.IN THE COURT OF APPEAL OF TANZANIA

AT DAR ES SALAAM

(CORAM: MBAROUK, J.A., ORIYO ,J.A., And MMILLA,J.A.)

CRIMINAL APPEAL CASE NO. 253 OF 2013

ABDALLAH ALLY.....APPELLANT

VERSUS

THE REPUBLIC .....RESPONDENT

(Appeal from the decision of the High Court of Tanzania

at Dar es Salaam)

(Chingwile,J.)

Dated the 18th day of January, 2013

in

HC Criminal Appeal No. 104 of 2012

JUDGMENT OF THE COURT

10th & 21 July, 2015

ORIYO, J.A.:

The appellant was aggrieved by the decision of the District Court of Ilala at Samora Avenue, dated 4/7/2012, which found him guilty of rape of one Farida Ramadhani, on an unspecified date in December 2008, at 10.00 hours at Tabata Mtambani area within Ilala District, Dar es Salaam. At the end of the trial, he was sentenced to serve a term of 30 years in jail. He unsuccessfully appealed to the High Court, hence this second appeal.

Before us, the appellant appeared in person, unfended while the respondent Republic was represented by Mr. Thadeo Mwenempazi, learned Principal State Attorney, who supported the appeal. Mr. Thadeo forthrightly informed the Court that it appears from the trial court record that the appellant was sentenced without being convicted, contrary to section 235(1) of the Criminal Procedure Act, Cap 20, R.E. 2002. He submitted that in view of the mandatory nature of the language used in section 235(1), the failure by the trial magistrate to enter a conviction, was fatal. The learned Principal State Attorney prayed that the error committed in the trial court be corrected by exercising the Court's powers of revision under section 4(2) of the Appellate Jurisdiction Act to nullify and set aside the sentence imposed on the appellant and set him free.

On his part, the appellant, being a layman, had nothing useful to add. However, he agreed with the submissions of the respondent Republic and prayed that he be set free.

Apparently, the appellant had jumped bail before the prosecution case was closed. Thereafter, the hearing proceeded **exparte** under **section 226 of the Criminal Procedure Act and** at the close of the prosecution case, an **exparte judgment** was delivered whereby he was found guilty and sentenced accordingly.

After analyzing the prosecution evidence, the trial court made the following conclusion at page 28 of the record:-

> " *Being the case, I conclude that accused person* ***did commit the offence he is charged with and is therefore found guilty c/s 130(1)(a) and 131(1)of the Penai Code, Cap 16 R/E 2002."*** *(Emphasis supplied).*

Thereafter the accused was sentenced to serve 30 years in jail to start running from the date of his arrest.

Indeed, it is clear from the extract of the record at page 28 that the trial court did not proceed further **to convict** the appellant after finding him guilty and before passing the sentence against him.

Section 235(1) of the Criminal Procedure Act, provides the following:-

> *" 235(1) The court, having heard both the complainant and the accused person and their witnesses and the evidence,* ***shall convict*** *the accused and pass sentence upon or make an order against him according to law or* ***shall acquit*** *him or* ***shall dismiss the charge*** *under section 38 of the Penal Code ."*
> (Emphasis supplied)

Section 235(1) is couched in a mandatory language in that if at the end of the trial, the Court is of the opinion that on the evidence available, the accused person is guilty, it must proceed further, in terms of this subsection, by entering a conviction before proceeding to sentence such accused person.

The failure on the part of a trial court to convict the accused person before sentencing him as in the instant case was not a mere irregularity curable under section 388(1) of the Criminal Procedure Act, but fatal. Further, **Section 312(2) of the Criminal Procedure Act** provides the following:-

*" 312.-(2) In the case of **conviction** the judgment shall specify the offence of which, and the section of the Penal Code or other law under which, the accused person is convicted and the punishment to which he is sentenced."* (Emphasis supplied).

In terms of the clear, mandatory language used in sections 235(1) and 312(2), there is no valid judgment without a conviction having been entered, as it is one of the prerequisites of a valid judgment; see Court's decisions in **Shabani Iddi Jololo and Others Vs Republic** Criminal appeal No 200 of 2006, **Amani Fungabikasi Vs Republic** Criminal appeal No. 270 of 2008, **Jonathan Mluguani Vs Republic,** Criminal Appeal No. 15 of 2011, **Frederick s/o Godson and Another Vs Republic** Criminal Appeal No. 88 of 2013; (all unreported).

In **Amani Fungabikasi Vs Republic,** (supra), we said:-

*" So, since there was no **conviction** entered in terms of Section 235(1) of the Act there was no valid judgment upon which the High Court could uphold or dismiss "*

In **Mlugani,** (supra). we stated:-

we could make an order for a ***retrial.*** *But it is also true that we could have easily set aside the decision of the High Court and consequently* ***direct that the record he remitted to the District Court so that it enters a conviction.***

However, after giving the matter a very careful thought and consideration we are not inclined to make any of the above orders."(Emphasis supplied).

Apparently the omission to convict at the end of the trial and before sentencing, was not brought to the attention of the first appellate court. As in the cases of **Fungabikasi** and **Mlugani** (supra), we have also found it appropriate in the circumstances of this case not to order for a retrial or to set aside the decision of the High Court and remit the record to the trial court to enter a conviction. We have refrained from taking either of the two routes because in our view, it would be a futile exercise on our part and it will not serve the best interests of justice.

Having studied the record, we are neither persuaded on the legality of the proceedings nor convinced that the guilt of the appellant

was indeed proved to the required standard in criminal cases, as we shall demonstrate below.

To begin with the charge sheet which appears and reads as reproduced hereunder:-

" TANZANIA POLICE FORCE

CHARGE SHEET

NAME AND TRIBE OR NATIONALITY OF THE PERSON(S) CHARGED:

Name : ABDALLAH S/O ALLY
Tribe : NGINDO
Age : 28 Yrs Old
Occup : WAITER
Religion: ISLAM
Resides: TABATA MTAMBANI

STATEMENT OF OFFENCE: Rape C/S 130 (1) (a) and 131(1) of the Penal code [CAP. 16 R.E. 2002]

PARTICULARS OF OFFENCE: That Abdallah s/o Ally charged on unknown date day of December, 2008 at about 18:00 hrs at Tabata Mtambani area within Ilala District in Dar es Salaam Region did have camal knowledge of Farida D/O Ramadhani a girl of 16 yrs old.

STATION:

.....
PUBLIC PROSECUTOR

DATE:

BUG/IR/3034/2009".

Section 135 of the Criminal Procedure Act, which lays down the mode in which offences are to be charged. It is titled:-

"Mode in which offences are to be charged"

It provides the following:-

"135. The following provisions of this section shall apply to all charges and information 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;

(iii) after the statement of the offence, particulars of such offence shall be set out in ordinary language, in which the use of technical terms shall not be necessary, save that where any rule of law limits the particulars of an offence which are required to be given in a charge or an information, nothing in this paragraph shall require any more particulars to be given than those so required".

One of the reasons which made the respondent Republic support the appeal, according to the learned Principal State Attorney, was because the conviction arose from a defective charge sheet, as already demonstrated above.

Relying on the said charge sheet, the appellant was convicted of rape contrary to Sections 130(1)(a) and 131(1) of the Penal Code [Cap 16.RE.2002].

On perusal of the Penal Code, [Cap 16, R.E. 2002], Section 130(1) appears to be a general provision on rape. It states:-

> "It **is an offence for a male person to rape a girl or a woman."** [Emphasis supplied].

However, section 130(1) does not have any other category (a),(b) ... etc. Therefore it is indisputable that **section 130(1) (a)** cited in the charge sheet is non existent. The other enabling provision under which the appellant was charged, was section 131(1) which states:-

> 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 about determined by the court, to the person in respect of whom the offence was committed for the injuries caused to such person".*[Emphasis supplied].

The appellant was found guilty of **statutory rape** and was convicted to serve the mandatory minimum sentence of 30 years imprisonment. However, statutory rape is not provided for under section 130(1)(a) or 131(1) but under **section 130 (2) (e)** of the Penal Code which provides as hereunder:-

> *"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) – (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 supplies].*

The failure on the part of the prosecution to charge the appellant under the appropriate legal provisions of the Penal Code, led the trial court to fall into the same error when it found the appellant guilty

contrary to **section 130(1)(a)** which is non existent and section **131(1),** which is inapplicable; (according to page 28 of the record).

Apart from that, there is evidence on record that the appellant was found guilty of **statutory rape** and sentenced to serve 30 years imprisonment, without evidence on record establishing that the age of the victim was below eighteen years on the date of the incident. Going by the record, the **Charge Sheet** and the Memorandum of **Undisputed Matters** states the age of the victim to be 16 years as of December 2008. On the evidence of Pw1 **Salvatory Kitunda**, who was the uncle and guardian of the victim, he stated her age to have been 16 years on 28/3/2009. PW2, the victim, testified that she was 17 years when she started sexual relationship with the appellant; while PW3, **Violet Lukandala**, who was the wife of PW1, put the victim's age at 16 years in 2007.

Being charged with an offence, put on trial through irregular proceedings and being found guilty on a defective charge, based on wrong and/or non-existent provisions of the law, cannot be said that

the appellant was fairly tried in the courts below. And to cap it all, the appellant was not **convicted** in terms of section 235(1) of the Criminal Procedure Act.

In view of the foregoing shortcomings, it is evident that the appellant did not receive a fair trial in court. 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 serious charge of **statutory rape, in terms of section 130 (2) (e) of the Penal Code.** In the circumstances, the appellant, being a layman who had no means to pay for legal services, did not understand the seriousness of the charge laid against him to enable him come up with an appropriate defence. The statement of offence did not disclose the specific category of rape against the appellant.

In the recent decision of the Court handed down earlier this year, in **Marekano Ramadhani Vs Republic** Criminal Appeal No. 202 of 2013, (unreported), under similar circumstances, the Court stated:-

> *"Framing of charges should not be taken lightly. We think it is imperative for the prosecution to carefully fame up a charge in accordance with the*

law. It becomes even more vital to do so where an accused is faced with a grave offence attracting a long prison sentence as it was the case in this matter. When you look at the circumstances of the case, it appears that the appellant who is a lay person and who had no legal representation believed that the complainant was of the age for marriage. It was important therefore that from the word go he should have been informed and properly made aware that he was being charged with statutory rape so that he could adequately address the charge laid against him."

In the case of **Simba Nyangura Republic**, Criminal Appeal No. 144 of 2008, (unreported). It was stated as follows:-

"...in a charge of rape, an accused person must know under which of the descriptions (a) to (e) in section 130(2) the offence he faces falls so that he can be prepared for his defence....this lack of particulars unduly prejudiced the appellant in his defence... ."

See also **Charles Makapi v R,** Criminal Appeal No. 85 of 2012 (unreported).

Acting on the powers of the Court in terms of Section 4(2) of the Appellate Jurisdiction Act, we nullify the proceedings and judgements of the two lower courts and set aside the respective sentences imposed. Consequently we order that the appellant be released from prison forthwith unless otherwise lawfully held.

DATED at DAR ES SALAAM this 16th day of July,2015

M. S. MBAROUK
JUSTICE OF APPEAL

K. K. ORIYO
JUSTICE OF APPEAL

B. K. MMILLA
JUSTICE OF APPEAL

I certify that this is a true copy of the original

E. F. FUSSI
DEPUTY REGISTRAR
COURT OF APPEAL