IN THE HIGH COURT OF TANZANIA
AT DODOMA

(APPELLATE JURISDICTION)

(DC) CRIMINAL APPEAL NO. 76 OF 2013

(Original Criminal Case No. 91 of 2011 of the District Court of Kongwa District at Kongwa)

DAUD CHANDU .....APPELLANT

VERSUS

THE REPUBLIC.....RESPONDENT

JUDGMENT

13/5 & 15/6/2016

KWARIKO, J.

Appellant herein was arraigned before the District Court of Kongwa with the offence of Rape contrary to sections 130 (1) and 131 (1) of the Penal Code [Cap. 16 R.E. 2002] where it was alleged that on unknown date and time in July, 2011 at Pingalame village within Kongwa District the appellant had carnal knowledge of one KILEWELA D/O MWAMBIA a girl of 17 years. After the appellant denied the charge the prosecution brought two witnesses to prove the same.

The evidence by prosecution revealed that in July, 2011 one ERICA SUNGWA, PW2, complainant's mother discovered that her daughter

KILEWELA MWAMBIA, PW1 a standard VI pupil was not at home. She reported the matter to the Village Executive Officer who wrote a letter to trace her. In the course of search PW1 was found at Ngusero village in Kiteto District living with appellant as a couple. Both were arrested and sent to police. PW1 did not deny that she was taken in as lived in girlfriend by the appellant from July to October, 2011 where she became pregnant for him. A PF3 exhibiting PW1's pregnancy was tendered and admitted in court as exhibit P1.

In his defence the appellant categorically denied to have ever known the complainant and said was arrested on 28/7/2011 by militiamen at his Ngusero village home where he was later charged with the alleged offence which he denied.

At the end of the trial the court found that the charge was sufficiently proved against the appellant, was found guilty and convicted, he was sentenced to thirty (30) years imprisonment with twelve strokes of a cane and an order of compensation to the complainant at a tune of Tshs. 300,000/=.

The appellant was aggrieved by the trial court's decision hence filed this appeal upon the following seven grounds of appeal;

1. *That, the learned trial Magistrate erred in law and fact to convict him upon weak prosecution evidence.*
2. *That, the trial court erred in law and fact to convict him without proof that the complainant was a student.*

3. *That, the prosecution side did not prove that he was responsible for complainant's pregnancy.*
4. *That, the prosecution witnesses did not prove the complainant's age to be 17 years.*
5. *That, the prosecution did not prove he was found living with the complainant.*
6. *That, the prosecution ought to have called alleged Village Executive Officer whom PW2 reported disappearance of the complainant.*
7. *That, PW1 ought to have proved the age of pregnancy to match with her evidence.*

When the appeal was called for hearing appellant asked the respondent to reply his grounds of appeal first before he said anything else. Luckily, the respondent through Mr. Sarara learned State Attorney made appellant's situation easy since he did not oppose the appeal. In his submission Mr. Sarara contended that appellant was charged under section 130 (1) and 131 (1) of the Penal Code but the evidence by the two witnesses indicated that the complainant was aged under 18 years whereas particulars of the offence in the charge showed that the complainant was aged 17 years. It was Mr. Sarara's argument that there was no proof of the complainant's alleged age and PW2 who was the mother did not prove the age. That, had complainant's age been proved the charge would have been proved since complainant was appellant's lived-in-girlfriend hence complainant lived with appellant on her own free will. Appellant did not have any rejoinder.

This court is supposed to decide an issue whether the appeal has merit. However, before going into merit of the appeal this court is obliged to observe and decide one legal issue which although the learned State Attorney touched it but he did not elaborate vividly same any further instead looked at particulars of the charge vis a vis evidence on record. This issue is in relation to the law under which the appellant stood charged. The law under which appellant stand charged which purported to create offence is section 130 (1) of the Penal Code. This provision says;

> ***It is an offence for a male person to rape a girl or a woman.***

This provision alone could not have been legally enough to create an offence as the appellant was not informed how a woman or girl if raped was an offence. The prosecution ought to have specified category of rape the appellant alleged to have committed to enable him prepare his defence. Categories of rape are provided under subsection (2) of section 130 of the Penal Code which says;

> ***(2) A male person commits the offence of rape if he has sexual intercourse with a girl or a woman under circumstances falling under any of the following descriptions:***
>
> ***(a) not being his wife, or being his wife who is separated from him without consenting to it at the time of the sexual intercourse;***

(b) with her consent where the consent has been obtained by the use of force, threats or intimidation by putting her in fear of death or of hurt or while she is in unlawful detention;

(c) with her consent where her consent has been obtained when she was of unsound mind or was in a state of intoxication induced by any drugs, matter or thing, administered to her by the man or by some other person unless proved that there was prior consent between the two;

(d) with her consent when the man knows that he is not her husband, and that her consent is given because she has been made to believe that he is another man to whom, she is, or believes herself to be, lawfully married;

(e) with or without her consent when she is under eighteen years of age, unless the woman is his wife who is fifteen or more years of age and is not separate from the man.

Now, since particulars of the offence alleged that the appellant had carnal knowledge of the girl aged 17 years the rightful description under the foregoing provision of law falls under item (e). Had the prosecution charged the appellant they ought to have cited section 130 (1) (2) (e) of the Penal Code which creates offence. As indicated earlier proper charging enables accused to know what he is accused of so that he can well prepare

his defence. That is why section 132 of the Criminal Procedure Act [Cap. 20 R.E. 2002] provides thus;

> *Every charge or information shall contain, and shall be sufficient if it contains, a statement of the specific offence or such particulars as may be necessary for giving reasonable information as to the nature of the offence charged.*

Therefore, since the information in the charge was not sufficient to inform the appellant of what he was accused of he could not have appreciated the nature of the allegations against him to enable him to give his plea or make defence thereafter. In this case although the age of the victim was mentioned in the charge sheet but it could not have assisted in the absence of proper provision of law.

Be as it may, the charge against the appellant was incurably defective which could not have enabled appellant fair trial. I am supported in this opinion by the decision in the cases of **RAMADHANI JUMANNE VR, Criminal Appeal No. 587 of 2015** and **MATHAYO KINGU VR Criminal Appeal No. 589** of the Court of Appeal of Tanzania at Dodoma (unreported).

For the foregoing, since the charge was defective the whole proceedings before the trial court were null and void and are hereby quashed and all orders thereto set aside. It is thus ordered that appellant be released from prison unless otherwise held.

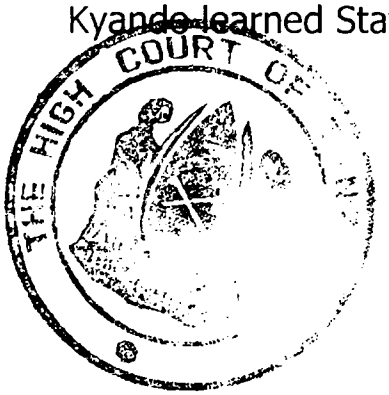
It is ordered accordingly.

M.A. KWARIKO

JUDGE

15/6/2016

Judgment delivered in court today in the presence of the Appellant and Mr. Kyande learned State Attorney. Mr. Nyembe court clerk present.



M.A. KWARIKO

JUDGE

15/6/2016