

IN THE COURT OF APPEAL OF TANZANIA

AT BUKOBA

(CORAM: MWARIJA, J.A., MUGASHA, J.A., And MKUYE, J.A.)

CRIMINAL APPEAL NO. 162 OF 2018

PROJESTUS ZACHARIA..... APPELLANT

VERSUS

THE REPUBLIC RESPONDENT

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

(Khaday, J.)

Dated 17th December, 2015

in

HC Criminal Appeal No. 48 of 2014

JUDGMENT OF THE COURT

30th April & 3rd May, 2019

MUGASHA, J.A.

In the District Court of Karagwe, the appellant was arraigned as
hereunder:

*"TANZANIA POLICE FORCE
CHARGE SHEET*

TRIBE OR NATIONALITY OF PERSON(S) CHARGED

NAME- Projestus s/o Zakaria

TRIBE- Haya

AGE – 21 yrs.

OCCP- Peasant

RESID- Kafunjo

OFFENCE, SECTION AND LAW- RAPE C/S 130 (1) 2 (e) and 131 (1) of the Penal Code as amended by sexual offences special Provision Act No. 4/1998.

PARTICULARS OF THE OFFENCE:- That Projestus s/o Zakaria is charged on the 16th day of February, 2003 at Kafunjo village within Karagwe District in Kagera region did unlawfully have carnal knowledge of A.F.

Station:-Kayanga Police

DATE: - 3^d March, 2003."

The appellant denied the allegation subsequent to which the prosecution paraded three witnesses in support of its claims. In a nutshell, a brief account of the prosecution account was to the effect that, on the fateful day around 17.00hrs A.F (PW1) the victim went to fetch water accompanied by her brother one **JUMA FOCUS** who testified as PW3 and **JENISCA** who was not among the prosecution witnesses. While fetching water, PW1 recalled having been approached by the appellant's brother who told her that the appellant's mother wanted to see her. As PW1 heeded to the call suddenly, the appellant surfaced holding a panga, beat PW1, pushed her into his house, tore her clothes and raped her. Then, the appellant's mother who held a spear and a panga threatened to cut PW1 if

she refused to be married by the appellant. PW3 who had accompanied her sister the victim to fetch water had slightly a different account which was to the effect that, as the appellant's brother told PW1 that the appellant's mother was calling her, PW1 obliged and went to the house of the appellant's mother. However, when PW1 was told about marrying the appellant, she refused and as she was walking away, the appellant surfaced with a panga and pushed PW1 into his mother's house. Having seen what had befallen her sister, PW3 rushed home to call his father **FOCUS STEPHANO** (PW2) who raised alarm, went to the scene holding a panga while the appellant took to his heels insisting that, he must marry PW1. PW2 as well recounted to have been told by PW1 on what happened to her. About eleven days later, that is on 27th February, 2003, PW1 was taken to the Nkwenda hospital and the matter was reported to the Police.

In his defence, the appellant dissociated himself from the prosecution's accusation and protested his innocence. He claimed to have been arrested on 28th February, 2003 at around 20.00hrs, at his home by the Local Militia (Sungusungu), taken to the street chairman and later sent to the police where he was accused to have raped PW1. He also told the trial court that, the case was fabricated against him due to existing grudge

with the victim's father because he had declined to sign the land agreement between his father and PW2. The appellant as well, faulted the prosecution for not parading as witnesses those alleged to have responded to the alarm on the fateful incident.

On the whole of the evidence, the trial court accepted as truthful the prosecution version found the appellant guilty and convicted and sentenced him to imprisonment for thirty years. In addition, the trial court ordered the appellant to compensate the victim a sum of TZS. 250,000/=.

The appellant unsuccessfully appealed to the High Court where the conviction and the sentence were confirmed hence the present appeal. In the Memorandum of appeal, the appellant raised seven grounds of complaint. In a nutshell, the appellant seeks to fault the first appellate court for upholding the trial court's conviction despite the unreliable testimonies of the prosecution witnesses and a defective charge sheet.

At the hearing of the appeal, the appellant appeared in person unrepresented whereas the respondent Republic had the services of Ms. Susan Masule, learned State Attorney. The appellant opted to initially hear

the submission of the learned State Attorney while reserving the right of reply if need would arise.

At the outset, the learned State Attorney intimated to support the appeal having informed us that, the appellant was convicted on the basis of an incurably defective charge sheet. She pointed out that, the charge of rape which was laid against the appellant is defective for not having indicated the age of the victim in the particulars of the offence which is a crucial element in the offence of rape as per dictates of the provisions of section 130 (2) (e) of the Penal Code [CAP 16 RE. 2002 (the Penal Code). Moreover, Ms. Masule added that, the defect could not be remedied by the evidence of the victim and her father as none of them in the testimonial account stated the age of the victim. In this regard, the learned State Attorney contended that, the defect in the charge vitiated the entire proceedings as the appellant was not made aware of the entire elements in the offence charged which is an omission not curable under section 388 (1) of the Criminal Procedure Act [CAP 20 RE.2002]. To support her propositions, the learned State Attorney referred us to the cases of **MUSSA MWAIKUNDA VS REPUBLIC** [2006] TLR 387 and **RWEKAZA BERNADO VS**

REPUBLIC, Criminal Appeal No. 477 of 2016 (unreported). The learned State Attorney thus urged us to allow the appeal.

On the other hand, the appellant supported the submission of the learned State Attorney and asked us to allow the appeal.

We are aware that, this being a second appeal, the Court rarely interferes with the concurrent findings of fact by the Courts below. In the case of **DIRECTOR OF PUBLIC PROSECUTIONS VS JAFARI MFAUME** [1981] TLR 149 the Court among other things held:

"...This is a second appeal brought under the provisions of section 5 (7) of the Appellate Jurisdiction Act, 1979. The appeal therefore lies to this Court only on a point or points of law. Obviously this position applies where there are no misdirections or non-directions on the evidence by the first appellate Court. In cases where there are misdirections or non-directions on the evidence a Court is entitled to look at the relevant evidence and make its own findings of fact."

We have carefully considered the record and the submission of both sides which hinges on the issue of the defective charge sheet and its

effects on the trial which constitutes the third ground of the appellant's complaint and a point of law for the Court's determination. On this account, we had earlier reproduced the charge sheet which shows that, the appellant was charged with rape contrary to sections 130 (1) (2) (e) and 131 (1) which categorically state as follows:-

Section 130 (1)

"It is an offence for a male person to rape a girl or a woman".

Section 130 (2) (e)

" 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 applicable;*
- (b) not applicable;*
- (c) not applicable;*
- (d) not applicable;*
- (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."

[Emphasis supplied]

Section 131(1)

"Any person who commits rape is, except in the cases provided for in the renumbered subsection (2), liable to be punished with imprisonment for life, and in any case for imprisonment of not less than thirty years with corporal punishment, and with a fine, and shall in addition be ordered to pay compensation of an amount determined by the court, to the person in respect of whom the offence was committed for the injuries caused to such person."

In the light of the bolded expression of section 130 (2) (e) of the Penal Code, the age of the victim is a crucial element in the offence which ought to have been stated in the particulars of the charge sheet in order to enable the appellant to know the nature of the charged offence. While the burning issue is as to what is tied to the said shortcoming, it should be recalled that, Ms Masule contended that the omission is incurably defective.

In the case **KHAMISI ABDEREHEMANI VS REPUBLIC**, Criminal Appeal No.21 of 2017, the Court was confronted with a situation whereby, the statement of offence in the charge sheet under which the appellant was arraigned for rape cited sections 130 (1) (2) (e) and 131 (1) instead of the proper sections 130 (1), (2) (b) and 131 (1) of the Penal Code. In addressing the anomaly, the Court concluded that, the defect was curable under section 388 of the CPA as it did not prejudice the appellant because the particulars of the offence in the charge sheet were sufficient enough to inform the appellant of the nature of the offence he was facing. Therefore, in the light of what we said in **KHAMISI ABDEREHEMANI VS REPUBLIC** (supra), in the present case the issue for our consideration is whether the appellant was prejudiced by the omission to state in the particulars of the offence the age of the victim which is the essential element in the offence.

In our serious considered view, as the particulars of the offence omitted to state the age and a crucial description or the category of the offence of rape under which the appellant was charged, the present case is distinguishable from the **KHAMISI ABDEREHEMANI VS REPUBLIC** (supra). We are fortified in that account because the circumstances of the matter under scrutiny are close to what transpired in the case of **MUSSA**

MWAIKUNDA VS REPUBLIC (supra) where the particulars of the charge sheet omitted to allege 'threatening' which is an essential ingredient to the offence of attempted rape. Having pondered on the effect of such omission the Court concluded as follows:

*"...the issue is whether the charge facing the appellant was curable under section 388 (1) of the Criminal Procedure Act, 1985. With respect, we do not think that it was curable. We say so for two main reasons. **One, since threatening was not alleged in the particulars of the offence the effect was that an essential element of the offence of attempted rape missed in the case against the appellant. Two, at any rate, as already stated, the complainant did not state anywhere in her evidence that she was threatened by the appellant. If she had alleged any threat may be there could have been room for saying that the appellant knew the nature of the case that was facing him.**"*

[Emphasis ours]

In the case at hand, as earlier indicated in the particulars of the offence, the age of the victim was not stated and neither was it said in the

evidence of the victim or her parent as reflected at page 8 to 11 of the record of appeal. Before the victim testified, what appears partly at page 8 of the record is as follows:

"PW1 A.F, 15 years, Christian sworn and states:"

This was a mere citation by a magistrate regarding the age of the witness before giving her evidence and it was not part of the evidence of the victim. See- **NALONGWA JOHN VS REPUBLIC**, Criminal Appeal No 588 of 2015 (unreported).

Since the detail of age was an essential element in the offence of rape to which the appellant stood arraigned, it follows that its omission in the particulars of the charge unduly prejudiced the appellant and the trial was vitiated and so are the proceedings and the judgment of the first appellate Court which are a nullity. In this regard, we agree with the learned State Attorney that, the omission is fatal and it cannot be cured by the provisions of section 388 (1) of the CPA.

In view of the aforesaid, the conviction and the sentence against the appellant are hereby quashed and set aside respectively. We as well, nullify

the proceedings and judgment of the first appellate court as they stem on null trial proceedings. The appellant should be released forthwith from custody unless he is held for some other lawful cause.

DATED at **BUKOBA** this 2nd day of May, 2019.

A. G. MWARIJA
JUSTICE OF APPEAL

S. E. A. MUGASHA
JUSTICE OF APPEAL

R. K. MKUYE
JUSTICE OF APPEAL



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


S. J. KAINDA
DEPUTY REGISTRAR
COURT OF APPEAL