IN THE COURT OF APPEAL OF TANZANIA
AT MBEYA

(CORAM: MUSSA, J.A, MZIRAY, J.A. And NDIKA, J.A.)

CRIMINAL APPEAL NO. 401 OF 2015

MNAZI PHILIMON..... APPELLANT
VERSUS
THE REPUBLIC..... RESPONDENT

(Appeal from the Judgment of the High Court of Tanzania at Sumbawanga)

(Khaday, J)

dated the 27th day of June, 2011
In
Criminal Appeal No. 5 of 2011

.....

JUDGMENT OF THE COURT

9th & 12th October, 2017

MZIRAY, J.A:

The Appellant herein, is appealing against the decision of High Court of Tanzania at Sumbawanga (Khaday, J.) dated 27/6/2011 whereby it upheld the conviction and the sentence of thirty (30) years imprisonment meted out by the District Court of Mpanda at Mpanda which convicted him of the offence of attempted rape contrary to section 132(1) of the Penal Code Chapter 16 of the Revised Laws (the code). As it could be seen in the proceedings before the District Court, the initial charge against the appellant was rape contrary to section 130 of the Code.

In order to get a good understanding of the matter, it befits for us at this point to reproduce the charge that was laid against the appellant and upon which he was convicted. The charge reads:

> ***"CHARGE SHEET***
>
> ***OFFENCE, SECTION AND LAW:***
> *Rape c/s 130 of the Penal Code, cap 16 of the laws*
> ***PARTICULARS OF OFFENCE:*** *That Mnazi s/o Philimon charged on 15th day of August, 1998 at about 15:00hrs at Mnyaki, Katumba Refugee Settlement within Mpanda District, in Rukwa Region did have carnal knowledge with one Velaria Misango."*

The appellant filed in Court a memorandum of appeal which enlists seven (7) points of complaint. At the hearing before us, the appellant was fending for himself, unrepresented, whereas the respondent Republic had the services of Mr. Ofmedy Mtenga, assisted by Catherine Paul, both learned State Attorneys. However, Mr. Mtenga addressed the Court first because the appellant opted to respond to what would be submitted by the learned State Attorney in relation to the appeal.

Before resorting to the substance of the appellant's complaints, we asked the learned State Attorney to address us on the propriety of the charge sheet which was laid at the appellant's door.

From the outset, the learned State Attorney was of the firm view that the charge sheet leveled against the appellant was defective on account that the statement of offence did not specify the category of the offence of rape against which the appellant was arraigned. He pointed out that in every case where an accused person is indicted for rape under the provisions of the Code, the charge should specify which, amongst the categories of rape itemized under section 130(2) (a) to (e) of the code, is intended in the indictment, short of which, the charge would be defective. He cited the case of **David Halinga vs The Republic**, Criminal Appeal No. 12 of 2015 as an authority. On that basis therefore, the learned State Attorney urged the Court to quash and set aside the conviction and sentence imposed.

In a brief rejoinder submission, the appellant who is a layman, had nothing useful to say save for his plea to the Court to set him free.

It is now beyond controversy that one of the principles of fair trial in our system of criminal justice is that an accused person must know

the nature of the case facing him, and that, this can only be achieved if a charge discloses the essential elements of an offence. (See **Mussa Mwaikunda vs The Republic** (2006) TLR 387. And for that reason, it has been sounded that no charge should be put to an accused unless the court is satisfied that it discloses an offence known to law. (See **Oswald Mangula vs The Republic**, Criminal Appeal No. 153 of 1994 (unreported). A clear charge drawn in terms of section 135 of the Criminal Procedure Act - Cap. 20 of the Laws Revised (CPA) would give an accused person an opportunity to fully appreciate the nature of the allegations against him so as to have a proper opportunity to present his or her own case.

In the present case, the charge sheet to which the appellant was initially charged in the District Court was rape contrary to section **"130"** of the Code. Having carefully read the charge reproduced supra and the cited section, we are of the settled view that the charge is incurably defective. It is incurably defective because it did not specify, in the statement of the offence the category of rape under which the appellant was charged.

Worse more, the provision under which the appellant was arraigned is non-existent as it does not feature anywhere in the Code. What is contained in the Code is section **"130(1)"** which makes a general stipulation thus:-

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

Of recent, the Court had to grapple with a similar problem in the unreported Criminal Appeal No. 253 of 2013- **Abdallah Ally vs The Republic,** where it was observed:-

> *"...being found guilty on a defective charge, based on* ***wrong and/or non-existent provisions of the law, it cannot be said that the appeilant 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....."*
>
> [Emphasis supplied.]

As demonstrated herein above, the charge sheet was defective as the appellant was arraigned under a non-existent provision of the law. On that basis therefore, we are of the view that the irregularity was such that it prejudiced the appellant and therefore occasioned a failure of justice. The defect is incurable under Section 388 of the CPA.

In respect of the rule relating to the mode of drawing charges, this Court in the case of **Michael Luhiyo vs The Republic** (1994) TLR 181, followed in **Kobelo Mwaha vs The Republic** Criminal Appeal No. 173 of 2008 (unreported) emphasized and we quote:-

> *"We wish to remind the magistracy that it is a salutary rule that no charge should be put to an accused before the magistrate is satisfied, inter alia, that it disclosed an offence known to law. It is intolerable that a person should be subjected to the rigors of a trial based on a charge which in law is no charge. It shall always be remembered that the provisions of section 129 of the CPA are mandatory. The charge laid at the appellant's door having disclosed no offence known to law all the proceedings conducted in the District Court on*

the basis thereof were a nullity since you cannot put something on nothing:"

In the event, and for reasons stated herein above, we allow the appeal, quash the conviction and set aside the sentence. We order that the appellant be released from prison forthwith unless otherwise lawfully detained.

DATED at **MBEYA** this 11th day of October, 2017.

K. M. MUSSA
JUSTICE OF APPEAL

R. E. S. MZIRAY
JUSTICE OF APPEAL

G. A. M. NDIKA
JUSTICE OF APPEAL

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

E. Y. MKWIZU
DEPUTY REGISTRAR
COURT OF APPEAL