

**IN THE COURT OF APPEAL OF TANZANIA**

**AT ARUSHA**

**(CORAM: MUSSA, J.A., MWARIJA, J.A., And MWANGESI, J.A.)**

**CRIMINAL APPEAL NO. 250 OF 2016**

**FRANK SAUL MUSHI @ OMARY ..... APPELLANT  
VERSUS**

**THE REPUBLIC..... RESPONDENT  
(Appeal from the decision of the High Court of Tanzania**

**at Moshi)**

**(Mwingwa, J.)**

**Dated 25<sup>th</sup> day of May, 2016**

**In**

**Criminal Appeal No. 36 of 2015**

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**JUDGMENT OF THE COURT**

27<sup>th</sup> February & 7<sup>th</sup> March, 2018

**MUSSA, J.A.**

In the District Court of Hai, the appellant was arraigned as hereunder:-

***"OFFENCE, SECTION AND LAW: Rape c/s 130(1)***

***(2) and 131(1) of the Penal Code, Cap 16 Vol 1 of***

***the laws (R.E. 2002).***

***PARTICULARS OF OFFENCE: That FRANK s/o***

***SAUL MUSHI @ OMARY 26<sup>th</sup> January, 2014 charged***

*(sic) at or about 17:45 hrs at Machame Kialia Village within Hai District in Kilimanjaro Region, did unlawfully have carnal knowledge of one HAPPYNESS <sup>D/O</sup> SIMON MEENA, a girl of 17 years old".*

The appellant denied the charge, whereupon the prosecution lined up four witnesses and one documentary exhibit to establish its claim. The appellant testified on oath and featured two witnesses to fortify his denial of the charge. After a full trial, the appellant was found guilty, convicted and sentenced to a term of thirty years imprisonment. His appeal to the High Court against the conviction and sentence was dismissed in its entirety (Mwingwa, J.). Aggrieved, the appellant presently locks horns with the decision of the High Court in a memorandum of appeal which is comprised of four points of grievance. At the hearing before us, the appellant was represented by Mr. Samwel Nyari, learned Advocate, whereas the respondent Republic had the services of Ms. Janeth Sekule, learned Senior State Attorney. Ahead of our consideration of the issues of contention in this appeal, we should briefly reflect the factual background

giving rise to the arrest, arraignment and the eventual conviction of the appellant.

The case for the prosecution was to the effect that on the date, time and place mentioned in the extracted charge sheet, the appellant ravished the referred Happyness Simon Meena (PW1). It was not disputed that, at the material times, the victim (17) was a form III pupil at Nkuwas Secondary School. Her account was that the appellant way laid her as and when she was walking towards home, following which he threatened her with a knife and forcefully led her to a coffee plantation. Next, the appellant undressed her and inserted his manhood into her vagina. Thereafter, the appellant took Pw1 to his house where he, seemingly, kept her in captivity for three days. As to what transpired next, Pw1's account was somewhat incoherent and, for that matter, it is best if we tape the tale from her own words:-

*"At (sic) the fourth day he forgotten (sic) to close the door and there Tshs. 500/= which I took as fare up to Moshi town. When I got a bus to go home, accused was a driver of that car and told a conductor not to*

*permit me to drop on that car. But I escape (sic) and run away but accused followed me and caught me again and raped me again and put his penis on my anus."*

To say the least, the foregoing account begs several questions but, more particularly, it is not told where exactly the second incident of rape was perpetrated. Wherever may have been the scene of the second rape, according to Pw1, in the immediate aftermath, she disclosed the entire episode to her parents following which the appellant was arrested and formally arraigned on the 7<sup>th</sup> February; 2014. That concludes the prosecution version of the episode.

In his sworn evidence, the appellant told the trial court that he was apprehended at his residence by a mob of villagers on the 26<sup>th</sup> February, 2014 upon allegations that he had abducted a girl whom he did not know. On the whole, he completely disassociated himself from the prosecution accusation and insistently pleaded that he was being accused for an occurrence which he knows nothing about.

We have already intimated that, on the whole of the evidence, the trial court was impressed by the prosecution version and, in the upshot, the appellant was convicted and sentenced to the extent we have already indicated. As we have, again, similarly intimated, the first appellate court found no cause to fault the verdict of the trial court.

The memorandum of appeal is upon a variety of grievances but, at the hearing, we prompted both Mr. Nyari and Ms Sekule to comment on the propriety of the charge sheet, that is, aside from the points raised in the memorandum of appeal. As it turned out, counsel from either side were unanimous in the submission that the charge sheet laid at the appellant's door was incurably defective. More particularly, the learned Senior State Attorney had reference to Section 130(2) of the Penal Code (the Code) which classifies the circumstances under which a male person commits the offence of rape under five categories, (a) to (e) which are neither here nor there in the indictment at hand. Ms. Sekule also reminded us the mode in which a statement of offence ought to be framed as clearly expressed under the provisions of section 135(a) (ii) of the Criminal Procedure Act, chapter 20 of the revised laws(CPA) thus:-

*" 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.]

To the extent that the statement of offence does not make reference to the specific category of rape under which the appellant was arraigned, she concluded, the charge sheet was incurably defective. To buttress her position the learned Senior State Attorney referred us to 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 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....”.*

We entirely subscribe to this submission and we note that apart from the referred case, corresponding remarks were earlier made in another unreported Criminal Appeal No. 201 of 2013 – **Marekano Ramadhani Vs The Republic** and; more recently, in **Kastory Lugongo Vs The Republic** –Criminal Appeal No. 251 of 2014 (unreported). Indeed, in all these decisions, the court held that the defective charge sheet unduly prejudiced the appellant in his defence.

We are minded of the same view in the matter presently under our consideration, the more so as the specific category of rape under which the appellant was arraigned was not referred in the statement of offence. Having adjudged that the appellant was not fairly tried on account of an incurably defective charge sheet, we are constrained to intervene under the provisions of section 4(2) of the Appellate Jurisdiction Act, Chapter 141 of the revised Laws. In the result, the conviction and sentence meted out

against the appellant are, respectively, quashed and set aside. Accordingly, the appellant should be set at liberty forthwith unless if he is detained for some other lawful cause.

**DATED** at **ARUSHA** this 6<sup>th</sup> day of March, 2018.


K. M. MUSSA  
**JUSTICE OF APPEAL**

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

S.S. MWANGESI  
**JUSTICE OF APPEAL**

I certify that this is a true copy of the Original!



  
E. Y. MKWIZU  
**DEPUTY REGISTRAR**  
**COURT OF APPEAL**