

IN THE COURT OF APPEAL OF TANZANIA
AT TANGA
(CORAM: MUSSA, J.A., LILA, J.A. And MKUYE, J.A.)

CRIMINAL APPEAL NO. 7 OF 2017

HAMISI MALIKI NGODA..... APPELLANT

VERSUS

THE REPUBLIC.....RESPONDENT

**(Appeal from the decision of the High Court of Tanzania at
Tanga)**

(Msuya, J.)

dated the 29th day of August, 2016

in

Criminal Appeal No. 70 of 2016

JUDGMENT OF THE COURT

12th & 19th February, 2019

MKUYE, J.A.:

This is a second appeal. It arises from the decision of the High Court (Tanga Registry) (Msuya, J.) which upheld the decision of the District Court of Pangani (Bally, RM) whereby he convicted and sentenced the appellant to life imprisonment upon his own plea of guilty on a charge of rape predicted under sections 130 (2) and 131(1) of the Penal Code, Cap 16 R.E 2002.

What can be gleaned from the record is that when the charge was read over to the appellant he entered a plea of guilty. Likewise, when the summary of facts was outlined to him he admitted them to be true and correct. Dissatisfied, he appealed to the High Court but his appeal was dismissed on account that he had unequivocally pleaded guilty to the charge and therefore was properly convicted on his own plea of guilty. Still contesting for his innocence, he has come before us on three interrelated grounds of appeal as hereunder:-

- (1) *That, both the learned trial magistrate and appellate judge erred in law by failing to analyze that the charge sheet is defective as it lacks proper provisions of the law as such the alleged plea was equivocal.*
- (2) *That, both the learned trial magistrate and appellate judge erred in holding that the appellant's plea was unequivocal.*
- (3) *That, both the learned trial magistrate and appellate judge ought to have entered a plea of not guilty in view that the accused was not*

aware of what he was admitting and the offence itself.”

It is noteworthy that the appellant also filed written submission in support of his appeal.

At the hearing of the appeal, the appellant appeared in person and unrepresented whereas the respondent Republic was represented by Mr. Waziri Mbwana Magumbo assisted by Ms. Maisara Mkumba, both learned State Attorneys.

When the appellant was given an opportunity to elaborate his grounds of appeal he opted to let the State Attorney submit first and reserved his right to rejoin later, if need would arise.

Ms. Mkumba, initially prefaced by supporting both the conviction and sentence. However, as we considered the issue of the propriety of the charge sheet which is also a ground of appeal could dispose of the matter without necessarily dealing with the other grounds, we asked the parties to address us on it. Ms Mkumba readily conceded that the charge sheet was defective for failure to indicate paragraph (e) of section 130 (2) of the Penal

Code bearing in mind that the victim of rape was a child aged nine (9) years. She also added that it was not proper to cite section 131(1) of the Penal Code for punishment of an offence of rape to such a child. She said, the proper penal provision was section 131 (3) of the same Penal Code.

In further elaboration, Mr. Magumbo contended that as the provisions cited did not show the category of the offence of rape and the gravity of sentence it meant that the appellant was not well informed on the offence he was facing and hence even his plea he had entered was equivocal. On that account, he urged the Court to invoke its revisional powers under section 4(2) of the Appellate Jurisdiction Act, Cap 141 R.E 2002 (the AJA) and nullify the proceedings, quash the conviction and set aside the sentence meted on the appellant and order a retrial on a proper charge.

In reply, the appellant did not have much except that he agreed with what was submitted by the learned State Attorneys.

On our part, after having examined the grounds of appeal and the submissions from both sides, we think our starting point is the charge sheet. For easy of reference we find it prudent to reproduce part of it as hereunder:-

"CHARGE SHEET.

STATEMENT OF OFFENCE

RAPE c/s 130 (2) and 131(1) of the Penal Code, Cap. 16 of the Law (sic) R.E. 2002.

PARTICULARS OF THE OFFENCE

That, HAMISI s/o MALIKI NGODA, is (sic) stand (sic) charged that on 11th day of December, 2015 at Funguni area within Pangani District in Tanga Region did rape the (sic) one AISHA D/O HAMISI a child of 9 years.

Signed at Pangani this 16(sic) day of December, 2015.

Sgd

.....
"PUBLIC PROSECUTOR"

What is clear from the above quoted charge is that the appellant was charged with an offence of rape under section 130(2) and 131(1) of the Penal Code. Section 130 (2) which is the offence section does not indicate the specific provision which shows the category of the offence of rape allegedly committed by the appellant. That section provides for five

categories of the offence of rape as stipulated under paragraphs (a) to (e). On top of that section 131 provides for punishments for persons found to have committed any of the offences of rape. In particular, section 131(1) which was cited in the charge relates to punishment for persons who commit rape other than boys who are of the age of eighteen years or below. On the other hand, as was rightly argued by Ms. Mkumba, section 131(3) of the Penal Code is the provision which specifically provides for a punishment of life imprisonment for those who commit rape to girls under the age of ten years.

It is important at this juncture to point out that section 135(a) (ii) of the Criminal Procedure Act, Cap. 20 R.E 2002 in mandatory terms requires the statement of the offence to cite a correct reference of section which sets out a particular offence alleged to have been committed. It states as follows:

*"135 (a) (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 reference***

to the section of the enactment creating the offence.”

[Emphasis added]

This position of the law was reiterated in the case of **Juma Mohamed vs. Republic**, Criminal Appeal No. 272 of 2011 (unreported) in which the Court, after having made reference to the above quoted provision stated as follows:-

"It is clear from the above provisions that a statement of offence should describe the offence and should contain a reference to the section of the enactment creating the offence. After the statement of the offence then the particulars of the offence should be set out."

[See also **Mussa Mwaikunda v. Republic**, [2006 TLR 387; **Simba Nyangura v. Republic**, Criminal Appeal No. 144 of 2008 (unreported); **Charles Makopi v. Republic**, Criminal Appeal No. 85 of 2012 (unreported); and **Said Hussein v. Republic**, Criminal Appeal No. 110 of 2016 (unreported)].

We need to emphasize that it is important for a charge to indicate a specific provision of the law that is contravened. This is so because the charge sheet lays the foundation of the trial. (see **Zarau Issa v. Republic**, Criminal Appeal No. 159 of 2010 (unreported)). It is also important to enable the accused to understand the nature of the offence he is alleged to commit before he is called upon to make his plea and be in a position to prepare an informed defence. (See **Simba Nyangura's** and **Zarau Issa's** cases (supra)).

In this case, as we have alluded earlier on, the appellant was charged with an offence of rape under section 130 (2) of the Penal Code, to which he pleaded guilty. The category of the offence as set out under paragraphs (a) to (e) was not indicated in the charge. As was correctly argued by Ms. Mkumba, as the victim was said to be aged 9 years old, the proper provision to be referred in the charge sheet ought to be section 130 (2) (e) of the Penal Code. Failure to indicate that paragraph means that the appellant pleaded guilty and convicted on an uncertain or non-existent offence. Unfortunately, he was also punished under a wrong provision of the law as section 131(1) which was cited does not provide for punishment for such an

offence. In the case of **Charles Mlande v. Republic**, Criminal Appeal No. 270 of 2013 (unreported), when the Court faced a similar situation, quoted with approval the case of **Abdallah Ally v. Republic**, Criminal Appeal No. 253 of 2013 (unreported) where it was observed as follows:

"Being found guilty on a defective charge based on wrong and or non-existent provision of law, it cannot be said that the appellant was fairly tried in the courts bellows"

In the same case, the Court went on to state that:

"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..."

Besides that, the Court in the case of **Simba Nyangura** (supra), after observing the importance of the accused to know under which description in section 130 (2) (a) to (e) of the offence of rape he was facing in order to be in a position to make a defence, held a view that lack of particulars in the charged offence prejudiced the appellant in his defence.

On our part we are inclined to subscribe to the above cited decisions. We are settled in our mind that as the charge sheet did not state the category of the offence of rape alleged to have been committed together with a proper provision for punishment, the appellant cannot be said to have been in a position to understand the nature of the offence and the punishment thereof to enable him appreciate as what he was pleading guilty outrightly as he did. We think, had the charge sheet been properly drawn, the appellant might not have entered a plea of guilty there and then as he did. We, therefore, agree with Mr. Magumbo that the plea entered by the appellant on a defective charge was equivocal. Moreover, as the appellant was convicted and sentenced on the basis of his plea of guilty on a charge which was defective, we entertain no doubt that he did not receive a fair trial and hence he was prejudiced. In the result, we agree with the appellant and the learned state attorneys the charge sheet was defective.

That said and done, we hereby invoke our revisional powers vested on us under section 4(2) of the AJA and nullify the proceedings of the trial court and the judgment of the High Court, quash the conviction and set aside the sentence imposed on the appellant. However, given the seriousness nature

of the offence, the gravity of sentence and the age of the victim, order that the matter be expeditiously retried before another magistrate on a proper charge. Meanwhile, we direct that the appellant should remain in custody.

It is so ordered.

DATED at **TANGA** this 19th day of February, 2019.

K. M. MUSSA
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.




E. Y. MKWIZU
SENIOR DEPUTY REGISTRAR
COURT OF APPEAL