

**IN THE HIGH COURT OF TANZANIA
AT DAR ES SALAAM**

CRIMINAL APPEAL NO. 188 OF 2016

(Originating from District Court of Kisarawe Criminal Case No. 821 of 2015)

HAMIRU SALUMU @ MWERA	APPELLANT
	VERSUS	
THE REPUBLIC	RESPONDENT

JUDGMENT

27/4/2018
Mdemu, J

In the District Court of Kisarawe, in Criminal Case No. 82/2015 **HAMIRU SALUMU @ MWERA**, the Appellant was sentenced to 30 years in prison, following conviction on unnatural offence contrary to Section 154 (a) (b) of the Penal Code. Being aggrieved, he filed this appeal challenging both conviction and sentence of the trial court met on 3/12/2015.

On 19/4/2018 when the appeal came for hearing, the Respondent, the Republic under the service of Ms. Z. Masinde, learned State Attorney invited the Court to determine the legality of the conviction and sentence arrived from a charge framed in contravention of Section 135 of the CPA, Cap. 20 instead of dwelling on the grounds of appeal notwithstanding that the Appellant never included that defects in his grounds of appeal. She could not therefore support conviction and sentence arrived from what she termed as a defective charge.

The learned State Attorney submitted that the charge brought the Appellant to the dock is devoid of a specific date and year of which the Appellant did have carnal knowledge with **Abdallah Hamis** PW1, the victim against the order of nature. To her, non compliance of this legal requirement renders the charge defective hence proceedings and judgment followed thereafter is a nullity.

Given the opportunity to reply, while insisting on his grounds of appeal, the Appellant made no comment to this procedural requirement. I should point out in simple phrase that a charge in criminal law as ascribed in Osborn's Concise Law Dictionary, 11th edition, sweet and Maxwell at page 80 is simply "an accusation" meaning, as in the words of B.D. Chipeta, Judge in a Magistrate Manual, T.M.P. Book Department Tabora, 1988 at page 8 that:-

"In simple terms, a charge means a formal complaint, usually in writing, made before a Court of law alleging that a particular person has committed an offence or offences, with a view to putting in motion the Criminal Law process, that is, with a view to moving the Court to inquire into or try the case".

In those terms, the charge, in its form and content should meet the requirement stipulated in Section 135 of the Criminal Procedure Act, which, among others requires the statement of offence to cite relevant provision of the law and the particulars thereof to state time/date within which the offence was committed.

In the present appeal, the statement of offence cited Section 154 (a) (2) of the Penal, the particulars of which state as follows:-

“..... that HAMIRU s/o SALUMU charged on September, at about unknown date and time at Kitonga Village, Maneromango Ward within Kisarawe District, Coast Region did have carnal knowledge with one ABDALLAH s/o HAMISI, a boy aged 10 years against the order of nature”.

The proper section which the Prosecutor should have cited is Section 154 (1) (a), (2) and not Section 154 (a) (2) which do not exist. It is noted in the particulars of offence to miss a specific year within which the offence was committed. It cannot be taken that the year and date signed in the charge is the year and date the offence was committed. Charge of this nature cannot inform the Court and the accused in clear terms allegations facing the accused person and therefore the duty of the Court to control proceedings and more so confine arguments and evidence of witnesses to the allegations in the charge cannot be met.

This Court in **Republic Vs. Karimu Taibale**, [1985] TLR at page 197 upon discovering a charge framed in non existing section, declared it defective and quashed conviction and set aside sentence of trial court as the defect to the charge was so fundamental.

In the present appeal, as demonstrated above, the section cited do not exist. It is not known when the offence was committed. Such defects in a charge are so fundamental to enable the Court to confine arguments and evidence to what is alleged in the charge.

I was mindful to order a retrial, but having assessed the testimony of PW1, PW2 and PW4 noted some contradictions regarding the date of commission of the offence, thus refrained from such an order. Whereas PW1, the victim testified that it was Thursday September, PW2 said all events occurred on 7th September, 2015 as revealed as follows at page 6 of the proceedings:-

"All events occurred in 7th September, 2015 when reported to Ward Executive Officer. I was given a letter to Police where I received a PF3. I went to hospital where doctor and nurse attended my child. I was told to wait outside. The doctor filled PF3 and I returned to Police where I was told that the matter will be sent to the Court".

Whereas PW2 testified to have referred PW1 to hospital on 7th September, 2015, PW4 who medically examined PW1 said he did his job on 8th September, 2015. Moreover, the Thursday of September, 2015 referred by PW1, when I visited the calendar, have the following dates; 3rd, 10th, 17th and 24th of September, 2015 respectively. The nearest date to the fateful day on that September is 10th which materially differs from 7th of September, 2015 by PW2 and 8th of September by PW4. Equally, according to PW4 who tendered PF3, PW1 used to engage himself in carnal knowledge against the order of nature regularly. That said, the testimony of PW3 when interrogating the Appellant reporting ^{ed} that the later ^t received complaints from others on the behavior ^u of PW1 to engage himself in canal knowledge against the order of nature cannot be faulted. Such inconsistencies in the prosecution evidence even where a retrial is ordered cannot make a meaningful case of the prosecution.

Ms. Masinde, urged the Court to allow this appeal. I agree with her and consequently this appeal is allowed, conviction met from a charge citing non existing Section of the law and not disclosing the year of which the offence was committed in its particulars of offence is hereby quashed and the sentence of 30 years imprisonment is set aside. It is further directed that, unless he is held for some other lawful purposes, the Appellant should be released from prison forthwith. Right of appeal explained.

Dated at Dar es Salaam this 27th day of April, 2018.

G.J. MDEMU
JUDGE
27/4/2018

Judgment delivered in presence of the Appellant ^{and Mr. E. Shija} ~~Ms. Z. Masinde~~, State Attorney for the Respondent.

G.J. MDEMU
JUDGE
27/4/2018