**IN THE COURT OF APPEAL OF TANZANIA**

**AT DAR ES SALAAM**

**(CORAM: MUSSA, J.A., MUGASHA, J.A., And LILA, J.A.)**

**CRIMINAL APPEAL NO. 249 OF 2014**

**FAKI SAID MTANDA..... APPELLANT**

**VERSUS**

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

**(Appeal from the decision of the High Court of Tanzania**

**at Dar es salaam)**

**(Shangwa, J.)**

**Dated 13th May, 2014**

**in**

**HC Criminal Appeal No. 59 of 2013**

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## JUDGMENT OF THE COURT

**5th & 29th April, 2019**

**MUGASHA, J.A.**

The appellant is challenging the decision of the High Court (Shangwa, J) which upheld the conviction and sentence against him on the charge of rape.

We have deemed it crucial from the outset, to observe that, the charge sheet, the first appellate court proceedings and its decision are included in the record of appeal. As it were, at a certain stage, the original

record of the trial proceedings together with the judgment got lost and all efforts to trace them were unsuccessful.

Nonetheless, from the charge sheet and the decision of the first appellate court we have been able to discern that the appellant was arraigned as hereunder:

*"TANZANIA POLICE FORCE*

*CHARGE SHEET*

*NAME AND TRIBE OR NATIONALITY OF PERSON CHARGED*

*NAME- FAKI s/o SAID MTANDA*

*TRIBE- MAKUA*

*AGE 48 YEARS*

*OCC- PEASANT*

*RELIG- MOSLEM*

*RES- MPARANGE*

*OFFENCE , SECTION AND LAW- RAPE C/S 130 OF THE PENAL CODE CAP 16 VOL. I RE 2002*

*PARTICULARS OF THE OFFENCE:- That FAKII S/O SAIDI MTANDA Charge on the 24th day of April 2011 at about 02.00 hrs at Ngomboloni Mparange area within Rufiji District, Coast Region did carnal knowledge to MWAJUMA d/o ALLY RWAMBO aged 68 YRS without her consent.*

*STATION- IKWIRIRI*

*DATE: - 28/4/2011"*

Again, the judgment of the first appellate court sheds light on the charge which was laid against the appellant as the following is evident at page 13 of the record of appeal:

> *"This is an appeal against conviction and sentence of 30 years term of imprisonment imposed on the Appellant Faki Saidi Mtanda by the District Court of Rufiji at Utete in Criminal Case No. 36 of 2011 after finding him guilty of the offence of rape C/S 130 of the Penal Code Cap 16 R.E. 2002.*
>
> *The particulars of the offence with which he was charge and found guilty are that on 24th Day of April, 2011 at about 2.00 hours at Mgomboloni Mparange area within Rufiji District, Coast Region, he did have carnal knowledge of one Mwajuma Ally Rwambo aged 68 years without her consent. By then the appellant was 48 years old."*

The first appellate court dismissed the appeal hence the present appeal.

In the Memorandum of appeal the appellant raised three grounds of complaint namely:

1. That, the learned trial magistrate and the 1st appellate judge erred in law and fact by finding the appellant guilty and convicting him on the basis of the charge which was defective.

2. That, the lower courts grossly erred by convicting the appellant for the offence of rape whereas the prosecution failed to establish penetration against the appellant.

3. That the learned trial magistrate and the 1st appellate judge grossly erred in law for failure to observe that the charge wasn't proved beyond any reasonable doubt against the appellant.

In addition, the appellant filed written submissions in support of basically the first and third grounds of complaint.

At the hearing of the appeal, the appellant was unrepresented whereas the respondent Republic was represented by Mr. Credo Rugaju, learned Senior State Attorney, assisted by Ms. Aveline Ombock, learned State Attorney.

The appellant opted to initially hear the submission of the learned Senior State Attorney.

In the absence of the trial proceedings and the judgment, Mr. Rugaju conceded to the first ground of appeal. He pointed out that, the appellant was charged and convicted on the basis of a defective charge sheet which preferred the offence of rape under section 130 of the Penal Code which is non-existent. He submitted that, the appellant ought to have been charged under section 130 (1) and section 130(2)(a) of the Penal Code. On that accord, the learned Senior State Attorney thus argued that, the appellant's plea was entered on the non-existent provision contrary to section 135 (a) (ii) of the Criminal Procedure Act Cap 20 RE. 2002 (the CPA) which mandatorily requires the charge sheet to cite the particular provision which creates an offence and not otherwise. The learned Senior State Attorney further submitted that, the anomaly is not curable under section 388 (1) of the CPA. To back up his propositions he referred us to the cases of **SIMBA NYANGURA VS REPUBLIC,** Criminal Appeal No. 144 of 2008 and **OMARI KITAMBO VS REPUBLIC,** Criminal Appeal No. 94 of 2014 (both unreported). Ultimately, Mr. Rugaju argued that, the trial was a nullity and urged us to quash the conviction and the sentence and allow the appeal.

On the other hand, the appellant supported the submissions of the learned State Attorney and urged us to allow the appeal.

The point for our determination is the propriety or otherwise of the charge preferred against the appellant.

We have previously reproduced the charge sheet which was preferred against the appellant is under section 130 of the Penal Code which is non-existent in the Penal Code. It can be discerned from the judgment of the first appellate court that, the trial proceedings disappeared after the hearing of the first appeal. As such, at the outset, as earlier pointed out, on account of the lost trial proceedings and since the decision of the first appellate court did not attempt to put across and analyse the appellant's defence, we were not advantaged to decipher the nature of defence put forth by the appellant in order to gauge if he understood the charge he faced at the trial.

We are aware of a salutary principle of law that a first appeal is in the form of a re-hearing. Therefore, the first appellate court, ought to have re-evaluated the entire evidence on record by reading it together and subjecting it to a critical scrutiny and if warranted arrive at its own conclusions of fact. (See **D. R. PANDYA VS REPUBLIC,** (1957) EA 336 and

**IDDI SHABAN @ AMASI VS REPUBLIC,** Criminal Appeal No. 2006 (unreported). In addition, and in the interest of justice, the compliance with the salutary rule by the first appellate court is very crucial as it would remedy the occasions of disappearance of the trial Court proceedings and enable the Court to discern what had transpired at the trial. We thus urge the High Court at the hearing and determination of first appeals to comply with the Salutary Rule as expounded in the case of **PANDYA VS REPUBLIC** (Supra) and **IDDI SHABANI @ AMASI VS REPUBLIC** (Supra).

In view of the said, deficiency, our decision will be confined to the law governing the framing of charges in criminal offences. The Mode on which the charge must be preferred is stated under section 135 (a) (ii) of the CPA which categorically states as follows:

> *"The following provisions of this section shall apply to all charges and informations and, notwithstanding any rule of law or practice, a charge or an information shall, subject to the provisions of this Act, not be open to objection in respect of its form or contents if it is framed in accordance with the provisions of this section–*

*(a) (i) A count of a charge or information shall commence with a statement of the offence charged, called the statement of the offence;*

*(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]

The bolded expression categorically requires the charge sheet to contain reference to the section of the enactment which creates an offence.

In **OMARI KITAMBO VS REPUBLIC** (supra) the Court was faced with a scenario whereby the charge of rape was preferred under section 130 (c ) of the Penal Code. The Court held that,

*"... the appellant had answered a charge which was non-existent in the Penal Code the principle of the law is that a person must be charge with an offence created by the law."*

Simllarly, in the case of **KASTORY LUGONGO VS REPUBLIC,** Criminal Appeal No. 251 of 2014 (unreported) the appellant was charged under sections 130 and 131 of the Penal Code. Apart from the Court observing that section 130 under which the appellant was arraigned is no show, it concluded as follows:

*"We are keenly aware that not every defect in the charge sheet would vitiate the trial. As to the effect the defect could lead, would depend on the particular circumstances of each case,* ***the overriding consideration being whether the defect worked to prejudice the accused person****. Our particular concern here is in the reality that the appellant was arraigned under a non-existent provision of the law."*

[Emphasis ours]

Consequently, being found guilty on non-existent provisions of the law, it cannot be said that the appellant was fairly tried in the courts below.- See **ABDALLAH ALLY VS REPUBLIC,** Criminal Appeal No. 252 of 2013 (unreported).

In the present case, it is not in dispute that the appellant was charged under section 130 of the Penal Code which is non-existent. As previously intimated, due to the lacking trial Court proceedings and the state of the decision of the first appellate court, we had difficulty to consider if the defect worked to the prejudice of the appellant or otherwise. In this regard, being left with a sole incurable anomaly that the appellant was charged under a non-existent offence, this in our considered view occasioned a failure of justice as the appellant did not receive a fair trial.

Therefore, we agree with the learned Senior State Attorney that, the appellant was called upon to answer a charge in respect of non-existent offence created under the law. Thus, as we said in the case of **OMARI KITAMBO VS REPUBLIC** (supra), the appellant was not accorded a fair trial which unduly prejudiced him in pleading to and giving defence on a non-existent offence. We say so because the charge ought to have been

preferred under section 130 (1) and (2)(a) of the Penal Code as per mandatory requirements of section 135 (a) (ii) of the CPA. Since the appellant was arraigned for an offence not existent under the law, the trial was a nullity and so was the appeal before the High Court because it stemmed on a nullity.

Finally, this appeal succeeds and, accordingly, the conviction and the sentence are respectively quashed and set aside. We order the immediate release of the appellant unless he is held for another lawful cause.

**DATED** at **DAR ES SALAAM** this 12th day of April, 2019.

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

S.E.A. MUGASHA
**JUSTICE OF APPEAL**

S.A. LILA
**JUSTIE OF APPEAL**

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

B. A. MPEPO
**DEPUTY REGISTRAR**
**COURT OF APPEAL**