

TANZANIA / JUDGMENT

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IN THE COURT OF APPEAL OF TANZANIA AT DAR ES SALAAM {CORAM: MJASIRI, J.A., MUGASHA, J.A And LILA, J.A) CRIMINAL CASE NO. 495 OF 2016 JAFARI MOHAMED ; ~ APPELLANT VERSUS THE REPUBLIC RESPONDENT {Appeal from the decision of the High Court of Tanzania at Dar es Salaam) {Kitusi, J.) dated the 7 th day of July, 2016 in HC. Criminal Appeal No. 145 of 2015 JUDGMENT OF THE COURT 27th February & 4th April, 2018 MJASIRI, J.A.: In the District Court of Kinondoni District, the appellant, Jafari Mohamed was charged of committing an unnatural offence contrary to section 154 of the Penal Code [Cap 16, R.E. 2002]. He was convicted as charged and was sentenced to thirty (30) years imprisonment. In addition to the prison term, the appellant was ordered to pay Shillings One Million (1,000,000/=) to the victim. Being dissatisfied with the decision of the trial court, the appellant appealed to the High Court. His appeal to the .High Court was unsuccessful hence his second appeal to this Court. 1 ~ 'v i~

- . 1,j· It was the prosecution case that on the 17th day of December, 2004 at about 23.00 hours at Manzese Sisi kwa Sisi area, within Kinondoni District, the appellant did have carnal knowledge of a child of 14 years against the order of nature. The charge sheet read as hereunder:- Statement of offence: unnatural offences c/s 154(1} of the Penal Code as amended by the Sexual Offences/ Act No. 4 of 1998. Particulars of offence: that Jafari s/o Mohamed charged that on the J Jth day of December, 2004 at about 23. 00 hours at Manzese Sisi kwa Sisi area within Kinondoni District Dar es Salaam Region did have carnal knowledge of a child of 4 years against the order of nature. At the hearing of the appeal the appellant was unrepresented and had to fend for himself whereas the respondent Republic had the services of Ms Celina Kapange, learned State Attorney. The appellant presented a four- point memorandum of appeal, which can be summarized as follows:- 2
1. The first appellate court erred in law in upholding the conviction of the trial court which was based on an uncategorized provision of the Penal Code.
 2. There was no evidence to establish penetration.
 3. The appellant was not properly identified.

4. The prosecution did not prove its case beyond reasonable doubt. When called upon to present his arguments, the appellant opted to let the State Attorney present her submissions first. The learned State Attorney did not support the conviction for the following reasons:- In relation to ground No. 1, the learned State Attorney submitted that section 154(1) has various categories and the different categories of the offence carry different penalties. It is not shown in the charge sheet under which category of section 154(1), the appellant was charged. According to her, this was contrary to the requirements of section 135(a)(ii) of the Criminal Procedure Act [Cap 20 R.E. 2002] (the CPA), which requires the description and the essential elements of the offence to be outlined, specifying the relevant provisions of the law. She relied on the case of *Musa Mwaikunda v Republic* [20061 TLR 387. She also made reference to *Fred Mwakajilo v Republic*, Criminal Appeal No. 252 of 2011 and 3
- „*Marekano Ramadhani v Republic*, Criminal Appeal No. 202 of 2013 (both unreported). She submitted that failure to specify the category of an offence in a charge sheet is fatal. She stated further that failure to categorize the offence denies the accused person the chance to properly defend himself, hence it is prejudicial to his defence. She asked the court to nullify the proceedings and judgments of the two courts below, and to set the appellant free. The learned State Attorney did not ask for a retrial. According to her, there were contradictions and inconsistencies between the major prosecution witnesses, PW1 and PW2. She concluded that the evidence on record was not sufficient to establish the offence. We on our part, after a careful perusal of the record, are of the considered view that the main issue for consideration and determination is whether or not the charge against the appellant complied with the statutory requirements and enabled the appellant to appreciate the offence he was charged with in order for him to make an informed defence. We are inclined to agree with the submissions made by Ms Kapange. It is evident from the record that the charge made against the appellant did not properly categorise the offence. Section 154(1) of the Penal Code is reproduced as follows:- 'Any person who- {a) has carnal knowledge of any person against the order of nature/ or {b} has carnal knowledge of an animal/ or {c} permits a male person to have carnal knowledge ; of him or her against the order of nature. The appellant was simply charged with. section 154(1) without any mention of the categories laid out under (a), (b) and (c) respectively. The law is settled that the particulars of the offence must state and include all the essential ingredients to the offence, failure of which would render the charge defective. In *Marekano Ramadhani v Republic*, Criminal Appeal No. 202 of 2013 (unreported) it was stated thus:- "It is a mandatory requirement under section 135 of CPA that a charge sheet should describe the offences and should make reference to the section of the law creating the offence. " 5 See *Charles s/o Makapi v Republic*, Criminal Appeal No. 85 of 2012 (unreported). In *Simba Nyangara v Republic*, Criminal Appeal No. 144 of 2008 which was cited in *Marekano's* case (supra), the appellant was charged with rape contrary to section 130(1) and 131 of the Penal Code. The Court observed that 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. The Court went further and stated: ". that this lack of particulars unduly

prejudiced the appellant and his defence. " Section 135(a)(ii) provides as follows:- 11The 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 ingredients 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 provided]. 6 In Marekano's. case (supra) the court emphasized the need to frame up a charge in accordance with the law. The court stated thus:- "Framing of charges should not be taken lightly. We think it is imperative for the prosecution to carefully frame up a charge in accordance with the law. It becomes even more vital to do so where an accused person)s faced with a grave offence attracting a long prison sentence as it was the case in this matter." We entirely agree with the learned State Attorney that the irregular framing of the charge against the appellant is not curable under section 388 of the CPA. In Charles Mlande v Republic, Criminal Appeal No. 270 of 2013 (unreported) this Court stated that:- "The statement of offence must contain a reference and for that matte0 a correct reference to the section of the enactment creating the offence. " We are fully aware that not every defect in the charge sheet would invalidate the trial, as this depends on the particular circumstances of each case, the overriding consideration being whether or not the infraction worked to the prejudice of the accused person. 7 .. In Abd~lla Ally ,v Republic; Criminal Appeal No. 253 of 2013 (unreported), the Court stated thus:- "... 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 court below. In view of the foregoing shortcomings/ it is evident that the· appellant did not receive a fairtrial. The wrong and /or non-citation of the appropriate provision of the Penal Code under which the charge was preferre~ left the appellant unaware that he was facing a serious charge of rape." See - also Marekano Ramadhani v Republic (supra) Kastory Lugango v Republic, Criminal Appeal No. 251 of 2014 and David Halinga v Republic, Criminal Appeal No. 12 of 2015 (all unreported). In all these decisions, the court held that the defective charge prejudiced the respective appellant. We are of the same view in respect of the instant appeal. 8 In the result, we find merit in the appeal. We accordingly- allow the ·I ;. , .. - ...) ;_ ~·: _.,.. :- ; : :: :- appea I quash the conviction and set aside the sentence of 30 years imprisonment meted to the appellant together with the compensation order for Shillings One Million (1,000,000/=). We order that the appellant be immediately release~r from prison unless he is held for another lawful purpose. In view of the nature and quality of the evidence on record we are of the firm view that it would not be in the interest of justice to order a retrial in this case. Order accordingly. DATED at DAR ES SALAAM this 29 th day of March, 2018. S. MJASIRI JUSTICE OF APPEAL S. E.A. MUGASHA JUSTICE OF APPEAL S.A. LILA JUSTICE OF APPEAL I certify that this is a true copy of the original. A.H. M ~MI DEPUTY REGISTRAR COURT OF APPEAL 9

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