

**IN THE HIGH COURT OF TANZANIA**

**AT TABORA**

**APPELATE JURISDICTION**

**CRIMINAL APPEAL NUMBER 19 OF 2019**

**(Arising from Original Criminal Case No. 170 of 2016 of The  
District Court of Nzega at Nzega)**

**NGASA BUNDALA ----- 1<sup>ST</sup> APPELLANT**

**KASUBI MIDELO ----- 2<sup>ND</sup> APPELLANT**

**VERSUS**

**REPUBLIC ----- RESPONDENT**

**JUDGEMENT**

02/03 & 20/03/2019

**BONGOLE J.**

This judgment disposes two consolidated appeals namely, Criminal appeal No. 19/2019 as filed by the first appellant Ngasa Bundala and Criminal Appeal No. 20/2020 filed by the second appellant Kasubi Midelo.

The two appeals were consolidated because they emanate from the decision of Nzega District Court in Original Criminal Case No. 170 of 2016 in which the appellants were charged and convicted with one count of Rape c/s 130 and 131 of the Penal Code Cap 16 R.E 2002.

On 02/03/2020 this court ordered the two appeals be consolidated and be dealt in Criminal Appeal No. 19/2020.

After a full trial all accused persons were convicted and sentenced to serve custodial imprisonment.

All the appellants were aggrieved with the decision of the trial court and each of them managed to access this court and filed separate appeals.

On his petition of appeal, the first appellant appealing against conviction and sentence advanced four grounds of appeal Namely:-

- 1. That, the charge in respect of the matter at hand was preferred under wrong statute and it offended the mandatory of provision of section 132 of Cap 20 due to the fact that the offence of which the appellant was alleged to have committed is only governed by section 158(1)(a) of the Penal Code, adding the offence of rape which is controlled by section 130(1)(2)(e) and 131 (a) of the penal code brough contradiction on the offence and rendered the charge defective and the defective charge cannot support conviction.***
- 2. That, the prosecution case was not proved against the appellant to the required standard, that is beyond reasonable doubt since the evidence of penetration of the appellant's male organ into the victim's female organ to constitute the sexual intercourse was not forthcoming from the victim.***
- 3. That, the trial magistrate erred when held a bare and uncorroborated assertion by the victim (PW1) that the***

***appellant used to rape her on several occasions without any proof.***

***4. That, the guilty of the appellant was not established beyond reasonable doubt in view of the fact that the prosecution failed to discharge its burden of proof to the satisfaction of the court.***

Likewise the second appellant advanced five grounds namely:-

- 1. That, the charge against the appellant was defective since the provision of section 131(a) referred to the charge sheet is not existent (sic) in the penal code.***
- 2. That the trial court wrongly convicted the appellant of rape under section 130 (1)(2)(e) and 131(a) of the penal code and said charge was never amended or substituted to come to terms with section 243(2)(a) of Cap 20.***
- 3. That there is no harmony between the age of the victim and the provision of section 130 (1)(2)(a) and 131(a) under which the appellant was convicted hence rendered the charge defective.***
- 4. That, the trial magistrate erred when convicted the appellant despite the age of the victim (PW1) was not proved in the evidence.***
- 5. That, the trial magistrate erred when convicted the appellant acted on a mere assertion by the victim (PW1) that she was married by the appellant despite the failure by the prosecution***

***to tender any marriage certificate or marriage license to support the move.***

***6. That, the guilty of the appellant was not established beyond reasonable doubt in view of the fact that the prosecution failed to discharge its burden of proof to the satisfaction of the court.***

When the appeal came for hearing both appellants appeared in person while the republic was represented by Ms. Joainess learned State Attorney. All appellants prayed this court to adopt their petitions of appeal while Ms. Joainess who supported the appeal had this to submit,

That, the respondent do support the appeal basing on one main ground i.e the charge sheet that was presented in court was defective. The charge presented in court on 31/5/2016 shows that the charge had two counts for the 1<sup>st</sup> appellant while the charge she had in hand had one count of Rape.

The proceedings show that the appellant pleaded in two counts but there is no place in the proceedings where the charge was substituted with a view of adding a second count, therefore the appellants were convicted of a non-existing count.

Ms. Joainess however prayed for an order of retrial on the following grounds.

It is trite that the charge of rape was established as the first appellant was found guilty of having sexual intercourse with his daughter and for the second appellant the victim stated that she had been having sex with the 2<sup>nd</sup>

appellant an act which led to their marriage so the case was proved against all appellants and there will be no gaps to fill in case of retrial.

Further, Ms. Joainess prayed the victim be given her rights under section 388 of Criminal Procedure Act Cap. 20 R.E 2002 as the error was committed by the trial court.

The proceedings shows that the 1<sup>st</sup> appellant was charged with two counts that is 2<sup>nd</sup> count and 3<sup>rd</sup> count while the second appellant was charged with one count that is 1<sup>st</sup> count and in the judgment the trial magistrate convicted all the appellants as they were charged.

I have had time to go through the records of the trial court and I found that the charge sheet that is in the case file does not seem to be the one that was read to appellants during their trial till and there is no record of either substitution or amendment that was done. To that end I agree with the 2<sup>nd</sup> appellant that they were charged, convicted and sentenced on a non-existing charge.

If we assume that the charge sheet on record was the correct one that was to be read to the appellants still the same could not have legal feet to stand as it is fatally defective from its construction as it mentions the sections of law without categorizing subsections that comes under the mentioned sections.

In **Musa Ramadhani vs Republic Criminal Appeal 388 of 2013 CAT at Dar es Salaam** Mugasha JA. stated that, I quote

**"The charge sheet ought to have been framed according to the provision of section 135 (a) (ii) of the Criminal Procedure Act. Accused being found guilty on defective**

**charge based on a wrong and/or nonexistence provision of law, it cannot be said, that the appellant was fairly tried in the court below".**

In the upshot it is evident that the appellants were charged, tried and convicted on non-existing charge. This resulted into an unfair trial. I hereby nullify the entire proceedings, quash the conviction and set aside the sentence entered against the appellants.

That being said, I order that the appellants be tried *de novo* before another magistrate of competent jurisdiction. Taking into account of the fact that this matter is old, I direct that the retrial be conducted expeditiously.

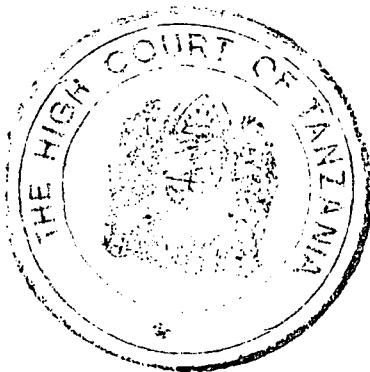


**S.B BONGOLE**

**JUDGE**

**20/03/2020**

Judgement delivered under my hand and seal of the Court in Chambers this 20/03/2020 in the presence of the parties.



**S.B BONGOLE**

**JUDGE**

**20/03/2020**