

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

AT DAR ES SALAAM

CRIMINAL APPEAL NO. 37 OF 2019

*(Originating from Criminal Case No. 37 of 2018 in the District Court of
Kiiombero at Ifakara)*

SIFA KABUME..... APPELLANT

VERSUS

THE REPUBLIC..... RESPONDENT

J U D G E M E N T

MGONYA, J.

Aggrieved by the decision of **Kiiombero District Court at Ifakara in Criminal Case No. 37/2018** the Appellant in this matter appealed before this Honorable Court with 4 grounds of appeal against the conviction and sentence , as herein below:-

- 1. That the Honorable learned trial Magistrate grossly erred in convicting the Appeal on basis of a defective charge.***
- 2. That the learned trial Magistrate erred in convicting the Appellant where none of the Public/Police Officer(s) to whom the offence was***

first reported ever testified to the effect that the Appellant was the prime culprit.

- 3. That the learned trial Magistrate erred in failing to realize that no evidence was led as to how the Appellant was re-arrested to ascertain whether his apprehension had any connection to the offence.***
- 4. That the learned trial Magistrate grossly erred in holding that the prosecution proved its case against the Appellant beyond reasonable doubt as charged.***

When the matter was for hearing the Appellant before this Court, prayed the four grounds of Appeal be accepted by the court for consideration.

Ms. Masue State Attorney informed this Court that, they the Prosecution don't support conviction neither sentence. The Appellant brought 4 grounds of Appeal and it is the Prosecution assertion that:

On the 1st ground which is a legal one that the Charge Sheet was not proper, the learned Counsel averred that, they have gone through the said charge and are satisfied that there was an error. Ms. Masue said: Appellant was charged for Rape **c/s 130 (1), (2) and 131 (1) of Cap 16 [R.E. 2002]** and convicted and sentenced 30 years.

She admitted that there was an error since section **130 (2)** has other many items **a – e** and each item has different scenarios in offence; and different penalties. She stated that the proper section was **130 (1)** and **(2) (d)**. However, particulars of offence were correct. From the above, it is the Republic's concern that the fault is curable by section **388 (1)** of CPA since the error did not occasion any injustice. In that event, Ms. Masue declared the 1st ground is meritless.

On the 2nd ground, the learned State Attorney stated that there was an error since there was no any police/public officer whom the offence was 1st reported who came to court to testify. On their part they have supported this ground that there was no any Officer/Police who went to testify since before the court there was only PW1 the victim, PW2 – David Mkama the husband of PW1 and PW3 the doctor who examined the PW1.

From the same, the learned State Attorney said they expected to be mentioned neighbors who went to the scene of crime and that the same could appear before the court and testify, but that was not the case. For us, the absence of the investigation officer, the Local Government leader and the Police who recorded the Appellant watered down the case. . In the

event therefore, Republic therefore supports this ground of appeal.

On the 3rd ground Ms. Masue declared that there was a failure of explaining on how the Accused was apprehended and being brought to Police. Indeed, there is no any evidence to that effect; from the witness who was brought before the court. Further there is no any further explanation and movement of the accused after he was locked at the victim's house to the Police and further to court.

On the last ground on error of conviction beyond reasonable doubt; Republic through thee Learned State Attorney supported the ground too since the offence was rape and hence penetration was paramount, but even where there was a doctor's examination of which took place one day after the act, there was no any tight evidence that the Appellant was the one who raped the victim as she was an elder person with a husband. Further, even that was the case, the Learned State Attorney Stated that, there was no one to testify before the court that the Accused was seen inside the victim's and PW2's bedroom for that act.

In conclusion, Ms. Masue was of the opinion that, since there was weak evidence, we support the Appeal and pray the

Court to set aside the conviction and sentence of 30 years imprisonment.

Having gone through the submission by the parties, I intend to go through the grounds of Appeal as they appear in the Memorandum of Appeal.

As to the **1st** ground of appeal, the Appellant states that the Magistrate erred by convicting him on basis of a defective Charge. It is the position of the law that Criminal offences are instituted through a charge. It is a charge that initiates a criminal offence. It the charge that notifies the Accused as to what he is charged with before the Court of Law. Ms. Masue supports that the Charge before the trial Court was not properly drafted but since the particulars of the offence were correct, the error can be cured under **section 388 (1) of the Criminal procedure Act [Cap 20 R.E 2002]**. The section states that:

" Subject to the provisions herein before contained no findings sentence or order made or passed by a court of competent jurisdiction shall be reversed or altered on appeal or revision on account of any error omission or irregularity in the Complaint, summons, warrant, charge,

proclamation, order, judgment or any inquiry or other proceedings under this Act; save that there where on appeal or revision, the court is satisfied that such error, omission or irregularity has in fact occasioned failure of justice, the Court may order a retrial or make such other order as it may consider just and equitable”.

Ms. Masue Learned State Attorney states that the Accused was Charged for Rape under **section 130 (1), (2)** and section **131(1), (2)** of the Penal Code and Convicted for 30 years. It is not denied by the learned State Attorney that there was an error for section **131 (2)** has item **a –e** and each item has different scenarios in offences and penalty. The proper section ought to have been **Section 130 (1)** and, **(2) (d)**. Particulars of the offence having being correct to my opinion do not amend the charge. A person is convicted on bases of what institutes a criminal case which is the Charge. In the case of **MUSA RAMADHANI VS REPUBLIC, Criminal Appeal No. 388 of 2013 Mugasha JA**, Held that:

Accused being found guilty on a defective Charge based on a wrong citation and/ or non

existence provision of law, it cannot be said, that the Appellant was fairly tried in the Court below.

In the Case of ***Simba Nyangura vs Republic, Criminal Appeal No.144 of 2008***, it was observed that:

".... Appellant was charged under section 130(1) and 130 of the Penal Code, the Court said that a person accused must know under which of the description in section 130(1) (a) to(e) the offence he faces falls, so that he can prepare his defence. The Court further stated that, "lack of particulars unduly prejudiced the Appellant in his defense."

Both above cases and holdings were also cited in the case of ***ISAACK MATHAYO MACHA VS REPUBLIC, Criminal Appeal No.24 of 2017 HC***, by Mruke J, and formed the basis of the decision in the above case. In the event therefore, sail in the same finding as per defective charge is concerned and **find the ground of appeal meritorious.**

In light of the 2nd ground of appeal on failure of the police to whom the matter was reported failing to testify before the Court, the L\learned State Attorney support the ground for failure

of having evidence as if it was the Appellant was truly the culprit that committed the offence. Before the Court was the Victim and the husband and the Doctors that testified. However, the neighbors named to have gone to the scene are nowhere in record to have testified. Therefore the absence of witnesses who are named to have witnessed the offence weakened the prosecution case.

It is settled point of law that the burden of proof in criminal cases lie upon the prosecution. This was well emphasized in the case of ***JONAS NKIZE VS REOUBLIC [1992] TLR 213 (TZHC)***, hence ***this ground too has merits.***

Moreover the 3rd ground of appeal being error in realizing that there was no evidence that led as to how the Appellant was re-arrested to ascertain whether the apprehension had any connection to the offence, Ms Masue avers that, there was failure to show how the Accused was apprehended after being locked up in the Accused house to how he got to the station and therefore supports the ground of appeal. It is my fair opinion to this ground of appeal that the failure to establish the chain of events puts the prosecution case prone to big chances of lacunas that were yet to be water tight to warrant a Conviction for the Appellant. For

those stated reasons I find the chain of events was coherent and therefore **find this ground meritorious.**

On the 4th ground of appeal the Appellant avers to have been erroneously convicted on holding that the prosecution proved its case beyond reasonable doubt as charged. The learned State Attorney in support of this ground of Appeal states that the Appellant being charged of rape, penetration ought to have been of paramount weight, however there was lack of watertight evidence on the same. Moreover there was no evidence to prove that the Appellant was seen inside the victim's room and for such weakness, the learned State Attorney prayed to set aside the C conviction and sentence of thirty years.

It is still my emphasis that the burden of proof in Criminal cases is vested unto the shoulder of the prosecution who are with the duty to prove their case, Case of ***JONAS NKIZE VS REPUBLIC (supra).***

In the event, I **allow the appeal, quash the conviction and set aside the sentence.** I order that the Appellant be released forthwith from prison unless he is otherwise held for other lawful reason.

It is so ordered.

Right of appeal explained



L. E. MGONYA
JUDGE
28/10/2010

Judgment delivered in chambers in the presence of Ms. Faraja George, Advocate for the Respondent, the Appellant and Ms. Veronica RMA, this 28th day of October, 2019.



L. E. MGONYA
JUDGE
28/10/2010