

TANZANIA / JUDGMENT

omary salum omary vs republic

2017 tzca 328 6 july 2017

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IN THE COURT OF APPEAL OF TANZANIA AT MTWARA (CORAM: MBAROUK, J.A., MUGASHA, J.A.. And MWANGESI. J.A.) CRIMINAL APPEAL NO. 207 OF 2016 OMARY SALUM OMARY.....APPELLANT VERSUS THE REPUBLIC.....RESPONDENT (Appeal from the decision of the High Court of Tanzania at Mtwara) (Gwae, J. ^ dated the 29th day of April, 2016 in Criminal Appeal No. 68 of 2014 JUDGMENT OF THE COURT 4th & 6th July, 2017 MBAROUK, J. A.: In the District Court of Ruangwa at Ruangwa, the appellant, Omary Salum Omary was convicted of the offence of rape contrary to section 130(1) (2) (e) and section 131(1) of the Penal Code, [Cap. 16 R. E. 2002]. He was sentenced to life imprisonment. His appeal before the High Court of Tanzania (Gwae, J.) at Mtwara was dismissed in its entirety. Undaunted, the appellant has preferred this second appeal. i In this appeal, the appellant appeared in person unrepresented, whereas Mr. Paul Kimweri appeared for the respondent/Republic. When the appeal was called on for hearing, it transpired that the charge-sheet was defective for lack of relevant section of the law concerning punishment as the victim was a child aged eight

- (8) years old. The relevant provision which missed in the charge sheet was section 131 (3) of the Penal Code [Cap. 16. R. E. 2002]. We therefore asked the learned Senior State Attorney to address us on the anomaly. Mr. Kimweri out rightly agreed that apart from the provisions cited in the charge - sheet, he said as the victim of rape was a girl aged eight (8) years old, section 131(3) of the Penal Code had to be included therein the charge - sheet. Non - inclusion of that important provision of the law in the charge - sheet has rendered it to be defective. For being defective, he said, that has led to make all the proceedings before the trial court and the High Court a nullity. He therefore urged us to invoke section 4(2) of the Appellate Jurisdiction Act and quash the conviction and set aside the sentence imposed on the appellant thereafter order a re-trial. On his part, the appellant being a lay person not knowledgeable of the technicalities of the provisions of the law had nothing to address us on the points raised by the Court. He therefore let the matter to be resolved as the Court may deem it fit. We have found it proper to begin with the citation of section 132 of the Criminal Procedure Act, [Cap. 20 R. E 2002] which reads as follows:- "Every charge or information shall contain, and shall be sufficient if it contains, a statement o f the specific offence or offences with which the accused person is charged, together with such particulars as may be

necessary for giving reasonable information as to the nature of the offence charged." 3 The reason to cite that provision is that, it is a fact that in Criminal cases, a charge sheet is taken as a source of prosecution case and an accused person is supposed to be provided with sufficient and specific information necessary for giving him/her reasonable information as to the nature of the offence charged. This Court in the case of Mathayo Kingu Vs. Republic, Criminal Appeal No. 589 of 2015 (unreported) stated as follows:- "For purposes of this appeal we can only but agree with the learned State Attorney that the non-citation of proper provisions of the law specifying the type of rape and resulting sentence should the conviction be entered, prevented the appellant from appreciating not only what form of defence he should marshal but the important elements of which type of the offence of rape he was going to face. The non-citation of proper provisions also prevented the appellant from appreciating the important element of punishment he would face if convicted." In the instant case, the charge sheet at the trial court has failed to cite section 131(3) of the Penal Code especially knowing that the victim was below the age of ten (10) years. We are of the firm view that, such non-citation has not provided the appellant with sufficient information of the charge against him and the probable punishment he would have faced if found guilty. We find such an omission fatal and the trial was vitiated. We therefore, invoke the powers of Revision conferred upon us under section 4(2) of the Appellate Jurisdiction Act and hereby nullify all the proceedings before the trial court and those before the High Court. In addition to that, we quash the conviction and set aside the sentence imposed upon the appellant. Ordinarily, we should have ordered a retrial, but as four years have passed since PW1 (the victim) encountered with such horrific incident of rape, we do not think it is wise to send her again to testify at the trial as she is above the age of ten. Considering the circumstances stated herein above and for the interest of justice we are constrained to order the release of the appellant from prison forthwith, unless he is otherwise lawfully held. DATED at MTWARA this 5th day of July, 2017. M. S. MBAROUK JUSTICE OF APPEAL S. E. A. MUGASHA JUSTICE OF APPEAL S. S. MWANGESI JUSTICE OF APPEAL I certify that this is a true Original. DEPUTY REGISTRAR COURT OF APPEAL 6

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