

**IN THE COURT OF APPEAL OF TANZANIA
AT DODOMA**

(CORAM: KILEO, J. A., MBAROUK, J. A. and MASSATI, J. A.)

CRIMINAL APPEAL NO. 369 OF 2014

ADAM RAJABU APPELLANT

VERSUS

THE REPUBLICRESPONDENT

**(Appeal from the Decision of the
High Court of Tanzania at Dodoma)**

(Mkuye, J.)

dated the 29nd day of August, 2014

in

Criminal Appeal No. 6 of 2013

JUDGMENT OF THE COURT

05/06/ & 09/06/2015

KILEO J.A:

The District Court of Singida sitting at Singida convicted the appellant of the offence of rape contrary to section 130 (1) (a) of the Penal Code, Cap 16 RE 2002. He was sentenced to suffer 30 years imprisonment.

Aggrieved by the findings of the District Court, the appellant unsuccessfully appealed to the High Court of Tanzania sitting at Dodoma in Criminal Appeal No. 6 of 2013. Being still aggrieved he has come to the highest court of the land in search of justice.

The appellant appeared in person at the hearing of his appeal without legal counsel. The respondent Republic was represented by Ms. Rosemary Shio, learned Principal State Attorney.

The appellant filed a memorandum of appeal consisting of a total of nine grounds. For reasons that will shortly become apparent, we do not need to go into those grounds nor do we need to list them here. We also need not narrate the evidence that was adduced at the trial.

Before the learned Principal State Attorney had responded to the appellant's grounds of appeal we called upon her to address us first on the validity of the charge. We did so considering that a determination on this legal point alone could dispose of the appeal. In response to our prompting she was quick to observe that the charge was defective and confusing. She was of the considered view that the charge sheet was not properly drawn so as to have enabled the appellant to understand the nature of the charge preferred against him and make an informed defence.

In order to get a good understanding of the matter it befits for us at this point to reproduce the charge that was laid against the appellant and upon which he was convicted. The charge reads:

"CHARGE SHEET

STATEMENT OF OFFENCE

RAPE contrary to section 130 (1) (a) of the Penal Code Chapter 16
Vol. 1 of the Laws, Revised Edition 2009 (sic!)

PARTICULARS OF OFFENCE

*That **ADAM S/O RAJABU** is charged on the 16th day of April, 2012 at about 16th day of April, 2012 at about 23:00 hours at Mdida village within the District and region of Singida, have sexual intercourse with one **REHEMA D/O YOHANA** a girl of 17 years of age without her consent."*

It is common knowledge that where someone rapes a girl who is below 18 years of age that is statutory rape. Statutory rape is created by section 130 (2) (e) of the Penal code which states:

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

(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.

In statutory rape consent is immaterial.

There is no gainsaying that procedure requires that the particulars of the charge sheet disclose the essential elements or ingredients of the offence that an accused is accused of having committed. In explaining why this is important this Court in **Isidori Patrice v. R**, Criminal Appeal No. 224 of 2007 (unreported) stated:

"It is now trite law that the particulars of the charge sheet should disclose the essential elements or ingredients of the offence. The requirement hinges on the basic rules of criminal law and evidence to the effect that the prosecution has to prove that the accused committed the actus reus of the offence charged with the necessary mens rea. Accordingly the particulars in order to give the accused a fair trial in enabling him to prepare his defence, must allege the essential facts of the offence and any intent specifically required by law."

The appellant was charged under section 130 (1) (a) of the Penal Code which is non-existent. We do not know if it was intended to charge the appellant under section 130 (2) (a) of which one of its essential elements is the lack of consent.

As rightly pointed out by Ms Shio, the charge was indeed confusing. No wonder when the appellant was asked to respond to the facts that were read over to him he replied that the victim consented. Section 135 of the

Criminal Procedure Act (CPA) provides the mode in which offences are to be charged. It provides in part as follows:

"135 (a) (i) A count of a charge or information shall commence with a statement of the offence charged, called the statement of the offence;

(ii) the statement of offence shall describe the offence shortly in ordinary language avoiding as far as possible the use of technical terms and without necessarily stating all the essential elements of the offence and, if the offence charged is one created by enactment, shall contain a reference to the section of the enactment creating the offence."

As we have already indicated above, section 130 (1) (a) under which the appellant was charged is non-existent. To make matters even more confusing the appellant was accused of having had carnal knowledge of a 17 years old girl "*without her consent*" while in view of the complainant's age consent was immaterial.

Our next question is what should be the effect of the defects so apparent on the charge that was laid against the appellant? This Court while dealing with a similar situation in **Nassoro Juma Azizi v. Republic**, Criminal

Appeal No. 58 of 2010 (unreported) stated lucidly the necessity of complying with rules of procedure. Because of the circumstances of this case and for the benefit of justice we will reproduce at length what we stated in the above case. The following is what this Court said:

"It cannot be gainsaid that generally the purpose of all the rules of procedure is, to guide the courts and the parties in the orderly and fair administration of justice, and it cannot be overemphasized that it is important that they be strictly complied with. Non compliance with those rules certainly has consequences, but these differ depending on the effect of the infringement and importance of the particular rule(s) breached. This is so because rules of procedure differ in importance. Some are vital and go to the root of justice and fair trial and can only be infringed with attendant dire consequences. Some rules are of less significance and have cosmetic value only, and when they are breached, the court may afford to look the other side. The drawing line between these is always, whether the breach has occasioned a failure of justice.

Thus, generally, in a criminal case, it has been held that for an appellate court to fault any trial and declare it a nullity due to any

*irregularity in procedure, it must be shown that, **the irregularity was such that it prejudiced the accused the therefore occasioned a failure of justice** (emphasis supplied) (see **MICHAEL LUHIYO v R** (1994) TLR 181, followed in **KOBELLO MWAHA v R** Criminal Appeal No. 173 of 2008 (unreported). Under section 388 of the CPA, it is a court sitting in appeal or revision which is empowered to declare which infringements in criminal procedures, amount to failure of justice, and to make appropriate orders befitting the circumstances of each case. This Court has exercised those powers and declared several infringements fatal, and some not. In respect of the rule relating to the mode of drawing charges, this Court once remarked:-*

'We wish to remind the magistracy that it is a salutary rule that no charge should be put to an accused before the magistrate is satisfied, inter alia, that it disclosed an offence known to law. It is intolerable that a person should be subjected to the rigors of a trial based on a charge which in law is no charge. It shall always be remembered that the

provisions of section 129 of the CPA 85, are mandatory. The charge laid at the appellant's door having disclosed no offence known to law all the proceedings conducted in the District Court on the basis thereof were a nullity since you cannot put something on nothing.'

*(See **OSWARD MANGULA v R** Criminal Appeal No. 153 of 1994 (unreported)."*

In the present case, we have demonstrated above that the charge was not only defective but it was also confusing. We are of the settled mind that the irregularity was such that it prejudiced the accused and therefore occasioned a failure of justice.

We have pondered on what should be our next step. Should we order a remittance of the matter to the trial court for a re-trial? This would entail an amendment of the charge followed by a rehearing of the case. We have considered all the circumstances of the case and we do not think that it will be in the interest of justice to take such a course of action.

In the event, and for reasons stated above, we allow the appeal, quash the conviction and set aside the sentence. We order that the appellant be released from prison forthwith unless otherwise lawfully detained.

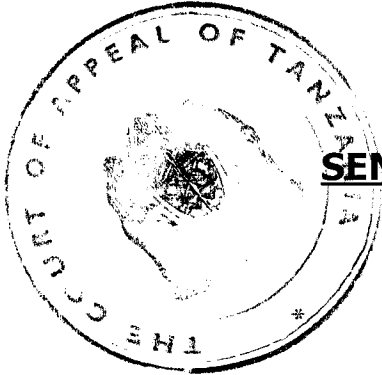
DATED at **DODOMA** this 8th day of June, 2015.

E. A. KILEO
JUSTICE OF APPEAL

M.S. MBAROUK
JUSTICE OF APPEAL

S. A. MASSATI
JUSTICE OF APPEAL

I certify that this is a true copy of the original.



A handwritten signature in black ink, appearing to read "P. W. Bampihya", is written over a horizontal line.

P. W. BAMPIKYA
SENIOR DEPUTY REGISTRAR
COURT OF APPEAL