

IN THE HIGH COURT OF TANZANIA
(DAR ES SALAAM SUB DISTRICT REGISTRY)
AT DAR ES SALAAM
CRIMINAL APPEAL NO. 60 OF 2022

(Arising from the decision of the District Court of Ilala at Kinyerezi in Criminal Case No.
367 of 2019, before Hon. Mpaze - SRM)

JOSEPH JOEL.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

Date of last Order: 22nd May, 2023

Date of Judgment: 16th June, 2023

E.E. KAKOLAKI, J.

The appellant herein who is still contesting for his innocence was arraigned before the District Court of Ilala at Kinyerezi faced with a charge on two counts of **Incest by Males**; Contrary to section 158(1)(a) and **Unnatural Offence**; Contrary to section 154 (1)(a) and (c) both of the Penal Code, [Cap 16 R.E 2019] [now R.E 2022], tried, found guilty on both counts, convicted and sentenced to 30 years and life imprisonment respectively. During trial the prosecution case was premised on evidence of seven (7) witnesses and one exhibit (PF3 –exhibit P1) to prove the assertion against the appellant that, on diverse dates and time up to May, 2019 at Karakata

area within Ilala District, Dar es salaam region, did have carnal knowledge of his own daughter one RX or PW3 (whose name is withheld to hide her identity), aged 4 years in the first count and on second count that, he had carnal knowledge of her against the order of nature.

Briefly as garnered from the record on the 03/05/2019 the appellant's wife (PW1) had set out to the local government office in response to her husband's call there as the appellant was not feeling okay. When PW1 came back home she found PW3 crying and when asked her as to what went wrong she disclosed that her father had sexually ravished her. And when examined her private parts she noted reddish signs in her anus area, the result of which that information was divulged to PW1's aunt (PW2) and later on to the ten cell leader (PW4) and PW1's sister (PW5) who also on inquiring from the victim as to who perpetrated the crime, she mentioned the appellant. Further to that, PW4 examined her private parties and noted that she was penetrated, before the matter was reported at Sitakishari Police Station, where PW3 was issued with the PF3 and later on examined by the doctor at Amana Hospital (PW7) who established that, PW3 private parts were penetrated as she had her anus torn and the vagina bruised, and later on filled the PF3 which was tendered and admitted in Court as exhibit P1.

On his side the appellant, who was arrested soon after the reporting of crime at police, flatly denied the charges laid against him while claiming to be framed up with the case by PW2 (PW1's aunt) who was unhappy with their marriage, after the appellant had converted his wife (PW1) a Muslim into Christianity. The trial court could not buy appellant's story as it was satisfied that, the prosecution case was proved beyond reasonable doubt against the appellant, thus proceeded to convict him as charged and sentence him accordingly, the decision which displeased the appellant hence the present appeal relying on 10 grounds of appeal. However for the reasons to be apparent soon, I am not intending to reproduce them.

Hearing of the appeal took the form of written submission and both parties complied with the filing schedule of submissions as set out by the Court. In the course of preparation of this judgment, the Court noted some defects in the charge sheet, thus found it apposite to invite the parties to address it on the same, as it is common knowledge that, it is the charge sheet that institutes criminal proceedings. When parties appeared to address the Court on 15/06/2023 both were ready to proceed orally as the appellant had a self-representation, while the respondent enjoyed the services of Mr. Adolf Kisima, learned State Attorney.

It is Mr. Kisima who staged on the floor first and informed the Court that, after perusal of the charge sheet he had noted some defects on both counts. On the first count he submitted, there are some alterations made and signed against by unknown person on 17/07/2019, particularly on the cited date of commission of the offence, which he noted such amendment of charge if any is not reflected in the lower court proceedings. On the second count he said, the place where the offence is alleged to have been committed is not disclosed in the particulars of offence. Despite of those defects Mr. Kisima was quick to argue, the same are curable under section 388 of the Criminal Procedure Act, [Cap. 33 R.E 2022] and therefore did not affect appellant's conviction, thus prayed the Court either to disregard the noted defects and proceed to determine the appeal or in the interest of justice remit the case file to the lower court for retrial of the matter as there is sufficient evidence to prove the charge against the appellant.

On his part lay as he is, the appellant blamed the prosecution for the defects which prejudiced him. He thus invited the Court to allow his appeal and release him forthwith.

I had time to consider both parties submissions, peruse the charge sheet under scrutiny, the proceedings of the lower, impugned judgment and

consult the law related to the essential ingredients of the charge sheet. It is true as submitted by Mr. Kisima the charge is defective. The only remaining nagging question for determination by this Court is whether the charge is incurably defective or the defects can be curable under section 388 of the CPA. To appreciate the issue under consideration, I find it imperative to reproduce part of the charge read out to the appellant in which the trial court based its conviction on. The charge reads:

CHARGE

1ST COUNT

STATEMENT OF OFFENCE

INCEST BY MALES; *Contrary to section 158(1) of the Penal Code, [Cap. 16 R.E 2002]*

PARTICULARS OF OFFENCE

Joseph Joel, *on 6th day on different dates and time up to May, 2019 at Karakata area within Ilala District in Dar es salaam Regon, did have carnal knowledge of his daughter RX, a girl of 4 years.*

2ND COUNT

STATEMENT OF OFFENCE

UNNATURAL OFFENCE; *Contrary to section 154(1)(a) and (2) of the Penal Code, [Cap. 16 R.E 2002].*

PARTICULARS OF OFFENCE

Joseph Joel, on different date and time up to May, 2019 did have carnal knowledge of one RX, a girl of 4 years old against the order of nature.

Dated at Dar es salaam this 15th day of May, 2019.

Sgd:

STATE ATTORNEY

Now moving to the raised issue, it is a requirement of the law under section 132 of the Criminal Procedure Act, [Cap. 20 R.E. 2002] (the CPA) that, every charge sheet must disclose all essential elements of the offence, the object being to enable the accused person understand the nature of the offence facing him and be able prepare and enter an informed possible defence. The section provides:-

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.

Deliberating on the requirement for disclosure of essential ingredients of the offence to the accused person in the charge sheet, the Court of Appeal in the case of **Mussa Mwaikunda Vs. R** [2006] TLR 387, observed, inter alia:-

*"The principle has always been that **an accused person must know the nature of the case facing him. This can be achieved if a charge discloses the essential element of an offence.**" (Emphasis supplied)*

It is now trite law that, essential elements/ingredients of the offence must include particulars of offence sufficient enough to offer reasonable information to the accused with clarity as to place and time of commission of an offence, thing, matter, act or omission referred to therein as provided under section 135(f) of the CPA, the object being to render fair trial to the accused person by enabling him to prepare his defence after being informed of the nature of the offence facing him. This sound principle of law was articulated by the Court of Appeal in the case of **Isidori Patrice Vs. Republic**, Criminal Appeal No. 224 of 2007 (CAT-unreported) where the Court held that:

It is a mandatory statutory requirement that every charge in a subordinate court shall contain not only a statement of the specific offence with which the accused is charged but such particulars as may be necessary for giving reasonable information as to the nature of the offence charged... It is now trite law that the particulars of the charge shall disclose the essential elements or ingredients of the offence. This

*requirement hinges on the basic rules of criminal law and evidence to the effect that the prosecution has to prove that the accused committed the actus reus of the offence with the necessary mensrea. Accordingly, the particulars, **in order to give the accused a fair trial in enabling him to prepare his defence, must allege the essential facts of the offence and any intent specifically required by law.***
(Emphasis supplied)

A close look at the extract of the charge sheet to start with, it is noted in the first count that, the date in which the offence is alleged to have been committed is not clear as it reads "*on 6th day on different dates and time up to May, 2019*". Is noted further as submitted by Mr. Kisima that, the said date **on 6th day** was altered in the charge sheet with signature appended against it dated 17/07/2019, though such alteration is not supported by any prayer and order in the proceedings, thus the date remains intact. With such specification of date while at the same time it is alleged the offence was committed on different dates without mentioning the starting date but rather the ending date, I hold is a defect which goes to the root of the case as it resulted in appellant's unfair trial for want of clarity of the time/date in which the offence is alleged to have been committed, as per the requirement of section 135(f) of the CPA, so as to enable him understand as to when was

he accused to committed the offence and prepare a useful defence. I so hold since the charge is to the effect that, the offence was committed **on 6th day on different dates and time up to May, 2019**, while the evidence adduced by PW1, PW3 and PW4 is at variance with the charge in that the offence was specifically committed on 03/05/2019. Under the circumstances it cannot be concluded that, the charge was proved as there is clear variance between the time and dates mentioned in the charged sheet and the evidence led by the prosecution to prove the offence, the variance which no doubt would have attracted amendment of the charge under section 234(1) of the CPA but the prosecution failed to do so.

More or less similar defect is obtained in the second count where the place in which the offence is alleged to have been committed is not mentioned as well as none disclosure of the time/date in which the offence is believed to have started to be committed. Non-disclosure of such important ingredients of offence of specific time and place, I my firm view goes to the root of the case and no doubt prejudiced the appellant as rightly submitted by him. I so hold as I do not find as how under such confusion on dates/time and the omission to mention the place in which the offence is alleged to have been committed as detailed in the second count, the appellant would been in a

position to comprehend the nature of the offence, prepare and enter an informed defence, since it is a well settled principle of law that, a defective charge leads to unfair trial to the accused. See the case of **Abdallah Ally Vs. Republic**, Criminal Appeal No. 253 of 2013 (CAT-unreported) cited with approval in the case of **Robert Madololyo & Another Vs. R**, Consolidated Criminal Appeals Nos. 46 and 428 of 2019 (CAT-unreported).

It is argued by Mr. Kisima that, the defects of charge under discussion are curable under section 388 of the CPA, hence the same should be disregarded and/or in the alternative the case file be remitted to the lower court to retrial. With due respect I do not buy Mr. Kisima's propositions, as it is already held above that the defects were such offensive to render unfair trial to the appellant, hence affect his conviction as well since variation between the charge and evidence adduced in court is incurably fatal. The same cannot therefore be rescued under section 388 of the CPA. The only remedy for such defects was for the prosecution to amend the charge under section 234(1) of the CPA, in which they failed to do as alluded to above. It is from the above deliberation I am convinced and hold that, appellant's conviction was wrongly arrived at by the trial court, for being premised on defective charge, retrial of the case is not a right cause to be taken under the

circumstances as prayed by Mr. Kisima. This issue disposes of the appeal and in don't see the importance of deliberating on the grounds raised by the appellant.

In the event and for the fore stated reasons, I am satisfied that this appeal is meritorious hence proceed to allow it. The appellant's conviction is quashed and sentence and order meted on him set aside, in lieu of I order for his immediate release from prison unless lawfully held.

It is so ordered.

DATED at Dar es salaam this 16th June, 2023.



E. E. KAKOLAKI

JUDGE

16/06/2023.

The Judgment has been delivered at Dar es Salaam today 16th day of June, 2023 in the presence of the appellant in person, Mr. Adolf Kisima, State Attorney for the respondent and in the presence of Ms. Asha Livanga, Court clerk.

Right of Appeal explained.



E. E. KAKOLAKI
JUDGE
16/06/2023.

