

IN THE COURT OF APPEAL OF TANZANIA  
AT DAR ES SALAAM

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

CRIMINAL APPEAL NO. 239 OF 2015

CHARLES S/O LEMULA ..... APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

(Appeal from the decision of the High Court of Tanzania  
at Dar es Salaam.)

(Mushi, J.)

dated the 19<sup>th</sup> day of June, 2012  
in  
Criminal Appeal No. 102 of 2011

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JUDGMENT OF THE COURT

29<sup>th</sup> July & 15<sup>th</sup> August 2016

LUANDA, J.A.:

The appellant Charles s/o Lemula was charged, convicted and sentenced to 30 years imprisonment for rape by the District court of Kibaha at Kibaha. Dissatisfied with both the finding and sentence, he unsuccessfully appealed to the High Court of Tanzania (DSM Registry).

Still aggrieved, he has come to this Court on appeal. So, this is a second appeal.

Briefly the facts leading to his conviction were that, on the material day around 19.00 hrs when the complainant Winfrida d/o Longino (PW1) a child of 10 years old, was on her way back home from collecting a mobile phone from a nearby shop, she was followed by two people. The two people who were familiar to her were the appellant and Stamili who grabbed her and taken to unfinished house. She was undressed and raped by the appellant. Upon satisfying his quest, the appellant told her not to disclose the incident to anyone and in return she would be given Tsh. 10,000/=.

But on the following day her teacher one Boke Chacha (PW2) noticed PW1 to have been walking with difficulty. On being asked, PW1 spilled the beans that she was raped by the appellant, hence the arrest of the appellant and eventually charged.

In this appeal the appellant was unrepresented and so he fended for himself. The respondent/Republic had the services of Mr. Credo Rugaju,

learned Senior State Attorney. The appellant has raised eleven grounds of appeal in his memorandum of appeal. But before we started discussing the grounds of appeal, Mr. Rugaju informed the Court that there is a fundamental procedural irregularity which vitiates the entire proceedings. He told us that the charge sheet upon which the conviction rested is incurable defective.

Clarifying, he said the appellant was charged with rape C/SS 130 and 131 of the Penal Code, Cap. 16 RE. 2002. He went on to say SS 130 and 131 of the Penal Code (the Code) contains categories of rape. So it is the duty of the prosecution to indicate under which category the offence was committed to enable the accused to know the offence he was going to face. Failure to indicate the category under which the accused is charged is a fundamental defect and therefore not curable under S. 388 of the Criminal Procedure Act, Cap 20 RE 200 (the CPA) which will normally vitiates the proceedings. Because the defect is fundamental, he prayed that the Court to exercise its revisional powers as provided under S. 4 (2) of the Appellate Jurisdiction Act, Cap. 141 RE 2002 quash the conviction, set aside the sentence and release the appellant.

On the other hand the appellant being a lay person, not learned in law, had nothing to contribute to the point of law raised.

As earlier said, the appellant was charged with rape C/SS 130 and 131 of the Code. But S. 131 of the Code enumerates categories of rape under which such offences can be committed. It is not enough therefore to cite SS 130 and 131 of the Code without specifying the categories under which rape was committed. Indeed, it is a mandatory requirement under S. 135 of the Criminal Procedure Act, Cap. 20 RE 2002 (the CPA) that a charge sheet should describe the offences and should make reference to the section of the law creating the offence. (See **Charles s/o Makapi V R**, Criminal Appeal No. 85 of 2002 (unreported)). The Section reads:-

*135 (a) (i) A count of a charge or information shall commence with a statement of the offence charged called the statement of the offence.*

*(ii) The statement of the 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 ours]

And the need to make reference to the section specifying the offence is two fold. One, it will enable the accused person to know the nature of the case he is going to face. Two , it will also enable the accused person prepare his defence. It is for these reasons that we wish to remind once again that those who are responsible in framing the charges should strictly comply with the requirement of the law.

In **Marekano Ramadhani V R**, Criminal Appeal No. 202 of 2013 (CAT reported) where a similar problem occurred we said:-

*"Framing of charge should not be taken lightly. We think it is imperative for the prosecution to carefully frame up a charge in accordance with the law."*

In **Kastory Lugongo V R**, Criminal Appeal No. 251 of 2014 (CAT – unreported) the Court also encountered with a similar problem which it

raised *suo motu* in that the appellant was charged with rape C/SS 130 and 131 of the Code without disclosing under which category of rape he was arraigned. The Court, inter alia, said.

*"... it is not known under which category of rape the appellant was arraigned against. In this regard we should go further and observe that the charge sheet is additionally undermined by an even more fundamental non-disclosure. We have purposefully extracted in full the charge sheet to postulate, beyond question, that the appellant was arraigned under a non-existent provision of the law."*

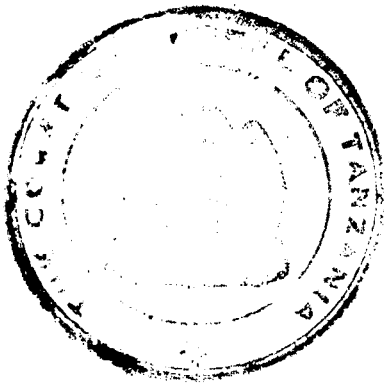
To put it differently to cite SS 130 and 131 of the Code without more is tantamount to non preferring a charge against the accused person. The charge sheet is incurably defective. We entirely agree with Mr. Rugaju. Exercising our revisional powers as provided under S.4 (2) of the Appellate Jurisdiction Act, Cap. 141 RE 2002 we quash the conviction and set aside the sentence of 30 years imprisonment.

We order the appellant to be released from prison forthwith unless he is detained in connection with another matter.

Order accordingly.

**DATED at DAR ES SALAAM this 9<sup>th</sup> day of August, 2016**

B.M. LUANDA  
**JUSTICE OF APPEAL**



B.M. MMILLA  
**JUSTICE OF APPEAL**

R.E. MZIRAY  
**JUSTICE OF APPEAL**

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

  
E. F. FUSSI  
**DEPUTY REGISTRAR**  
**COURT OF APPEAL**