

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

AT TABORA

CRIMINAL APPEAL NO. 123 OF 2019

(Original Criminal Case No. 49 of 2001 in the District Court of Meatu at
Meatu)

NTIGA GWISU APPELLANT

VERSUS

REPUBLIC RESPONDENT

JUDGMENT

KIHWELO, J.

The judgment in this matter was reserved by my late brother, Bongole, J, who unfortunately did not live to compose and deliver as he suddenly passed on the night of 15th July 2020 two days from the date the matter was last fixed for judgment. The record has now been re-assigned to me.

In the District Court of Meatu in Shinyanga region, the appellant stood arraigned for one count which was predicated under sections 130 and 131 of the Penal Code Cap 16 [Henceforth "the Penal Code"] as amended by Sexual Offences Special Provisions Act No. 4 of 1998. The particulars were that on the 24th day of June, 2002 at about 11:00 hours at Mwanyahina village within Meatu District in Shinyanga Region, the

appellant did rape one **XY** without her consent. He was convicted as charged and sentenced to a thirty years' term of imprisonment.

Being unhappy with the conviction and sentence of the trial court, the appellant came before this court armed with a six-point petition of appeal. I take the liberty to paraphrase his six points of complaint thus:

- 1. That, the prosecution did not prove the case against the appellant beyond reasonable doubt.*
- 2. That, the charge sheet presented by the prosecution was defective.*
- 3. That, the charge against the appellant was bad in law as the paragraphs of section 130 and 131 of the Penal Code was not specified the sub-sections to which the appellant was charged.*
- 4. That, it was wrong for the trial magistrate to hold that the victim of rape was of unsound mind and disabled without proof of any examination to prove the same.*
- 5. That, there was irregularity in the trial court proceedings as the court did not make any finding of case to answer something which prejudiced the appellant.*
- 6. That, the caution statement of the appellant and the medical report were not read out in court to the appellant contrary to the requirement of the law.*

At the hearing of the appeal before this court, the appellant appeared in person fended for himself. He basically adopted his six grounds of appeal and urged the court to reverse the decision of the trial court that convicted and subsequently sentenced him.

For the respondent Republic, Mr. Miraji Kajiru, learned State Attorney, was fairly short. He readily supported the appeal of the appellant against conviction and sentence. He had it that the charge upon which the appellant was convicted was defective, the section cited 130 of Penal Code was defective as it is not known which subsection of section 130 of the Penal Code the appellant was convicted under.

He went further to submit that the defect offends section 135 (a) (ii) of the Criminal Procedure Act [Henceforth "the CPA"] which expressly provides on how a charge sheet should be prepared. The effect of which is that the appellant never knew the charge against him and so he could not prepare his defence properly and therefore there was no fair trial on the part of the appellant.

Mr. Kajiru argued further that, the prosecution's exhibit "PF3" was tendered in court by PW3 a police officer without calling the doctor who prepared it, this was contrary to section 240 of the CPA he buttressed. In further supporting the appeal Mr. Kajiru strenuously argued that the caution statement which was admitted in evidence was never read aloud in court as required by the law. To hammer home that point he cited the case of **Robinson Mwanjisi vs R. 2003 TLR 208** where the court insisted that once an exhibit has been cleared for admission and admitted in evidence, it must be read out in court.

Upon a careful perusal of the court records I am convincingly inclined to the submission by the learned State Attorney that the appellant was charged, prosecuted and convicted on a defective charge as correctly

complained of by the appellant and supported by the lucid argument submitted by Mr. Kajiru.

Admittedly, the charge against the appellant before the trial court as indicated above was Rape c/s 130 and 131 of the Penal Code Cap 16 now Revised 2002.

Section 130 has five sub-sections, for clarity it reads thus:-

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

(2) A male person commits the offence of rape if he has sexual intercourse with a girl or woman under circumstances falling under any of the following descriptions:-

(a) not 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 or 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 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, lawful 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 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 staff 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 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, is liable to imprisonment for a term prescribed under subsection (1) of section 131"

(4) For the purposes of proving the offence of rape.-

(a) penetration however slight is sufficient to constitute the sexual intercourse necessary to the offence; and

(b) evidence of resistance such as physical injuries to the body is not necessary to prove that sexual intercourse took place without consent.

(5) For the purposes of this section spouses shall be deemed lawfully separated even if the separation is arranged by the family or clan members."

Equally so, section 131 has three (3) subsections. It reads thus:-

131.- (1) Any person who commits rape is except in the cases provided for in the renumbered subsection (2), liable to be punished with imprisonment for life, and in any case for imprisonment of not less than thirty years with corporal punishment, and with fine, and shall in addition be ordered to pay compensation of an amount determined by the court, to the person in respect of whom the offence was committed for the injuries caused to such person.

(2) Notwithstanding the provision of any law, where the offence is committed by a boy who is of the age of eighteen year or less, he shall-

(a) if a first offender, be sentenced to corporal punishment only;

(b) if a second time offender, be sentenced to imprisonment for a term of twelve months with corporal punishment;

(c) if a third time and recidivist offender he shall be sentenced to life imprisonment pursuant to subsection (1).

(3) Notwithstanding the preceding provision of this section whoever commits an offence of rape to a girl under the age of ten years shall on conviction be sentenced to life imprisonment."

Traversing on the above cited provisions of the penal code it is not clear from the charge sheet under which subsection of the provisions referred the appellant was charged and therefore making the charge sheet defective and that being the case the appellant was prejudiced by the defective charge that resulted in the conviction and sentence that was imposed on him.

I have no hesitation in view of the circumstances above which I have already described to observe that the prosecution did not squarely abide to the provisions of section 135(a)(ii) of the CPA when it presented the charge sheet at the trial District Court.

Unfortunately, with due respect, the learned trial Resident Magistrate did not exercise care and close scrutiny when he admitted the charge sheet which was defective before he assumed the trial of the case.

I find it convenient to restate that a charge is an important aspect of any criminal trial as it gives an opportunity to the accused to understand in his own language the allegations which are sought to be made against him by the prosecution. It is thus important that the section and the subsection of the law against which the offence is said to have been committed must be mentioned and stated clearly in a charge. The charge has to tell the accused clearly, precisely and concisely as nearly as possible the offence

and the matters in which he stands charged. This will enable the accused to adequately prepare the defence.

The Court of Appeal has made it clear in a number of cases that such a defect is incurable under section 388 of the CPA. There is a plethora of legal authorities in this matter and I am referring to the cases of **Joseph Paul Mivela Vs R.** Criminal Appeal No. 379 of 2016 at Iringa and **Antidius Augustine v R,** Criminal Appeal No. 89 of 2018 at Bukoba (both unreported) just to mention a few.

The above being the circumstances, I am satisfied that the proceedings that were conducted by the trial court and the subsequent judgment were a nullity.

Having nullified the whole proceedings of the trial court, I find it unnecessary to deal with the rest of the grounds of appeal as that will be tantamount to an academic exercise which is not the domain of this court.

In the event, I allow the appeal and quash the conviction which was entered by the trial court. I also set aside the sentence of thirty years' term of imprisonment. In the circumstances of this case, I do not think a retrial can be ordered by this Court. I accordingly order that the appellant should be released from prison forthwith and be set free unless held for other lawful cause.



P.F. KIHWELO

JUDGE

10/12/2020

Judgment to be delivered by the Deputy Registrar on a date to be fixed.



P. F. KIHWELO

JUDGE

10/12/2020

Date: 17/12/2020

Coram: Hon. B.R. Nyaki, Deputy Registrar

Appellant: Present in person

Respondent: Absent

B/Clerk: Grace Mkemwa, RMA

Court:-

Judgement delivered this 17th day of December, 2020 in the presence of the Appellant but in absence of the Respondent.

Right of appeal explained.



B.R. NYAKI

DEPUTY REGISTRAR

17/12/2020

