

**IN THE COURT OF APPEAL OF TANZANIA
AT DAR-ES-SALAAM**

(CORAM: MUGASHA, J.A., SEHEL, J.A and RUMANYIKA, J.A.)

CRIMINAL APPEAL NO. 496 OF 2020

EDWARD YUSUPH@GAO.....APPELLANT

VERSUS

THE REPUBLIC.....RESPONDENT

(Appeal from the Judgment of the High Court of Tanzania at Dar-es-salaam)

(Rwizile, J)

dated the 24th day of July, 2020

in

Criminal Appeal No.263 of 2019

JUDGMENT OF THE COURT

13th & 17th February, 2023

MUGASHA, J.A.:

In the Resident Magistrates' Court of Kibaha at Kibaha, the appellant was arraigned for the offence of incest contrary to section 158 (1) (a) and 159 of the Penal Code CAP 16 R.E 2019. It was alleged by the prosecution that, on diverse dates between September and October 2018 at Misufini –Soga area within Kibaha District in Coast Region, the appellant did have sexual intercourse with his granddaughter a girl aged 13 years old. For the purposes of concealing her identity the girl shall be referred to as the victim or PW2.

The appellant denied the allegation subsequent to which in order to establish its case, the prosecution paraded four witness. On the whole of the

evidence, the trial court accepted as truthful the prosecution version, found the appellant guilty, convicted and sentenced him to imprisonment for thirty years. The appellant unsuccessfully appealed to the High Court where the conviction and the sentence were confirmed hence the present appeal. On account of what will be unveiled in due course, save where need arises, we shall not embark on giving a factual background of what transpired at the trial which resulted to the conviction of the appellant and nor shall we reproduce the grounds of appeal contained in the Memorandum filed by the appellant.

At the hearing of the appeal, the appellant appeared in person unrepresented, whereas the respondent Republic had the services of Mr. Grey Uhagile, learned State Attorney. Having adopted the grounds of appeal and the written submissions earlier filed, the appellant opted to initially hear the submission of the learned State Attorney while reserving the right of reply if need would arise.

We have gathered from the prosecution evidence that the appellant who is accused to having sexual intercourse happens to be the paternal uncle of the victim's father. Thus, we invited the learned State Attorney to address us on the propriety or otherwise of the charge on which the appellant was convicted for the offence of Incest by Males under section 158(1) (a) of Cap 16. In particular, our concern was whether the appellant who is accused of

having had sexual intercourse with the victim falls under the categories prescribed under the said section 158 (1) (a) for purpose of prohibited sexual intercourse. The provision stipulates as follows:

*158.-(1) Any male person who has prohibited sexual intercourse with a female person, who is to his knowledge his **granddaughter**, **daughter**, **sister** or **mother**, commits the offence of incest, and is liable on conviction—*

(a) if the female is of the age of less than eighteen years, to imprisonment for a term of not less than thirty years; [Emphasis added].

After taking another look at the above provision in light of the particulars of the offence and the evidence on the record; on reflection, Mr. Uhagile conceded that the appellant was wrongly charged because he does not fall under the prescribed categories of prohibited sexual relationships which envisages sexual intercourse with the offender's granddaughter, or his daughter, or his sister or his mother. In this regard, it was his submission that the particulars of the offence and the evidence on record are more consistent with the offence of rape but not of incest by males. In the circumstances, the learned State Attorney asserted that, since the appellant was charged under a wrong provision, the entire proceedings including the conviction and sentence before the trial court and subsequently before the first appellate court were a

nullity. He implored on the Court to invoke its revisional jurisdiction, nullify the entire proceedings of both the trial and first appellate court, quash the conviction and the sentence and subsequently order the immediate release of the appellant.

When he was given the chance to submit on the issue of law regarding the propriety of charge which led to his conviction, this being a point of law, the appellant who is layperson had nothing to add except to agree with the submission of the learned State Attorney.

We have carefully considered the submission of the learned State Attorney and the record before us and the issue for our determination is the propriety or otherwise of the charge upon which the conviction hinges and the resulting consequences.

The mode in which offences are to be charged is regulated by the provisions of section 135 (1) of the Criminal Procedure Act CAP 20 R.E.2019. Under the said provision, it is mandatorily required that a charge must contain a correct statement of the law in respect of the offence charged and correct particulars of the offence. This is very crucial so as to make an accused person understand the nature of the offence charged in order to make an informed defence. See: **ABDALLA ALLY VS REPUBLIC**, Criminal Appeal No. 253 of 2013, **SIMBA NYANGURA VS REPUBLIC**, Criminal Appeal No. 144 of 2008,

CHARLES S/O MAKAPI VS THE REPUBLIC Criminal Appeal No.85 of 2012
and **PROJESTUS ZACHARIA VS REPUBLIC**, Criminal Appeal No. 162 of
2018 (all unreported).

At this juncture it is crucial to reproduce the charge which was the basis
of the appellant's arraignment and conviction as hereunder:

"REPUBLIC

Versus

EDWARD YUSUPH @ GAO

CHARGE

STATEMENT OF OFFENCE

INCEST: *Contrary to section 158 (1) (a) and section
159 of the Penal Code Act [Cap 16 R.E.2002]*

PARTICULARS OF OFFENCE

*EDWARD YUSUPH@GAO, on diverse dates between
September and October 2018 at Misufini –Soga area
within Kibaha District in Coast Region did have sexual
intercourse with his granddaughter one CLEMENCIA
D/O JOHN 2 GAO, a girl aged 13 years old."*

As earlier stated, the victim is alleged to have had sexual intercourse
with the appellant who is the paternal uncle of the victim's father and the
crucial question is whether this falls under the prescribed prohibited sexual

relationships under section 158 (1) (a) of the Penal Code. On our part, we agree with the learned State Attorney that the appellant was wrongly charged with the offence of incest by males where sexual intercourse involved the victim who is not the granddaughter of the appellant and thus not envisaged under the charging section 158 (1) (a) of Cap 16. We are fortified in that regard having considered that, in the familiar canons of statutory construction of plain language, when the words of a statute are unambiguous, judicial inquiry is complete because the courts must presume that a legislature says in a statute what it means and means in a statute what it says there. As such, there is no need for interpolations, lest we stray into the exclusive preserve of the legislature under the cloak of overzealous interpretation. See: **REPUBLIC VS MWESIGE GEOFREY AND ANOTHER**, Criminal Appeal No. 355 of 2014 (unreported).

Guided by the principle in the above cited case, according to the plain and unambiguous language used in section 158 (1) (a) of Cap 16, prohibited sexual intercourse is one where the female is the offender's granddaughter, daughter, sister or mother. Thus, with such limitation of the prescribed categories, the law never intended to make a stretch to cover distant related members so as to embrace the situation obtaining in this matter on the

alleged sexual relationship between the victim and the paternal uncle of her father.

Apparently earlier, the Court was confronted with akin scenario in the case of **LAWAMA S/O DEDU VS REPUBLIC**, Criminal Appeal No. 318 of 2015 (unreported). In that case, the appellant was charged with the incest by males for having sexual intercourse with his niece. Besides, holding that, it was wrong to charge the appellant with the offence of incest by males, the Court considered the broader categories of prohibited marriage relationships as improvised under section 14 of the Law of Marriage Act CAP 29 R.E.2019 which stipulates as follows:

"(1) No person shall marry his or her grandparent, parent, child or grandchild, sister or brother, great-aunt or great-uncle, aunt or uncle, niece or nephew, as the case may be.

(2) No person shall marry the grandparent or parent, child or grandchild of his or her spouse or former spouse.

(3) No person shall marry the former spouse of his or her grandparent or parent, child or grandchild.

(4) No person shall marry a person whom he or she has adopted or by whom he or she was adopted.

(5) For the purposes of this section, relationship of the half-blood shall be as much an impediment as relationship of the full blood and it shall be immaterial whether a person was born legitimate or illegitimate.

(6) For the purposes of this section grandparent, grandchild, great child, great-uncle and great-aunt include, as the case may be, grandparent, grandchild great-uncle and great-aunt of any degree whatsoever.

(7) Persons who are, by this section, forbidden to marry shall be said to be within the prohibited relationships."

Ultimately the Court recommended as follows:

"Suffice to say, the Penal Code provisions punishing incest by males or females need to be harmonized with the provisions outlining the prohibited marriage relationships in the Law of Marriage Act."

It is thus glaring that, in our jurisdiction, while the penal code has limited categories of males and females covered in the group of prohibited sexual relationships the categories are broader under the Law of Marriage Act. This could be due to historical connotations surrounding the period when the two statutes were enacted. While the Criminal Procedure has its traces from the colonialists, the Law of Marriage Act enacted in 1971 embraces as well, the context of an African setting which can be discerned from the prescribed

broader categories of prohibited marriage relationships in the respective Act. In the circumstances, on account of what transpired in the present matter and the case of **LAWAMA S/O DEDU VS REPUBLIC** (supra), we thus reiterate our earlier position that, it is high time that the categories of prohibited sexual relationship under the penal code be harmonized with categories of prohibited marriage relationships under the Law of Marriage Act. In the alternative, in future in respect of cases akin to the present matter, the Director of Public Prosecutions is advised to prefer charges of rape against the offenders who happen to be distant relatives of the victims.

In view of what we have endeavoured to discuss, the appellant was wrongly charged with the offence of incest by males contrary to the provisions of section 158 (1) (a) of the Penal Code which renders the charge defective. It is settled law that, being found guilty on a defective charge based on wrong and /or non-existent provisions of the law, occasions a failure of justice because the appellant was left unaware of the charge he was facing and as such, he could not make an informed defence which is not compatible with the tenets of a fair trial. See: **ABDALLA ALLY VS REPUBLIC** and **PROJESTUS ZACHARIA VS REPUBLIC** (supra).

Therefore, having found that the appellant was wrongly charged, the subsequent proceedings before both the trial and the first appellate courts

were a nullity. On the way forward, we invoke section 4 (2) of the Appellate Jurisdiction Act, Cap. 141 R.E. 2019, the conviction and sentence are hereby quashed and set aside respectively. We as well, nullify the proceedings and judgments of both the trial and first appellate courts as they stem on null proceedings. The appellant should be released forthwith from custody unless he is held for some other lawful cause.

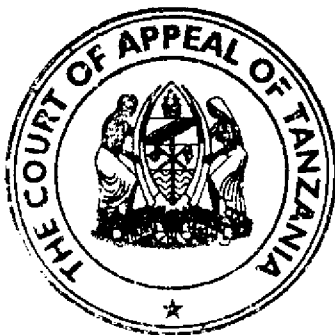
DATED at DAR-ES-SALAAM this 16th day of February, 2023.

S. E. A. MUGASHA
JUSTICE OF APPEAL

B.M.A. SEHEL
JUSTICE OF APPEAL

S. M. RUMANYIKA
JUSTICE OF APPEAL

The Judgment delivered this 17th day of February, 2023 in the presence of the appellant in person, through video link at Ukonga Prison and Ms. Jenipher Masue, learned State Attorney for the respondent/Republic, is hereby certified as a true copy of the original.




A. L. KALEGEYA
DEPUTY REGISTRAR
COURT OF APPEAL