

TANZANIA / JUDGMENT

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13 December 2017

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~,, :_.. :.. ~~, ""r' ' IN THE COURT OF APPEAL OF TANZANIA ATARUSHA {CORAM: MJASIRI, J.A., MWARIJA, J.A., And MWANGESI, J.A.) · CRIMINAL APPEAL NO. 389 OF 2013 SEMA SIMA•..... APPELLANT VERSUS THE REPUBLIC RESPONDENT (Appeal from the decision of the High Court of Tanzania at Arusha) (Massengi, J.) Dated 4 th day of December, 2013 In Criminal Appeal No. 92 of 2013 JUDGMENT OF THE COURT 12th & 15th Dec. 2017 MJASIRI, J.A.: In the District Court of Babati, the appellant was charged with the offence of defilement of a girl under fourteen years of age contrary to · section 136(1) of the Penal Code [Cap 16, R.E. 2002]. However the appellant for reasons to be stated later, was convicted of the offence of rape by the trial court and was sentenced to life imprisonment. Aggrieved by the decision of the trial court, the appellant filed his appeal to the High Court. His appeal was unsuccessful and the conviction for rape was upheld by the High Court even though the offence of 1 , defilement was indicated in the High Court judgment. Undeterred, the appellant has now filed his second appeal to this Court. It was the prosecution case that on the 13th day of October, 1998 at 13:30 hours at Gidika Village within the District of Hanang in Arusha Region, the appellant did have carnal knowledge of one Udawili d/o Ganangu, a girl who was eight years old. The prosecution relied on the evidence of the victim, PW2, a minor and that of PW3, who was also a minor (a 9 year old) to establish their case against the appellant. The appellant presented a five-point memorandum of appeal which is summarized as follows:

1. The charge which was preferred against the appellant was defective.
2. The trial court failed to comply with the requirements under section 228 of the CPA.
3. The trial court failed to verify the age of PW2, who was the victim of rape.
4. The first appellate court failed to re-evaluate the evidence on record.
5. The first appellate court failed to correct the irregularity in the Judgment of the trial court. 2
'\ At the hearing of the appeal the appellant was represented by Mr. Meinrad D'Souza, learned advocate, whereas the respondent Republic had the services of Mr. Fortunatus Muhalila, learned Senior State Attorney. In his submission, Mr. D'Souza stated that the charge was defective. The appellant was charged on a non-existent charge. According to him, the appellant was alleged to have committed the offence on October 13,

1998. At that time the Sexual Offences, Special Provisions Act 1998 (Act No. 4 of 1998), the Sexual Offences Act, which amended the Penal Code was already in place. It came into effect in July, 1998, hence section 136 of the Penal Code was no longer in existence. He stated that the appellant has already served a prison term of 19 years on a non-existent offence. Mr. D'Souza relied on the cases of Abdalla Ali v. Republic, Criminal Appeal No. 253 of 2013 (unreported) and Magesa s/o Mjunja v. Republic [1986] TLR 10. He reiterated that the amendment to the act brought in place a brand new offence, bearing different wording and a new sentence. He argued that when there is no proper charge before the court against the appellant, it is a good ground to allow the appeal. On the question of whether or not there should be a new trial, the learned advocate for the appellant argued that the evidence on record is not sufficient to support the conviction. He submitted that the prosecution relied on the evidence of the victim who was 8 years old (PW2) and another minor aged 9 (PW3) in support of the charge. He stated that according to the record, a voir dire examination was conducted to the two witnesses by the trial magistrate. PW2 and PW3 both testified that they were pagans, but strangely stated that they feared God and if they lied, they would be committing a sin, which is contrary to the universal belief as far as pagans are concerned. This means that their evidence is unreliable. He submitted that according to the Court decision in Kimbute Otiniel v. Republic, Criminal Appeal_ No. 30 of 2011 (unreported) the evidence would require corroboration. Mr. Fortunatus Mhalila, learned Senior State Attorney informed the Court that he did not support the conviction of the appellant due to the following reasons.
1. The charge against the appellant was defective. The amendment to the act, meant that the offence of defilement under section 136 (1) of the CPA was no longer viable given the amendments to the Penal Code brought about under the Sexual Offences Act. The substituted charge of rape under section 131(1) & (3) had a different wording and carried a 4 different penalty. The offence of rape under section 131 (1) &
 - (3) of the Penal Code carried a mandatory minimum sentence of life imprisonment, unlike the offence of defilement which carried a maximum of life sentence.
 2. The evidence on record was insufficient to prove the charge. The evidence of PW2 and PW3 was not reliable given the state of confusion on the children's religion and the nature of oath administered by the trial Court. The learned Senior State Attorney did not support the conviction given the underlying circumstances. He readily conceded that the charge against the appellant was defective. Under normal circumstances, a request for a re-trial would have been in order. However under the circumstances of this case given the nature of the evidence on record, he agreed with the counsel for the appellant that it would not be in the interest of justice to order a retrial. Mr. Muhaila also informed the Court that the appellant has been in prison for a period of 19 years. He was charged in 1998. We, on our part, are inclined to agree with counsel. On the defective charge, it is evident from the record that the appellant was charged with the offence of defilement contrary to section 136(1) of the Penal Code, which provided that:- 5 • ".Any person who carnally knows any girl under the age of

twelve years is guilty of a felony, and is liable to imprisonment for life, with a or without corporal punishment. " Section 136 of the Penal Code was repealed in July, 1998 following the enactment of the Sexual Offences Act which amended several written laws, and making special provisions in those laws, with regard to sexual and other offences to further safeguard the personal integrity, dignity, liberty and security of women and children. In the process section 130 of the Penal Code was also repealed and replaced with another section. Section 131 of the Penal Code was also repealed and replaced by a new section. A mandatory minimum sentence was introduced under the amendment. Section 131 provides that:- "(1) Any person who commits rape is except in the cases provided for in the renumbered subsection (2), liable to be punished with imprisonment of not less than thirty years with corporal punishment, and with fine, and shall in addition be ordered to pay compensation of amount determined by the court, 6 to the person in respect of whom the offence was committed for the injuries caused to such person.

- (3) Notwithstanding the preceeding provisions of this section whoever commits an offence of rape to a girl under ten years shall on conviction be sentenced to life imprisonment. " Given the different descriptions under the defilement and rape charges after the enactment of the Sexual Offences, Act, it was wrong for the trial Magistrate to quietly substitute the charge when drafting judgment. The charge against the appellant should have been substituted during the trial and the parties informed of the new charge. The amended charge of rape carried a mandatory minimum sentence of life imprisonment, whereas under the defilement charge the appellant was liable to imprisonment for life. The charges were not made clear to the appellant which is contrary to the principle of the fair hearing. The appellant was therefore prejudiced. As he was obviously charged on a non-existent provision of the law, he did not receive a fair trial. See - for instance the cases of Francis Simon Njavikuma v. Republic, Criminal Appeal No. 222 of 2014; Marekano Ramadhani v. Republic, 7 Criminal Appeal No. 201 of 2013 and Abdallah Ally v. Republic, Criminal Appeal No. 253 of 2013 (all unreported). In Abdalla Ally v. Republic (supra) 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 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.~ From the above, it follows as the night follows day, that since the appellant in the present case was charged under a non-existent law, it cannot be said that he was fairly tried. Therefore we are constrained to interfere with the findings of the two courts below, and to invoke section 4(2) of the Appellate Jurisdiction Act [Cap. 141 R.E. 2002] (the Act). Consequently we quash the proceedings and judgments of both the High Court and the trial court and set aside the sentence of life imprisonment meted out to the appellant. 8 " The next question for our consideration is whether or not a retrial should be ordered. Both counsel strongly expressed that the circumstances of this case do not justify a re-trial. The appellant has been in prison for a period of 19 years. According to them, it will not be in the

interest of justice to do so. They also took into consideration that the evidence on record may not be sufficient to prove the charge. We on our part, entirely agree with counsel that given the nature of the evidence on record, it will serve no purpose to order a retrial. See - Christian Sanga v. Republic, Criminal Appeal No. 512 of 2015 (unreported). In the case of Fatehali Manji v. Republic [1966] EA 343, the Court of Appeal for East Africa clearly laid down the criteria for ordering a retrial. The Court stated thus:- "In general a retrial will be ordered only when the original trial was illegal or defective. It will not be ordered where the conviction is set aside because of insufficiency of evidence or for the purpose of enabling the prosecution to fill up gaps in its evidence at the first trial. Even where a conviction is vitiated by a mistake of the trial Court from which the prosecution is not to blame; it does not necessarily follow that a retrial shall be ordered; each case must depend on its own facts and circumstances and an order of retrial should only be made where the interest of justice require. " .. Given the circumstances, we hereby order that the appellant be released from prison forthwith unless otherwise lawfully held .. . Order. accordingly. DATED at ARUSHA this 13th day of December, 2017. S. MJASIRI JUSTICE OF APPEAL A.G. MWARIJA ' ... '

- f. JUSTICE OF APPEAL S.S. MWANGESI JUSTICE OF APPEAL :.: ';; ; , ' ' . I certify that this is -a true copy of the original. . A.H. M MI DEPUTY REGISTRAR COURT OF APPEAL 10

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Prepared on 14 October 2026 · Esheria