

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

CRIMINAL APPEAL NO. 24 OF 2017

**ISAACK MATHAYO MACHA.....APPELLANT
VERSUS
THE REPUBLICRESPONDENT**

JUDGMENT

MURUKE, J.

The appellant was charged and convicted with the offence of unnatural offence contrary to section 154(1)(a) and (2) of the Penal Code [Cap 16, R.E. 2002] and sentenced for thirty (30) years imprisonment. Being dissatisfied with the decision of the district court, he appealed to this court advancing nine grounds as listed in the petition of appeal.

During hearing, the appellant requested the court to adopt his nine grounds of appeal as his submission in support of the appeal. Having received no objection court adopted appellant grounds of appeal as submission in support of appeal. Learned State Attorney, Christian Joan by way of preliminary remarks alerted the court that; There are irregularities in the court records, in particular charge sheet is defective. She submitted

that Section 154 has different categories of the offence carrying different penalty. In the charge sheet the appellant was charged on both categories of the offence ie. Section 154(1)(a) and (2). Section 135(a)(ii) of the CPA requires that, description of an essential element of the offence to be outlined specifying the relevant provision of the law.

Failure to categorize the offence the charge is defective. Irregular framing the charge sheet against the appellant cannot be cured under section 388(1) of the Criminal Procedure Act, (supra). Learned State Attorney cemented her argument with the case of **Laurent Rafael Mutabingwa Criminal appeal 153 of 2017**, (unreported) the decision of this court at page 4 and 5.

As correctly submitted by Learned State Attorney, charge sheet is defective. Perusal of court records reveals that the charge sheet is found on section 154 (1) (a) and 2 of the Penal Code instead of section 154 (1) (a) of the penal code, because the child victim was above 10 years of old (16 years). Section 154 (1) (a) was sufficient, to charge and convict the accused. Adding subsection 2 brought contradiction on the offence.

Section 154 (2) read as follows:

Where the offence under subsection 1 of these section is committed to a child under the age of 10 year the offender shall be sentenced to life imprisonment.

Section 154 1 (a) read as follows:

Any person who has Canal knowledge of any person against the order of nature, commits an offence, is liable to imprisonment for life and in any case, imprisonment for a term of not less than 30yrs.

Section 154 (1) (a) was the right section to charge and convict the accused person because the victim was above ten years. Defective charge affect the proceedings. Defective charge occasioned miscarriage of Justice as the trial was unfair. Charge sheet, is the foundation of the trial. Principal must be that, accused must understand the nature of the offence. The charge sheet, must contain sufficient particulars among them being the right section for the appellant to understand the nature of charges he is facing and what defence to raise. Section 135 of Criminal Procedure Act imposes mandatory requirement that a charge sheet should describe the offence and make reference to

the section and law creating the offence. It is the principle of the Law that charge sheet must fulfill following requirements: **“One** the charge drawn and signed by the trial magistrate is an offence known to law, **Two** it is an offence over which a court has jurisdiction, **Three** must reflect the offence complained.” Defective charge render the trial nullity. The defect is not curable. Section 388 (1) cannot cure defective charge. In case of criminal appeal 388 2013 Musa Ramadhani Vs Republic Mugasha, JA.

The charge sheet out to have been framed according to the provision of section 135 (a) (2) of the Criminal procedure act. Accused being found guilty on defective charge based on a wrong and/or nonexistence provision of law, it cannot be said, that the appellant was fairly tried in the court below.

It must be underscored that the complaint is which lays the foundation of a formal charge. Subsequently, the entire evidence paraded by the prosecution in its totality must point to the guilt of the accused person beyond reasonable doubt. Where the evidence is not in support of the charge that clouds the

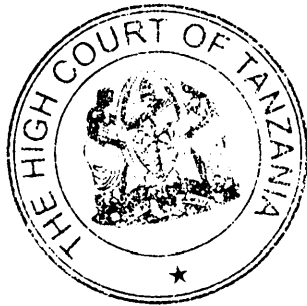
Judgment delivered in the presence of Sada Mohamed, State Attorney for the respondent and appellant in person.



Z. G. Muruke

JUDGE

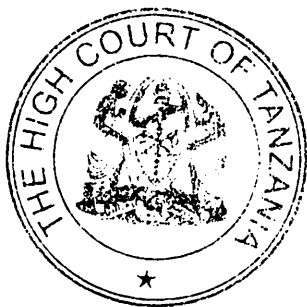
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prosecution case with a doubts and the benefit must be given to the accused person.

In another case of **Simba Nyangura vs Republic, Criminal Appeal No. 144 of 2008**, the appellant was charged under section 130(1) and 131 of the Penal Code, the Court observed that, the accused person must know under which of the description in section 130(1) (a) to (e) the offence he faces fall, so that he can prepare for his defence. As the court further stated that, *"lack of particulars unduly prejudiced the appellant in his defence."*

In the matter under scrutiny, it is obvious that the appellant was charged, tried and convicted on defective charge. This resulted into an unfair trial. In this regard, the trial was a nullity because it stemmed from a nullity. I hereby nullify the entire proceedings, quash the conviction and set aside the sentence meted out against the appellant. Appellant is set at liberty unless lawfully held.



A handwritten signature in black ink, appearing to read "Z. G. Muruke".

Z. G. Muruke

JUDGE

30/04/2018