

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

**IN THE SUB-REGISTRY OF MANYARA**

**AT BABATI**

**CRIMINAL APPEAL NO. 4689 OF 2024**

*(Original Criminal Case No. 144 of 2023 In the District Court of Babati Aa Babati)*

**MUSA AYUBU.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

**RULING**

*19<sup>th</sup> June & 19<sup>th</sup> June, 2024*

***Kahyoza, J.***

Musa Ayubu appeared before the district court charged with two counts; **first**, rape contrary to sections 130(1)(2)(a) and 131(1) of the Penal Code, [Cap. 16 R.E 2022]; and **second**, sexual harassment contrary to section 138 D(1) of the Penal Code [Cap. 16 R. E. 2022]. He pleaded not guilty. After full trial, conviction and sentence, Musa Ayubu appealed to this Court raising seven grounds of appeal.

On the date fixed for hearing, Ms. Blandina learned State Attorney raised three points of law for the Court to consider before hearing the appeal on merit. The points were that; **one**, the trial court convicted Musa Ayub

with the offence was not charged; two, the trial court convicted the appellant with the offence of sexual harassment under a wrong section; and **three**, trial court imposed a sentence to a person who was not charged.

The respondent's state attorney submitted in support of the first point of objection that the trial court convicted Musa Ayubu with the offence which he was not charged with. She contended that the appellant was charged with the offence of rape under section 130(1)(2)(a) and 131(1) of the Penal Code and convicted with the offence of rape under section 130(1)(2)(e) and 131(1) of the Penal Code [Cap. 16 R.E 2022].

She argued in support of the second point of law that the trial court convicted and sentenced Musa Ayubu to serve 30 years custodial sentence for offence of sexual harassment under section 130(1)(2)(e) and 131(1) of the Penal Code. She argued that the appellant was convicted under the wrong provision of the law. Worse still, the trial court imposed an illegal sentence of 30 years' imprisonment as the maximum sentence for offence of sexual harassment was 5 years.

Lastly, the learned state attorney argued that the trial court convicted Musa Ayubu but imposed a sentence on Richard Martine Gara. Richard Martine Gara was not an accused person in this case.

The learned State Attorney prayed the court to quash the conviction and sentence and to order, the trial court to properly convict and sentence the appellant.

The appellant, a lay person had nothing substantive to reply.

I had a cursory review of the charge sheet, the proceedings the judgment and sentence. I cannot agree more with the learned State Attorney that the irregularities as raised do exist. It is true that the appellant was charged with the offence of rape under section 130(1)(2)(a) and 131(1) of the Penal Code but convicted with the offence of rape under section 130(1)(2)(e) and 131(1) of the Penal Code. No doubt that the offence of rape under section 130(1)(2) of the Penal Code requires the prosecution apart from proving that there was penetration, to prove that the victim did not consent or her consent was obtained by force. While the offence of rape under section 130 (1)(2)(e) of the Penal Code, consent is not an element of the offence. It is immaterial whether the victim consented or not. To prove the offence of rape under section 130(1)(2)(a) of the Penal Code, the prosecution is required to prove the victim's age and penetration. Thus, the offence of rape under section 130(1)(2)(a) of the Penal Code is different from the offence of rape under section 130(1)(2)(e) of the Penal Code.

I am alive of the position of law that a person may be convicted with an offence which he was not charged with but that offence must be cognate to the offence charged and the court must give reasons for its findings. See section 300 of the Criminal Procedure Act, [Cap. 20 R.E. 2022] (the **CPA**). I do not find reason(s) why the trial court convicted Musa Ayubu with the offence he was not charged with. It misdirected itself.

Also, I find it proved that the trial court convicted Musa Ayubu with the offence of sexual harassment under the wrong section of the law. It convicted Musa Ayub with the offence of sexual harassment under section 130(1)(2)(e) and section 131(1) of the Penal Code. It is obvious that the offence of sexual harassment is found under section 138D(1) of the Penal Code. As if that is not enough, the trial court sentenced Musa to serve a sentence of 30 years for the offence of sexual harassment, while the maximum sentence law provides is five years' imprisonment. Section 138D(1) reads-

***"138D.-(1) Any person who, with intention, assaults or by use of criminal force, sexually harasses another person, or by the use of words or actions, causes sexual annoyance or harassment to such other person, commits an offence of sexual harassment and is liable on conviction to imprisonment for a term not exceeding five***

*years or to a fine not exceeding two hundred thousand shillings or to both and may also be ordered to pay compensation of an amount determined by the court to the person in respect of whom the offence was committed for any injuries caused to that person.”*

I find therefore, the trial court erred to convict Musa Ayub with the offence of sexual harassment under section 130(1)(2)(e) and section 131(1) of the Penal Code and sentencing him to serve a thirty years imprisonment.

To make things more worse, the trial court tried and convicted Musa Ayubu but sentenced Richard Martine Gara. Musa Ayub, the accused person was not sentenced. It is clearly wrong to sentence person who was not charged.

I am of the firm opinion that the irregularities in the present case cannot be cured by section 388 of the **CPA**. Consequently, I uphold the objection that Musa was not properly convicted and sentenced and proceed to set aside the conviction and sentence. I order the appellant to appear before the trial court for conviction and sentence according to law. Should the appellant be aggrieved by the conviction and sentence he will process his appeal.

The appeal is dismissed with an order for the appellant to appear before the trial court for conviction and sentence as per the law.

It is ordered accordingly.

Dated at Babati this 19<sup>th</sup> day of June, 2024.



A handwritten signature in black ink, consisting of a series of loops and a long horizontal stroke, positioned above a solid horizontal line.

**J. R. Kahyoza  
Judge**

**Court:** The judgment delivered in the virtual presence of Mr. Ndibalema- SA for the Respondent and in the absence of the appellant who could not connect to e-court. Ms. Fatina (RMA) present.

A handwritten signature in black ink, identical to the one above, positioned above a solid horizontal line.

**J. R. Kahyoza  
Judge  
20.6.2024**