

**IN THE HIGH OF TANZANIA**

**AT DAR ES SALAAM**

**DAR ES SALAAM REGISTRY**

**CRIMINAL APPEAL NO. 293 OF 2017**

**(Arising from Criminal Case No. 61 of 2000 in the District Court of  
Ulanga at Mahenge)**

**DAUD JOHN ..... APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

**JUDGEMENT:**

**MAGOIGA, J.**

The appellant was charged in the district court of Ulanga at Mahenge for two counts of rape contrary section 130 (1) of the Penal Code, cap 16 [R.E 2002] and was convicted on all counts and sentenced to 30 years' imprisonment on each count to run concurrently, twelve strokes of canes and payment of 300000/=being compensation or distress in default.

Aggrieved, the appellant appealed to this honorable court armed with five grounds of appeal namely;

1.That the learned trial Magistrate erred in law and fact to convict the appellant on basis of incurable defective charge as it did not cite a relevant subsection or category of the section 130 of the Penal Code under which he committed the offence the omission caused injustice to the appellant who is a laymen and unrepresented.

2.That the learned trial magistrate erred in law and fact to convict the appellant in a judgement which lacks legal and factual point for determination and the reasons thereon in compliance with the mandatory provision of Criminal Procedure Act (Cap 20 R.E.2002) as what contain in

the said judgement is a mere repetition of both prosecution and defense evidence,

3 That the learned trial magistrate erred in law and fact to convict the appellant on basis of evidence of PF3 tendered and admitted unprocedural as exhibit P1 as the appellant was not informed of his rights to require the author to be summoned in trial neither the same was read over before the trial court after its admission in compliance with the mandatory provisions of the CPA [Cap 20 R.E.2002]

4 That the learned trial magistrate erred in law and fact to convict the appellant relying on the evidence of PW1 (victim) without assessing objectively her credibility as she failed to tender before the trial court the underwear allegedly torn by the appellant before the commission of the crime so as to substantiate her assertion.

5 That the learned trial magistrate grossly erred in law and fact to convict the appellant by relying on contradictory evidence between PW1 and Pw 2 as regards to what transpired at the scene of crime.

The facts of this case are straight forward. That on 5/3/2000 the appellant without the consent of, one, AULELIANA D/O LIHETA had twice carnal knowledge of her. The two found themselves in same direction and in an inhabited bush at Sali village within Ulanga District around noon and the appellant took advantage of that and raped the victim twice before one Blandina Fimbo(PW2) found them and the matter was subsequently reported to the Sali village authority for further action and eventually ended up to police and the appellant was subsequently charged, convicted and sentenced hence this appeal to contest for his innocence.

When this matter was called for hearing, the respondent, Republic was represented by Ms Imelda Mushi, learned State Attorney and the appellant fended himself. The learned State Attorney readily told the court that she does not support conviction and sentence. The appellant given that stance opted to defer his submission until that of the Republic and he will reply later. The learned State Attorney opted to argue one point that the charge, the basis of this case was incurably defective, as such the conviction and subsequent sentence meted out on the appellant cannot stand on incurably

defective charge. The learned State Attorney went to argue that the appellant was charged under section 130 (1) of the Penal Code, Cap 16 [R.E.2002] on all counts without specifying under subsection 2, and in particular, under which paragraph among others he was charged and convicted. According to her, this occasioned failure of justice to the accused who on the face value of the case being a layman was denied a right to know exactly the offence he was charged with. She wind up by arguing that such a charge sheet was in contravention of section 135 of the Criminal Procedure Act, cap 20 (R.E. 2002) which shows how a charge sheet is supposed to be. In the circumstances, conclusively she argued that the said offences are not cured by the provisions of section 388 of Criminal Procedure Act. She invited the court to find that the trial, conviction and subsequent sentencing of the appellant was premised on incurably defective charge worth being a charge in the eyes of law. Eventually, the learned State Attorney told the court that this ground alone suffices to dispose of this matter without looking to other grounds of appeal.

The appellant in reply had nothing to say other than supporting wholly the learned Sate Attorney's arguments. Being a layman this marked the end of hearing this appeal.

This court had chance to look into said charge sheet, unhesitatingly agreed with the learned State attorney that the said charge sheet was incurably defective and same cannot be served by the provisions of section 388 of Criminal Procedure Act. In the case of CHARLES MLANDE VERSUS REPUBLIC CRIMINAL APPEAL NO 2270 OF 2013 (Ureported) Dar es salaam the Court of Appeal had this to say in a similar situation, quoting with approval the cases of ABDALLAH ALLY VERSUS THE REPUBLIC CRIMINAL APPEAL NO 253 OF 2013 AND CRIMINAL APPEAL NO 251 OF 2014 – KASTORY LUGONGO V. THE REPUBLIC:-

***"... being found guilty on a defective charge based in wrong /or non-existing provisions of the law, it cannot be said that the appellant was fairly tried in the court below.... In view to the foregoing shortcomings, it is evident that the appellant did not receive a fair trial in court. The wrong and/or non-citation of the appropriate provisions of the Penal Code under which the charges***

***was preferred, left the appellant unaware that he was facing a serious charge of rape...."***

On a further note in the above cases the Court of Appeal held that: \_

***"Indeed, in all these decisions, the Court held that the defective sheet unduly prejudice the respective appellants"***

This being the legal point of law and a sufficient reason to allow this appeal, this court find no further justification to say anything regarding the other grounds of appeal as automatically they become obsolete in the circumstances. In the upshot this appeal has merits and this court quash the conviction and set aside sentence of the trial court and order for immediate release of the appellant from prison custody unless held for another lawful cause.

It is so ordered.

Dated at Dar es salaam this 08 day of June 2018.



A handwritten signature in black ink, appearing to read "S.M. Magoiga".

S.M. MAGOIGA

**JUDGE**

08/06/2018

A handwritten signature in black ink, appearing to read "S.M. Magoiga".