

IN THE HIGH COURT OF TANZANIA
AT MOSHI.

APPELLANT JURISDICTION

(DC CRIMINAL APPEAL NO.89 OF 2002)
ORIGINAL SAME DC CRIMINAL CASE NO. 8 OF 2002

SERAPHINI PETER APPELLANT
VERSUS
THE REPUBLIC RESPONDENT

J U D G M E N T

RUTAKANGWA, J.

The appellant was inconceivably, charged before the Same District Court with the Offence of "Defilement c/s 136 (1) of the Penal Code Cap.16 of the laws, as repealed and replaced by s.10 of the Sexual Offences (Special Provisions) Act, No.4 of 1998 or SOSPA hereinafter. The particulars of the offence read as follows:

"That Seraphini s/o Peter charged on 2nd day of January, 2002 at about 11.00 hrs. at Vumari Village within Same District in Kilimanjaro Region did unlawfully have carnal knowledge of one NAKANIWA D/O HASSAN a child of 2½ years of age".

He did deny the charge and a full trial was conducted and carried to its logical conclusion on the basis of this charge.

The evidence led in support of the charge came from Hassan s/o Athuman (the father of Nakaniwa) and PW.2 Tumaini s/o Mohamed, (the sub-village Chairman of Matongo sub-village).

In his evidence, PW.1 Hassan told the trial court that the appellant is his neighbour and a brother in law, as his young brother (Eliakunda) is married to the sister of the appellant. On 2/1/2002 in the morning, PW.1 Hassan was working in his shamba which is situated about 170 meters away from his home. He was at the shamba until when he left the shamba at about 11.00 hrs and headed for his home passing through the home of Eliakunda. On reaching Eliakunda's house he found the appellant lying on top of his young daughter, Nakaniwa, who was born in 1999. According to the evidence of PW.1 Hassan, when the appellant saw him, he rose up and started to flee.

Before he took to flight, PW.1 Hassan managed to see the appellant's erect penis protruding from his trousers through the open fly of the trousers. He then went straight to where his daughter was lying. On checking her he found sperms on the outer surface of her vaginal area. He thereupon gave a chase to the appellant and managed to catch up with him. He then took him to PW.2 Tumaini. The said Nakaniwa was also taken to PW.2, who on being told what had transpired, also checked her and found her with Semen as stated by PW.1. Also present was the appellant's father, among others. It was the evidence of both these two witnesses that the appellant, when interrogated, told them that indeed he was found lying on top of the infant but denied raping her because he gained no penetration. According to the prosecution evidence, while still at the home of PW.2 Tumaini, the appellant prayed for clemency but PW.1 Hassan resolutely refused to accede to such pleas. The appellant while under cross-examination conceded to this fact but added:

".....I requested the complainant to forgive me not because I did the act but just to bring the matter to an end."

The appellant was then sent to Same Police Station and subsequently charged accordingly. Interestingly, the appellant never cross-examined PW.1 at all.

In his very short evidence the appellant denied the charge. He stated that on the material day PW.1 caught at the home of Eliakunda on suspicion that he had raped Nakaniwa. He was then sent to the village Chairman where he was interrogated and denied the allegations of raping Nakaniwa and was subsequently taken to Same Police Station. While under cross-examination the appellant admitted that when he was found by PW.1 Hassan at the home of Eliakunda, Nakaniwa, whom he said was about 2 or 3 years old was present, but was quick to add that she was not near him. The appellant had no witness to call.

On the basis of this evidence the learned trial Senior District Magistrate was of a settled mind that the appellant committed the alleged acts. The issue he found himself confronted with was the type of the offence committed by the appellant. Apparently, he realised at the time of writing his judgment that the charge was defective as the appellant was charged with defilement which is strictly speaking no longer an offence and under any section of the penal code or s.136 which created no offence at all.

He did not fold his arms and wait for a solution from heaven above. He sought for a solution out of this quagmire he found himself in by holding as follows:-

"..There is no section which replaced s.136 of the Penal Code as indicated in the charge sheet. It is suffice (sic) to say that the accused was charged under a dead or non existing law. The accused should have been charged with the offence of Rape contrary to section 130 (1) (2) (e) of the Penal Code Cap.16 of the laws as amended by section 5 of the Sexual Offences Special Provisions Act.No.4 of 1933".

After reproducing the said provisions of SOSFA, the learned trial Senior District Magistrate, further held:-

"However, in my view, the error is curable as it has not occasioned to failure (sic) of justice".

Although he did not specifically amend the charge as such he proceeded on that assumption (i.e, that the charge had been amended to be that the accused was being charged with rape).

After subjecting the entire evidence to an objective scrutiny and directing his mind to the law, especially the ingredients of rape, he settled for a finding that the appellant had committed the offence of attempted rape and he convicted him accordingly. The appellant was then sentenced to twenty years imprisonment, apparently under the Minimum Sentences Act, 1972. Being aggrieved by the conviction and sentence, he is appealing against both.

The petition of appeal contains about seven grounds of appeal most of which are inter related. In essence, he is mainly faulting the trial magistrate for convicting him on a defective charge, on basing his decision on uncorroborated prosecution evidence, on a failing to assess the credibility of PW.1 Hassani on relying on lay opinion on the nature of the substance found around the vaginal area of Makeniwa and on failing to realise that the charge was a concocted one as he had a grudge with PW.1 arising out of a shambe dispute between them.

I will start with the issue of the alleged bad blood between him and PW.1 Hassani. As correctly pointed out by Ms. May, learned State Attorney, while resisting this appeal, this is a mere after-thought by the appellant and deserves no serious consideration from this court. This is because the evidence of PW.1 Hassan remains on record unassailed through the crucible of cross-examination.

As I have already indicted in this judgment after PW.1 Hassan had given a damningly detailed incriminating evidence against the appellant, though given the opportunity, the appellant failed to cross-examine him. If there was in existence this grudge then one would naturally have expected the appellant to bring it to light by cross-examining PW.1 on it. That he did not do so is a clear indication that this complaint is a mere concoction. To bear me out on this is the naked fact that the appellant first raised this issue when he was giving his defence but worse still not in his evidence in chief but when being cross examined by the public prosecutor.

Neither the law nor judicial practice demand corroboration for the evidence of PW.1 Hassan in this case. But even if I were to look for this corroboration, it is not wanting from the evidence on record. The undisputed evidence of PW.2 Tumaini to the effect that the appellant admitted to him that he was indeed found by PW.1 Hassan lying on top of Nakaniwa but only failed to gain penetration is good corroboration of the evidence of PW.1 Hassan for the offence the appellant was convicted of. There is yet more equally cogent evidence. The conceded fact that the appellant pleaded for mercy with PW.1 Hassan is sufficient corroboration. If he was not found lying on top of Nakaniwa by PW.1 and took to his heels, on seeing PW.1 Hassan, with his penis erect and the fly of his trouser wide open, why did he take the trouble of beseeching PW.1 Hassan to pardon him. The reason he gave is totally unconvincing. The appellant's admission to PW.2 Tumaini and his conduct of seeking for forgiveness is nothing less than a confession in terms of section 3 (1) of the Evidence Act, 1967 and standing alone is sufficient to warrant a conviction for attempted rape. Under these clear circumstances it was even not necessary for him to ejaculate. I am, therefore, convinced and satisfied that all things being equal, the accepted true evidence of PW.1 and PW.2 proved the offence of attempted rape beyond any shadows of, leave alone reasonable doubts, as rightly found by the trial court, as there was no penetration at all.

But there is the issue of the charge. As the trial Senior District Magistrate belatedly discovered the appellant was charged with an offence now no longer recognized by our laws following the coming into operation of the SOSEA on 1st July, 1998. The charge was, therefore, defective. Was this irregularity fatal to the conviction of the appellant for the offence of attempted rape, the offence he was not initially charged with but which was substituted when the trial had been completed?

After perusing the evidence and the law, my answer to this question is in the negative. I will show why.

The trial District Court has no doubt the power to amend /or substitute, the defective charge at any stage of the trial under s.234 (1) of the Criminal Procedure Act, 1935 or the Act hereinafter. The provisions of the said s.234 (1) and 2 (a) and (b) of the Act are identical with the provisions of s.202 (1) of the then Criminal Procedure Code, Cap.20 of the C.F.C. These provisions empowered and/or empower the trial court to amend and/or substitute or even add a new charge "at any stage of a trial." As was held by this court (Katiti, J. as he then was) in JASTON MASENGULA V.R (1977) LRT n.32:

"...the amendment of a defective charge is permissible at any stage of a trial and it is mandatory that the accused be given the golden opportunity of pleading to the amended charge and further be allowed opportunity to re-call witnesses to give evidence afresh or for further cross-examination ..."

Similar sentiments had earlier been echoed by this court (Biron, J) in his well researched and reasoned judgment in the case of REPUBLIC V. ALI LITENGINE (1973) LRT n.53. What the courts always lay great emphasis on is that this power should only be exercised on the full appreciation of the fact that the intended amendment and/or substitution shall occasion no injustice. The case of JASTON is more relevant to the predicament the learned trial senior District Magistrate in this case found himself in.

In JASTON's case "the trial magistrate realised in the course of judgment that actually the two charges preferred against the appellant were misconceived. He therefore at that late hour proceeded to amend the charge" and convicted the accused on the basis he amended himself. The issue on appeal was whether or not it was lawful for the trial magistrate to amend the charge at that late stage. The learned judge in his judgment observed that:-

"The most honoured principle in the administration of justice is that the accused person must know the nature of the charge he stands prosecuted. This necessary knowledge enables him to prefer his defence to the extent of his ability.."

After the learned judge had quoted in full s.209 (1) of the C.P.C., he continued to hold that:

"...It goes without saying and categorically obvious that since the above referred to opportunities can hardly be given to the accused during the judgment, I would therefore add that for the purposes of this section at any stage of the trial should mean stages from arraignment up and excluding judgment."

I fully endorse this stance which Biron, J. had also taken earlier in REPUBLIC V. SALLEH RUHUMA (1973) L.R.T. N.83. This court, therefore, in JASTON's case proceeded to hold that the amendment in the judgment was belated and therefore irregular, as section 209 of the C.P.C. had no application at that stage. Notwithstanding this holding this court stated in no uncertain terms that irregularity could not go to vitiate the conviction as the same was curable under s.346 of the C.P.C. The provisions of the said s.346 which were also relied on by Biron, J. in RV. ALLI LITENGINE are identical with the provisions of s.388 of the Act. Having found that the amendment at the judgment stage occasioned no injustice to the Accused in JASTON's case, this court sustained the conviction.

One might be tempted to argue that JASTON's case and this case ~~are distinguishable~~ in the sense that the appellant herein was arraigned for a ~~non-existing~~ offence of defilement. It is true that section 10 of SOSPA repealed s.136 of the Penal Code which created the offence of defilement without ~~it~~. However, as the learned trial judge found, the erstwhile offence of defilement was embodied in the ~~now new~~ expanded definition of rape under s.130 (1) and (2), (e) of the Penal Code. In view of this fact, can it be seriously argued that the appellant was prejudiced by the citing of the wrong section of the penal code and/or the non-citing of the proper offence? My considered answer to this question is in the negative. This is because the citation of the offence of rape c/s 130 (1) and (2) (e) of the Penal Code could have made no difference to the appellant in the way he cross-examined the witnesses and/or prepared himself for his defence or in how he gave his evidence in defence. The particulars of the charge, as reproduced above, clearly show that right from the day of his arraignment the appellant knew that he was being charged with the offence of having had carnal knowledge of a 2½ year old Nakaniwa 3/o Hassan, an offence which was formerly known as defilement up to 1st July, 1998 and it is rape since then. Indeed the evidence of PW.1 Hassan and PW.2 Tumaini is unambiguous on this: both testified that the appellant had raped Nakaniwa on 2nd January, 2002. The evidence of the appellant should clear any lingering doubt. He defended himself against the charge of rape and not defilement or any other offence. It goes without saying, therefore, that the non citation of the proper offence in the statement of offence and/or the irregular substitution of the charge at the judgment stage did not occasion a failure of justice. The appellant was alive to the naked fact right from the day of his apprehension and arraignment and throughout his trial that he was being charged with the offence of having had carnal knowledge of Nakaniwa on 21/1/2002.

He was, therefore, on the credible evidence on record, properly convicted for the offence of attempted rape. The appeal against conviction accordingly fails and it is hereby dismissed.

As already shown herein the appellant was sentenced to serve a prison sentence of twenty years. Although he appealed against conviction and prison sentence he opted not to appear at the time of hearing the appeal. Ms. Mlay, learned State Attorney has submitted to me that in terms of section 8 of SOSPA the sentence imposed on the appellant by the trial court was illegal. The maximum sentence provided by the said section is life imprisonment and the minimum sentence is imprisonment for not less than thirty years with or without corporal punishment. Had the appellant been present on the day of the hearing of his appeal and heard on the aspect of sentence I would not have hesitated to impose a sentence longer than the minimum. This notwithstanding I am enjoined by law to impose the minimum sentence fixed by the law even without hearing the appellant. I accordingly quash and set aside the illegal sentence of twenty years imprisonment imposed by the trial District Court and substitute therefore the statutory minimum sentence of thirty (30) years imprisonment. The appeal against sentence fails too.

Delivered in court in the presence of Ms. Mlay, learned State Attorney only this 17th day of December, 2003 at Moshi.


E.M.K. RUTAKANGWA,

JUDGE

17/12/2003