IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

ARUSHA SUB REGISTRY

AT ARUSHA

CRIMINAL APPEAL NO. 48 OF 2023

(Originating from the District Court of Karatu at Karatu in Criminal Case No. 142 of 2021)

ERASTO SIASI @ SHARO ..... APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

JUDGMENT

20th September & 14th December, 2023

KAMUZORA, J.

The District Court of Karatu at Karatu (the trial court) in Criminal Case No 142 of 2021 convicted Erasto Siasi @ Sharo (the Appellant herein) for the offence of rape and imposed a custodial sentence of 50 years imprisonment. The Appellant was charged under section 130 (1), (2)(e) and 131 (3) of the Penal Code Cap 16 R.E 2019.

The facts reveal that on diverse dated between August, 2021 to 31st October 2021 at Qurus Village within Karatu District in Arusha region, the Appellant did have sexual intercourse with one ZM (name withheld) who will also in this appeal be referred to as the victim or PW1

interchangeably. It was alleged that on diverse date the victim was sexually abused by the Appellant when grazing cattle and sometimes by another young man by the name Samwel when sent out to fetch sand for washing utensils. The trial court was satisfied with the prosecution evidence hence, convicted and sentenced the Appellant as pointed out above. The Appellant is aggrieved by both conviction and sentence hence, brought this appeal armed with eleven grounds of appeal which are hereunder reproduced:

1) *That, the trial court erred in law and fact as it failed to comply with mandatory requirement of section192(2), (3) and (4) of the CPA [Cap 20 R.E 2019] for Preliminary Hearing was not conducted.*
2) *That, the trial court erred in law and fact as it failed to comply with mandatory requirement of section 234(1) of the CPA, for the substituted charge was never read out to the Appellant.*
3) *That, the learned trial court Magistrate erred in law and fact in holding that PW2 (the victim) was a credible witness while her evidence was full of contradictions, uncertainty and incoherent.*
4) *That, the trial court erred in law and fact in holding that PW3 was credible witness while her evidence was full of contradictions, uncertainty and incoherent.*
5) *That, the trial court erred in law and fact for failure to notice that exhibits P1 (PF3) was not properly identified by the witness as it was already in his possession when he prayed to tender it.*

6) *That, the medical evidence of PW4 (Doctor) and exhibit P1 (PF3) worth nothing for it did not prove that it was the Appellant who raped the complainant as his was in contradiction with evidence of PW1.*

7) *That, the trial court erred in law and fact when convicted and sentenced the Appellant by relying on exhibit P1(PF3) which was not read out during trial after being admitted.*

8) *That, the trial court erred in law and fact for failure to notice that this is a fabricated case as the prosecution witnesses mentioned two accused persons and the evidence shows that all accused persons were arrested but the evidence is silent on the other accused person.*

9) *That, the learned trial magistrate erred in law and fact by convicting the Appellant without observing that there was non compliance of section 231(1) of the CPA.*

10) *That, the trial court erred in law and fact when failed to see the contradiction of prosecution witness which should have been resolved in the favour of the Appellant.*

11) *That, the learned honourable Magistrate erred in law and fact to reach to the conclusion that the prosecution proved the case beyond reasonable doubt while there were serious contradictions in prosecution witnesses' testimony.*

Hearing of the appeal was by way of both written and oral submissions whereas; the Appellant's Swahili written submission was adopted to form part of his submission and the Respondent orally responded to the appeal. As a matter of legal representation, the

Appellant appeared in person while Mr. Alawi learned state attorney appeared for the Respondent, Republic.

Before I go to the root of the matter in addressing the grounds of appeal, I will first adjudicate on the issue of the charge sheet that laid the foundation of the Appellant's conviction and sentence before the trial court. In course of perusing trial court records, this court discovered that the Appellant was charged for statutory rape under the provision of section 130 (1) (2)(e) but the particulars of the offence in the charge did not indicate if the victim was a child within the meaning of section 130 (1) (2)(e) of the Penal Code. The charge read: -

> *ERASTO S/O SIASI @ SHARO, on diverse dates between August 2021 up to 31 October 2021 at Qurus Village within Karatu district in Arusha region, did have sexual intercourse with one (ZM)."*

Parties were therefore asked to address this court on the competency of the charge that was laid against the Appellant at the trial court.

The learned state Attorney in addressing this court admitted to the fact that the charge sheet does not indicate the age of the victim. He however contended that the omission is not fatal as the victim is a child and the same was proved by the clinical card which showed the age of the victim. To him, the Appellant was not prejudice by the omission. He thus prayed for this court to regard the age of the victim as proved. The

Appellant informed this court that he was not even aware that the age of the victim was not indicated in the charge sheet. Now the issue is whether the defect in the charge was fatal or not.

Legally, the charge sheet or information is a vital document in a criminal proceeding because it is the foundation of a criminal case. Its purpose is to give information to the accused of clear, unambiguous and precise notice of the nature of the accusation that he is called upon to meet in the course of a trial. For this see the Court of Appeal decision in the case Of **Paulo Apolo Vs. The Republic,** Criminal Appeal No 260 of 2015 CAT at Dar Es Salaam (Unreported). As pointed out above, the trial court record reveals that the Appellant was charged for the offence of rape contrary to section 130(1)(2) (e) and 131(3) of the Penal Code.Section 130 (1) (2) (e) reads: -

> ***130****.-(1) It is an offence for a male person to rape a girl or a woman.*
>
> *(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) to d) N/A*
>
> *e) with or without her consent when she is under eighteen years of age, unless the woman is his wife who is fifteen or more years of age and is not separated from the man.*

Section 131(3) of the penal code that creates sentence of the above offence states that;

> *131(3) "Subject the provisions of subsection (2), a person who commits an offence of rape of a girl under the age of ten years shall on conviction be sentenced to life imprisonment."*

From the wording of the above provisions, it is clear that the section introduces in the elements of the offence, the issue of age. When a person is charged under the above provisions, it become necessary for the age of the victim to be included in the particulars of the offence in the charge sheet to make the accused understand the nature of offence he is facing and the gravity of sentence he is likely to face. Basically, the offence of rape attracts 30 years imprisonment but where the victim is below 10 years old, the punishment is life imprisonment. Thus, apart from citing proper provisions of the law, it was necessary for age of the victim to be included in the particular of offence to make the accused aware of the gravity of offence he was facing.

It is trite law that burden of proof in criminal cases lies on the prosecution to prove the case beyond reasonable doubt. For one to conclude that an offence was proved beyond reasonable, the accused must be properly aligned before the court of law. As previously stated, a charge is an important aspect in trial as it tells the accused precisely and concisely the offence he stands charged. Section 132 of the CPA requires

a charge sheet to contain a statement of 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. The charge to which the Appellant was charged with contain the following particulars: -

"ERASTO S/O SIASI @ SHARO on diverse dates between august 2021 up to October 2021 at Qurus village within Karatu district in Arusha region did have sexual intercourse with one ZM."

As above quoted particulars of the offence only informed the Appellant that he did have sexual intercourse with ZM. The particulars of the offence did not specify if the said sexual intercourse was unlawful and contrary to the law under our jurisdiction. Having sexual intercourse is not an offence in itself unless shown that it was procured unlawfully without consent or to a child whose consent is irrelevant. In my view, the above particulars of offence do not create the offence of rape because they only suggest that the Appellant had sexual intercourse with the ZM. In that regard, the charge itself apart was defective for not containing element of offence committed in the particulars of offence.

This court is much aware of the principle that a defective charge may be cured as long as the accused person is not prejudiced or embarrassed in his defence or it does not otherwise occasion to failure

of justice. See the case of **R Vs. Ngidipe Bin Kapirama & others** (1939) 6 E.A CA 118 which was cited in approval in the case of **Omary Abdallah @ Mbwanagwa Vs. The Republic,** Criminal Appeal No 127 of 2017 CAT at Mwanza (Unreported).

In the matter at hand, the Appellant response when asked to address this court shows that he was not even aware if the age was not indicated or if it was crucial. This shows that he was not aware of the gravity of the offence he was facing for him to prepare a sound defence. Legally, that is incurable defect as one could conclude that there was no fair trial on the Appellant's side.

That being the case, it is my firm stand that the defectiveness of the charge in this case is not curable under section 388(1) of the CPA. The circumstances of this case raise doubt if the Appellant was made aware of the particulars and seriousness of the offence against him for him to prepare a sound defence. The offence to which the Appellant was convicted of called for severe punishment of life imprisonment if proved hence, the particulars of the offence ought to be clear and direct for the accused to understand nature of the offence. I therefore find that the charge was defective and such defect in the circumstance of this case occasioned to failure of justice. In the case of **Alex Medard Vs. The**

Republic, Criminal Appeal No 571 of 2017 CAT at Bukoba (Unreported) it was held that,

> *".... since the charge was not clear to him for being defective, it cannot be said he was fairly tried. Definitely, he might have been prejudiced. Consequently, since the Appellant was charged with the charge which was incurably defective, it renders the whole proceedings and judgment nullity."*

Basing on the wording of the above decision, the defectiveness of the charge would surface to dispose the appeal. However, bearing in mind that the court may in certain circumstance direct for retrial of the case to accord the Appellant fair hearing, I opted to go through the evidence and see if there was need for ordering a fresh trial. It is unfortunate that the evidence in record is not that strong which could enforce this court to order for retrial. I say so because, the victim's evidence shows that she mentioned the Appellant and another person as people who were having sexual intercourse with her. It was not a single day but a repeated act for the whole period of almost two months. She never reported anywhere and she never explained if she was threatened not to tell anyone. It is her mother who came to discover that she was being sexually abused when washing her clothes. Even after the victim had told her that two people are responsible, there is no evidence as to why only the Appellant was charged. The evidence by PW3 shows that

two people were arrested; Erasto Sias @ Sharo and Samwel Matheo but did not explain as to why Samwel Matheo was not charged for the offence. PW5 was the investigator of the case, she also admitted that two people were arrested for the offence but only the Appellant was charged as he was mentioned by many people. If the victim mentioned two people it was expected for the investigator to explain the basis for excluding another accused from the charge.

In his defence the Appellant was wondering as to why he was arrested. He claimed that he was arrested and sent to the police station where he was informed that he is the rapist. To him, the witnesses were lying to say that he is a rapist. He denied knowing the victim and claimed that he was at Endala since February.

The Appellant's defence was a general denial of the allegation thus, it remained the prosecution duty to prove the case on the required standards in criminal cases. The victim's evidence and that of other prosecution witnesses before the trial court was not self-satisfactory for one to hold that the offence was well proved. As well pointed out in my discussion above, the prosecution evidence left a lot of doubts which was to be resolved in favour of the Appellant.

I consequently find merit in this appeal and proceed to quash the whole proceedings and judgment and set aside the conviction and

sentence imposed to the Appellant by the trial court. I however hesitate from making an order for retrial because I did not find water tight evidence that could entail this court to give such order. I order for immediate release of the Appellant from prison unless, lawfully held for any other valid cause.

Appeal allowed.

DATED at **ARUSHA** this 14th day of December, 2023.

D.C. KAMUZORA

JUDGE