IN THE COURT OF APPEAL OF TANZANIA
AT DODOMA

(CORAM: JUMA, C. J., MWARIJA, J. A. And MZIRAY, J. A.)

CRIMINAL APPEAL 346 OF 2017

NELSON MANG'ATI..... APPELLANT

VERSUS

THE REPUBLIC..... RESPONDENT

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

(Mansoor, J.)

Dated the 9th day of June, 2017
in
Criminal Appeal No. 83 of 2016.

JUDGMENT OF THE COURT

26th June, & 3rd July, 2018

MZIRAY, J, A.:

In the District Court of Kongwa at Kongwa in Criminal Case No. 74 of 2015, the appellant, Nelson Mang'ati, was charged with and convicted of the offence of rape contrary to sections 130 and 131 (1) of the Penal Code R.E 2002. He was alleged to have had carnal knowledge of one **R.M**, a girl of four years old on 21st day of June, 2015 between 18.00hrs and 20.00 hrs at Leganga Village within Kongwa District in Dodoma Region. He was sentenced to serve thirty (30) years imprisonment and was ordered to pay

the victim of the rape Tshs. 2,000,000= as compensation. He was aggrieved by the conviction, sentence and order of compensation. On first appeal, his appeal was dismissed for want of merit. Still protesting his innocence he lodged this appeal.

The facts of the case as reflected in the record may briefly be stated as follows:- On 21/6/2015 at around 18.00hrs Msafiri Sinje (PW1) was at his residence with his daughter PW7 who was around the place. He was digging a pit for a latrine. He later on realized that her daughter had disappeared. He started searching her in vain. Later on, her daughter was brought by one Neema, a neighbour and she appeared to be in a state of shock. Upon inspecting her vagina they noticed some blood stains. When they asked her as to what happened she mentioned ***mtu wa mungu,*** Nelson Mang'ati, the appellant, to have raped her. Acting on the information received from the victim, they immediately reported the matter to the village authority and later on to the police where PF3 was issued for her to be medically examined. Subsequently the appellant was arrested and charged in connection with the offence.

In his defence, the appellant denied to have committed the offence and raised a defence of alibi alleging that on that particular day and time

he had gone in the fields to guard his crops from being destroyed by monkeys where he stayed until around 7.30pm and resorted back to his home. At around 2.30 am in the early hours of the next day his house was ambushed and upon forcing the door in, he was beaten up, put under arrest and implicated with the offence, which he denied. He was conveyed to police and subsequently charged. He totally disassociated himself with the offence.

The appellant through the services of Mr. Godfrey Wasonga, learned counsel lodged this appeal to this Court raising four grounds in the memorandum of appeal as hereunder reproduced:

1. *That, both trial court and Appellate court erred in law by convicting the appellant to serve 30 years imprisonment without considering that the charge was defective.*
2. *That, both trial court and Appellate court erred in law and in fact by not considering that the prosecution side failed to prove their case beyond reasonable doubt.*
3. *That, both trial court and Appellate court did not consider the fact that the testimonies and evidence*

adduced contradicted in each other favouring the accused person.

4. *That, the whole proceedings was marred by procedural irregularities.*

Arguing the first ground of appeal, the learned counsel stated that the charge sheet was defective on account that the statement of offence did not specify the category of the offence of rape against which the appellant was arraigned. He expounded that in every case where an accused person is indicted for rape under the provisions of the Penal Code, Chapter 16 of the revised laws (the Code), the charge should specify which, amongst the categories of rape itemized under section 130(2) (a) to (e) of the Code, is intended in the indictment. He contended that the statement of the offence simply mentioned Rape contrary to sections 130 and 131(1) of the Code, whereas the correct provisions which should have been cited were sections 130(1) and (2) (e) and 131(1) of the Code.

On arguing the second, third and fourth grounds of appeal generally, the learned counsel stated that the case against the appellant left a lot to be desired. The same was not proved beyond reasonable doubt, he stressed. He pointed out for instance that there are fundamental

contradictions found in the prosecution case. He gave example of the contradiction which appeared in the testimonies of the prosecution witnesses as to the time when the incident of rape happened. It was alleged in the charge sheet that the offence was committed on 21/6/2015 between 18.00hrs to 20.00 hours. The learned counsel pointed out that, the PF3 tendered by PW3, Dr. Gilead Lupembe who examined the victim was filled at 16.00hrs on 21/6/2015 giving an impression that the same was prepared and filled before the time of the incident. Mr. Wasonga said, this was a fundamental contradiction which raises doubt as to the time when the alleged offence of rape was committed. He urged us to find that the contradictions are fundamental, and give the benefit of doubt to the appellant.

Apart from that, the counsel submitted that the trial court proceedings were flawed as there were procedural irregularities. He pointed out that PW7 was not one among the witnesses in the list. Despite the objection from the appellant, the trial court proceeded to record her evidence. Further to that, the counsel submitted that there is nothing on the record to show that examination was carried out to determine if the child was possessed of sufficient intelligence to justify the reception of her

evidence, and if she understood the duty of speaking the truth in terms of section 127 (2) of the Evidence Act, Cap 6 R.E 2002.

Another irregularity pointed out by the learned counsel was on change of Magistrates. He submitted that three magistrates participated in the conduct of the trial but there were no reasons assigned for the change of magistrates. On this point, the learned counsel relying on the unreported case of **Saidi Sui v. R,** Criminal Appeal No. 266 of 2015 submitted that, it was not proper for the second and third magistrate to take over and continue with the trial without assigning any reason for the change of hands. He said that this was contrary to section 214 (1) of the Criminal Procedure Act, Cap. 20 R.E.2002 (the CPA) and that the irregularity was incurable. He stressed that for the irregularity, the appropriate remedy is to remit the case to the trial court for it to start afresh but, with the defective charge sheet and the insufficient evidence the remedy is not appropriate in the circumstances.

On her part, Ms. Rosemary Shio, learned Principal State Attorney, who represented the respondent Republic submitted in support of the appeal. She based her argument on the following points. One, the charge sheet

was not properly drawn so as to have enabled the appellant to understand the nature of the charge preferred against him and prepare for his defence. She submitted that section "**130"** under which the appellant was arraigned is non-existent as it does not feature anywhere in the Code and that the category of rape was not disclosed. Charge sheet being a foundation of a trial, and since the same was defective, citing the unreported case of **Mathayo Kingu v. R,** Criminal Appeal No. 589 of 2015, the learned Principal State Attorney urged the Court to set the appellant at liberty.

We begin with the wording of the charge sheet. We will reproduce the charge sheet for ease of reference:

TANZANIA POLICE FORCE

CHARGE SHEET

NAME, TRIBE OR NATIONALITY OF THE PERSON CHARGED

NAME: NELSON S/O MANG'ATI

AGE: 36YRS

TRIBE: BARABAIGI

OCC: PEASANT

REL: CHRISTIAN

RES: LEGANGA

***STATEMENT OF THE OFFENCE**: Rape c/s 130 and 131(1) of the Penal Code Cap.16 [R.E 2002].*

***PARTICULARS OF THE OFFENCE**: That NELSON S/O MANG'ATI charged on 21st day of June, 2015 between 18:00hrs to 20.00hrs at Leganga village within Kongwa District in Dodoma Region did rape one RAHEL S/O MSAFIRI a child of 4 years.*

***STATION**: KONGWA POLICE*

***DATE:** 07/09/2015*

SGN: PUBLIC PROSECUTOR

Section 135 of the CPA lays out the mode in which offences are to be charged. For ease of reference we reproduce it as here under:-

> *(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;
(Emphasis added.)

It is clear from the above provisions that a statement of offence shall describe the offence and shall contain a reference to the section of the enactment creating the offence.

In the case at hand, the statement of the charge failed to specify the specific classification among the categories stated under section 130 (2)(a) to (e). The classifications of the offence of rape have been divided into five as reflected in that section. As it appears in the charge sheet in this case, it is not clear under which of those five classifications or categories of the offence of rape was the appellant alleged to have committed.

This Court in **PASTORY LUGONGO V. R,** Criminal Appeal No. 251 of 2014 (unreported), citing with approval the decision in **Abdallah Ally Vs The Republic,** Criminal Appeal No. 253 of 2013 (unreported) stated:-

> *"...being found guilty on a defective charge, based on wrong and/or non-existent provisions of the law, it cannot be said that the appellant was fairly tried in the courts below...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 rape....."*

Corresponding remarks were earlier made in the case of **Marekano Ramadhani Vs The Republic,** Criminal Appeal No. 201 of 2013 (unreported). Indeed, in both decisions the Court held that the defective charge sheet prejudiced the appellant and left him unaware that he was facing a serious charge. On that basis therefore we allow the 1st ground of appeal.

As for the other irregularities argued in the third ground of appeal the learned Principal State Attorney readily conceded that there are material

contradictions in the prosecution's case as correctly submitted by the counsel for the appellant in respect of the time when the incident of rape happened. On our part, we are of the settled view that, the contradiction raised by the learned counsel for the appellant and supported by the learned Principal State Attorney is fundamental. As correctly submitted, it is important to know the exact time the offence of rape was committed. The prosecution witnesses contradicted themselves as to the time when the offence of rape was committed. While it was alleged in the charge sheet that the offence was committed on 21/6/2015 between 18.00hrs to 20.00 hrs, PW3 tendered PF3 in the trial court showing that the same was filled at 16.00hrs prior to the incident. We see this as a major and fundamental contradiction which raises genuine doubt. For that reason, we give the benefit of doubt in favour of the appellant on this point.

On the third point raised on change of magistrates in the trial court, the learned Principal State Attorney also conceded that taking over and continuing with the trial without assigning any reason for the change of hands was a procedural irregularity violating the mandatory requirements of section 214(1) (the CPA) which reads:

S. 214 (1) where any magistrate, after having heard and recorded the whole or any part of evidence in a trial ... is for any reason unable to complete the trial ...another magistrate ... may take over and continue with the trial ... and the magistrate so taking over may act on the evidence or proceedings recorded by his predecessor ***and may in the case of a trial and if he considers necessary, resummon the witnesses and recommence the trail.....***

(2) Whenever the provisions of subsection (1) apply the High Court may, ... set aside any conviction passed on evidence not wholly recorded by the magistrate before the conviction was ***had, if it is of the opinion that the accused has been materially prejudiced thereby and may order a new trial" .***

(Emphasis provided).

The principle that can be gathered from the above provision is that once the trial of a case has begun before one judicial officer that judicial officer has to bring it to completion unless for some reason he/she is unable to do that. The provision cited above also imposes upon a successor magistrate an obligation to put on record why he/she has to take up a case that is partly heard by another. There are a number of reasons why it is

important that a trial started by one judicial officer be completed by the same judicial officer unless it is not practicable to do so. For instance, integrity of judicial proceedings hinges on transparency. Where there is no transparency justice may be compromised. Section 214 (1) of the CPA therefore caters for takeover of trial by a successor magistrate where one magistrate is unable for some reason to bring the proceedings to completion. Our settled position is that the reasons for the takeover have to be put on record.

In **Priscus Kimaro v. Republic**, Criminal Appeal No. 301 of 2013 (unreported) the Court observed:

> *"...where it is necessary to re-assign a partly heard matter to another magistrate, the reason for the failure of the first magistrate to complete the matter must be recorded."*

On the basis of the preceding authority herein above which we subscribe, all proceedings before Senapee RM and Nasari - RM pertaining to the takeover of the partly heard matter becomes a nullity.

Having found above that the trial was marred by irregularities shown above the issue is whether or not we should order a retrial. It was conceded by both learned counsel that PW7 was not examined by the trial magistrate to determine whether she was possessed of sufficient intelligence and understood the importance of speaking the truth as required by Section 127 (2) of the Evidence Act, Cap 5 R.E 2002. The learned counsel contended that, since no *voire dire* examination was conducted to determine the intelligence of PW7, it was not clear whether she was intelligent enough and whether she understood the duty of speaking the truth. It is obvious in the court case record that the evidence of PW7 was received without recourse to a *voire dire* examination. In **Kimbute Otiniel Vs The Republic**, Criminal Appeal No. 300 of 2011 (unreported) this Court took the position that as to the consequences of the misapplication of the conduct of a *voire dire*, each case is to be determined on its own set of circumstances and facts. But, the Court proceeded further to hold, *inter alia,* that:-

> *"....Where there is a complete omission by the trial court to correctly and properly address itself on sections 127 (1) and 127 (2) governing the competency of a child of*

tender years, the resulting testimony is to be discounted."

That being the position, the testimony of PW7 is as good as nothing.

Given the fact that the evidence of PW7 was a vital direct evidence, coupled with the fact that the appellant was not fairly tried on account of an incurably defective charge, we are of the settled view that the order of retrial will not be appropriate. The option left for us is to quash the conviction and set aside the sentence meted against the appellant, as we hereby do. We order that the appellant be released from prison forthwith unless otherwise lawfully detained.

DATED at **DODOMA** this 2nd day of July, 2018.

I. H. JUMA
CHIEF JUSTICE

A. G. MWARIJA
JUSTICE OF APPEAL

R. E. S MZIRAY
JUSTICE OF APPEAL

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

E. Y. MKWIZU
DEPUTY REGISTRAR
COURT OF APPEAL