstances. Hence was wrongly placed.

As it can be seen, the appellant was charged under section 130(2)(a) of the penal code, where it was not indicated in the statement of the offence the specific provision which classifies the circumstances under which the offence of rape was committed, further, it does not show the category of rape committed by the appellant. Though the State Attorney cited the Case of **Chobaliko supra**, I am aware of section 135(a) (ii) of the Criminal Procedure Act, Cap.20 which requires the statement of offence to have correct reference of the section which creates the particular of the offence.

The importance of indicating the specific provision of the law is to enable the accused to understand the nature of the offence he stands

charged and be able to prepare an informed defence that will guarantee a fair trial.

This position was stated in the case of **Jackson Venant V Republic, Criminal Appeal No. 118 of 2018** where Wambali, J. A in a similar case held that;

> *"We need to emphasize that in any criminal trial, a charge is an important aspect of the trial as it gives an opportunity to the accused to understand in his language the allegations which are sought to be made against him by the prosecution. It is thus important that the law and section of the law against which the offence is said to have been committed must be mentioned and stated clearly in the charge..."*

Guided by the authorities cited above with due respect, I differ with the learned State Attorney for the Respondent that the defect of the charge in the present appeal is curable.

Since this ground suffices to dispose of the appeal in the event, this resulted in an unfair trial on account of an incurably defective charge sheet. I allow the appeal, I hereby nullify the entire proceedings and judgment of the trial court, further quash the conviction, and set aside the sentence meted out against the appellant. The appellant is set at liberty unless lawfully held.

Order accordingly.

A. A. BAHATI

JUDGE

13/8/2021

Judgment delivered under my hand and seal of the court in chamber this 13th day August, 2021 in the presence of both parties.

A. A. BAHATI

JUDGE

13/8/2021

Right of appeal fully explained.

A.A. BAHATI

JUDGE

13/8/2021