

**IN THE COURT OF APPEAL OF TANZANIA
AT ARUSHA**

(CORAM: KIMARO, J.A., LUANDA, J.A., And MMILLA, J.A.)

CRIMINAL APPEAL NO. 113 OF 2012

ISUMBA HUKA APPELLANT

VERSUS

THE REPUBLIC RESPONDENT

**(Appeal from the Judgment of the High Court of Tanzania
at Arusha)**

(Sambo, J.)

dated the 18th day of April, 2012

in

Criminal Appeal No. 58 of 2010

JUDGMENT OF THE COURT

18th & 26th November, 2013

LUANDA, J.A.:

The above named appellant was charged in the District Court of Hanang at Katash with rape contrary to Section 130 of the Penal Code, Cap. 16 RE. 2002. He was convicted as charged and sentenced to life imprisonment.

Aggrieved by the finding of the trial District Court, he unsuccessfully appealed in the High Court of Tanzania at Arusha. Dissatisfied, he has come to this Court on second appeal.

The appellant has raised two grounds of appeal in his memorandum of appeal. In the first ground, his complaint is that he was not given opportunity to cross examine the victim of rape one Neema d/o Idd (PW1) who was 7 years of age at the time she testified in court. In the second ground the appellant complained that the charge sheet upon which conviction was grounded was incurably defective in that it does not specify under which of the categories enumerated under Section 130 of the Penal Code, Cap 16 (the Code) the offence was committed.

Briefly the prosecution case which was found credible by both lower courts was that on the fateful day when Neema d/o Idd (PW1) was left home alone grazing calves, the appellant arrived, dragged her to one of the houses and raped her. PW1 raised an alarm whereby her mother Magreth Kaula (PW2) and other villagers responded and went to the house where they found both the appellant and PW1 naked. It is the evidence of PW2 that she being the first to arrive met the appellant in the act of having sexual intercourse with PW1. On the strength of the above evidence, the appellant was convicted and sentenced as stated earlier on.

In this appeal, the appellant was unrepresented and so he defended for himself; whereas the respondent/Republic was represented by Mr. Elisaria Zakaria Senior State Attorney. Mr. Zakaria supported the appeal.

However, having carefully studied the two grounds of appeal, we are of the settled view that ground number two which lays the foundation of the prosecution case should first be discussed and if need be we shall move to the first ground. This is because if we find out that the charge sheet is incurably defective then whatever followed thereafter cannot sustain. So, we begin with the second ground.

Mr. Elisaria submitted that Section 130 of the Code as cited and appearing in the charge sheet is incomplete. The section contains five categories under which the offence of rape can be committed. Since no category was cited, it is not known under which category the appellant was charged with. He referred us to the decision of this Court in **Juma Mohamed v. R.**, Criminal Appeal No. 272 of 2011 where we emphasized the need to show in

the charge sheet under which category the offence of rape was committed. It is his submission that the appellant was not properly charged. The charge is incurably defective. Since the charge is incurably defective, the conviction and sentence cannot stand. He prayed that the proceedings of both lower courts be quashed and the sentence and order made thereof be set aside. He also prayed that we order a re-trial. He cited no provision of the law to back up his proposition.

Be that as it may, Section 135 of the Criminal Procedure Act, Cap. 20 RE. 2002 (the Act) provides the mode in which offences are to be charged. As to what a charge sheet should contain, paragraph (a) (i) and (ii) states very clearly that a charge sheet should describe the offence and should make reference to the section of the law creating the offence.

The Section reads, we reproduce:

135(a) (i) A count of a charge or information shall commence with a statement of the offence;

*(ii) the 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 essential elements 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 Supplied]

In our case the charge sheet preferred at the appellant's door reads as follows:

STATEMENT OF OFFENCE: Rape c/s 130 of the Penal Code Cap. 16 vol. 1 of the Revised Laws as amended by sexual offence special provision Act No. 4 of 1998

PARTICULARS OF OFFENCE: That ISUMBA s/o HUKA is charged on the 15th day of July, 2003 at about 13.00 hrs at Gawidu Village within Hanang District and Manyara Region did have carnal knowledge of one Neema d/o Idd without her consent.

From the above extract it is clear that the statement of offence only refers to section 130 of the Code. It does not show under which category among the five categories enumerated therein the charge was preferred. That goes contrary to section 135(a) (ii) of the Act. Failure to do so infringes the above cited section which is couched in mandatory terms.

It is clear therefore that the charge is incurably defective. As such the proceedings are a nullity. We agree with Mr. Elisaria and we find no need of discussing the first ground. We declare the proceedings of the District Court and High Court a nullity. The same are quashed and conviction and sentence set aside.

Mr. Elisaria has prayed the Court to order a re-trial. Generally a re-trial will be ordered only when the original trial was illegal or defective (See **Fatehali Manji V R**, [1966] EA 341 and **Narche Ole Mbile VR** [1993] TLR 253)

Since the original trial was defective, in the interest of justice we order a re-trial before another magistrate. The prosecution should amend the Charge Sheet so as to indicate the provision under

which category rape was committed as well as the punishment provision.

Order accordingly.

DATED at **ARUSHA** this 25th day of November, 2013.

N.P. KIMARO
JUSTICE OF APPEAL

B.M. LUANDA
JUSTICE OF APPEAL

B.M. MMILLA
JUSTICE OF APPEAL

I certify that this is a true copy of the original.




F.J. Kabwe
DEPUTY REGISTRAR
COURT OF APPEAL