IN THE COURT OF APPEAL OF TANZANIA

AT DAR-ES-SALAAM

(CORAM: KAIJAGE, J.A., MMILLA, J.A., And MUGASHA, J.A.)

CRIMINAL APPEAL NO. 229 OF 2015

CHARLES S/O JONATHAN.....APPELLANT

VERSUS

THE REPUBLIC.....REPUBLIC

(Appeal from the decision of the High Court of Tanzania, at Dar-es-salaam)

(Munisi, J.)

dated the 1st day of December, 2014
in
HC. Criminal Appeal No. 166 of 2011

JUDGMENT OF THE COURT

2nd & 13th December, 2016

MUGASHA, J.A.:

In the District Court of Ilala, the appellant was charged with rape contrary to Sections 130 (e) and 131 (1) of the Penal Code, **[CAP 16 R.E. 2002].** He was convicted and sentenced to thirty years imprisonment together with twelve strokes of a cane. He was also ordered to pay the victim a sum of Tshs. 300,000/= being compensation. In appeal, both conviction and sentence were upheld and confirmed by the High Court hence the present appeal.

It was alleged before the trial court that on 23rd January, 2008 at 13.00 hrs, at Chanika area, Ilala District in Dar-es-salaam region, the appellant had carnal knowledge of one Martha d/o Mnyema without her consent.

Briefly, the prosecution case hinged around the evidence of the victim who testified as PW1 and other three prosecution witnesses namely: **E.5042 CPL BENJAMIN (PW2), HAMIS MUSSA MKUMBA (PW3) and DR. PATTY LUKUWI (PW4)** and one documentary exhibit (PF3). According to the record, the victim lived together with her grandfather (the appellant) and great grandmother. Her testimonial account was to the effect that, on the material date and time, she was alone in the house as some other members of the family were not around. While asleep in her room, she felt someone touching her. She woke up only to find that it was her grandfather (the appellant). He grabbed her, covered her mouth using his hands, slapped her, removed her khanga and pants and then proceeded to have sexual intercourse with her. Once he was done, he threatened her not to reveal the incident to anyone or else he would kill her and he then disembarked leaving her in the room. Later on the same day, the victim

narrated the incident to her grandmother and the incident was reported to the Police. The victim was issued with PF3 and was then taken to the hospital where the doctor concluded that she was raped because she had bruises on the vaginal area. Both PW3 and PW2 recounted to have been told about the rape incident by one Mwanne who was not paraded as a prosecution witness.

The appellant denied to have committed the offence and claimed to have been at church when the offence was committed. Besides, he challenged the victim's account as to why did she not raise alarm if at all she was raped.

In the memorandum of appeal, the appellant has raised three grounds which may be conveniently condensed into one main ground namely: That, the prosecution case was not proved beyond reasonable doubt.

Before us, the appellant was unrepresented whereas the respondent Republic was represented by Ms Rachel Magambo, learned State Attorney.

When the appeal was called on for hearing, the learned State Attorney sought and we granted her leave to address the Court on a point of law touching on the implications of the appellant having been arraigned in violation of the mandatory provisions under section 135 (a) (ii) of the Criminal Procedure Act. To expound the issue, she pointed out that, the appellant was arraigned and convicted under section 130 (e) which is non-existent in the Penal Code. She argued this to be an incurable irregularity which led to an unfair trial and it occasioned a miscarriage of justice on the appellant who was not in a position to make an informed defence. She backed her argument referring us to the case of **MAREKANO RAMADHANI vs. THE REPUBLIC**, Criminal Appeal No. 202 of 2013 (unreported). She added that, as the victim was 21 years old, the appellant ought to have been charged under section 130(1) (2) (e) of the Penal Code. However, she submitted that, since the record shows that, the appellant was a grandfather to the victim, the appropriate charge to be laid against the appellant should have been "incest" contrary to section 158(1) (b) of the Penal Code.

On the basis of the said incurable irregularity, we were thus invited to invoke our revisional powers under section 4 (2) of Appellate Jurisdiction Act **[CAP 141 RE.2002]** and proceed to nullify the proceedings of the two courts below and set the appellant free.

As to the way forward, the learned State Attorney did not prefer a retrial due to following reasons. **One**, the appellant has stayed behind bars for almost half of the term, if a proper charge of "incest" was laid against him. **Secondly,** the victim will be psychologically tormented to testify on the sexual offence should a retrial be ordered. **Three**, the retrial if any, will entail the framing of a new charge of incest which is unfair to the appellant who has served a jail term after having been initially convicted of an offence preferred under a non-existent provision in the penal law.

As this was a point of law, the appellant had nothing useful to add.

We intend to dispose of this appeal by examining the propriety of the charge laid against the appellant. For ease of reference we will reproduce the respective charge sheet:

"TANZANIA POLICE FORCE

CHARGE SHEET

Name, Tribe or Nationality of the person charged.

Name: Charles s/o Jonathan.

Tribe: Gogo.

Occ: Peasant.

Age: 44 yrs.

Relg: Christian.

Resd: Chanika.

Statement of Offence

Rape c/s 130 (e) and 131 (1) of the Penal Code (RE. 2002) as amended by Act. No. 4 of 1998.

Particulars of the Offence

That Charles s/o Jonathan charged on 23rd day of January, 2008 at about 13.00 hrs at Chanika within Ilala District in D'slaam Region did have unlawful carnal knowledge one Martha d/o Mnyema without her consent.

Station: Stakishari Police

Signed.

Public Prosecutor

Date: 28.01.2008"

It is the charge sheet which lays a foundation of the trial because an accused person must know the nature of case he is facing before making his defence. (See **MUSSA RAMADHAN vs REPUBLIC**, Criminal Appeal No. 368 of 2013). Section 135 (a) (i) (ii) of the Criminal Procedure Act, clearly

articulates the mode in which offences are to be charged and the principle guiding the framing of the charge as follows:-

> *"The following provisions of this section shall apply to all charges and informations and, notwithstanding any rule of law or practice, a charge or an information shall, subject to the provisions of this Act, not be open to objection in respect of its form or contents if it is framed in accordance with the provisions of this section–*
>
> *(a) (i) A count of a charge or information shall commence with a statement of the offence charged, called the statement of the offence;*
>
> *(ii) 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."***
>
> [Emphasis supplied].

From the above cited provision, it is clear that in a given charge, a statement of offence ought to describe the offence and must contain a reference to the section of enactment creating the offence. This position was emphasized in **CHARLES S/O MAKAPI VS REPUBLIC,** Criminal Appeal No. 85 of 2012 (unreported) where the Court categorically said that, section 135 of the CPA imposes mandatory requirements that a charge sheet must describe the offence and make reference to the section and law creating the offence.

In another case of **SIMBA NYANGURA VS REPUBLIC**, Criminal Appeal No. 144 of 2008 (Unreported), the appellant was merely charged under section 130(1) and 131 of the Penal Code. The Court observed that, the accused person must know the description of the offence in section 130 (2) (a) to (e) he faces so that he can prepare his defence.

The predicament in the present charge is that, the statement of offence makes reference to a non-existent section of the Penal Code. Section 130 (e) does not exist in the Penal Code. Besides, we have noted

that on the basis of the evidence on record, since the appellant is the grandfather to the victim, he ought to have been charged with incest contrary to section 158(1) (b) of the Penal Code which provides:

> *" Any male person who has prohibited sexual intercourse with a female person, who is to his knowledge his granddaughter, daughter, sister or mother, commits the offence of incest, and is liable on conviction–*
>
> *(a) if the female is of the age of less than eighteen years, to imprisonment for a term of not less than thirty years."*

In the present purported appeal, the glaring absence of reference to the section creating the offence renders the charge defective as we said in **MUSSA MWAIKUNDA VS REPUBLIC (2006) TLR 387.** Having pointed out the defects in the charge sheet, the next question for determination, is, what is the effect of these defects?

We wish to repeat what we said in **NASSORO JUMA AZIZI VS REPUBLIC,** Criminal Appeal No. 58 of 2010 (unreported):

"It cannot be gainsaid, that generally the purposes of all rules of procedure is, to guide the courts and the parties in the orderly and fair administration of justice, and it cannot be overemphasized that it is important that they be strictly complied with. Non compliance with those rules certainly has consequences, but these differ depending on the effect of infringement and importance of the particular rule(s) breached. ***This is so because rules of procedure differ in importance. Some are vital and go to the root of justice and fair trial and can only be infringed with attendant dire consequences.*** *Some rules are of less significance and have cosmetic value only, and when they are breached, the court may afford to look the other side.* ***The drawing line between these always, whether the breach has occasioned a miscarriage of justice."***

[Emphasis supplied]

In this regard, generally, in a criminal case, it has been held that for an appellate court to fault any trial and declare it a nullity due to any

irregularity in procedure, it must be shown that, the irregularity was such that it prejudiced the accused and therefore occasioned a failure of justice. **(SEE MICHAEL LUHIYO VS REPUBLIC (1994) TLR 181 and KOBELO MWAHA VS REPUBLIC,** Criminal Appeal No.173 of 2008.

In the present purported appeal, it is clear that the appellant was convicted on the basis of a non-existent provision in the Penal Code. Throughout the entire trial he was not made to understand the nature of charge he was facing to enable him to prepare an informed or rational defence. This is an incurable irregularity which occasioned a miscarriage of justice.

In respect of the rule relating to the mode of drawing charges, the Court once remarked:

> *" We wish to remind the magistracy that it is salutary rule that no charge should be put to an accused before the magistrate is satisfied, inter alia, that it disclosed an offence known to law, It is intolerable that a person should be subjected to the rigors of trial based on charge which in law is no charge. It shall always be remembered that the provisions of Section 129 of the CPA, are*

mandatory. ***The charge laid at the appellant's door having disclosed no offence known in law all the proceedings conducted in the District Court on the basis thereof were a nullity since you cannot put something on nothing."***

[Emphasis supplied]

(See **OSWALD MANGULA VS REPUBLIC** Criminal Appeal No. 153 1994 (unreported) and **ISIDORI PATRICE VS REPUBLIC** (supra).

In this regard, since the charge laid at the appellant's door made reference to a non-existent section of the Penal Code, it is violative of section 135 of the Criminal Procedure Act which is a fundamental rule of procedure and the appellant was not availed a fair trial which resulted into a miscarriage of justice.

In the judgment of the trial court at page 39 of the record, the following is evident:

" *.....In consequence thereof, this court finds the prosecution to have proved the case beyond reasonable doubt. Consequently the accused Charles Jonathan is found guilty of rape c/s 130 of the Penal*

Code Cap 16 R.E. 2002, and, is hereby convicted accordingly."

It is unfortunate that, the shortfall was not remedied by the first appellate court which upheld the conviction of the appellant and at page 49 of the record the opening sentence of its judgment is as follows:

> *"The appellant, Charles Jonathan stood before the District Court of Ilala at Kariakoo charged with the offence of rape contrary to section 130 and 131 of the Penal Code."*

It is clear that, the appellant was found guilty and convicted on the non-existent provision in the Penal Code which is in violation of section135 of the Criminal Procedure Act. Therefore, the trial was a nullity and so was the appeal before the High Court because it stemmed on a nullity. Equally, before us no appeal can lie on a nullity.

We therefore, invoke section 4(2) of the **APPELLATE JURISDICTION ACT,** and hereby nullify the entire proceedings and judgment of the trial court in Criminal Case No. 105 of 2008 and in the High Court Criminal Appeal No 166 of 2011. We further quash the conviction and set aside the sentence meted out against the appellant.

We agree with the learned State Attorney that, a retrial is not in the interest of justice on both, the victim who will be psychologically tormented and the appellant who was incarcerated on non-existent provision in our penal law. We therefore, order the immediate release of the appellant, unless he is otherwise lawfully held for some lawful cause.

DATED at **DAR ES SALAAM** this 6th day of December, 2016.

S. S. KAIJAGE
JUSTICE OF APPEAL

B. M. MMILLA
JUSTICE OF APPEAL

S. E. A. MUGASHA
JUSTICE OF APPEAL

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

B. R. NYAKI
DEPUTY REGISTRAR
COURT OF APPEAL