IN THE COURT OF APPEAL OF TANZANIA
AT ARUSHA

(CORAM: MWARIJA, J.A., LILA, J.A., And KWARIKO, J.A.)

CRIMINAL APPEAL NO. 442 OF 2016

1. **OBADIA DANIEL**
2. **JUBILATE MUSHI** ……
APPELLANTS

VERSUS

THE REPUBLIC……

……RESPONDENT

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

(Sumari, J.)

dated the 18th day of October, 2016
in
(DC) Criminal Appeal No. 34 of 2016

JUDGMENT OF THE COURT

05th & 12th December, 2018

KWARIKO , J.A.:

Formerly, before the District Court of Hai, the appellants herein and one ELIREHEMA JOSEPH who was then the first accused, were charged with the offence of gang rape contrary to section 131A (1) of the Penal Code [CAP 16 R.E. 2002] (the Code). The particulars of the offence were that, the appellants and the 1st accused jointly and together on the 11th day of March, 2014 at

around 21:00 hours at Machame Shari Village within Hai District in Kilimanjaro Region did unlawfully have carnal knowledge of one ELIZABETH MUSHI, a woman of 40 years without her consent. They denied the charge and the case went to full trial. However, at the end of the prosecution case, the charge was substituted. As a result ELIREHEMA JOSEPH was discharged thus leaving the appellants herein. Apart from the removal of ELIREHEMA JOSEPH other particulars in the charge remained the same. At the end of the trial, the appellants were convicted and sentenced to a mandatory term of life imprisonment. Their appeal before the High Court was not successful.

The facts of the case from the evidence adduced by both sides at the trial can be summarized as hereunder: On 11/3/2014 at about 20:00 hours when ELIZABETH MUSHI (PW1) was returning home, the 2nd appellant appeared and ordered her to take off her clothes but she refused. She was beaten up by him until she fell down. The 2nd appellant then carried her into an unoccupied house. One Oscar with whom she had misunderstanding shortly before, took her clothes off and raped

her while telling his colleagues to wear condoms. Then the 2nd appellant took his turn and raped her by force until she lost consciousness. Later, when she gained consciousness she heard a commotion between the rapists. Thereafter, she found one Obeid and Fred who had come to assist her. She also found the 1st appellant arrested by Obeid. She told Obeid and Fred that she knew the 1st appellant very well. Information was sent to the Village Executive Officer (VEO) and later she was issued with a PF3 which she tendered and was admitted in court as Exhibit P1.

It was the prosecution's further evidence that, on the material night OBEID MBASHA (PW2) and WILFRED WILLIAM (PW3) heard a woman screaming from an unoccupied house. They decided to go to find out what was the matter. They had a torch and when they approached that house, they saw a woman on the ground naked, being raped. PW2 said that while the 1st appellant was raping the woman, the 2nd appellant was holding her neck. That the woman was bleeding and she smelt alcohol. On his part, PW3 said when the rapists saw the torch they ran away but they

managed to arrest the one they found at the scene facing on the opposite direction. That person happened to be the 1st appellant.

In their defence the 1st and 2nd appellants who testified as DW2 and DW1 respectively said that, sometime in March, 2014 they were arrested by militiamen and taken to the VEO. When they got there, PW1 said she did not identify them at the scene of crime. They said they were implicated with the allegations as a result of a mistaken identity. ERICK JUBILATE (DW3), a boy aged twelve years is the 2nd appellant's son. He testified that the 2nd appellant was arrested at home and during the material time he was as well with him at home.

In the end the trial court found that the prosecution case had been proved beyond reasonable doubt that, PW1 was raped and it was the appellants who committed the offence. They were convicted and sentenced as stated earlier. The first appellate court upheld the trial court's decision.

It is against that decision that this appeal has been preferred. In their joint memorandum of appeal, the appellants raised seven grounds of appeal which can be summarized into the following five grounds:

1. That, the charge preferred against the appellants was defective.
2. That, the trial court contravened the provisions of section 214 (1) of the Criminal Procedure Act [CAP 20 R.E. 2002].
3. That, the trial court contravened section 234 (2) (b) of the Criminal Procedure Act [CAP 20 R.E. 2002]
4. That, the appellants were not afforded opportunity to cross-examine one another during their defence case.
5. That, the offence of rape was not proved beyond reasonable doubt against the appellants.

At the hearing of the appeal, the appellants appeared in person, unrepresented, while the respondent Republic was represented by Messrs Kassim Nassir Daud and Ignas Joseph Mwinuka, learned State Attorneys.

After they had adopted their grounds of appeal, the appellants opted to hear from the respondent first, and thereafter would make a rejoinder, if need be.

Mr. Mwinuka learned State Attorney for the respondent commenced his submission by supporting the appeal. As regards the first ground of appeal he agreed that the charge against the appellants was defective. First, he contended that when the charge was substituted on 3/3/2016, which resulted into the discharge of the 1st accused, the same only read OBADIA DANIEL & ANOTHER without specifying who was the first and who was the second accused. He was of the contention that this omission brought confusion as to the order of reference to the appellants; more so as there was the 1st accused who was no longer a party to the case.

Further, the learned State Attorney assailed the charge, in that it did not provide the definition and category of rape obtained under section 130 (1) (2) (a) of the Code. He added that, the charge only cited the punishment section. He concluded that

the charge against the appellants should have read; gang rape contrary sections 130 (1) (2) (a) and 131A (1) (2) of the Code. He argued that the charge was fatally defective.

On their part, the appellants being lay persons only concurred with the submission made by the learned State Attorney and prayed to be released from prison.

Upon consideration of the submission made by the learned State Attorney, we agree with him that the charge against the appellants was defective on the basis of the reasons advanced by him. We wish to state that any criminal trial is initiated by a charge which states the accusation against the accused person.

The manner in which offences are preferred is regulated by sections 132 and 135 of the Criminal Procedure Act [CAP 20 R.E. 2002] (the CPA). Section 132 provides that offences must be specified in the charge with necessary particulars. It provides thus;

“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”.

Section 135 (a) (ii) of the CPA requires the charge to contain specific section of the law creating the offence. That provision states that;

“The statement of 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.”

According to the law therefore, the charge must contain a statement of the specific offence or offences the accused is facing. It must also contain the section of the enactment creating the offence. Comparative to the cited provisions of the law cited above, it is glaringly clear that the charge against the appellants did not contain the section of law that created the offence charged. The appellants were charged as follows;

"STATEMENT OF OFFENCE

Gang rape contrary to section 131A (1) of the Penal Code, Cap 16 Vol. 1 of the laws (Revised Edition 2002)"

The cited law provides thus;

"*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."*

It is clear from the wording of the law that, the cited provision only defines gang rape. It does not define the offence of rape and state its category, so as to give the appellants opportunity to

know what they were accused of, in order for them to properly marshal their defence. In the case of **MOHAMED KONINGO v. R** [1980] T.L.R this Court held that;

> *"The basic principle of our criminal practice is that the accused must know clearly what the charge against him is so that he can prepare his defence accordingly."*

In the instant case, because the victim of the offence was aged above eighteen (18) years, as rightly submitted by the learned State Attorney, the correct provision creating the offence of rape ought to be section 130 (1) (2) (a) of the Code. This provision states that;

> *"(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) 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."

Further, since the offence was allegedly committed by more than one person, that is when the cited section 131A (1) of the Code came in the statement of the offence. In this case, not only that, the charge did not contain the provision of the law creating the offence of rape, but also it did not cite the provision for punishment. This is section 131A (2) of the Code which states thus;

"Every person who is convicted of gang rape shall be sentenced to imprisonment for life, regardless of the actual role he played in the rape."

The provision relating to punishment is equally important to enable the accused to be aware of what to expect in case he/she is convicted of the offence charged. The appellants herein were not informed at the outset, when they were called upon to plead to the charge as to what would be the punishment if they ended up being convicted of the offence charged.

For what we have shown above, the omission in the charge rendered it fatally defective. This Court has in many occasions found that a defective charge denies the accused a fair trial. In the case of **ABDALLAH ALLY v. R,** Criminal Appeal No. 253 of 2013, this Court held thus;

> *"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".*** (Emphasis supplied).

The foregoing position of the law has been applied by the Court in a number of decisions. Few of them are: **MUSSA MWAIKUNDA v. R** [2006] T.L.R 387**, ISIDORI PATRICE v. R,** Criminal Appeal No. 224 of 2007, **ABDALLAH ALLY v. R,** Criminal Appeal No. 253 of 2013, **CHRISTIAN SANGA v. R,** Criminal Appeal No. 512 of 2016, **JULIUS MGAWO v. R,** Criminal Appeal No. 76 of 2016 and

CHENGA NYAMAHANGA v. R, Criminal Appeal No. 122 of 2016 (all unreported).

Consequently, because the charge was fatally defective the appellants did not receive a fair trial. This ground disposes of the appeal; hence we find no need to discuss others. We accordingly allow the appeal, quash the conviction and set aside the sentence. The appellants should be released from prison unless they are otherwise lawfully held.

DATED at **ARUSHA** this 11th day of December, 2018

A. G. MWARIJA
JUSTICE OF APPEAL

S. A. LILA
JUSTICE OF APPEAL

M. A. KWARIKO
JUSTICE OF APPEAL

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

S. J. KAINDA
DEPUTY REGISTRAR
COURT OF APPEAL