IN THE COURT OF APPEAL OF TANZANIA

AT BUKOBA

(CORAM: MBAROUK, J.A., MKUYE, J.A. And WAMBALI, J.A.)

CRIMINAL APPEAL NO. 89 OF 2017

ANTIDIUS AUGUSTINE..... APPELLANT

VERSUS

THE REPUBLIC..... RESPONDENT

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

(Kairo, J.)

dated the 30th day of March, 2017

in

Criminal Appeal No. 56 of 2014

JUDGMENT OF THE COURT

27th August & 6th September, 2018

WAMBALI, J.A.:

The appellant, Antidius Augustine and two others namely Rudovick Rugakingira and Hamad Ibrahim (not subject to this appeal), appeared before the District Court of Muleba at Muleba charged with the offence of "Gang rape" contrary to sections 130(2)(c) and 131 (2)(1) of the Penal Code, Cap. 16. R.E. 2002 (the Penal Code), as amended by "sections 5 and 7 of

the Sexual Offences Special Provisions Act, No. 4/1998." As they did not admit the allegation, the trial was conducted and in the end it was only the appellant who was convicted of the offence of rape contrary to sections 130(2)(e) and 131(1) of the Penal Code instead of sections 130(2)(c) and 131(1) of the Penal Code which was indicated in the charge sheet. The other two persons named above were acquitted by the trial court.

The appellant immediately lodged an appeal to the High Court in which he protested against both conviction and sentence. The desire of the appellant to be set free could not be realised through the outcome of that appeal as the High Court in its judgment that was delivered on 30/3/2017 substituted the conviction of the appellant to be of "gang rape" and enhanced the sentence to life imprisonment. To be precise, the High Court observed that it found the appellant guilty of the offence of "**gang rape"** [our emphasis] contrary to sections 130(2) (e) and 131A (1)(2) of the Penal Code as amended by "**sections on 5 and 7 of the Sexual Offences Special Provisions Act, No. 4/ 1998.** It is worth to note that presumably the learned appellate judge did so as she acknowledged that the appellant

had earlier argued that the trial District Court had invoked an irrelevant provision of the law which did not concern the offence of gang rape.

The appellate High Court subsequently thereafter dismissed the appeal of the appellant against the decision of the trial District Court.

The appellant was dissatisfied with the decision of the appellate High Court hence, this second appeal in which he protests against both conviction and sentence.

The appellant lodged a memorandum of appeal comprising nine (9) grounds of appeal, which at the hearing, it was agreed that most of the complaints which we need not reproduce herein, centered on whether the prosecution proved its case against the appellant beyond reasonable doubt.

At the hearing of the appeal, the appellant appeared in person, unrepresented, while Mr. Nestory Paschal Nchiman, learned State Attorney appeared for the respondent Republic.

The appellant did not have much to say as he urged us to consider his complaints and allow the appeal.

The response of Mr. Nchiman for the respondent Republic on the appeal was fairly short. He readily supported the appeal of the appellant against conviction and sentence but on a different reason than most of the complaints of the appellant in the memorandum of appeal. His main argument in support of the appeal was that the charge which was laid against the appellant was defective from the beginning when the charge sheet was presented in the trial court. Mr. Nchiman submitted that the section of the law which was indicated in the charge sheet, did not concern "gang rape". The said section concerned a different category of the offence of rape, Mr. Nchiman emphasized.

Mr. Nchiman submitted further that although the trial Resident Magistrate in his judgment convicted the appellant under another section, that is, section 130(2) (e) and imposed a sentence under section 131 (1) and (2) of the Penal Code as the victim was below eighteen (18) years of age, he could not correct that defect in the charge at that stage as the charge was defective. To support his arguments on the effect of a defective charge, Mr. Nchiman referred the Court to the decision of this Court in **Nelson Manga'ti v. The Republic**, Criminal Appeal No. 346 of 2017 in which the

that before coming to the conclusion on this matter, it is important to revisit and discuss some of the relevant matters pertaining to the appeal and the law.

The provision of section 135(a) (ii) of the Criminal Procedure Act, Cap. 20 R.E. 2002 (the CPA) must be closely observed by both the prosecution when drawing a charge and the trial court when admitting the charge before assuming jurisdiction to try a case. The provision provides that:

> " *135(a)(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."*

The requirement elaborated in the above quoted provision aims to put more emphasis on the fact that it is the charge or information as stated in the CPA, which commences a criminal trial in subordinate court and the High

Court respectively. It follows that a defective charge or information, as the case may be, cannot therefore support or commence a lawful trial, unless it is amended or substituted before the completion of the trial in accordance with the law.

It is in this regard that this Court in a number of decisions has construed seriously and strictly the implication of a defective charge or information which escapes the attention of the subordinate court and the High Court as it did in **Abdallah Ally** (supra). [See also **Mussa Mwaikunda v. The Republic**, Criminal Appeal No. 174 of 20016 (unreported)].

We wish to emphasis that it is most important that before assuming trial of case a magistrate or a judge must thoroughly peruse the charge or information, as the case may be, which is presented before that court to ensure fair administration of justice and to give credence and respect to the criminal justice system as a whole. Failure to do so may lead into unexpected consequences to both sides to the case.

To appreciate the defects in the charge which was laid against the appellant at the trial District Court, we find it proper to reproduce it herein

partially from particulars indicated in the offence section and the law and the particulars without including the particulars of the accused who were at the trial court.

> *" **Offence section and law**: Gang rape c/s 130 (2) (c) and 131 (1) (2) of the Penal Code as amended by section 5 and 7 of the sexual offence special provision Act No. 4/1998.*
>
> ***Particulars of the offence**:*
>
> *That **ANTIDIUS** s/o **AGUSTINE, RUDOVICK** s/o **RUGAKINGIRA** and **HAMAD s/o IBRAHIM** are jointly and together charged on 28th day of May, 2004 at about 13:00 hrs. at Kamachumu Village, within Muleba district in Kagera region did have sexual intercourse with one **CONCHESTER d/o JOSEPH** without her consent a girl aged 17 years."*

We think that from the above quoted portion of the charge sheet, nobody can doubt that there is no connection between the particulars of the offence

and the section of the law which was purportedly considered as "Gang rape". Let the section bear the testimony to our considered observation:

> *"Section 130(2) (c) of the Penal Code provides:*
>
> *"(2) 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).....*
>
> *(b).....*
>
> *(c) With her consent when her consent has been obtained at a time when she was of unsound mind or was in a state of intoxication induced by any drugs, matter or thing, administered to her by the man or by some other person unless proved that there were prior consent between the two."*

It follows that even without reproducing the provision of section 131(1) and (2) of the Penal Code which was included in the statement of the offence for the purpose of punishment of a person convicted of the offence of rape depending on the category, it is apparent that, that section could not have been the one to be relied upon in the punishment for the purported offence of "gang rape" as it was laid in the offence section and particulars.

We have no hesitation in view of the circumstances which we have described above to observe that the prosecution did not squarely abide to the provisions of section 135 (a) (ii) of the CPA when it presented the charge sheet at the trial District Court.

Unfortunately, with due respect, the learned trial Resident Magistrate did not also exercise care and close scrutiny when he admitted the charge sheet which was defective before he assumed the trial of the case. This is apart from the fact that he rectified and substituted the charge and convicted the accused under section 130(2) (e) instead of section 130 (2) (c) of the Penal Code for allegedly raping the girl below eighteen years old. Moreover, we think that he could not had validly exercised those powers at that stage

of composing the judgment while the charge before him was defective and without affording the opportunity to the parties. His action was due to his view that the prosecution had proved another offence as per the evidence. However, our view is that up to the time when the learned trial Resident Magistrate composed his judgment and delivered it, he had not become aware that the section which was laid in the charge did not concern the offence of gang rape and that the particulars did not correspond to the offence which was laid in the charge. Besides, even after he purportedly rectified the section of the law, still the particulars remained intact in the charge and could not support the section of the law on the offence that he substituted, convicted and sentenced the appellant.

Exercising care in the scrutiny of a charge is extremely important for the trial court as we have observed above. It is in the circumstances like this case which led the erstwhile East African Court of Appeal to observe in **Avone v. Uganda** (1969) EA 129 at page 131 as follows:

> " *It is a matter of considerable surprise that the learned trial magistrate did not trouble to see that*

the charge as laid down were correct before even trying the case. These omissions are quite serious and it is incomprehensible how a magistrate could assume jurisdiction to try an accused person on a section of law which does not exist, or convict an accused person under a section of the Penal Code comprising several subsections without indicating the subsection of the section of the Penal Code under which an accused person was convicted. It is the primary duty of a magistrate to satisfy himself that the section of the Penal Code under which an accused is charged is correct before assuming jurisdiction to try the case."

From what we have pointed above with respect to the defects that surrounded the charge which was laid against the appellant at the trial District Court, it is apparent that the appellate High Court which set on the

first appeal could not also have validly rectified the defects which were apparent in the said charge from the beginning at that stage.

We need to state that although the appellate High Court purported to confirm the provisions of the law, that is, section 130(2) (e) of the Penal Code under which the appellant was convicted with by the trial court, but termed it as 'gang rape' and rectified the section on the punishment to be section 131A(1) (2) of the Penal Code, unfortunately too, with due respect, the learned appellate judge went into the same error of referring the offence under that section as gang rape. In this regard, we feel obliged to quote the learned appellate judge for the sake of consistence and clarity thus:

> *"Suffice to say that the court has mandate to correct such defects under section 344 of the Criminal Procedure Act, Cap.20 R.E. 2002 provided the conviction is valid. In the same stance, and for the purpose of putting the record proper, I hereby correct the provision under which the appellant was convicted to read "the court has found the appellant*

guilt of the offence of gang rape c/s 130(2) (e) and 131A (1) (2) of the Penal Code as amended by section 5 and 7 of the Sexual Offences Special Provision Act No.4/1998."

After the learned appellate judge made that finding, the punishment imposed on the appellant was also enhanced to life imprisonment as provide for under section 131A (2) of the Penal Code.

We think, with due respect to the learned appellate judge, that the sentence of life imprisonment that was imposed to the appellant was not proper. This is so because the provisions of the law under which the appellant was held to have been convicted is section 130(2) (e) of the Penal Code which did not relate to the offence of gang rape to make him liable to the punishment for life imprisonment under section 131A(2) of the Penal Code. In short section 130 (2) (e) of the Penal Code creates the offence of raping a girl under eighteen years of age. Besides, we have indicated that the charge which was laid before the trial court was defective and therefore it could not have been corrected at an appellate stage.

In the circumstances of this case, we subscribe to the remarks of this Court in **Abdallah Ally** (supra) which was quoted with approval by this Court in **Mang'ati** (supra). It is pertinent to refer to what the Court observed:

> *"... being found guilty on a defective charge based on a wrong and/or none-xistent provision of the law, it cannot be said that the appellant was fairly tried in the court below. In view of the foregoing shortcoming, 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 is preferred, left the appellant unaware that he was facing a serious charge of rape..."*

We, therefore, agree with the learned State Attorney in his argument that the defect in the charge was incurable. Indeed, it seems this is what compelled him not to support conviction and sentence that was imposed to the appellant. In this regard, we do not think it important to consider the

other grounds of appeal lodged by the appellant. The issue of a defective charge is sufficient to dispose of the appeal.

However, before we come to the end of our judgment, we think, in the circumstances of this case, and for the interest of proper criminal justice administration, it is important to emphasize on some matters with regard to the law on this particular area.

First, it is important to note that after the laws were revised and printed under the authority of section 4 of the Law Revision Act, No 7 of 1994 [Chapter 4 of the Revised Edition, 2002], it was therefore not necessary to indicate in the charge that was laid at the trial court and later the first appellate court that the said provisions (that is sections 130 (2) (e) and 131(1) (2) and 131A(2) were amended by "**section 5 and 7 of the Sexual Offences Special Provision Act, No. 4/1998.**" This is so because the Revised Edition of the Laws of Tanzania comprises and incorporates all amendments made to various chapters up to and including 31st July, 2002.Reference could have been made, if it was necessary, to the amendment that followed thereafter.

Second, it is important to note that the provisions of sections 131 and 131A of the Penal Code were amended in 2007 by Act No. 19 of 2007 of the Written Laws (Miscellaneous Amendments) Act, 2007.

Third, the provisions of sections 130 (3) (c), 131 (2) (c) and (3) were also amended by Act No 21 of 2009 of the Law of the Child Act, 2009.

We, therefore, think that it is important that the charge which is laid on those sections must comply with the provisions of the law as is presently constituted, for failure to do so will make the charge incurably defective.

All in all ,we are satisfied that the charge which was laid before the trail District Court was defective and in effect it prejudiced the appellant. In view of the defects which we have found, it could not be validly rectified by the trial court at the stage of composing judgment and High Court at the stage of the first appeal as it was incurable under section 388 of the CPA. The proceedings that were conducted at the trial court and followed by those in the High Court were a nullity .In the event, we allow the appeal and quash the conviction which was entered by the trial court and substituted by the

appellate High Court. We also set aside the sentence of life imprisonment that was imposed to the appellant by the High Court on appeal.

In the circumstance of this case, we do not think a retrial can be ordered by this Court. We accordingly order that the appellant should be released from prison forthwith and be set free unless otherwise held lawfully for other causes. We so order.

DATED at **BUKOBA** this 6th day of September, 2018.

M. S. MBAROUK
JUSTICE OF APPEAL

R. K. MKUYE
JUSTICE OF APPEAL

F. K. L. WAMBALI
JUSTICE OF APPEAL

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

E. Y. MKWIZU
SENIOR DEPUTY REGISTRAR
COURT OF APPEAL