

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

**CRIMINAL APPEAL NO. 395 OF 2016**

**(Originating from the decision of Bagamoyo District Court at  
Msoga in Criminal Case No. 125 of 2013)**

**SALUM SAID @ CHAMLUNGU.....APPELLANT**

**Versus**

**REPUBLIC.....RESPONDENT**

**JUDGEMENT**

**B.R. MUTUNGI, J:**

The appellant herein is aggrieved by the conviction on the offence of Incest by Males contrary to section 158 of the Penal Code [Cap. 16 R.E 2002] at the Bagamoyo District Court at Msoga (the trial court). Following the said conviction, the appellant was sentenced to serve thirty (30) years in jail.

The appellant has hence preferred to appeal in this Honourable court. He has raised five (5) grounds of appeal of which in my settled opinion fall within two categories. **One;** the trial court erred in law by convicting him while there is non-citation of the subsection of the charging section. **Two;** the trial court erred in law and fact by convicting him while the prosecution side had failed to prove the alleged offence beyond reasonable doubt as required by law.

The facts leading to the appeal can be retrieved from the court record as follows; on 20/5/2013 around 03:00 Hrs while SALIMA HUSSEIN (PW2) was sleeping, suddenly found her son in her bed room. PW2 while in shock inquired as to what he wanted. The appellant in reply stated that, he wanted to have sex with her. PW2 alleged that she refused and to her dismay the appellant took a panga which was

tendered by PW2 and admitted as Exhibit P.1. and threatened PW2 to remain silent. This is when he succeeded to rape her (PW2). Thereafter the appellant disappeared.

The prosecution evidence went further that, in the morning PW2 went to her daughter's house (ZAINABU SALUM PW1). PW1 inquired as to what had befallen PW2. By then PW2 was crying but managed to reveal that the appellant had raped her. Thereafter the matter was reported to the Police Station and PW2 was issued with a PF3 (Exhibit P.2). PW2 was sent to hospital for medical examination but Dr. TUMAINI SWAI (PW4) did not detect the alleged rape. The appellant was subsequently apprehended by E. 2394 DC GODIAN (PW3) and later arraigned in court and charged.

The appellant in his defense strongly denied to have committed the alleged offence. He went further by alleging

that the case against him was cooked due to conflicts and grudges against him by PW1 and PW2. As already observed ultimately, the appellant was convicted and sentenced accordingly.

During the hearing of the appeal, the appellant appeared in person and defended himself whereas Ms. Lilian Rwetabura learned State Attorney appeared for the respondent. The appellant in his submission prayed the court does consider his grounds of appeal.

Ms. Rwetabura submitted that, the appellant was charged in accordance with section 158 of the Penal Code (supra). She was of the view the said section does not exist, instead the appellant was supposed to have been charged under section 158 (1) (a) and (b) of the Penal Code. She further submitted the same was wrong contrary to section 135 (2) of the Criminal Procedure Act [Cap. 20 R.E 2002]

which requires the charge to disclose the offence so as to enable the accused to know the offence facing him /her and prepare for the defense.

In support of her submission, she referred this court to the case of **Mussa Mwalipunda Versus R [2006] T.L.R 38**. She further cautioned that, the said irregularity is not curable under section 388 of the Criminal Procedure Act (supra). She consequently prayed the appellant be released on the ground that, the appellant's conviction was based on a defective charge.

The question is whether the appeal has merit or otherwise.

I have gone thoroughly through the submissions from both camps and the entire court record, I find the charge sheet indicates the appellant was truly charged in terms of section 158 of the Penal Code. Basically, I agree with Ms.

Rwetabura's position that, the supporting evidence and circumstances of the matter at hand suggest the appellant did **rape his mother** (PW2) hence the appropriate charging section would be section 158 (1) (a) and (b) of the Penal Code (supra). There is no doubt that, the appellant at the trial was charged with an inappropriate section. This obviously renders the charge sheet defective.

In the case of **MATHAYO KINGU VERSUS REPUBLIC, CRIMINAL APPEAL. 589 of 2015 (CAT-DOM) (UNREPORTED)**, at page 8 it was stated as follows;

*'There is no doubt in our minds that in a criminal trial a Charge Sheet **is the foundation of any prosecution facing an accused person and provides him with a road map of what to expect from the prosecution witnesses during his trial...The important role of the charge sheet is to alert the***

***accused person of the important elements of the offence he is facing...*** [Emphasis is mine]

Further in the case of **AMINI ISMAIL VERSUS REPUBLIC, Criminal Appeal No. 178 of 2015 (CAT-TBR) (Unreported)** where the appellant was aggrieved that he was wrongly convicted by the trial court on the basis of a defective charge sheet since it did not state the specific paragraph of section 130 (2) of the Penal Code. In determining that ground of appeal, the Court of Appeal of Tanzania at page 13 had this to say and I quote;

*'As to the third ground, the basis of that ground is the omission to cite the specific provision disclosing the category of the offence with which the appellant was charged. **We agree that failure to cite the specific paragraph of section 130 (2) of the Penal Code rendered the charge sheet defective.***' [Emphasis is mine]

The above legal position was also amplified in the case of **MARMO SLAA @ HOFU AND 3 OTHERS VERSUS**

**REPUBLIC, CRIMINAL APPLICATION NO. 3 OF 2012 (CAT-AR)**  
**(UNREPORTED).**

Having found and concluded that the appellant was charged with a defective charge sheet, the corresponding conviction and sentence by the trial court hence forth becomes a nullity. The same are quashed and set aside, in the end the appellant is acquitted unless held for some other lawful cause.

It is so ordered.

  
**B.R. MUTUNGI**

**JUDGE**

**11/4/2018**

Right of Appeal Explained.

  
**B.R. MUTUNGI**

**JUDGE**

**11/4/2018**



Read this day of 11/4/2018 in presence of appellant and  
Miss. Lilian Rwetabula (S.A) for the respondent.

  
**B.R. MUTUNGI**



**JUDGE**

**11/4/2018**