IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

ARUSHA SUB-REGISTRY

AT ARUSHA

CRIMINAL APPEAL NO. 176 OF 2022

(Arising from Criminal Case No. 91 of 2022 from the District Court of Arusha at Arusha)

MELKIORY ERASTO KESSY _____ **1ST APPELLANT**

FADHILI RAMADHAN _____ **2ND APPELLANT**

VERSUS

REPUBLIC _____ **RESPONDENT**

JUDGMENT

21/08/2023 **&** *13/10/2023*

BADE, J.

The appellants herein were arraigned at the District Court of Arusha at Arusha on the offence of gang rape contrary to section 130 (1) and 131A (1) and (2) of the Penal Code, (Cap 16 R.E 2019). Trial Magistrate heard the evidence of both sides and ruled out that the prosecution managed to prove their case beyond the reasonable doubt, found both accused guilty as charged and sentenced them to thirty (30) years in prison.

Aggrieved by the aforesaid conviction and sentence, they lodged the instant appeal on the following grounds:

i. *Trial magistrate erred in law in convicting the appellants on defective charge, comprising improper provision of the offence of gang rape.*

ii. *The trial court erred in law and fact as it based its conviction on insufficient evidence and a case that was not proved beyond reasonable doubt.*

Before going to the merit of this appeal, a review of the contextual background is warranted. It was the prosecution's case that on 27/03/2022 at Adsoni Pub at Daraja Mbili Area within the City, District and Region of Arusha, the appellants jointly and together did have sexual intercourse with one, a woman of thirty (30) years old. The charge was read over and explained to the accused persons in their own words and entered the plea of not guilty to the charge.

During the hearing, the prosecution had a total of three witnesses while on the defense side, the accused persons defended themselves. Afgenia Simon Kessy, (PW1) who was the victim /complainant testified that on night of 27/03/2022 at 09.00 pm, the 1st appellant called her, as they

are familiar with each other through prior acquaintance as she used to sell to him food. She abides the call though she did not respond on time. So, a while after, she follows him at the grocery where he was sitting alone. She asked him what he call her for, he replied that he needs food, she told him that it is only rice remaining with no sauce. PW1 further testified that when the grocery was about to be closed the owner approached him and demanded his money, 1st appellant asked her for TZS 5000.00 but she told him that she only had TZS 3000.00. That the seller of grocery came with motorcycle and the 1st appellant asked her to give him TZS 1000.00, where she acceded. While waiting for the money the owner of the grocery by the name Kamili attacked her by force, she shouted but her shout went unheard because of the loud radio. Kamili forced her to the room, they fought a lot, he left and leave the door open, she left the room and go to the grocery where she found three of them, Kamili hurt her throat, they forced her again to the room. She further testified that she told them she was on her menstruation, but they did not want to hear it, they raped her one after another. Kamili was the first to rape her, followed by 1st appellant and then the 2nd appellant. The victim further testified that they took almost five minutes each of them to finish raping her. Her further testimony was

that she went home and her husband advised her to report to the police, waited until morning when she reported the ordeal to the police and then she went to the hospital.

Further testimony of the prosecution came through Elibariki Samson Kalua who testified as PW2, a medical doctor who stated that on 28/03/2022 he did physical examination on the victim who complained to him about sexual violence. He checked her vagina, her anus and conducted blood test and filed PF3. That victim had signs of being raped by force, she also had pain on her throat and on her thighs. He gave her some medication to prevent HIV and some antibiotic and pain relievers to subdue her painful throat and general body. PW2 further testified that the victim was not comfortable, she had bruises on her throat, on her left side of her head and on her thighs area. It was PW2'S testimony that the victim was on her period, her vagina was reddish in color and she was in pain, while her anus was alright. His further testimony was that reddish appearance indicated that there was a lot of friction by blunt object like a penis, finger or cucumber.

The last witness on prosecution side was WP 2612, Seargent Winifrida who testified as PW3. She stated that on 29/03/2022 he was assigned a file on rape case. The victim told her that the 1st appellant was his

neighbor. On the material day she was at home when the 1st appellant knocked her window, after finishing her house chores she went to him but she did not find him. His neighbor told her that the 1st appellant was at Adson Pub at Daraja Mbili, so she went to Daraja Mbili and found the 1st appellant there. He told her that he needed food, and the victim told him that she only had rice, he begged for money and the victim gave him TZS 1000.00 to Kamili who was the bar attendant, while the victim still on the said pub, Kamili pushed her in the room, the said room had a small four feet bed, where he forced her to remove her clothes so that he can make love to her. That victim tried to escape but Kamili moved from the room and closed the door, and came back with the appellants and started raping her. After they were done raping her, they let her go and on 30/03/2022 she reported the matter to the police station. PW3 further testified that the victim together with the patrolling police went to Daraja Mbili Area, where the victim saw and identified the 1st appellant who was at the shop. They immediately arrested him. Also, it was the 1st appellant who explained to them the place where they could find the 2nd appellant, and they managed to arrest him too. That upon interrogation, the appellants agreed on the material day being on the scene but denied any involvement on commission of the crime.

On the defense side, the 1st appellant testified as DW1, his testimony was to the effect that on the date alleged that the crime was committed he did leave his house on account of being unwell. That on 30/03/2022 when he was at some shop buying something for cooking, one person took him to a waiting vehicle and in it, he found five people, who asked him if he knew the victim, on his positive response, they started beating him and took him to police station where he was locked up.

On the other hand, the 2nd appellant testified as DW3, his testimony was that on the date of incident at 07.00pm he came from his work place and went home. About 08.15pm he went to Blue Pub with his friend, where they had drinks up to midnight and went home to sleep. On 30/03/2022 while at his place of work, two people who introduced themselves as police officers arrested him and took him to the police station.

This appeal was argued viva voce, with the respondent was represented by Ms. Lilian Kowero, learned State Attorney, and the appellants were represented by Mr. Ismail Nimrod Shaluwa, learned advocate. The counsel for the appellants dropped grounds no. 1 and no. 4. So collaring the 2nd ground of appeal, he submitted that section 132 of the Criminal Procedure Act (Cap 20 RE 2022) provided that a charge must have

necessary particulars, statement of specific offences which gives reasonable information as to the nature of offence charged. Mr. Shaluwa's contention was that the appellants were charged and convicted under section 130 (1) and 131A (1) and (2) of the Penal Code (Cap 16 RE 2019), and that there is omission to cite the proper section that creates the offence of gang rape. He added that the proper provision for the particular offence is section 130 (1) (2) (a-e) which creates several distinct categories of rape, but to his dismay, the charge which convicted the appellants did not cite any provision of the subsection (2) distinguishing which of the provision they fall into in the charge.

Moreover, the counsel submitted that the appellants were convicted with incurably defective charge that prevented them from appreciating all of the statutory ingredients of the offence of gang rape making it difficult for the appellants herein then accused, to prepare their evidence. In his opinion, since the charge sheet is the foundation of any prosecution and a roadmap that would direct the accused on which the accused would prepare their defence. He argues that the said non citation of the proper provision of the offence of gang rape denied a fair trial to the accused, causing failure of justice on their part, supporting his position

with the Court of Appeal cases of **Salum Yunusi Ngongoti & 2 Others vs Republic,** Criminal Appeal No. 219 of 2018 and **Mathayo Kingu vs Republic,** Criminal Appeal No. 589 of 2015.

Arguing the 3rd ground of appeal, Mr. Shaluwa submitted that if the charge sheet was incompetent and unsustainable in law as we have submitted, it also meant that the prosecution's evidence lacked the essential facts to prove the offence of gang rape during trial, failing to show any intent by the accused persons. He contends that on page 2 of the judgment, it shows that after the incident, the victim reported the matter to her husband who advised her to report the matter to the police, but the said husband was not called as a competent witness to testify, while acceding himself to the legal position that he is not necessarily compellable, but insisted that in his opinion, this raises some doubt.

Moreover, he points out that there is variance on the evidence on the dates that the matter was reported to police. He pinpoints that the incidence occurred on 27/03/2022, and checked on the hospital on 28/03/2022 but while being examined in chief, PW1 stated that she reported the matter to the police on the same day. He thus casts this doubt in relation to the credence of PW1 as a witness to be believed.

Opposing the appeal, Ms. Kowero responds that they fully support the conviction but not the sentence. While she agrees that there was a non-citation of the section which create the offence of gang rape in that the sections cited are sections 130 (1) and 131 A (1) and (2) of the Penal Code. In her opinion though, the charge sheet is not fatally defective due to the fact that the appellants were not prejudiced by the highlighted non-citation of the proper provisions since the charge sheet availed them with the necessary information, which was enough to have the appellants comprehend the seriousness of the offence that they were charged with.

She argues that the charge sheet showed that the offence was that of gang rape, and had the name of the victim, as well as the place and the date that the offence was committed. More importantly, she reasons that all these particulars were supported by the evidence as adduced by PW1 who was the victim of the offence. Ms. Kowero further retorts that the appellants had prepared their evidence, cross-examined the victim as well put out a defence, and defended themselves, and that is clear in the proceedings. That is to say, they were able to follow properly what was going on in court, and they were not at all prejudiced by the said defective charge. In her firm opinion, the omission is curable under

section 388 (1) of the Criminal Procedure Act, despite the fact that the proper citation should have been **section 130 (1) (2) (a)**. To cement her argument, she cited the case of **Ally Ramadhan Shekiondo and Another vs R,** Criminal Appeal No. 52 of 2017, where it was held that non-citation or citation of an inapplicable section of an offence is curable under section 388 of the Criminal Procedure Act, where the appellant was also charged with gang rape and the section that creates such offence was completely lacking.

Responding to the 3rd ground of appeal, Ms. Kowero was adamant that the case was proved beyond reasonable doubt. She scorns the allegation that the husband of the victim was not called to testify as being meritless as there is no number of witnesses needed to prove a case, bolstering her proposition with section 143 of the Evidence Act, (Cap 6 RE 2022). She insisted that the non-calling of this witness did not flop the prosecution case, as the victim's testimony clarified the ingredients of gang rape including penetration and the lack of consent of the victim PW1 who is an adult.

In response to the question of variance of dates between PW1 and PW3 on pages 11 and 12 of the trial court proceedings, she scorned it as a typing error which cannot be attributed to the import of the testimony

recorded to make the variance doubtful. She contends further that in sexual offences, the victim's evidence is the best evidence, supporting her position with the case of **Seleman Makumba vs R,** (2006) TLR 309. Since PW1 gave evidence on the way the incident occurred, how appellants had sexual intercourse with her without her consent, and how they attacked and carnally knew her forcefully; and there were signs on the victim's body. She added that the said evidence was enough to satisfy the ingredients of the offences that the appellants were charged with.

Supporting her contention that she does not support the sentencing, she argues that the appellants were given an illegal sentence as section 131A (2) subjecting the provision of subsection (3) which provides the punishment of life imprisonment for gang rape, so she, as a matter of law, invites this Court to change the sentence to life imprisonment to comply with the yearnings of the law.

In rejoinder, the counsel for the appellants argues that since the state attorney acceded on there being con citations of the sections on the offence of gang rape, he quickly distinguishes the case of **Shekindo** as cited by the State Attorney **(supra)** as being inapplicable as the case of **Salum Yunus (supra)** that he has made reference to and which was

delivered in February 2021 is the most recent one, making a plea that since the decisions are conflicting, the latest decision should prevail. Mr. Shaluwa insisted that a defective charge is not curable under section 388 of the Criminal Procedure Act., adding that despite the appellants defending themselves, they were defending on something that was not correct.

The counsel further responded to the allegation that the variance in evidence was due to a typing error, the record should testify to these facts, insisting that the variance in dates was not a typing error and had created some doubts.

On the issue of illegal sentence, he acquiesced and proposed that the republic could appeal the sentencing if they felt it was less than what the law provides.

Having gone through the lower court records and the rival submission by the parties, I am tasked to determine, **one,** whether the charge is defective, and if yes, whether it is incurably so; and **two,** whether the prosecution proved the case against the appellant beyond a reasonable doubt.

Addressing the first issue, the appellants' counsel alleges that the appellants were convicted on an incurably defective charge as there was

non-citation of the proper section that creates the offence of gang rape. The formality of preparing charge is governed by sections 132 and 135 (a) (ii) of the Criminal Procedure Act. Section 132 requires that the offence must be specified in the charge with the necessary particulars. Section 135 (a) (ii) provided that a charge must contain the essential elements of the offence and the specific section of the law creating the offence. This is important as it enables the accused to understand the charge against him so that he/she can prepare his or her defence.

In the case at hand, the appellants were charged under sections 130 (1) and 131A (1) and (2) of the Penal Code. As can be seen there is an omission of subsection (2). Now the question is whether the omission to cite subsection (2) prejudiced the appellants, to the extent of preventing them to comprehend the nature and gravity of the offence of gang rape they were facing, causing them to fail to prepare their defence. I am well alive to the fact that a defective charge renders the proceedings and the emanating decision a nullity. However, not every defect on the charge would invalidate the trial. Invalidation would depend on the particular circumstances of each case, the overriding consideration being whether or not the infraction worked to the prejudice of the accused person as it was held by the Court of Appeal in the case of **Charles**

Mkande vs Republic, Criminal Appeal No. 270 of 2013 (unreported). Similarly, in the case of **Jamali Ally @ Salum vs Republic,** Criminal Appeal No. 52 of 2017 (unreported) the Court of Appeal stated:

> *"Where the particulars of the offence are clear and enabled the appellant to fully understand the nature and seriousness of the offence for which he is being tried for, where the particulars of the offence gave the appellant sufficient notice about the date when the offence was committed, the village where the offence was committed, the nature of the offence, the name of the victim and her age, where there is evidence at the trial which is recorded giving a detailed account on how the appellant committed the offence charged, and thus any irregularities over non-citations and citations of an inapplicable provision in the statement of the offence are curable under section 388 (1) of the Criminal Procedure Act, Cap. 20 Revised Edition 2002 (the CPA)".*

In the instant case, as I have already pointed out, there was non citation of subsection (2). However, examining the particulars of the offence in the charge sheet which I will reproduce here for ease of reference:

> *"MELIKIORI S/O ERASTO KESSY @ MAPEE and FADHILI S/O RAMADHANI, on the 27th day of March, 2022 at Adsoni Pub-Daraja*

11 area within the City, District and Region of Arusha, jointly and together did have sexual intercourse with one "AS", a woman aged thirty (30) years".

These particulars left me with no doubt that the appellants were availed of the necessary information to enable them to comprehend the nature and seriousness of the offence. The charge which was read to them was clear enough and pointed to them the date and the place where the offence was committed. It also indicates the nature of the offence that the appellants were facing, and against whom the said offence was committed. These particulars were later supported by the evidence adduced by various witnesses of the prosecution particularly, PW1 and PW3, with PW2 supporting the evidence of PW1. So, I am satisfied that the particulars of the offence were supportive of the evidence, and when taken together, were sufficient to enable the appellants to appreciate the nature and gravity of the offence of gang rape that they were facing.

Further, I am of the considered view that they were not prejudiced by the omission to cite subsection (2) in the statement of offence and such non-citation is curable in terms of section 388 (1) of the CPA. The omitted subsection 2 (a) provides:

A male person commits the offence of rape if he has sexual intercourse with a girl or 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 consenting to it at the time of the sexual intercourse.

In any case, it is my considered view that while it is necessary to consider the rights of the accused when there is a defective charge sheet by omission of an offending section, it is equally important to examine the circumstances under which it could be said the rights of the said accused were violated and causing injustice to them, including their ability to answer the charge, has been impaired, and that should really depend on a vigilant examination of the relevant circumstances.

It goes without saying that any infringement would not be considered in the abstract but in having regard to the circumstances of each case, and how the same have affected the accused / appellants herein. The question is whether the accused's substantive fair trial rights were affected, and that had the inclusion of the omitted subsection been brought to their attention, it would have made a difference as conceivably, they might have advanced evidence to disprove such facts.

Examining the charge sheet, despite the omission of the above particular subsection, it is clear that the charge sheet was not only clear but with enough particulars to sustain the offence of gang rape as charged.

The cases cited by the appellants' counsel are distinguishable from the case at hand. In the case of **Mathayo Kingu** (supra), there was non-citation of subsection (2) (e) of the Penal Code which is important as the victim was a child of tender age, which is not the case here. In the case of **Salum Yunusi Ngongoti and 2 Others** (supra), the distinguishing fact is a complete non-citation of section 130, as opposed to the omission to include subsection (2) in the instant case.

Examining the 2nd issue, it was alleged by the appellants' counsel that, the victim's husband was not called as important witness and this raises some doubts. This point needs not detain the court as it was held by this Court and the Court of Appeal numerous times that in sexual offences the best evidence comes from the victim. The same position was held in the case of **Seleman Makumba vs R, (2006) TLR 309.** So the non-calling by the prosecution of the victim's husband does not at all weaken the prosecution's case as the evidence of PW1 was corroborated by that of PW2, a medical doctor. There is also an allegation of variation on the dates the incident was reported to the police. It is true that PW1

testified that she reported the incident to the police on the morning of 28th March 2022, and after which she went to the hospital as per page 6 of the typed proceedings. This is supported by the testimony of PW2 as per page 7 of the typed proceedings who also stated that he attended to the victim on 28th March 2022. Meanwhile, PW3 stated that after the victim was left to go by the appellants, she reported the matter to the police on the 30th of March, 2022. A close look at PW3's testimony though reveals that she was assigned the file on the case on 29th March 2022 as per page 11 of the typed proceedings. But as she narrates the sequence of the events, it becomes clear that it is on the 30th March 2022 that she as the investigator, went to apprehend the accused, as it would be illogical that she would have been assigned a file on the case without there being a complaint at the police station. In my view, this variation is minor and does not go to the root of the case, but rather it can be attributed to human error.

Before I pen off, there is a concern raised by the learned State Attorney that the sentence of 30 years imposed on the appellants by the trial magistrate was illegal as it is against the law. Punishment for gang rape is provided for under section 131A (2) of the Penal Code. The said section provides:

"131A (2) subject to the 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".

It is clear from the cited provision above that the punishment for gang rape is mandatorily provided by the law that creates the offence itself, which is life imprisonment. The trial magistrate contravened the law by imposing a 30-year sentence, having said so the sentence passed by the trial magistrate is hereby set aside and the appellants are sentenced to life imprisonment. This appeal is dismissed for lack of merit.

It is so ordered.

DATED at **ARUSHA** this **13th** day of **October 2023**

A. Z. Bade
Judge
13/10/2023

Judgment delivered in the presence of the Parties and or their representatives in chambers on the **13th** day of **October 2023.**

A. Z. Bade
Judge
13/10/2023

The Right of Appeal is hereby explained.

A. Z. Bade
Judge
13/10/2023