



Before this Court the appellant filed a Petition of Appeal with a total of ten grounds which may be crystallized into; **one** that, his conviction was not entered; **two** that, the charge was fatally defective and **three** that, prosecution failed to prove the case beyond reasonable doubt.

The factual background led to the conviction of the appellant can be summarized as follows; the appellant and the victim one Christina Gisito (PW1) were living at Kipunguni B area. PW1 was staying with her uncle one Musa Masweba (PW3) and often time she used to assist him at his shop. On 26<sup>th</sup> December, 2010 PW1 was at the said shop whereby the appellant went there for the purpose of buying corn bran. Upon being asked for payment, the appellant told her that he had left the money at home and asked her to go with him. They went together up to the appellant's house and after arrival he forced her in. He threatened her with a knife told her to undress. Then he threw her on the bed, undressed himself and proceeded raping her. After finishing his desire, he went to the window in order to see if anyone is passing by and it was at that juncture when PW1 dressed up and managed to escape leaving behind her skin tight.

She went straight to the shop and soon thereafter, the appellant followed her. The struggle ensued as he was trying to force himself in however, he ran away after realizing one of the neighbour was watching them. PW1 narrated to the neighbour on what befallen her whereby the called PW3 who together with other neighbours went to arrest the appellant and took him to police station. PW1 was taken to hospital after being given PF3 whereby the same was tendered and admitted as exhibit P1. Consequently, the appellant was arraigned to court and charged accordingly.

In his defence, the appellant denied to have committed the offence. He narrated about his arrest on 26<sup>th</sup> December, 2010 while he was at his house. When he was taken to Stakishari Police Station he admitted to have a debt of Tshs.20,000/= and the police demanded from him Tshs.150,000/= in exchange of his freedom but he refused and they brought him to court.

At the hearing of this appeal, the appellant appeared in person and fended for himself. The respondent Republic had the service of Mr. Bryson Ngidos, the learned State Attorney.

The appellant, commenced his submission by faulting the charge sheet. He argued that the prosecution failed to categorize the provisions of the law appeared under section 130 and 131 of the Penal Code. To his view the omission renders the charge defective and it prejudiced his right of proper defence. He cited two authorities to support his argument; one **Omary Kitambo v Republic**, Criminal Appeal No. 94 of 2014 CAT and two **Baraka Solongai v Republic**, Criminal Appeal No. 261 of 2015 CAT both unreported.

On the first complaint, the appellant argued that, the trial Magistrate failed to enter conviction hence he was sentence without being convicted which is fatal. He referred the case of **John Mabula and two others v Republic**, Criminal Appeal No. 409 of 2007 CAT (unreported).

In respect of the third complaint, the appellant submitted that, no evidence was brought by the prosecution to prove the victim's age as alleged on the charge sheet. He added that, in the absence of proof of victim's age it can be concluded that she was of the age of 18 or above and if so, the charge also could have still been defective for lack of one essential element which is "lack of consent". The appellant

further faulted the admissibility of exhibit P1 which was tendered by the Public Prosecutor instead of the witness. He prayed that, this court allows his appeal and set him free.

Arguing in support of the appeal, Mr. Ngidos submitted that the trial Magistrate failed to convict the appellant and such failure contravenes section 235(1) of the Criminal Procedure Act [Cap.20 R.E. 2002] (the CPA) which renders the judgment invalid. In that regard even the appeal before this court is premature. He further contended that failure to enter conviction is an irregularity which cannot be salvaged under section 388(1) of the CPA and the appellate court has no option than to remit the record to the trial court.

However, without prejudice to what he submitted above, Mr. Ngidos argued that, there are other legal irregularities he felt obliged to address. He submitted that, the charge before the trial court was fatally defective. The appellant was charged with rape contrary to sections 130 and 131 of the Penal Code without specifying category of rape as provided under that section. To his view the prosecution ought to have framed the charge under section 130(1)(2)(e) and 131 of the Penal Code. Therefore, the charge in the instance case was

framed in contravention of section 135(a)(ii) of the CPA. To conclude his submission on this ground Mr. Ngidos submitted that, since the charge was defective the appellant was prejudiced on his right to a proper defence considering the seriousness of the offence.

The learned State Attorney also commented on the issue of the victim's age. He contended that, in statutory rape proof of age is very important. The same can be proved by the evidence of a parent, victim or birth certificate. But in the instant case, PW1 and PW3 failed to establish the victim's age and in the absence of conclusive evidence of victim's age it goes without saying that the prosecution failed to prove the case beyond reasonable doubt. To back up his argument, he referred the case of **Andrea Francis v Republic**, Criminal Appeal No. 173 of 2014 CAT (unreported). Finally, he prayed that, the appeal be allowed by quashing the conviction, setting aside the sentence and the appellant be released.

Having examined the judgment of the trial court it shows that after analyzing the prosecution and defence evidence the trial court stated as hereunder;

*”Having given due consideration this court is of the firm view that the prosecution has proved the case against the accused beyond reasonable doubt. This court therefore finds the accused person ZAKARIA THOMAS, guilty of rape as charged”.*

Thereafter, the trial court proceeded to hear the mitigations and passed the sentence.

It is apparent from the extract record the trial court did not convict the appellant after finding him guilty. The law requires a conviction be entered. Section 235(1) of the CPA provides that;

*“The court, having heard both the complainant and the accused person and their witnesses and the evidence, **shall convict the accused** and pass sentence upon or make an order against him according to law or shall acquit him or shall dismiss the charge under section 38 of the Penal Code”. (Emphasis supplied)*

The above quoted section is couched in a mandatory language therefore, failure to comply is fatal. It was held in the case of **Abdallah Ally v Republic**, Criminal Appeal No. 253 of 2013 CAT (unreported) that;

*“The failure on the part of a trial court to convict the accused person before sentencing him as in the instant case was not a mere irregularity curable under section 388(1) of the Criminal Procedure Act, but fatal”.*

In another case of **John Mabula and two others v Republic**, (supra) the court held that;

*“The law on obtaining consequences of failure to enter a conviction is well settled that there is no valid judgment as stipulated under section 235(1) read together with section 312(2) of the CPA”.*

In that regard, since the trial Magistrate failed to enter conviction in the case at hand, the trial court’s judgment is a nullity. However, I have refrained from remitting the record to the trial court so that it enters a conviction because in my considered view it will not serve the interest of justice.

Having examined the record, it is very clear that the guilty of the appellant was based on the defective charge and insufficient evidence. The charge sheet before the trial court reads as hereunder:



**Statement of offence:** *rape c/s 130 and 131 of the Penal Code Cap 16 [R.E 2002]*

**Particulars of offence:** *that Zakaria s/o Thomas charged on the 26<sup>th</sup> day of December 2010 at about 11:20hrs at Kipunguni B area within, Ilala District in Dar es Salaam Region did have carnal knowledge to (sic) one Christina d/o Gisito aged 13 years old”.*

Before examining the irregularity on the quoted charge above, I would like to reproduce section 130 of the Penal Code for ease of reference, the same states that;

*“130. Rape*

*(1) It is an offence for a male person to rape a girl or a woman.*

*(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 her 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 when her consent has been obtained at a time 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 separated from the man.*

*(3) Whoever–*

*(a) being a person in a position of authority, takes advantage of his official position, and commits rape on a girl or a woman in his official relationship or wrongfully restrains and commits rape on the girl or woman;*

*(b) being on the management or on the staff of a remand home or other place of custody, established by or under law, or of a women's or children's institution, takes advantage of his position and commits rape on any woman inmate of the remand home, place of custody or institution;*

*(c) being on the management or staff of a hospital, takes advantage of his position and commits rape on a girl or woman;*

*(d) being a traditional healer takes advantage of his position and commits rape on a girl or a woman who is his client for healing purposes;*

*(e) being a religious leader takes advantage of his position and commits rape on a girl or woman.*

*(4) N/A*

*(a) N/A*

*(b) N/A*

*(5) N/A”.*

As clearly shown above, section 130 provides ten categories of rape as indicated under paragraphs (2)(a) to (e) and (3)(a) to (e). Therefore, each offence of rape must fall under one of the categories shown above.

The charge sheet in our case shows that the appellant was charged under sections 130 and 131 of the Penal Code and none of categories of rape has been indicated. The statement of the offence ought to be framed as provided under section 135(a)(ii) of the CPA which requires a statement of offence to have a correct reference of the section which creates the specific offence. In the case of **Shabani Masawila v Republic**, Criminal Appeal No. 358 of 2008 CAT (unreported), it was stated that:-

*“In this case, the appellant was charged with a serious offence of rape. Nevertheless, on account of omission to specify the category of rape under which the appellant, we think that the charge sheet was incurably defective”.*

Coming to the case at hand, it goes without saying that the appellant was charged with serious offence, yet still, the charge sheet did not specify the category of rape under which the appellant was charged. I totally agree with the learned State Attorney that this irregularity is very fatal and cannot be salvaged by section 388(1) of the CPA.

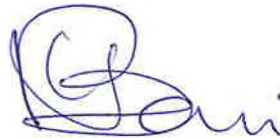
The next issue for determination is whether the appellant was fairly tried after being found guilty on defective charge. It is a settled principle that, being found guilty on a defective charge, based on wrong and/or non-existent provisions of the law, it cannot be said that the appellant was fairly tried. This was position in the case of **Abdallah Ally v Republic** (supra).

In the upshot, since the charge in the instant case was fatally defective, it cannot be said that the appellant was fairly tried in the trial court. The wrong and/or non-citation of the appropriate provisions of the Penal Code under which the charge was preferred, left the appellant unaware of the offence he was facing.

Despite the charge being defective, the prosecution evidence as a whole was not sufficient enough to warrant the conviction of the appellant. It is apparent from the record that the prosecution did not adduce any evidence to prove the victim's age. PW1 did not testify on the issue of her age, the same just appeared before testimony. Likewise, PW3 said nothing about the victim's age. In addition, there was no birth certificate tendered in court to prove that fact. In the absence of proof of victim's age, it is evident that the prosecution

failed to prove the case beyond reasonable doubt. Refer the case of **Andrea Francis v Republic** (supra).

For the reasons stated above, I hereby nullify the judgment of the trial court and set aside the sentence imposed on the appellant together with the compensation order of Tshs.300,000/=. I order the release of the appellant forthwith from prison, unless otherwise lawfully held.




**I.K. BANZI**  
**JUDGE**  
**05/07/2018**

Delivered this 5<sup>th</sup> day of July, 2018 in the presence of Bryson Ngidos, the learned State Attorney for the respondent and the appellant in person.



**I.K. BANZI**  
**JUDGE**  
**05/07/2018**

Right of appeal explained.

A handwritten signature in blue ink, appearing to read 'I.K. Banzi', is positioned above the printed name.

**I.K. BANZI**  
**JUDGE**  
**05/07/2018**