

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

(CORAM: MMILLA, J.A., MWANGESI, J.A., And KWARIKO, J.A.)

CRIMINAL APPEAL NO. 376 OF 2016

DEOGRATIUS VICENT APPELLANT

VERSUS

THE REPUBLIC RESPONDENT

**(Appeal from the decision of the High Court of Tanzania
at Moshi)**

(Mzuna, J.)

dated 2th day of March, 2013

in

Criminal Appeal No. 68 of 2008

.....

JUDGMENT OF THE COURT

2nd & 9th October, 2018

MMILLA, J.A.:

This is a second appeal by Deogratious Vicent (the appellant). He was originally charged before the District Court of Rombo with the offence of rape contrary to section 130 (1), (2) and 131 of the Penal Code as amended by the Sexual Offences Special Provisions Act, No. 4 of 1998. Upon conviction by the trial court, he was sentenced to life imprisonment in view of the fact that the victim of rape was aged 7 years. He

proceed to hospital for medical examination and treatment. The victim's sister, Lucia Barnaba testified as PW2, while the Dr. who medically examined the child, one Leonard Shirima, testified as PW3.

Meanwhile, the appellant was arrested by militiamen and sent to the police who formerly arrested him and eventually charged him with the offence of rape.

In his defence, the appellant maintained his innocence. He told the trial court that he was engaged by the victim child's mother to plough her farm using hired heads of cattle at the price of TZS 10,000/= per day. He added that he worked for three days for which he was entitled to be paid TZS 30,000/=:, but was paid only TZS 16,000/= of which he paid TZS 10,000/= to the owner of the cattle and remained with TZS 6,000/=. He claimed that he was not paid the rest of the money, which is why the victim child's family concocted that complaint to the police as a measure to avoid paying him his due.

As aforesaid, after a full trial the trial court convicted him and sentenced him to life imprisonment. He unsuccessfully appealed to the High Court, hence this second appeal to the Court.

The appellant filed an eight point memorandum of appeal as follows: **one** that, the prosecution did not prove the case against him beyond reasonable doubt; **two** that, the act of penetration was not established; **three** that, the evidence of the victim child was improperly received and relied upon because it was received contrary to the mandatory requirements prescribed under section 127 (2) of the Evidence Act; **four** that, the evidence of the victim child was not corroborated; **five** that, some of the essential witnesses were not called to testify; **six** that, the PF3 was wrongly relied upon because it was tendered during trial by a witness who did not examine the victim child, also that he was not the one who prepared it; **seven** that, the evidence of PW1 and PW2 was contradictory, weak and unreliable; and **eight** that, the appellant's defence was not considered.

On the date of hearing this appeal, the appellant appeared in person and fended for himself. He prayed for his grounds of appeal to be adopted and elected for the Republic to submit first. On the other hand, Ms Rose Sule and Ms Grace Madikenya, learned State Attorneys, represented the respondent/Republic.

At the outset, Ms Sule urged the Court to allow her address an essential legal point focusing on a fundamental defect in the charge which was capable of disposing of the entire appeal. With great respect, we granted that prayer.

In her submission on that point, Ms Sule contended that the charge sheet shows that the appellant was charged under section 130 (1), (2) and 131 of the Penal Code without more. She alleged that failure to specify the category of rape under which the charged offence fell among the categories under subsection (2) (a) to (e) of section 130 of that Penal Code was fatal because the omission deprived the appellant right to know the actual nature of the charge he was faced with. She added that a similar omission was done in respect of the provision creating the punishment because section 131 of the Penal Code prescribes different sentences for different categories of rape. Given that position, she said, the appellant was not afforded good chance of preparing his defence, especially so when it is considered that the age of the victim was 7 years for which, on conviction, it attracted the maximum sentence of life imprisonment. Relying on the cases of **Qaini Hiary v. Republic**, Criminal Appeal No. 295 of 2016 and **Frank Saul Mushi @ Omary v. Republic**, Criminal Appeal No. 250

of 2016, CAT (both unreported), she urged the Court to invoke the powers under section 4 (2) of the Appellate Jurisdiction Act Cap 141 of the Revised Edition, 2002 (the AJA) and release the appellant from jail.

On his part, the appellant said he fully supported the learned State Attorney's submission and pressed for his release from jail.

Admittedly, the charge was defective because it was anchored under sections 130 (1), (2) and 131 of the Penal Code without specifying the category of rape as envisaged by subsection (2) (a) to (e) of section 130 of that Act; also that the section 131 of the said Act did not indicate the appropriate subsection befitting the category of the offence charged. Section 130 (1) and (2) of the Penal Code provides as follows:-

"S. 130 (1): It is an offence for a male person to rape a girl or a woman.

(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."

While subsection (1) of section 130 of the Penal Code defines what rape is; paragraphs (a) to (e) of subsection (2) of that section refer to the different categories of rape. As will be observed, every category is distinct from the other.

On the other hand, section 131 of the Penal Code provides that:-

"S. 131 (1): Any person who commits rape is, except in the cases provided for in the renumbered subsection (2), liable to be punished with imprisonment for life, and in any case for imprisonment of not less than thirty years with corporal punishment, and with a fine, and shall in addition be ordered to pay compensation of an amount determined by the court, to the person in respect of whom the offence was committed for the injuries caused to such person.

(2) Notwithstanding the provisions of any law, where the offence is committed by a boy who is of the age of eighteen years or less, he shall–

(a) if a first offender, be sentenced to corporal punishment only;

(b) if a second time offender, be sentence to imprisonment for a term of twelve months with corporal punishment;

(c) if a third time and recidivist offender, he shall be sentenced to life imprisonment pursuant to subsection (1).

(3) Notwithstanding the preceding provisions of this section whoever commits an offence of rape to a girl under the age of ten years shall on conviction be sentenced to life imprisonment.”

Likewise, this section prescribes different punishments to some of the categories of rape.

From what we have just said, it is obvious that the charge had defects because the paragraph of the required category of rape under subsection (2) of section 130 and the subsection prescribing the requisite

punishment under section 131 of the Penal Code were not cited. Thus, section 135 (1) (a) (ii) of the Criminal Procedure Act Cap 20 of the Revised Edition, 2002 (the CPA) was not complied with. That section provides that:-

"135(a)

(i): NA

(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.]

See the case of **Abdallah Ally v. Republic**, Criminal Appeal No. 253 of 2013 CAT (unreported) in which we stated that:-

"...being found guilty on a defective charge, based on wrong and/or non-existent provisions of the law, it cannot be said that the appellant 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.....”

See also the cases of **Marekano Ramadhani v. Republic**, Criminal Appeal No. 201 of 2013 and **Kastory Lugongo v. The Republic**, Criminal Appeal No. 251 of 2014 (both unreported). In these cases too, the Court commonly stated that a defective charge sheet inexplicably prejudiced the appellant in his defence, hence that in such circumstances, the appellant will not have been fairly tried.

We have no qualm that the position in the above cited cases apply squarely to the circumstances in present case. Like the Court did in those cases, we are constrained to intervene under the provisions of section 4 (2) AJA, on the basis of which we quash the appellant’s conviction and set aside the sentence which was meted out against him.

As to the way forward, the learned State Attorney urged us to release the appellant from jail. We think, in the circumstances covered above, we agree with her. Thus, we order the appellant’s immediate

release from prison unless he is being continually held for some other lawful cause.

Order accordingly.

DATED at **ARUSHA** this 9th day of October, 2018.

B. M. MMILLA
JUSTICE OF APPEAL

S. S. MWANGESI
JUSTICE OF APPEAL

M. A. KWARIKO
JUSTICE OF APPEAL

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


B. A. Mpepo
DEPUTY REGISTRAR
COURT OF APPEAL