

**IN THE HIGH COURT OF UNITED REPUBLIC OF TANZANIA**

**(DAR ES SALAAM DISTRICT REGISTRY)**

**AT DAR ES SALAAM**

**CRIMINAL APPEAL NO. 115 OF 2021**

**AGRIPINUS EGOGO.....APPELLANT**

*VERSUS*

**THE REPUBLIC.....RESPONDENT**

*(Originating from the judgment of the District Court of Ulanga, Criminal Case No. 52 of 2019)*

*Date of last order: 8/10/2021*

*Date of judgment: 22/10/2021*

**JUDGMENT**

**E.I. LALTAIKA, J.**

The appellant, **AGRIPINUS EGOGO** was charged before the District Court of Ulanga with the offence of rape contrary to sections 130(1)(b) and 131 (1) of the Penal Code, Cap. 16 R.E.2019. The particulars that were laid in a charge showed that the appellant on 24<sup>th</sup> day of November, 2018 at about 19:00 hrs. at Mbagula village within Ulanga District in Morogoro Region had carnal knowledge with MP (identity of the victim is concealed) a girl of 16, years without her consent.

Subsequent to the said allegation, trial was conducted and the appellant was convicted and sentenced to 30 years imprisonment.

Aggrieved by the conviction and sentence, the appellant appealed to this court with the following grounds:

1. That the learned Resident Magistrate erred in law and fact by convicting the appellant as he was charged while the evidence on record is in variance with the charged offence.
2. That the learned Resident Magistrate misdirected himself when he failed to order for amendment of the charge sheet after observing that subsection 2(e) of section 130 was in conformity with evidence on record yet he proceeded to convict the appellant as he was charged.
3. That the learned Resident Magistrate erred in law and fact by convicting the appellant based on oral evidence of the victim (PW1) and doctor (PW3) without properly analysing their evidence that contradicted regarding the age (sic) of the victim's pregnancy compared to the date she was raped as;
  - (a) That the victim testified to be raped on 24/11/2018 later on (unknown date) she felt (sic) pregnant.
  - (b) The doctor who examined the victim on 26/2/2019 (about twelve (12) weeks after rape incident) found her to have (sic) pregnancy of about 22 weeks old.
4. Despite the trite law, that the trial court is obliged to inform the accused during the trial when it comes to notice that the prosecution is about to tender an implicating exhibit the danger of the intended exhibit against him and ask him his comment, the learned Resident Magistrate misdirected himself in law for proceeding to admit cautioned statement (PE.1) in evidence and used the same to convict him. (sic)

5. That the learned Resident Magistrate misdirected himself for admitting the cautioned statement (PE.1) without conducting inquiry to determine its volutariness ad if it was legally recorded while;
  - (a) The record of appeal indicates that the investigator (PW2) recorded the same on 13/4/2019 and the accused (appellant) was arrested by the same PW2 on 7/11/2018 hence it was recorded out of prescribed time.
  - (b) The investigator didn't state under which provisions of law he recorded the alleged statement. (PE.1)
6. That the learned Resident Magistrate misdirected himself by rejecting further opportunity to the appellant to call a witness during his defence the act which vitiated the trial and contrary to the right to be heard.

When the appeal was called up for hearing, Ms. Christine Joas, learned Senior State Attorney appeared for the respondent while the appellant appeared in person. In his submission the appellant did not have much to say. He adopted the grounds of appeal and left his fate to be determined by this court.

In reply, supporting this appeal, Ms. Joas submitted on grounds one and two collectively. She stated that the charge and evidence must go together. However, the learned senior state attorney submitted, at the trial court, the accused was arraigned with rape while the victim PW1 explained that the accused was with someone else. To this end, Ms. Joas expounded, the offence was supposed to be gang rape and not rape as per to the provisions of section 131A of the Penal Code.

To support her argument Ms. Joas cited the case of **Samwel Japhet Kahaya vs Republic, Criminal Appeal No.40/2017** where the court held that variance of charge and evidence is fatal and it is prejudicial to the appellant. Ms. Joas avers further that. According to the cited case, such variance is incurable under section 388 (1) of the Criminal Procedure Act, Cap 20.

In conclusion, Ms. Joas submitted that the appellant was not fairly tried as he was not given an opportunity to know the nature of the charge. She prayed for this court to quash the conviction and set aside the sentence.

I have dispassionately considered the grounds of appeal and submissions of the respondent on the instant matter. I shall address grounds one and two of the appeal simultaneously. This triggered me to revisit records of the trial court specifically page 9 of the proceedings whereupon PW1 testifies that:

*"...the accused and his friend hold me and take me into the house of his friend and the accused person raped me..." (sic)*

When the appellant was brought before the trial court, he was indicted with rape contrary to section 130 (1) (b) and 131 (1) while it is glaring from the record that, in commission of the offence, he was with another person referred to by PW1 as the appellant's friend. The friend, allegedly, abetted in taking the victim to his house. To this end, the proper offence ought to have been gang rape as per section 131A of the Penal Code which reads:

*131A.-(1) Where the offence of rape is committed by one or more persons in a group of persons, each person in the group committing or **abetting the commission of the offence is deemed to have committed gang rape.***

In appreciating the importance of explicit information of a charge sheet I wish to quote section 132 of the CPA which provides:

*"Every charge sheet or **information shall contain**, and shall be sufficient if it contains, a statement of the **specific offence or offences with which the accused person is charged**, together with such particulars as may be necessary for giving reasonable information as to the nature of the offence charged". (Emphasis is added)*

Moreover, in the case of **Sultan Omary Kipenzi & 6 Others vs Republic (Criminal Appeal No. 154 of 2017) [2018] TZHC 2431; (30 April 2018)** [www.tanzlii.org](http://www.tanzlii.org) the court, addressing on content of a charge sheet had this to say:

*"It must be underscored that the complaint is which lays the foundation of a formal charge. Subsequently, the entire evidence paraded by the prosecution must in its totality point to the guilt of the accused person beyond reasonable doubt. Where the evidence is not in support of the charge that clouds the prosecution case with a doubt and the benefit must be given to the accused person"*

From the above provision of the Act and the cited case law, I am of a considered view that, since a charge sheet is the foundation of a trial, the prosecution was under obligation to ensure that the accused person is charged in accordance with the proper provision of the law. This would

have given him an opportunity to understand the nature of the offence and to prepare for his defence.

I am in agreement with Ms. Joas' submission that the evidence on record is in discrepancy with the charge sheet creating the offence. As a result, such discrepancy has occasioned miscarriage of justice and the same cannot be cured by provisions of section 388 of the CPA. In the case of **Jackson Venant vs Republic, (Criminal Appeal No.118 of 2018) [2018]TZCA 187; (29 August 2018)** [www.tanzlii.org](http://www.tanzlii.org) the Court of Appeal, when confronted with similar circumstances of variance between charge sheet and evidence held that:

*"In the present appeal, we have found that the appellant was prejudiced, by the defective charge that resulted in the conviction and the sentence that was imposed. We therefore think that this is a proper matter in which the Court has to hold that the defect in the charge was incurable. We need to emphasize that this Court has also held in many other cases depending on the circumstance like this one, that the defects in the charge are incurable under section 388 of the CPA".*

Having determined grounds one and two of the appeal, I find them adequate to dispose of this appeal in its entirety. I, therefore, allow this appeal. I hereby quash the conviction, set aside the sentence and acquit the appellant forthwith. He is to be set at liberty immediately unless held for any other lawful cause.



**E.I. LALTAIKA**

**JUDGE**

**22/10/2021**