

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

(CORAM: MUSSA, J.A., LILA, J.A., AND MWAMBEGELE, J.A.)

CRIMINAL APPEAL NO. 282 OF 2016

ELISHA MUSSAAPPELLANT

VERSUS

THE REPUBLICRESPONDENT

(Appeal from the judgment of the High Court of Tanzania at Shinyanga)

(Ruhangisa, J.)

Dated 10th day of June, 2016

in

DC. Criminal Appeal No. 3 of 2015

JUDGMENT OF THE COURT

28th August & 3rd September, 2018

LILA, J.A.

The appellant was sentenced to life imprisonment by the District Court of Kahama upon being convicted of the offence of rape. The charge that was placed at the appellant's door during his arraignment which we deliberately reproduce hereunder and which we shall revert to in this judgment at a later stage is as follows:

"CHARGE SHEET

PARTICULARS OF ACCUSED PERSONS CHARGED

NAME: ELISHA S/O MUSSA

TRIBE: MUHA

AGE: 27YRS

RELG: CHRISTIAN

OCC: DRIVER

RESID: SHUNU – KAHAMA

STATEMENT OF OFFENCE:- *Rape c/s
130(1)(2)(e) and 131(1) of the penal code cap. 16
(R.E. 2002).*

PARTICULARS OF OFFENCE: *That ELISHA S/O
MUSSA is charged [on] 23^d day of July, 2013 at
about 06:15hrs at Shunu Street within Kahama
District in Shinyanga Region did (sic) sexual
intercourse with one SWAUMU D/O ISAMAIL OF
7yrs age.*

STATION KAHAMA

Signed

Public Prosecutor

DATE: - 25th July, 2013"

The appellant distanced himself with the commission of the offence when the charge was read over to him. Following that, the prosecution marshalled three witnesses to prove the charge against him. As it were, he happened to be the only defence witness. At the end, he was found guilty, convicted and sentenced as stated above.

While striving to exculpate himself, the appellant unsuccessfully protested his innocence before the High Court, hence the present

appeal. He has raised seven grounds of complaint in his memorandum of appeal seeking to impugn the concurrent findings of guilt by the two courts below. For reasons soon to follow we will not take pain to reproduce them.

In the course of hearing the appeal, we noted that the charge was problematic. Consequently, we *suo motu* raised a legal point whether the charge was proper. We accordingly invited parties to address us on that point which in our view would sufficiently dispose of the appeal if positively affirmed.

The respondent Republic was represented by Mr. Solomon Lwenge, Senior State Attorney, who was assisted by and Ms. Margareth Ndaweka, learned Senior State Attorneys. Arguing on the legal point, Mr. Lwenge did not mince words. He readily conceded that the charge was defective for not citing the appropriate sentencing section in the statement of offence. Given the fact that the victim of the offence of rape was seven years old as per the charge sheet, the statement of offence ought to have cited section 131(3) of the Penal Code Cap. 16 R.E. 2002 (the Penal Code) which provides for a sentence of life imprisonment, he submitted. In conclusion, he said failure to cite section 131(3) of the Penal Code left the appellant unaware of the life

imprisonment sentence he would face in case he would be found guilty. That way, he said, the appellant was prejudiced and cannot be said to have received a fair trial.

Regarding the way forward, Mr. Lwenge was of the view that the whole trial was a nullity and he urged the Court to invoke its powers of revision under section 4(2) of the Appellate Jurisdiction Act, Cap. 141 R. E. 2002 (the AJA) and thereby quash the proceedings and judgments of both courts below and set aside the sentence imposed by the trial court and upheld by the High Court. He was of the opinion that an order of retrial suits the circumstances of this case.

On his part, the appellant who appeared in person and unrepresented, and the issue being a legal one had nothing substantial to contribute. He, instead, maintained being innocent and urged the Court to set him free.

We have given due consideration to the arguments by the learned Senior State Attorney. The issue for consideration here is whether the charge is defective?

It is incontrovertible that it is the charge which commences the lawful criminal proceedings against an accused person and the practice is that at the commencement of trial the accused is asked to plead to a

charge. The charge must sufficiently disclose the offence he is accused of having committed and the particulars thereof (see **Hassan Jumanne @ Msingwa**, Criminal appeal No. 290 of 2014 (unreported), **Naoche Mbile Vs. Republic**, (1993) and **DPP Vs. Ally Nur Dirie and another** [1988] TLR 252). A clear and valid charge is intended to achieve one basic principle that an accused must be well informed of the charge he is facing hence be able to marshal his defence accordingly (see **Mohamed Koningo Vs. Republic** [1980] TLR 279).

To insure that charges are framed in the manner that the aforesaid purpose is attained, the Legislature enacted sections 132 and 135 of the Criminal Procedure Act, Cap. 20 R. E. 2002 (the CPA) providing for the format and mode in which offences must be charged. In terms of section 132 of the CPA offences must be specified in the charge with necessary particulars. That sections states:-

"132. Every charge or information shall contain, and shall be sufficient if it contains, a statement of the specific offence or offences with which the accused person is charged, together with such particulars as may be necessary for giving reasonable information as to the nature of the offence charge."

Regarding the offence section, the provisions of section 135 (a) (ii) of the CPA, imperatively require the charge to contain the specific section of the enactment creating the offence. That section states:-

*"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].

Although, read closely, the above provisions do not require the section providing for the sentence in respect of the offence charged be cited in the statement of offence, it is a long and deep rooted practice that the same is also indicated in the statement of offence. The significance of it is, as rightly argued by the learned Senior State Attorney, to keep the accused informed of the nature of sentence to be imposed upon him in case of his being convicted of the offence charged.

In maintaining the above practice, the charge under scrutiny in the present case is, in the statement of offence, couched thus:-

***"Rape s/s 130 (1) (2)(e) and Section 131
(1) of the Penal Code Cap 16 of the Laws R.E.
2002"***

While the provisions of section 130 (1) (2) (e) informs the appellant the offence he was facing as being that of raping a child, now famously known as statutory rape, section 131 (1) of the Penal Code, was intended to inform the appellant of the sentence he would be liable to serve upon being convicted. But the intended purpose could not be achieved. That section states:-

"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."

Certainly, section 131 (1) of the Penal Code provides for general punishments to whoever is found guilty of the various categories of the offence of rape. It does not cater for particular and specific situations like the one at hand.

In the present case, the victim was under the age of ten years. The sentence for a person convicted of the offence of ravishing a girl under the age of ten years is provided under section 131(3) of the Penal Code to be the statutory sentence of life imprisonment. Considering the seriousness of the offence and severity of the sentence, we are of the firm view that in the present case section 131(3) of the penal Code ought to have been cited in the statement of offence. By so doing, the appellant would have known well in advance the obtaining severe sentence in respect of the charge he was facing. He would, in that situation, not have taken it lightly but more seriously hence properly arrange for his defence. The record would bail us out on this by looking at the nature and limited questions the appellant asked the prosecution witnesses during cross-examination. They didn't reflect the expected seriousness and concern of a person expected to be incarcerated for life in the event of a conviction. He casually conducted the cross-examination. The mere citing of section 131(1) was, in our strong view, insufficient.

All said, the appellant in the present case, was entitled to know the specific sentence applicable in case he could be found guilty. The same way we insist that the charge should indicate, in the statement of

offence, the specific category of rape and necessary particulars thereof (see **Simba Nyangura Vs. Republic**, Criminal Appeal No. 144 of 2008 (unreported)), we equally and with the same weight insist that the charge should indicate the specific provision providing for the sentence in case of a conviction. It will be recalled that in that case the Court stated that:-

"We think that in a charge of rape an accused person must know under which of the descriptions (a) to (e) in section 130 (2) of the Penal Code, the offence he faces falls, so that he can prepare for his defence. These particulars are missing in the present case. We agree with Mr. Mwipopo that, this lack of particulars unduly prejudiced the appellant in his defence...."

In the circumstances and in the same vein, we fully agree with the learned Senior State Attorney that the statement of offence did not disclose a specific and relevant sentencing section. That notwithstanding, the appellant was sentenced to serve a life jail term which sentence he was not aware of throughout the trial. He was, in our firm view, thereby duly prejudiced. It therefore follows that he cannot

be said to have received a fair trial. The Court faced almost a similar situation in the case of **Swalehe Ally Vs. Republic**, Criminal Appeal No. 119 of 2016 (unreported) and the charge was found to be, on that account, fatally defective.

It is apparent that the appellant was found guilty on a defective charge. He cannot be said to have received a fair trial. The inevitable consequence is that the trial is vitiated-see **Simba Nyangura Vs. Republic** (supra) and **Abdallah Ally Vs. Republic**, Criminal Appeal No. 253 of 2013 (unreported).

Given the circumstances the only course available to us is to invoke the powers of revision vested on us under section 4(2) of the Appellate Jurisdiction Act, Cap. 141 R. E. 2002 and proceed to quash the proceedings and judgments of both courts below and set aside the life jail term imposed by the trial court and upheld by the first appellate court.

Upon our prompting on the way forward, the learned State Attorney was emphatic that we should order a retrial. He was of the view that there was cogent evidence proving the appellant's guilty at the trial court. On his part, the appellant urged the Court to set him free.

With due respect to the learned State attorney, we decline his invitation. As we have endeavored to demonstrate above, the charge is the foundation of any criminal trial. After we have held that the charge is fatally defective it means there is no charge in existence on which the appellant can be retried -see **Mayala Njigailele Vs. Republic**, Criminal Appeal No. 490 of 2015(unreported).

For the foregoing reasons, we order the appellant be released from prison forthwith unless held for other justifiable cause.

DATED at **TABORA** this 31st day of August, 2018.

K. M. Mussa
JUSTICE OF APPEAL

S. A. Lila
JUSTICE OF APPEAL

J. C. M. Mwambegele
JUSTICE OF APPEAL

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


A. H. Msumi
DEPUTY REGISTRAR
COURT OF APPEAL(T)

