IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(MOSHI SUB REGISTRY)

AT MOSHI

CRIMINAL APPEAL NO. 25 OF 2022

(C/F District Court of Moshi in Criminal Case No. 201 of 2020)

NESTORY STEVEN @ MUNISHI..... APPELLANT

VERSUS

REPUBLIC..... REPONDENT

JUDGMENT

Last order: 24/04//2023

Date of Judgemet:22/05/2023

MASABO, J.:-

This is a first appeal from a conviction and a sentence passed against the appellant by the District Court of Moshi in Criminal Case No. 201 of 2020. The record shows that, the appellant was charged and convicted of gang rape contrary to section 131A (1) and (2) of the Penal Code, Cap 16 R.E. 2019. The particulars of the charge were that, on 23rd September 2019 at Sambarai area within Moshi District, the appellant and another person still at large, unlawfully had carnal knowledge of the victim, MIMI (pseudo name, real name omitted for concealment of identity) a girl child of 14 years.

To prove these facts, the prosecution paraded 5 witnesses. MIMI, the victim, testified as PW1. Yusta Ignas Ndakidemi, who was with the victim

immediately before the incidence testified as PW2. PW3 was the doctor who medically examined the victim. The victim's mother testified as PW4 and the investigator of the case testified as PW5. The testimonies gathered from these witnesses were that, on the fateful day, 23/09/2019, PW1 in the company of her friends, PW2 inclusive, went to an engagement party at her grandmother's house. At around 22hrs they left and started heading home on foot. Before reaching home, they met the appellant and one Kibabu who is still at large. By then it was between 22:30 and 23:00hrs. Surprisingly, the appellant herein who was well known to PW1 and PW2 as they all lived in the same village, grabbed PW1 by hand, pulled out a knife and threatened to injure her friends if they interfered. Fearful of the incidence, PW2 and her company ran away leaving PW1 in the appellants hands. The appellant took off his shirt and stuffed it into PW1's mouth, lifted and carried her on his shoulder and started walking to an abandoned house with the said Kibabu following them. When they arrived at the house which was in the middle of a shamba, he took off his shorts, undressed her trouser and raped PW1 as Kibabu stood watch. After he had finished, he stood watch as Kibabu also raped PW1. When they had all finished, they walked away leaving PW1 helpless.

Meanwhile, upon being threatened, PW2 and her peers ran to PW1's home where they reported the incidence to PW4 (PW1's mother). Together, they went out searching for PW1 in vain and returned home afterwards. PW1 did not return home until around 4:00hrs to 5:00hrs when she returned with her apparel terribly dirty. She later on narrated the incidence to PW4 who took

her to a ten cell leader and from there, the incidence was reported at a police station and a PF3 was issued. PW1 was taken to hospital for examination where she was examined and found with fresh bruises in her vagina and a conclusion was drawn that she had been penetrated with a blunt object. On his side, the appellant denied commission of the crime but his defence was found unmerited hence the conviction and sentence which he is now appealing against.

In his memorandum of appeal, the appellant has complained that the trial court erred in law and fact by convicting him whereas there were multiple errors namely: *One,* the facts read to him during the preliminary hearing was at variance with the evidence tendered in court during trial. *Two,* the testimony of PW2 and PW4 was inconceivable and highly improbable at it is beyond imagination that PW4 having failed to see her daughter in the middle of the night went home and slept while giving no report to the authorities. *Three*, the appellant was not positively identified as the conditions were not favorable of a positive identification. *Four*, the chargesheet was incurably defective. *Five,* the evidence of PW3, the medical doctor was misapprehended as her testimony suggests that she examined the victim prior to the incident, not after the incidence. *Six,* the prosecution evidence was uncorroborated, weak, tenuous, contradictory, inconsistent, incredible and wholly unreliable. And, *seven,* the charges against the appellant were not proved beyond the reasonable doubt.

Submitting in support of his appeal, the appellant who was self-represented, argued that, the conviction and sentence was lucidly misconceived as it emanated from a fatally defective charge sheet. The provision cited in the charge sheet only provided for punishment. He clarified that as the charge against him was gang rape, the charge sheet ought not only to cite section 131A(1) and (2) of the Penal Code. It ought to have cited section 130 of the Penal Code which specifically provides for rape. The omission to cite such provision rendered the charge sheet incurably defective as it offended section 135(1)(i) and (ii) of the Criminal Procedure Act.

He then submitted that the trial court ought not to have believed the evidence of PW2 and PW4 as they entertain suspicion of what exactly befell the victim. PW2 who was with the victim testified that after the victim had been grabbed by the appellant, she went to report the incidence to the victim's mother and the two of them started to search for the victim in vain. Thereafter they went to sleep while not knowing the whereabout of the victim. It is the appellant's argument that, it is incomprehensible that PW4 went to sleep whereas her daughter was missing. He added that, from PW2's evidence, the incidence started at 22:00 and immediately thereafter, she went to PW4's home and informed her of the incidence but PW4 stated that the incidence happened at around 23:30 and that her daughter returned home at 4:00 to 5:00 thus suggesting the incidence lasted for the whole night.

Further he cited the case of **Halfan Daud vs The Republic**, Criminal Appeal No. 231 of 2019 (HC) where it was held that the evidence of victims of sexual offences should be cautiously applied to rule out the danger of incrimination of innocent persons by untruthful victims. He proceeded that it is therefore incumbent that the testimony of the victim in the present case be cautiously handled taking into account that there were several discrepancies between her evidence and that of other prosecution witnesses. For instance, whereas PW1 and her mother PW4 stated that the incidence happened in the night of 23/9/2019 and that they went to hospital for check up in the morning on 24/9/2019, the doctor who examined PW1 stated that he examined her on 23/9/2019 at 09:29 hours. In the foregoing, he prayed that the court find merit in his appeal, quash and set aside the conviction and sentence and set him at liberty.

In reply, the respondent conceded to the first ground of appeal arguing that indeed there were some discrepancies between the facts read out during preliminary hearing and the evidence rendered during trial but the same is inconsequential as preliminary hearing is not part of the trial as held in **Shaban Said Likubu v Republic**, Criminal Appeal No. 228 of 228 CAT and **Juma Antoni v Republic**, Criminal Appeal No. 571 of 2020, CAT. On the 2nd ground of appeal, it was briefly submitted that it was without merit as the failure to report the incidence to the local authority does not any how flop the prosecution's case. Regarding visual identification which is the 3rd ground of appeal, it was submitted that this too is without merit as there were no chances for mistaken identity. The appellant was positively identified

by PW1 and PW2 to whom he was very familiar. The appellant was a friend to the victim's brother and she recalled that, during the incidence the appellant ordered him not to address him as brother but should address him as 'baby'. It was argued further that the incidence took a considerable time, the case of **Anuary Nangu & Another v R,** Criminal Appeal No. 109 of 2006, CAT was cited in fortification that the appellant was positively identified. On the fourth ground, it was argued that much as it is true that the charge sheet erroneously included the phrase "without consent' to the particulars of the offence, the error is minor and inconsequential as it never prejudiced the appellant. Hence curable under section 388 of the CPA as stated in **Mohamed Koningo v Republic** [1980] TLR 279 and **Jamal Ally Salum v Republic,** Criminal Appeal No. 52 of 2017, CAT.

On the fifth ground it was briefly submitted that it was unfounded. On the sixth ground it was argued that the case against the appellant was proved to the required standards. There were no material inconsistencies between the witnesses. The inconsistencies if any were minor and inconsequential thus should be disregarded as held in **Elia Bariki v The Republic**, Criminal Appeal No. 321 of 2016, CAT (unreported). It was submitted further that the evidence of all witnesses was credible thus, they are entitled to credence and their evidence should be believed as held in **Goodluck Kyando v the Republic** [2006] TLR 363. Lastly, on the seventh ground of appeal, it was argued that the evidence of PW1 as corroborated by PW2, gave a first account of the incidence. Their evidence was best evidence as per section 61 and 62 of the Evidence Act. The case of **Athumani Rashid v R**, Criminal

Appeal No. 264 of 2016 and **Magendo Paul and Another v R** [1993] TLR 218 were cited in support of the argument that the prosecution evidence was more probable and ably proved the case against the appellant.

I have thoroughly read and considered the submission by the parties and the lower court record. As I embark on the determination of the appeal, I prefer to start with the fourth ground of appeal in which the appellant has challenged the competence of the charge sheet. I do so mindful that, a charge sheet is a vital instrument in criminal trials as it constitutes the foundation of every criminal trial (See, **Gerold Moris Hugo vs Republic** (Criminal Appeal No. 204 of 2016) [2017] TZCA 246 (Tanzlii).

Amplifying this ground of appeal during his submission, the appellant has argued and submitted that, the charge sheet on which his charges were preferred had two major anomalies the first being that, the charge sheet cited section 130A (1) and (2) of the Penal Code while it omitted section 130 (1) and (2) of the same law which creates and stipulates the ingredient of rape. The omission, he argued, was a fatal error pregnant with a risk of vitiating the proceedings, conviction and sentence. The second defect complained of, is the inclusion of the phrase 'without consent'. The appellant's complaint is that the victim of the offence was a minor girl of 14 years with no legal capacity to consent to sexual intercourse. The offence of rape against her fell under the purview of statutory rape to which the consent of the victim is irrelevant. The phrase 'without consent' was therefore superfluous and erroneous. The respondent did not respond to the first

point. It conceded to the second sub point while arguing that the defect is a minor one and curable under section 388 of the Criminal Procedure Act, Cap 20 RE 2019 as the appellant was capable of understanding the offence he was charged with and ably entered his defence.

Two questions need be answered in determining this ground that is, whether the charge sheet was defective and if so, whether the defects are fatal and incurable. Answering these two questions requires me to navigate through Section 132 and 135 of the Criminal Procedure Code, Cap 20 RE 2019 which regulate the framing of charge sheet and whose content is hereby reproduced for easy of reference. They state thus;

> **"132.** 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."
>
> "135 (a) (ii) the statement o f 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."

Luckily, these two provisions are not unchartered territories. They have been interpreted and applied in a plethora of decisions in jurisdiction. Thus, there is a plenty of authorities. In **Robert Madololyo & Another vs Republic**

(Consolidated Criminal Appeals 46 of 2019, 428 of 2019) [2020] TZCA 1909 which among such authorities, the Court of Appeal instructively held that:

> The emphasis in section 132 of the CPA is that it provides for a requirement for the offence with which the accused is charged to be specified in the charge or information together with such particulars as may be necessary for providing a reasonable information regarding the nature of the offence (See also **Mussa Mwaikunda v. Republic** [2006] TLR 387). In relation to section 135(2) (ii) of the CPA, the emphasis is that the charge must contain the essential elements of the offence and the specific section of the enactment or the law creating the offence. These requirements are vital so as to enable the accused person to understand the nature of the offence he is facing and thereby prepare his defence (See **Mohamed Koningo v. Republic**, [1980] TLR 279) and **Isidori Patrice v. Republic**, Criminal Appeal No. 224 of 2007 (unreported).

From this authority and similar authorities, it is plain and settled that a State Attorney or prosecutor charged with drafting a charge sheet must observe these guidance else the charge sheet shall become fatally defective and in the event the trial proceeds to finality without any amendment being done to it to cure the defect, the proceedings, conviction and sentence thereto, shall correspondingly become incurably defective. With this in mind, I will now look at the statement and particulars of the charge sheet filed in the trial court to determine the correctness or otherwise of the appellant's lamentation. For easy of reference, I reproduce it below:

STATEMENT OF THE OFFENCE

Gang rape contrary to section 131A(1) and (2) of the Penal Code [Cap 16 R.E 2002].

PARTICULARS OF THE OFFENCE

Nestory Steven @Munishi and another at large on the 23rd day of September, 2019 at Sambarai area within the District of Moshi in Kilimanjaro region did have canal knowledge of one JACKLINE JOHN SHIO a girl child of 14 years of age without her consent"

For better appreciation of the appellant's arguments, I will also reproduce the two provisions cited in the chargesheet. They provide thus;

> 131A.-(1) Where the offence of rape is committed by one or more persons in a group of persons, each person in the group committing or abetting the commission of the offence is deemed to have committed gang rape.
> (2) Subject to provision of subsection (3), every person who is convicted to gang rape shall be sentenced to imprisonment for life, regardless of the actual role he played in the rape.

From the wording of these provisions, it is crystal clear that none of them stipulates the ingredients of rape. All they stipulate is the concept of 'gang rape' and the punishment thereto. Hence the question whether, it was important to cite the provision establishing the offence of rape and whether, its omission amounts to a fatal irregularity capable of vitiating the proceedings, conviction and sentence. The decision of the Court of Appeal in **Robert Madololyo and Another vs Republic** (supra) is once again significant. The appellants in that case were arraigned in the trial court charged with gang rape of a mentally retarded person but, just like in the present case, the chargesheet did not cite the provisions establishing the offence of rape. Resolving the issue, the Court emphatically held that;

Our understanding from the above provisions of the law is that it specifically describes gang rape which is a more serious type of the offence of rape and together with its punishment. As it is, it explains the circumstances under which an offence of rape can be categorised to be gang rape. As such offence of rape cannot stand on its own under this provision without citing any of the provisions under section 130 (1) (2) (a) to (e) of the Penal Code which specifically provide for specific offences of rape. In this regard, it is our considered view that, in the circumstances of this case the charge against the appellants ought to have not only predicated under section 131A of the Penal Code but also under section 130 (2) (a) of the same Code"

It proceeded that;

"That said and done, it is our considered view that, the omission to cite any of the provisions under section 130 (2) of the Penal Code in the charge rendered it to be fatally defective which defect cannot be cured under section 388 of the CPA. It is now a settled law that a defective charge leads to unfair trial to the accused. (See also **Mussa Mwaikunda (supra); Mohamed Koningo (supra); Isidori Patrice** (supra); and **Abdallah Ally v. Republic,** Criminal Appeal No. 253 of 2013 (unreported). In fact, in the latter case to which we subscribe, the Court went a step further and stated as follows: -

"Being found guilty on a defective charge based on a wrong or non-existent provision of the law is evident that the appellant did not receive a fair trial. The wrong and/or non- citation of the appropriate provisions of the Penal Code under which the charge was preferred left the appellant unaware that he was facing a severe charge of rape."

On the strength of this authority, it is obvious that the two questions above attract positive answers. Since the rape was committed against a girl child of 14 years, it was incumbent for the charge sheet to specifically cite section 130(1) and (2)(e) of the Penal Code which carters for similar offences. As this was not done, it is obvious that the charge was fatally defective and the proceedings before the trial court were a nullity for being predicated on a fatally defective charge sheet. The fourth ground of appeal thus succeeds. Given that this ground disposes of the appeal, I see no need to proceed to the remaining grounds of appeal.

Accordingly, I allow the appeal, quash the proceedings of the trial court, set aside the conviction and sentence thereof. I subsequently order the immediate release of the appellant unless he is held for other lawful cause.

DATED and DELIVERED at MOSHI on this 22nd day of May 2023.

J.L. MASABO

JUDGE