

IN THE UNITED REPUBLIC OF TANZANIA
THE HIGH COURT OF TANZANIA
(DAR ES SALAAM DISTRICT REGISTRY)
AT DAR ES SALAAM

CRIMINAL APPEAL No. 129 OF 2020

(Originating from Kisarawe District Court in Criminal Case No. 64 of 2019)

SAMWEL ABRAHAM@CHUMA.....APPELLANT

Versus

THE REPUBLIC.....RESPONDENT

JUDGMENT

13th July, - 09th September, 21st September, 2020

J. A. DE - MELLO J;

In the District Court of Kisarawe, the Appellant, Samwel Abraham @Chuma was charged with the offence of Rape, contrary to **section 130 (1) (2) (e)** and **131(1)** of the **Penal Code, [Cap. 16 R.E 2002]**, trial of which convicted and, sentenced him to serve a **thirty (30)** years imprisonment. Being aggrieved, the Appellant lodged this Appeal based on the following grounds;

- 1. That, the Court erred in law and, fact when it convicted and sentenced the Appellant based upon incurably defective charge sheet as the particulars of the offense did not disclose the word "unlawful" before the phrase carnal**

knowledge which is an essential element of ingredient in the offence of rape which rendered the appeal not to defend himself.

- 2. That, the Court erred in law and, fact failing to comply with section 231 (3) of CPA.**
- 3. That, the Court erred in law and, fact when it convicted and sentenced the Appellant based on a case that the age of the victim was not proved.**
- 4. That, the Court erred in law and, fact when it convicted and, sentenced the Appellant based on uncorroborated, incredible and contradictory evidence of prosecution side.**
- 5. That, the Court erred in law and, fact when it convicted and sentenced the Appellant with a case that, was not proved to the hilt.**

This appeal was disposed by way of oral submissions where by the Appellant appeared in person, whereas; **Monica Ndakidemi** learned State Attorney fended the Republic. In this Appeal I don't intend to reproduce factual settings of the case, as the proceedings and judgment has it clear. However, and considering the lay background of the Appellant, his only submission was that it is all pure fabrication as he doesn't know the victim

but an errant boy taking tea and running errands at her grandmother's homestead. With this position, the Court urged the Appellant to be attentive to State Counsels submissions in view of understanding the response for his knowledge. **Counsel Ndakidemi** took the lead resisting the Appeal, alleging it to be baseless. The charge sheet is not defective for missing the word "**Unlawful**" as the offence was drawn from **sections 130 & 131 Cap. 16** together with particulars of the offence, clearly displaying the unlawful act. From **page 4** of the proceedings it shows that, the accused knew the victim and **page 19** of the typed proceedings shows that **section 231(3), Cap. 20** was duly adhered to when the accused pleaded to give his defence on oath, hence rendering the second ground baseless. Regarding ground three, the Appellant not objecting, the doctor confirmed the victim's age to be between **12 - 13 years**. Counsel prayed for the Court to take judicial notice, to section 122 of Cap. 6 in light of the case of **Isaya Renatus vs. R, Criminal Appeal No. 542 of 2015, Court of Appeal of Tanzania, at Tabora** on **pages 8-9** of the typed proceedings.

Joining the fourth and fifth ground together, Counsel basing her submission on the **best witness** principle in rape cases, that which the

Trial Magistrate believed to be credible but even corroborated by doctor who examined her to establish fresh bruises caused by a blunt object. He prays for the Appeal to be dismissed in its entirety, the case having been proved without leaving any shadow of doubts.

In his brief rejoinder, still limited, the Appellant insisted not to know the victim neither, had any intercourse with her.

As I undertake to address the first ground, it is vivid glaring that the word "**unlawful**" is missing in the charge sheet before the phrase carnal knowledge. Whether or not this is fatal, has been described from the case of **Mnazi Philimon vs. Republic, Criminal Appeal No. 401 of 2015, Court of Appeal of Tanzania at Mbeya** where it was held that; "**It is now beyond controversy that one of the principles of fair trial in our system of criminal justice is that an accused person must know the nature of the case facing him, and this can only be achieved if the charge discloses the essential elements of the offence and for that reason, it has been sounded that, no charge should be put to an accused unless the court is satisfied that it discloses an offence known to law.**"

Considering and, as observed by **Counsel Ndakidemi**, the omission and, considering the charge framed under **section 130 (1) (2) (e)** and

131(1) of the Penal Code, Cap. 16 R.E 2002], whose particulars of the offence clearly stipulated that; "...on 14th day of November 2019 during a day time at Kibaoni village within Kisarawe District Coast Region did have carnal Knowledge to one SALMA D/O ABDALLAH @SELEMAN a girl if 13 years old..."

In **Mussa Mwaikunda vs. R [2006] TLR 387** the Court, observed, inter alia:- **"The principle has always been that an accused person must know the nature of the case facing him. This can be achieved if a charge discloses the essential element of an offence."**


After all, there isn't lawful carnal knowledge, if at all. I therefore find the first ground unmerited Regarding the second ground on non compliance of with section **231 (3)** of CPA which I find wise to borrow as hereunder; **Where the accused, after he has been informed in terms of subsection (1), elects to remain silent the court shall be entitled to draw an adverse inference against him and the court as well as the prosecution shall be permitted to comment on the failure by the accused to give evidence.**

From the typed proceedings on **page 19**, record reveals the accused opted to give his evidence under oath. This ground is also baseless. On the third ground concerning age of the victim, I am fully in one with the State

Counsel that, was a class five pupil at **Kibasila Primary School** with the age of thirteen (13) years, confirming to understand what oath means while promising to tell the truth. Both the doctor as well as the guardian (grandmother) testified the victim to be of thirteen (13) years old, fact which the Appellant never objected. This ground does not to have merit also, and is dismissed. Combining the fourth and fifth grounds together, in compliance on the part of the Trial proceedings and, on conformity with the law. All in fine, I am satisfied that, this Appeal is an afterthought as it has no merits and is dismissed. The did justice to the case by proving its case beyond reasonable doubt which the Trial Magistrate convicted and sentenced the Appellant accordingly.

It is so ordered.



 Recoverable Signature

X *J. A. De Mello*

Signed by: J.A. DE-MELLO

JUDGE

21st September, 2020