

IN THE COURT OF APPEAL OF TANZANIA
AT IRINGA

(CORAM: MJASIRI, J.A., MWARIJA, J.A., And MUGASHA, J.A.)

CRIMINAL APPEAL NO. 176 OF 2014

GODFREY S/O MKINGA APPELLANT
VERSUS
THE REPUBLIC RESPONDENT

(Appeal from the decision of the High Court of Tanzania
at Iringa)

(Mkuye, J.)

Dated the 23rd day of September, 2009

In

Criminal Appeal No. 3 of 2009

JUDGMENT OF THE COURT

19th & 22nd July, 2016

MUGASHA, J.A.:

In the District Court of Iringa the appellant was arraigned as
hereunder:

"OFFENCE SECTION AND LAW: *Rape C/S 130 (1) and
131 (1) of the Penal Code Cap 16. Revised Edition 2002.*

PARTICULARS OF OFFENCE: *That Godfrey s/o Mkinga
charged on unknown date of December 2006 at Madilu Village
within Ludewa District in Iringa Region you did carnal knowledge
of one Rozina d/o Mgina a girl of seventeen years".*

The appellant denied the charge subsequent to which prosecution paraded five witnesses and two documentary exhibits. The appellant was the sole witness for the defence. After a full trial, the appellant was convicted and sentenced to imprisonment for thirty (30) years. He unsuccessfully appealed to the High Court, hence the present appeal. In the memorandum of appeal the appellant raised three grounds namely:

1. That, the learned trial magistrate erred in law and fact to convict the appellant relying on evidence of one witness.
2. That the learned trial magistrate erred in law and fact by convicting the appellant without DNA test to prove whether the child belonged to the appellant.
3. That the learned trial magistrate erred in law and fact by relying on repudiated caution statement without conducting a trial within trial.

The appellant was unrepresented and the respondent Republic was represented by Mr. Adolf Maganda, learned Senior State Attorney.

The appellant opted to initially hear the submission of the learned Senior State Attorney. In his submission, the learned Senior State Attorney initially resisted the appeal. When asked by the Court whether the charge read to the appellant was sufficient to justify a fair trial, he readily conceded that the charge sheet was defective and the trial was unfair. He pointed out that, the appellant who is alleged to have raped a seventeen (17) years old girl was charged under sections 130 (1) and 131 (1) of the Penal Code which do not sufficiently disclose the offence of rape. He submitted that, the appellant ought to have been charged under section 130 (2) (e) of the Penal Code. As such, he urged us to nullify the proceedings and judgments of both the trial court and the High Court. On the way forward, the learned Senior State Attorney declined to press for retrial and he urged the Court to consider the jail term of eight years already served by the appellant and set him free.

On the other hand, the appellant who is a lay person had nothing useful in reply apart from asking the Court to make the appropriate order.

It is the charge sheet which lays a foundation of a trial because an accused person must know the nature of the case he is facing before

making his defence (see **MUSSA RAMADHAN VS REPUBLIC**, Criminal Appeal No. 368 of 2013, (Unreported)). Section 135 (a) (ii) of the Criminal Procedure Act, clearly articulates the mode in which offences are to be charged and the principle guiding the manner of framing the charge as follows:

" 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]

The underlined expression clearly shows that, the statement of the offence must contain a correct reference of the section of the enactment creating the offence. This position was emphasized in **CHARLES S/O MAKAPI VS THE REPUBLIC**, Criminal Appeal No. 85 of 2012, where the Court categorically said that section 135 CPA imposes mandatory requirements that a charge sheet should describe the offence and make reference to the section and law creating the offence.

At the beginning we extracted the charge sheet to show that, the appellant was charged under section 130 (1) and 131 (1) of the Penal Code. The offence of rape is created by section 130 (1) of the Penal Code in the following words:-

"It is an offence for a male person to rape a girl or a woman".

However, to determine whether the offence of rape has been committed, section 130 (1) must be read together with section 130 (2) (a) – (e) of the Penal Code which classifies circumstances under which a male person commits rape in terms of the following description:

"(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 consenting to it at the time of the sexual intercourse;

(b) with her consent where the consent has been obtained by the 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 drugs, 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 her 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."

In the circumstances of the case at hand, since the victim was seventeen (17) years, the description stated under section 130 (2) (e) of the Penal Code is a fit provision because among other things, it states as follows:

"A male person commits the offence of rape if he has sexual intercourse with a girl or a womanwith or without her consent when she is under eighteen years of age.....".

However, in the matter under scrutiny the charge was not drawn in a manner indicating the stated provision. As earlier intimated, the appellant was charged under sections 130 (1) and 131 (1) of the Penal Code which read in isolation, do not establish the offence of rape.

Besides, throughout the trial, since the victim was below eighteen (18) years the prosecution did not make any prayer to have the charge sheet amended in order to rectify the defect and state the correct provision of the law creating the offence charged. This resulted into the appellant being tried and convicted on the basis of a defective charge sheet. In **ABDALLAH ALLY VS REPUBLIC**, Criminal Appeal No. 253 of 2013 (Unreported), the Court was confronted with a similar situation like the one in the present case. The Court observed among other things, that being found guilty on a defective charges based on wrong provisions of the law, it cannot be said that the appellant was fairly tried in the courts below. The Court thus decided:

"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 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.”

In another case of **SIMBA NYANGURA VS REPUBLIC**, Criminal Appeal No. 144 of 2008 (Unreported), the appellant was merely charged under section 130(1) and 131 of the Penal Code. The Court observed that, the accused person must know the description of the offence in section 130 (2) (a) to (e) he faces so that he can prepare his defence.

In the present appeal, it is clear that the appellant was charged, tried and convicted on the basis of a defective charge lacking sufficient particulars of the section of the law creating the offence of rape. In this regard, throughout the entire trial the appellant was not made to understand the nature of the charge he is facing to enable him to prepare an informed or rational defence. This was not a fair trial on account of an incurably defective charge sheet and it occasioned a miscarriage of justice. In the premises, the trial was a nullity and so was the appeal before the High Court because it stemmed on a nullity and before us, no appeal can lie on a nullity.

We therefore invoke the provisions of section 4(2) of the Appellate Jurisdiction Act [CAP 141 RE.2002] and hereby nullify the entire proceedings and judgment of the trial and High Court in Criminal Appeal No. 3 of 2009. We further quash the conviction and set aside the sentence meted out against the appellant. We agree with the learned Senior State Attorney that, a retrial is not worthy, since the appellant who was not admitted on bail has stayed behind bars for more than ten (10) years. We order the immediate release of the appellant, unless he is otherwise lawfully held.

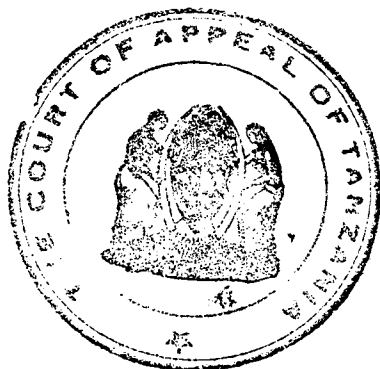
DATED at IRINGA this 21st day of July, 2016.

S. MJASIRI
JUSTICE OF APPEAL

A. G. MWARIJA
JUSTICE OF APPEAL

S. E. A. MUGASHA
JUSTICE OF APPEAL

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




B. R. NYAKI
DEPUTY REGISTRAR
COURT OF APPEAL