IN THE COURT OF APPEAL OF TANZANIA

AT ARUSHA

(CORAM: MMILLA, J.A., MZIRAY, J.A. And KWARIKO, J.A.)

CRIMINAL APPEAL NO. 375 OF 2016

1. RICHARD ESTOMIHI KIMEI
2. EMMANUEL OFORO KIMARO ..... **APPELLANTS**

VERSUS

THE REPUBLIC.....RESPONDENT

(Appeal from the Judgment of the High Court of Tanzania at Moshi)

(Rutakangwa, J.)

dated the 22nd day of September, 2003
in
Criminal Appeal No. 47 of 2002

JUDGMENT OF THE COURT

5th & 12th October, 2018

MZIRAY, J.A.:

The two appellants herein were charged and convicted by the District Court of Mwanga with the offence of rape contrary to sections 130(1) and 131, of the Penal Code, Cap 16 R.E 2002. The prosecution alleged that on 26th day of November, 2000 at about 20:30 hrs at Simbomu/Mwai village within the District of Mwanga and Kilimanjaro Region the two appellants jointly did unlawfully have carnal knowledge of one Evalait Mmary without her consent. The trial court found them

guilty, convicted and sentenced them each to a term of thirty years imprisonment. Aggrieved with the findings of the trial court, the appellants preferred an appeal to the High Court. On hearing the appeal, the High Court altered the charge of rape that was before the trial court; substituted the same with the offence of gang rape and enhanced the sentence of thirty years to life imprisonment. Still protesting their innocence, they have appealed to this Court.

The appellants filed a joint memorandum of appeal comprising of seven grounds which can be conveniently condensed into the following three main grounds:

1. *That, the conditions at the scene were not conducive for an unmistaken identification.*
2. *That, both the trial magistrate and honourable Judge proceeded to hear and determine the matter without considering that the charge sheet was defective.*
3. *That, the prosecution did not prove the case beyond reasonable doubt.*

In this appeal, the appellants have appeared in person, fending for themselves. The respondent Republic was represented by Mr. Fortunatus Muhalila, learned State Attorney along with Ms Penina Joachim Ngotea also learned State Attorney.

At the hearing, the two appellants opted to allow the learned State Attorneys to submit first to their grounds of appeal and wished to respond thereafter, if need be.

On his part, Mr. Fortunatus Muhalila, learned State Attorney from the very outset, did not find it fit to support the conviction and the life imprisonment sentences imposed by the High Court. Submitting in support of the appeal generally, he said and correctly so in our view, that it was not proper for the High Court judge to substitute the charge from minor to a greater offence. He submitted that according to the principle applicable in offences which are cognate in nature, substitution is done from greater offence to minor offence and not *vice versa*. On that basis, he said, it was wrong for the High Court judge to substitute the charge from rape to gang rape and

proceed to impose life imprisonment sentences to the appellants. He further stated that the substitution of the charge from rape to gang rape without affording the appellants the right to defend themselves on the new substituted charge was against the principles of fair trial and natural justice, hence prejudiced the appellants.

On the basis of the pointed illegalities in the proceedings before the High Court, the learned State Attorney prayed for the conviction to be quashed, the sentences imposed be set aside and the two appellants be released from jail.

The appellants being laymen had nothing useful to add in rejoinder. They only prayed to be released from custody.

We have carefully considered the arguments advance by the learned State Attorney. We think that the only important issue that crops up for determination in this appeal is whether the High Court judge was right in substituting the charge and entered a conviction for gang rape under section 131A (1) of the Penal Code (the Code), as an alternative offence to that of rape, with which the appellants were initially charged, and subsequently enhanced the sentences to life imprisonment.

In determining the same, we seek guidance from the provision of section 300 (1) and (2) of the Criminal Procedure Act, CAP 20 R.E 2002 (CPA) which is reproduced herein below:

> *"(1) When a person is charged with an offence consisting of several particulars, a combination of some only of which constitutes a complete minor offence, and such combination is proved but the remaining particulars are not proved, he may be convicted of the minor offence although he was not charged with it.*
>
> *(2) When a person is charged with an offence and facts are proved which reduce it to a minor offence, he may be convicted of the minor offence although he was not charged with it.*

Reading carefully, sub-section 1 of section 300 of the CPA as quoted herein above, requires the substituted offence to be minor and cognate to the offence that an accused was initially charged with. Case law has also construed that provision and stated that an accused person in order to be convicted of a lesser or minor offence, the offence should be on the face of it minor and cognate in character to

the greater offence. In **Robert Ndecho and Another v. R,** (1951) 18 EACA 171 at page 174, the then East African Court of Appeal said:-

> *"In order to make the position abundantly clear we restate again that ... where an accused is charged with an offence, he may be convicted of minor offence, although not charged with it, if that minor offence is of a cognate character, that is to say of the same genes and species."*

In more or similar situation, the High Court of Tanganyika in **Elmi bin Yusufu v. Rex, T.L.R** (R) 269 had the occasion to interpret section 181(1) of the Criminal Procedure Code (then repealed) which has identical wording with section 300 (1) of the CPA. It said:-

> *"Though a magistrate [or Judge] has power under this section to convict the accused of a different offence from what he was originally accused of, still this must be done only in cases where the accused is not in any way prejudiced by the conviction on the new charge. The accused person is entitled to know with certainty and accuracy the exact nature of the charge brought*

against him, and unless he has this knowledge, he must be seriously prejudiced in his defence."

We entirely agree and subscribe to that interpretation. We have no flicker of doubt that the offence of gang rape is cognate to that of rape. Both of them are related and carries similar characteristics but they differ only on gravity. Much as the wording of subsection 1 of section 300 of the CPA allows an accused person to be convicted of a minor offence, though not initially charged with it in the original charge, still, the substitution of the charge should not be done at the detriment of the accused person. The accused person is entitled to know with certainty and accuracy the exact nature of the charge against him. Additionally, there must be evidence in support of the substituted charge and the accused person must be accorded a right of defending himself on that new charge in a sense and spirit of a fair trial.

In the case at hand, the evidence available on record on which the appellants were convicted of was that of rape. It was therefore wrong in principle for the High Court to alter the charge to that of gang rape on the strength of the evidence which was adduced in the trial court, which essentially was for a charge of rape. The substitution of

the charge to gang rape must have prejudiced the appellants because they did not get an opportunity to defend it.

From the foregoing, we are of the settled view that in terms of section 300 (1) (2) of the CPA, a conviction for the offence of gang rape cannot be a substitute as an alternative verdict to that of rape. In principle, substitution moves from greater offence to a minor offence and not otherwise. On that basis, it is obvious that the High Court judge misdirected himself in substituting the offence of rape to which the appellants were charged with to that of gang rape and that substitution in our view had no backing of the law. We cannot allow the substituted charge from rape to gang rape, a serious offence, to stand.

That said, we exercise our powers under section 4 (2) of the Appellate Jurisdiction Act (Cap. 141 – R.E 2002) and revise all the proceedings and judgment of the High Court. The sentences imposed on the appellants are also set aside.

Ordinarily we would have ordered a fresh hearing of the appeal before the High Court but on carefully going through the evidence before the trial court we find that the case against the appellants was not proved beyond reasonable doubt. Due to insufficient evidence, we

find it inappropriate for us to order for the appeal to re-commence afresh before the High Court.

In the circumstances, we order for the appellants be released from prison forthwith, unless they are otherwise lawfully incarcerated.

It is so ordered.

DATED at **ARUSHA** this 11th day of October, 2018.

B.M. MMILLA
JUSTICE OF APPEAL

R.E.S. MZIRAY
JUSTICE OF APPEAL

M.A. KWARIKO
JUSTICE OF APPEAL

I certify that this is a true copy of the original.

B. A. MPEPO
DEPUTY REGISTRAR
COURT OF APPEAL