IN THE COURT OF APPEAL OF TANZANIA

AT TABORA

(CORAM: MBAROUK, J.A., MASSATI, J.A., And MUSSA, J.A.)

CRIMINAL APPEAL NO. 85 OF 2012

CHARLES S/O MAKAPI ..... APPELLANT

VERSUS

THE REPUBLIC..... RESPONDENT

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

(Songoro, J.)

dated the 20th day of February, 2013

in

Criminal Appeal No. 138 of 2009

JUDGMENT OF THE COURT

17th & 19th June, 2014

MBAROUK, J.A.:

In the District of Tabora at Tabora, the appellant, Charles s/o Makapi was charged with the offence of rape contrary to sections 130 and 131 of the Penal Code Cap. 16 Vol. 1 of the Laws, as amended by sections 5 and 6 of Sexual Offences Special Provisions Act No. 4 of 1998. He was convicted and sentenced to thirty (30) years imprisonment. His appeal before the High Court of Tanzania (Songoro, J.) was dismissed for lack of merit, hence this second appeal.

In this appeal, the appellant who fended for himself, preferred a lengthy memorandum of appeal containing five grounds of appeal which can be summarized as follows:-

1. *That, the prosecution failed to call material witnesses.*
2. *That, the prosecution failed to explain the delay in charging the appellant taking into account that, the offence was committed on 6-6-2004 and he was charged on 2-11-2004.*
3. *That, the evidence of the prosecution witnesses contradicted, but the trial court and the High Court failed to consider those contradictions.*
4. *That, there was non compliance with section 240(3) of the Criminal Procedure Act.*

5. That, the trial court and the High Court relied on the evidence of family members without being corroborated.

At the hearing of the appeal, when the appellant was given a chance to elaborate his grounds of appeal he opted to allow the learned State Attorney to submit first.

On his part, Mr. Iddi Mgeni, learned State Attorney for the respondent/Republic initially did not support the appeal and proceeded to argue the appeal. However, later on in the course of hearing the appeal, when asked by the Court to comment on the status of the Charge Sheet, whether the appellant was properly charged, he conceded that the charge was defective.

This issue which was prompted by the Court is to the effect that the statement of the offence in the charge sheet does not disclose the specific category of the offence against the appellant. We have seen the necessity to reproduce the charge sheet for ease of reference:-

TANZANIA POLICE FORCE

CHARGE SHEET

MEANING AND TRIBE OR NATIONALITY OF THE PERSON(S)

CHARGED:

NAME : CHARLES S/O MAKAPI

AGE : 47 YRS

TRIBE : GOGO

OCC : PEASANT

REL : CHRISTIAN

RES : KITOTO, IGAGA VILLAGE

OFFENCE SECTION AND LAW: Rape c/s 130 and 131 of the Penal Code Cap. 16 Vol. I of the Laws, as amended by sect. 5 and 6 of Sexual Offences special provisions Act No. 4/1998.

PARTICULARS OF OFFENCE: That Charles s/o Makapi charged on 6th day of June, 2004 at or about 22.00 hrs at Mitowo Village within Sikonge District, and Region of Tabora did have Carnal knowledge with one Monica d/o Charles the girl aged at ten (10) years.

Station: Tabora .....

Date: 2/11/2004 **PUBLIC PROSECUTOR**

As shown in the charge sheet, the statement of the offence simply mentioned Rape contrary to sections 130 and 131 of the Penal Code. Whereas the correct provisions to have been cited were sections 130(1) and (2) (e) and 131(1) of the Penal Code. Even the

learned State Attorney conceded that the statement of the offence in the charge sheet is defective.

In the case of **Mohamed Kaningo v Republic** [1980] TLR 279, this Court had the following observation, namely:-

> *"it is the duty of the prosecution to file the charges correctly, those presiding over criminal trials should, at the commencement of the hearing, make it a habit of perusing the charge as a matter of routine to satisfy themselves that the charge is laid correctly, and if it is not to require that it be amended accordingly."*

In the instant case, the prosecution side has failed to be extra careful to satisfy itself that the charge laid down was correct. It is a mandatory requirement under section 135 of the Criminal Procedure Act, that a charge sheet should describe the offence and should make reference to the section of the law creating the offence. To reproduce the relevant part of section 135, the same reads as follows:-

"135(a) (i) A Count of a charge or information shall commence with a 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 added:).

As shown earlier above, the statement of the charge failed to specify the specific classification among the categories stated under section 130. The classifications of the offence of rape have been divided into five, from section 130(2) (a) to (e). As it appears in the charge sheet here in this case, it is not clear under which of those five classifications or categories of the offence of rape the appellant is alleged to have committed.

This Court has arrived to different conclusions on whether such defect was curable or not depending on the circumstances of each case. For example in the case of **Michael Martini Katibu V The Republic**, Criminal Appeal No. 208 of 2012; **Joseph Leko V The Republic**, Criminal Appeal No. 124 of 2013 and **Edward Joseph V. The Republic** (all unreported), this Court under the circumstances which appeared therein those cases led to the conclusion that the omission of not giving a clear classification or category of the charge of rape was a curable defect under section 388(1) of the Criminal Procedure Act [Cap. 20 R.E. 2002] (the Act).

However, on the other hand, this Court under the circumstances which appeared in the case of **Isumba Huka V The Republic**, Criminal Appeal No. 113 of 2012 (unreported) which also infringed the mandatory requirements under section 135(a) (ii) of the Act reached to a conclusion that the charge therein was incurably defective.

In the instant case, apart from the non – compliance with section 135 (a) (ii) of the Act for not being clear as to the classifications or categories of the offence of rape alleged against

the appellant, we have also noted that there is no proof of the age of the victim Monica d/o Charles (PW1) mentioned as a girl aged ten (10) years in the particulars of the alleged offence. Taking into account that this is a statutory rape, it is important for the prosecution to give a clear evidence of the age of the victim. Failure of that, will create doubt as to the real age of the victim in this alleged statutory rape. The record in this case is completely silent on the issue of the age of the victim. Neither the victim herself nor her mother Ashura Rajabu (PW2) has specified on the issue of age of the victim.

We are increasingly of the view that, the cumulative effect of the defects examined herein above leads us to find that section 388 of the Act cannot apply under the circumstances in this case to cure the defects. We are further of the view that had the two courts below considered these defects, they would have arrived at a different conclusion.

Taking into account that each case has to be decided according to its own facts, we are obliged to find that the charge in this case is incurably defective. We also agree with the learned

State Attorney that as the aspect of the age of the victim in this alleged statutory rape was not proved, that creates doubt to the prosecution's case. In the event, we are constrained to give the benefit of doubt to the appellant. For that reason, we allow the appeal.

Having allowed the appeal, we hereby quash the conviction and set aside the sentence. Similarly, we order the appellant to be set free from prison forthwith unless otherwise lawfully held.

DATED at TABORA this 18th day of June, 2014.

M.S. MBAROUK
JUSTICE OF APPEAL

S.A. MASSATI
JUSTICE OF APPEAL

K.M. MUSSA
JUSTICE OF APPEAL

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

E.Y. MKWIZU
DEPUTY REGISTRAR
COURT OF APPEAL