IN THE COURT OF APPEAL OF TANZANIA
AT IRINGA

(CORAM: LUANDA, J.A., LILA, J.A., And MKUYE, J.A.)

CRIMINAL APPEAL NO. 234 OF 2016

ISSA S/O CHARLES ..... APPELLANT
VERSUS
THE REPUBLIC ..... RESPONDENT

(Appeal from the Decision of the High Court of Tanzania at Iringa.)

(Sameji, J.)

Dated the 13th day of May, 2016
in
DC Criminal Appeal No. 58 of 2015

JUDGMENT OF THE COURT

4th & 6th June, 2018

LUANDA, J.A.:

The appellant one ISSA S/O CHARLES was charged in the District Court of Iringa with rape "C/SS 130 (1) (e) and 131" of the Penal Code, Cap 16 RE 2002 (the Code). He was convicted as charged and sentenced to 30 years imprisonment.

The appellant was dissatisfied with the finding of the trial District of Court, he unsuccessfully appealed to the High Court. Undaunted, he has come to this Court on appeal.

In this appeal the appellant has raised six grounds in the memorandum of appeal. However, when the appeal came on for hearing, Ms. Kasana Maziku who was assisted by Ms. Hope Masambu both learned State Attorneys rose and informed the Court that the charge, which is the foundation of any criminal case is incurably defective. Clarifying she said the sections cited supra does not exist. The correct and proper sections ought to have been cited, according to the evidence available on record, was SS. 130 (1) and (2) (e) and 131 (1) of the Code as the victim of rape was a girl of 16 years of age. Since the charge preferred against the appellant contravened S. 135 (a) (ii) of the Criminal Procedure Act, Cap 20 RE 2002 (The CPA), the proceedings and judgment of the lower courts are a nullity. She cited **Joseph Paulo @ Muvela Vs Republic,** Criminal Appeal No. 379 of 2016 Court of Appeal

Tanzania (unreported). She prayed the Court to invoke its revisional powers as provided under S. 4 (2) of the Appellate Jurisdiction Act, Cap 141 RE 2002, and quash the proceedings of lower courts, set aside the sentence and release the appellant from prison.

Time and again the Court keep on reminding those who are responsible in filing the charges as well as those who preside over criminal trials should make a habit of perusing the charges and consult their books so as to satisfy themselves as to their correctness (see **Mohamed Koningo Vs The Republic** (1980) TLR 279). Since in this case the charge cited non-existent sections, as correctly pointed out by Ms. Maziku, they did not disclose any offence known in law. A charge which does not disclose an offence is incurably defective (see **Isidori Patrice Vs The Republic,** Criminal Appeal No. 224 of 2007 (unreported) and **Mussa Mwaikunda Vs The Republic** [2006] TLR 387).

In **Joseph Paul @ Miwela** case cited supra, the appellant was charged with rape C/SS 130 (1) (e) and 130, similar to our case. The Court emphasized the need to correctly charge the accused by citing the correct provision of law creating the offence. As regards citing "S 130 (1) (e)" of the Penal Code, the Court said as follows:

> *"Having examined the charge sheet in this matter, we agree with Ms. Ngilangwa that the said charge is defective in that its statement of offence predicates the offence of rape upon section "130 (1) (e)" of the Penal Code, which is obviously non-existent. The statement of offence would have been correct or proper if, besides citing section 130 (1) of the Penal Code, it had made reference to one of the categories of rape created by subsection*

(2) of section 130 of the Panel Code (i.e., categories (a), (b), (c), (d) and (e). We wish to emphasise that since each category of rape has its own ingredients and peculiarities, it is of the highest significance that the specific category of that offence charged be clearly disclosed in the statement of offence."

The Court invoked it revisional powers by quashing the proceedings and judgments of lower courts and set aside the sentence and released the appellant.

In the exercise of our revisional powers under S. 4 (2) of the AJA, we quash all the proceedings and conviction of the lower courts and set aside the sentence. Since the foundation of the case namely the charge is wanting, it is not proper to make an order of retrial. Retrial presupposes a criminal charge to have been in order and in existence.

All in all, the appellant to be released from prison forthwith unless he is held in connection with another matter.

Order accordingly.

DATED at **IRINGA** this 5th day of June, 2018.

B. M. LUANDA
JUSTICE OF APPEAL

S. A. LILA
JUSTICE OF APPEAL

R. K. MKUYE
JUSTICE OF APPEAL

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

P. W. BAMPIKYA
SENIOR DEPUTY REGISTRAR
COURT OF APPEAL