

TANZANIA / JUDGMENT

20170523 TZCA Dodoma

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IN THE COURT OF APPEAL OF TANZANIA AT DODOMA (CORAM: LUANDA. J.A.. MWARIJA. J.A.. And MKUYE. J.A.^ CRIMINAL APPEAL NO. 64 OF 2016 MOSES SANJITO.....APPELLANT VERSUS THE REPUBLIC..... RESPONDENT (Appeal from the decision of the High Court of Tanzania at Dodoma) fLema. PRM ExtJur.l Dated the 14th day of July, 2010 in Criminal Appeal No. 85 of 2015 JUDGMENT OF THE COURT 15th & 24th May, 2017 MWARIJA. J.A.: The appellant was charged in the District Court of Mpwapwa with the offence of rape. It was alleged that on 15/9/2014 at about 20.30 hrs at Mwanakianga village within Mpwapwa District in Dodoma Region, the appellant did have a carnal knowledge of one Mariam d/o Mbatiani, a girl aged 16 years. After a full trial, the appellant was convicted and sentenced to 30 years imprisonment. Dissatisfied with the conviction and sentence, the appellant appealed to the High Court. The appeal was transferred to the Resident Magistrate's Court of Dodoma under S. 45 (2) of the Magistrate's Courts Act [C apll R.E. 2002] to be heard by W.E. Lema, a Principal Resident Magistrate with Extended Jurisdiction(Ext. Jur.). After hearing the appeal, the learned Principal Resident Magistrate (Ext. Jur.) found the same to be lacking in merit. She dismissed it in its entirety. Aggrieved further, the appellant preferred this second appeal. The factual background of the appeal can be briefly stated as follows: On 15/9/2014, the victim of the offence, Mariam Mbatiani who was at the material time a Form II student at Mazae Secondary School, was at home studying with her friends and her sister, Julia Mbatiani who resided in the same house. The study was later interrupted by deceptive act of the person who, according to the victim, raped her. At about 20.00 hrs one child by the name of Simon Ndaga who stayed in the same house, arrived and informed Mariam Mbatiani that her friend, Angelina Mhondokwa wanted to see her. Mariam went with him but despite having walked for about ten metres, the said Angelina was nowhere to be seen. The victim who gave evidence at the trial as PW1 testified that to her surprise, instead of meeting Angelina as expected, she saw the appellant who was known to her. The appellant told her that her friend Angelina was at the shop but had left for home. According to the victim, on what transpired to her to be the appellant's stratagem, he volunteered to escort her so that she could meet Angelina. After having walked for a distance of almost 15 metres, the appellant revealed his intention. He told her that he was in fact deceiving her. His intention was to get the opportunity of letting her know that he loved her. He wanted to have a sexual intercourse with her but she refused. According to her evidence, the appellant reacted by beating her. Thereafter, he removed his shirt and used it to cover her mouth followed by the act of tearing

her skirt and underpants. He then fell her down and had a carnal knowledge of her. She explained that, without using a condom, the appellant molested her sexually for about 30 minutes after inserting her penis into her vagina thereby causing her to suffer pain as she had never had sexual intercourse before. PW1's evidence was supported by that of Julian Mbatiani (PW3). She testified that while in their study group with PW1 and their friends, Simon Ndaga arrived there and told PW1 that she was being called by Angelina. The said child went out with PW1. Simon Ndaga was also called as a witness (PW6) but in the course of his testimony, he was declared a hostile witness. The incident was reported to police on 16/9/2014 whereupon PW1 was issued with a PF.3 by a police officer, E. 4919 DC Ramia (PW4). She was medically examined on the same day. According to the evidence of the Doctor who examined her, Dr. Arsen Onesmus Michael (PW5) of Mpwapwa District Hospital, although she was not found with spermatozoa, she had bruises on her right leg and her vagina was found to have been penetrated by a blunt object. She had a painful vaginal examination. In his defence, the appellant denied the charge. He disputed the prosecution evidence that he met and raped PW1 on the material date. He testified that for a period of a whole week from 9/12/2014, he was at home making bricks with one Erasto Sanjito (DW2). In his evidence, DW2 supported the appellant's version that he was with him at home making bricks for the whole week as from 9/12/2014. It was the appellant's account further that on 16/9/2014, he met PW4 who required him to report to police station following an allegation against him that he raped PW1. He went to police on 26/9/2014 and found there PW2 who allegedly took the advantage of reminding the appellant about his (PW2's) claim for compensation. He said that PW2 wanted to be paid sh. 70,000/- as compensation arising from a motorcycle accident caused by the appellant. PW2 had claimed that he was knocked down by the appellant. He said that he was threatened to be charged with the offence of rape if he did not pay PW2. After consultation with her mother, the appellant refused to pay and as a result he said, he was charged with the offence of raping PW1. 4 The appellant's memorandum of appeal consists of two main grounds:

1. That the learned Principal Resident Magistrate (Ext.Jur.) erred in upholding the sentence of 30 years imposed by the trial court on the appellant who was at the material time of the offence aged 18 years.
2. That the learned Principal Resident Magistrate (Ext Jur.) erred in upholding the appellant's conviction which was founded on the charge which was defective. At the hearing of the appeal, the appellant appeared in person and unrepresented while the respondent Republic was represented by Mr. Angaza Mwipopo, learned Principal State Attorney. When he was called upon to argue his appeal, the appellant opted to hear first the learned Principal State Attorney reply to the appeal and if need be, respond thereafter. Mr. Mwipopo stated at the outset that the respondent supports the appeal. Starting with the 2nd ground of appeal, he argued that the charge sheet is indeed defective as contended by the appellant. The learned Principal State Attorney submitted that from the particulars of the offence, the appellant was not charged under the proper section of the Penal Code. He explained that whereas s. 130 (1) of the Penal Code creates the offence of rape, S.131 (2) gives several descriptions of that offence. Since the victim was a girl under the age of 18 years, Mr. Mwipopo went on to

argue, the appellant should have been charged under s. 131 (2) (e) which applies to a statutory rape, whereby consent to sexual intercourse is immaterial. He added that s. 131 (1) and (2) (a) is inapplicable in the circumstances of this case because it caters for a situation where consent is an essential element in proving the offence of rape. On the effect of charging the appellant under the provision which specifies a different type of rape, Mr. Mwipopo submitted that the infraction prejudiced the appellant because he was denied the right of preparing his defence based on the proper description of the offence facing him. As stated above, the appellant was charged under sections 130(1) and (2) (a) and 131(1) of the Penal Code. With regard to the provisions of S. 130 (1) and (2) (a), as correctly argued by Mr. Mwipopo, whereas sub- section (1) of S. 130 creates the offence of rape, sub-section (2) gives description or types of the offence of rape. S. 130 (1) states as follows:- 130-

- (1) It is an offence for a male person to rape a girl or a woman. As for sub-section (2) of S. 130 the same provides as follows:
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) Not being his wife or being his wife who is separated from him without her consent to it at the time of the sexual intercourse.
 - (b) With her consent where the consent has been obtained by use of force, threats, or intimidation by putting her in fear of death or of hurt or while she is in unlawful detention.
 - (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 drug, matter or thing, administered to her by the man or by some other person unless proved that there was prior consent between the two.
 - (d) With her consent when the man knows that he is not her husband, and that her consent is given because she has been made to believe that he is another man to whom she is, or believes herself to be, lawfully married.
 - (e) With or without the 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. From the particulars of the offence, description of the offence rape subject of the charge in this case is clearly not applicable. The type of rape envisaged under paragraph (a) of S. 130 (2) of the Penal Code is committed when there is lack of consent by a girl or a woman. When the girl is under the age of 18 years it is immaterial whether there was a consent or not. As argued by Mr. Mwipopo, the applicable provision under the circumstances is paragraph (e) of S. 130 (2) of the Penal Code. The Court stated as follows in the case of *Amos Palanzi v. The Republic*, Criminal Appeal No. 137 of 2012 (unreported) cited by the learned Principal State Attorney: The offence of rape consists of two scenarios. One is statutory rape where the victim is below 18 years of age in which case consent becomes immaterial. The scenario falls under S. 130 (2) (e) The second scenario is where the victim is 18 years of age or above where

the lack of consent must be proved before a conviction of rape is entered. In the present case, whereas the appellant was charged under S. 130

- (1) and (2) (a) of the Penal Code under which, as pointed out above, consent is material, the particulars of the offence refers to a statutory rape whereby consent is immaterial. In the circumstances, we agree with the learned Principal State Attorney that the charge is defective. We also agree that the defect is fatal because it was of such a nature that it prejudiced the appellant in preparing his defence. In the case of Amos Palanzi (*supra*) the appellant was charged under S. 131(1) of the Penal Code. However, sub-section (2) of that Section was not cited. The Court observed as follows: The appellant was entitled to know from the beginning under which scenario he was charged so as to enable him to put up an informed defence. Failure to specify the exact provision of the law that under which the accusation of rape against appellant fell in the circumstances of this case prejudiced the appellant's trial. In another case *Simba Nyangura v. Republic*, Criminal Appeal No. 144 of 2013, also cited by Mr. Mwipopo, the Court had this to say on the requirement of citing in the charge sheet, a specific provision under sub-section (2) of Section 130 of the Penal Code. We think that in a charge of rape an accused person must know under which of the descriptions (a) - (e) in section 130 (2) of the Penal Code the offence he faces falls, so that he can prepare for his defence... we agree with Mr. Mwipopo that, this lack of particulars unduly prejudiced the appellant in his defence... On the basis of the foregoing, we find that the nature of the defect in the charge sheet vitiated the trial. Our finding in the 2nd ground of appeal suffices to dispose of the appeal. We, however, find it apposite to consider briefly and by way of reiteration, the law on sentencing as raised in the 1st ground of appeal. The appellant's complaint is that he was wrongly sentenced to imprisonment because he was aged 18 years at the time when the offence was committed. In support of that ground of appeal, which he argued in the alternative to the 2nd ground, Mr. Mwipopo submitted that the sentence of 30 years imprisonment imposed on the appellant was illegal. According to the learned Principal State Attorney, the fact that the appellant was aged 18 years is apparent from the charge sheet. That the appellant was of that age was not disputed both at the preliminary hearing and during the defence, added Mr. Mwipopo. For that reason, the learned Principal State Attorney submitted, since the appellant was 18 years of age and because he was a first offender, by virtue of the provisions of S. 131
- (2) of the Penal Code, he should not have been imprisoned. We respectfully agree with Mr. Mwipopo that the sentence was illegal. Section 131(1) and (2) (a) of the Penal Code provides as follows: 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 amount determined by the Court, to the person in respect of whom the offence was committed for the injuries caused to such person.

- (2) Notwithstanding the provision of any law, where the offence is committed by a boy who is of the age of eighteen years or less, he shall -
- (i) If a first offender, be sentenced to corporal punishment only. (ii) (Hi) The Court had the opportunity to consider that section in the case of Biko Emmanuel v. The Republic, Criminal Appeal No. 590 of 2015 (unreported) also cited by Mr. Mwipopo. It stated as follows: Section 131(2) of the Penal Code bars imprisonment for boys of 18 years or less in cases of conviction for rape unless they are recidivists. Giving sentence in this case, the learned trial Resident Magistrate observed that the appellant was aged above 18 years. That is not correct. As submitted by Mr. Mwipopo, according to the record, it is undisputed that the appellant's age was 18 years. Even if his age was to be considered as at the date of the sentence, in law that would be wrong. Under S. 131 (2) of the Penal Code reproduced above, it is the age which had been attained by the convicted person at the time of commission of the offence which determines the type of sentence - See for example, the case of Mohamed Hamis v. The Republic, Criminal Appeal No. 114 of 2013 (unreported). 12 That said and done, on the basis of the finding in the 2nd ground of appeal, we allow the appeal. The conviction is quashed and the sentence is set aside. The appellant shall be released from custody forthwith unless he is otherwise lawfully held. DATED at DODOMA this 23rd day of May, 2017. B. M. LUANDA JUSTICE OF APPEAL / A. G. MWARIJA JUSTICE OF APPEAL / XijW - R. K. MKUYE / JUSTICE of appeal I certify that this is a true copy of the original. E.F. DEPUTY RE COURT OF 13

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