

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

**(CORAM: MWARIJA, J.A., LILA, J.A., And KWARIKO, J.A.,)**

**CRIMINAL APPEAL NO 302 OF 2016**

**MESHAKI S/O MALONGO @ KITACHANGWA  
.....APPELLANT**

**VERSUS**

**THE REPUBLIC .....  
.....RESPONDENT**

**(Appeal from the judgment of the High Court  
of Tanzania at Arusha)  
(Moshi, J)**

**Dated 18<sup>th</sup> day of March, 2016  
in  
Criminal Appeal No. 65 of 2015**

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**JUDGMENT OF THE COURT**

30<sup>th</sup> November & 11<sup>th</sup> December, 2018

**MWARIJA, J.A.:**

The appellant, Meshaki Malongo @ Kitachangwa was charged in the Resident Magistrate's Court of Arusha with the offence of rape. The charge was preferred under S. 130 (1) (2) (e) and 131 (1) of the Penal Code [Cap. 16 R.E 2002]. It was alleged that on 26/4/2014 at Nambala area within Arumeru District, Arusha Region, the appellant raped one "H.M" a girl aged three year (hereinafter "the Child").

Having heard the prosecution evidence which was built on the testimony of five witnesses and the evidence of the appellant, who was the only witness for the defence, the trial court found that the case against the appellant had been proved to the hilt. As a result, the appellant was sentenced to the mandatory term of life imprisonment. Aggrieved by the decision of the trial court, the appellant appealed to the High Court. His appeal was unsuccessful hence this second appeal.

The background facts giving rise to the appeal can be briefly stated as follows: On 26/4/2014 while on the way to a shop, Rahel Joseph, who testified as PW2, heard a child crying. According to her evidence, that child was "HM". She was with the appellant who had held her on his laps. When she asked the appellant as to why the Child was crying, he replied that it was because she wanted to sleep and was thus caressing her so as to let her get asleep. As the Child went on to cry for what appeared to PW2 to be an agony and upon refusal by the appellant to put her down, PW2 decided to forcefully take her from the appellant. It was then that PW2 noticed that the appellant was in fact raping the Child. PW2 raised an alarm and people turned out at the scene.

The appellant was, as a result, arrested and sent to police station while the Child was sent to hospital after a PF3 had been obtained from the police. Following the incident the appellant was charged as shown above.

As stated above, the prosecution relied on the evidence of five witnesses. Apart from the evidence of PW2, the other witnesses were Neema Lothoi, the mother of the Child who testified as PW1, Florencia Simba (PW3) and D. 6271 D/Sgt Rubeu (PW5), the police officer who investigated the case. Another witness was Thomas Maulid (PW4), a child of tender age. According to the record, however, his evidence was recorded in contravention of the then sub-section (2) of S. 127 of the Evidence Act [Cap. 6 R.E. 2002]. It is not shown that a *voire dire* was conducted.

PW1's evidence is to the effect that when the incident took place, she was at his work place. It was while she was on the way back home that she was informed of the incident. She went straight to the hospital where she found the child. She had already been medically examined and was thus given the Child's

P.F3. Upon her personal check on the Child's private parts, she found that she had been molested. She tendered the P.F 3 in court as an exhibit (Exhibit P.I). The medical person and who examined the Child, Florencia Simba (PW3), a clinical officer of Meru District Hospital, testified that her examination on the Child revealed that she was raped.

After his arrest, the appellant was interrogated by PW5 whose evidence was to the effect that the appellant denied the allegation that he raped the child. After investigations were completed, the appellant was charged in the trial court.

In his defence, the appellant testified that on the material date of the incident, when he returned home, he found there the Child and her brother. Later on, PW2 also arrived there. Because he had a swollen leg, he wanted to boil some water so that he could use it to massage the swollen area of his leg. However, PW2 volunteered to assist him. He allowed her to boil some water but declined to allow her to massage his leg. She then decided to go away with the children. However, after 30 minutes a group of people arrived at his home and arrested him on allegation of having raped the Child. He denied the allegation contending that

the case was framed by PW2 because he refused her advances towards him to enter into a love relationship.

In its judgment, the trial court found that the evidence tendered by the prosecution had sufficiently proved the case against the appellant. Having outlined the evidence, the learned trial Resident Magistrate concluded as follows:

*“in its totality the aforementioned evidence of PW2, PW3, PW4 and exhibit P1 establish that [H.M.] was raped by the accused person before this Court.”*

In convicting the appellant, she basically relied on the evidence of PW2 and the medical report (Exhibit P.1.)

On appeal, the High Court upheld the appellant’s conviction. Like the learned trial magistrate, the learned first appellate judge was of the view that the prosecution evidence, particularly the testimony of PW2, to the effect that she witnessed the incident and PW4 who conducted medical examination on the Child, proved firstly, that the Child was raped and secondly, that it was the appellant who raped her.

In this appeal, the appellant is challenging the findings of the two courts below contending that his conviction was based on erroneous findings. On 7/11/2017, he lodged a memorandum of appeal consisting of three grounds of appeal. Later on 26/11/2018, he filed an additional memorandum containing two grounds, thus making a total of five grounds as paraphrased below:

- “1. *THAT, the first appellate court erred in law and in fact for upholding the decision of the trial court while the learned trial magistrate did not conduct voire dire in accordance with the law.*
2. *THAT, the first appellate court erred in law and in sustaining conviction for unnatural offence on the inconsistent, contradictory and implausible evidence of PW2 and PW4 which did not prove the charge.*
3. *THAT, the first appellate court erred in law and in fact when it held that PW2, PW3 and*

*PW4 prove (sic) the prosecution case beyond reasonable doubt.*

4. *THAT, both the trial court and the first appellate court erred in law and in fact when they failed to see the glaring contradictions and discrepancies in the testimony of the prosecution which should have been resolved in favor of the appellant.*
  
5. *THAT, both the trial court and the first appellate court erred in law and in fact in not finding that the charge sheet against the appellant was defective.”*

At the hearing of the appeal, the appellant appeared in person, unrepresented while the respondent Republic was represented by Mr. Innocent Njau, learned Senior State Attorney. In arguing the appeal, the appellant opted to hear the learned Senior State Attorney’s response to the grounds of appeal and then make a rejoinder if the need would arise.

As shown above, in his memorandum of appeal, the appellant has raised, as one of his grounds, the point challenging correctness of the charge. For reasons which will be apparent herein, we intend to consider that ground first. Responding to this ground, Mr. Njau argued that since the point concerning the defect of the charge was not argued in the courts below, the same has been improperly raised at this appellate stage of the proceedings. He submitted however, in the alternative, that the error in citing sub-section (1) instead of sub-section (3) of S. 131 of the Penal Code is not a fatal irregularity. It was Mr. Njau's argument that, since the provision is one providing for punishment, the omission to cite it did not render the charge fatally defective. The learned Senior State Attorney added that, the irregularity did not occasion injustice because, in sentencing the appellant, the learned trial magistrate properly acted on that sub-section notwithstanding the fact that the same was not cited in the charge sheet. He submitted further that, in case the Court finds that the omission has rendered the charge fatally defective, then a retrial should be ordered.



On his part, the appellant maintained that the omission rendered the charge fatally defective. He argued that the trial magistrate erred in sentencing him under the provision of the law which was not cited in the charge sheet. He stressed that in essence the trial magistrate amended the charge and worse still, did so without affording him the opportunity of being heard. For this reason, he argued, he was wrongly sentenced under the provision which was introduced at the time of sentencing him, thus occasioning injustice on his part.

From the parties' submissions, it is not disputable that the charge, on which the appellant was arraigned, did not contain sub-section (3) of S. 131 of the Penal Code. The relevant part of the charge reads as follows:

**“CHARGE**  
**STATEMENT OF OFFENCE**

RAPE; Contrary to Section 130 (1) (2) (e) and 131 (1) of the Penal Code, [CAP 16 R.E. 2002.]

**PARTICULARS OF OFFENCE**

MESHAKI S/O MALONGO @ KITACHANG'WA on 26<sup>th</sup> day of April, 2014 at Nambala area within Arumeru District and Region of Arusha, did have sexual intercourse with one [“H.M.”] a girl of three (3) years old the act which contravenes the law.

Signed at Arusha this 02 day of MAY, 2014.....”

Section 131 which provides punishment for the offence of rape states as follows:-

“ 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”.*

It is clear from the above quoted section that, whereas under sub-section (1), the minimum imprison term is thirty years, under sub-section (3), it is mandatory life imprisonment.

In the circumstances, we agree with the appellant that he was prejudiced because he did not have the opportunity to make his defence against the offence falling under the category punishable with a mandatory life imprisonment. In the case of **Simba Nyangura v. Republic**, Criminal Appeal No. 144 of 2008 (unreported), cited in the case of **Marekano Ramadhani v. Republic**, Criminal Case No. 202 of 2013 (unreported), the Court underscored the requirement that, when an accused person is charged with the offence of rape, he must know under which of

the descriptions under S. 130(2) of the offence he faces falls, the purpose being to enable him to properly prepare for his defence. In our considered view, the principle equally applies to the categories of punishment under S. 131 of the Penal Code. In this case, it is clear from the defect in the charge that the appellant did not know that he was facing a serious offence which carries a mandatory sentence of life imprisonment. We are therefore, of the considered view that he was prejudiced.

For these reasons, we find that the charge was fatally defective. Since the proceedings of the trial court were based on a fatally defective charge, those proceedings are a nullity, so are consequentially, the proceedings of the High Court. The same are therefore hereby quashed and the judgment is set aside. As a result the appellant's conviction is quashed and the sentence is set aside.

Mr. Njau had urged us to order a retrial. Having considered the nature of the defect in the charge and after having found that the same occasioned injustice to the appellant, we are, with respect unable to agree with that prayer. When considering a similar situation in the case of **Abdallah Ally v. The Republic**,

Criminal appeal No. 253 of 2013 (unreported) the court had this to say:-

*“...being found guilty on a defective charge based on wrong and/or non-existent provision of the law, it cannot be said that the appellant was fairly tried in the court below.... **In view to the foregoing shortcomings, it is evident that the appellant did not receive a fair trial in court.** The wrong and non-citation of the appropriate provisions of the Penal Code under which the charge was preferred, left un aware that he was facing a serious charge of rape.” [Emphasis added]*

The effect of a conviction based on a defective charge was also stated in the case of **Mayala Njigailele v. The Republic**, Criminal Appeal No. 490 pf 2015 (unreported). In that case, the Court stated as follows:

*“Normally an order of retrial is granted, in criminal cases, when the basis of the case namely, the charge sheet is proper and is in existence. Since in this case the charge sheet is*

*incurably defective, meaning it is not in existence, the question of retrial does not arise”.*

We wish to add that, since the charge the appellant was convicted of, was fatally defective, it will be an exercise in futility to order a retrial. This is because, a retrial is normally ordered on assumption that the charge is properly before the court.

Since the finding in this ground suffices to dispose of the appeal, the need for considering the other grounds does not arise. On the basis of the foregoing reasons, we order immediate release of the appellant from prison unless he is otherwise lawfully held.

**DATED** at **ARUSHA** this 8<sup>th</sup> day of December, 2018

A.G.MWARIJA  
**JUSTICE OF APPEAL**

S.A. LILA  
**JUSTICE OF APPEAL**

M. A. KWARIKO  
**JUSTICE OF APPEAL**

I certify that this is a true copy of the original

S. J. KAINDA  
**DEPUTY REGISTRAR**  
**COURT OF APPEAL**