

TANZANIA / JUDGMENT

charles haule vs republic

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IN THE COURT OF APPEAL OF TANZANIA AT IRINGA (CORAM: LUANDA, I.A .. MZIRAY, I.A., And NDIKA, I.A.) > CRIMINAL APPEAL NO. 240 OF 2016 CHARLES HAULE ... II .. II .. I II. 11 ... 1. II II II. II. 11 .. 1 II ... II APPELLANT VERSUS THE REPUBLIC RESPONDENT (Appeal from the judgment of the High Court of Tanzania at Songea) (Chikoyo, I.) dated the 25th day of April, 2016 in DC Criminal Appeal No. 10 of 2016 RULING OF THE COURT 9th & 15th May, 2018 NDIKA, I.A.: This appeal arises from the judgment of the High Court of Tanzania sitting at Songea (Chikoyo, J.) in DC Criminal Appeal No. 10 of 2016 dismissing the appellant's first appeal against conviction and sentence handed down by the District Court of Songea District at Songea. The trial court had tried the appellant for two counts, namely, rape contrary to sections 130 (1), (2) (e) and 131 (3) of the Penal Code, Cap. 16 RE 2002 ("the Penal Code"), on the first count; and unnatural offence contrary to section 154 (1) of the Penal Code, on the second count. Having heard the 1 evidence of three prosecution witnesses that included the victim of the sexual attack, aged six years at the material time, as well as the appellant's own defence, the trial court found the charges proved beyond all reasonable doubt and convicted the appellant of the two offences committed on 24th February 2015. The trial court, then, sentenced him to two concurrent terms of life imprisonment, one for each count. In addition, the trial court sentenced him to suffer six strokes in respect of the first count. Before us the appellant appeared in person, unrepresented. He sought to challenge the first appellate court's decision on the basis of five grounds of complaint contained in his Memorandum of Appeal. On the adversary's side, Ms. Amina Mawoko, learned State Attorney, assisted by Ms. Hellen Chuma, learned State Attorney, represented the respondent Republic. At the hearing before us on 9th May 2018, the respondent Republic raised a single point of preliminary objection based upon a notice duly filed on 5th May 2018. The said point was to the effect that: "the notice of appeal is defective for failure to cite proper provisions of the law. " Submitting on the preliminary objection, Ms. Mawoko attacked the appellant's notice of appeal, appearing at page 71 of the record of appeal, 2 on the ground that it was defective on account of citing wrong provisions of the law under which the appellant was convicted of rape and unnatural offence. She elaborated that while the appellant was convicted of rape contrary to sections 130 (1), (2) (e) and 131 (3) of the Penal Code, the notice of appeal wrongly predicates that conviction under sections 130 (1) and 131

- (1) of the Penal Code. In her view, the notice is fatally anomalous in two respects: first, it omits subsection (2) (e) of section 130; and secondly, it erroneously cites subsection (1) of section 131 instead of subsection (3) of that section. As regards the unnatural offence, she submitted that the notice is defective for stating the appellant's conviction of that offence under section 154 (91) (a) of the Penal Code, which is non-existent, instead of section 154 (1) (a) of the Penal Code. Given the circumstances, Ms. Mawoko urged us to find the notice incurably defective on the ground that it contravenes the mandatory requirement, under Rule 68 (2) of the Tanzania Court of Appeal Rules, 2009 ("the Rules"), that every notice of appeal must indicate the nature of the conviction sought to be challenged. She argued further that since a notice of appeal is the instrument that institutes a criminal appeal in terms of Rule 68 (1) of the Rules, the present appeal, instituted by a defective notice, is inevitably incompetent. Relying on the decision of this Court in *John Ikland 3 @ Ayoub v. The Republic*, Criminal Appeal No. 196 of 2014 (unreported), the learned State Attorney urged us to strike out the appeal. The appellant, apparently a layperson, had nothing much to say in reply. Having pithily lamented that the impugned notice of appeal was not drawn and lodged by himself but his Officer-in-Charge of Prison on his behalf, the appellant prayed for the Court's indulgence in the matter. Having considered the submissions of the parties on the preliminary objection before us, we find it imperative, at this point, to reproduce the relevant part of the provisions of Rule 68 (2) of the Rules on the content of a notice of appeal thus: "Every notice of appeal shall state briefly the nature of the acquittal, conviction, sentence, order or finding against which it is desired to appeal," [Emphasis added] We have supplied emphasis to the text above to stress the prerequisite that every notice of appeal must state briefly the nature of the acquittal, conviction, sentence, order or finding against which it is desired to appeal. We recall that in *John Ikland @ Ayoub* (supra), cited to us by Ms. Mawoko, the Court held that where these aspects or anyone of them is not indicated, the notice will be declared fatally defective. See also *Lazaro Msote 4 Sangulu and Others v. Republic*, Criminal Appeal No. 143 of 2006 and *Mwanya Ally Dadi @ Hamisi Mussa Mtondoima v. Republic*, Criminal Appeal No. 105 of 2013 (both unreported) which were also referred to in *John Ikland @ Ayoub* (supra). In the instant appeal, we agree with Ms. Mawoko that the impugned notice of appeal found at page 71 of the record of appeal is riddled with the defects she pointed out. Indeed, while the appellant was convicted of rape contrary to sections 130 (1), (2) (e) and 131 (3) of the Penal Code, the notice of appeal wrongly states that conviction as having been contrary to sections 130 (1) and 131 (1) of the Penal Code. It is evident that the said notice not only omits subsection (2) (e) of section 130 of the Penal Code but also incorrectly cites subsection (1) of section 131 instead of subsection (3) of that section. We also agree with Ms. Mawoko that the notice is anomalous by stating the appellant's conviction of unnatural offence under section 154
- (91) (a) of the Penal Code, which is non-existent, instead of section 154 (1)

(a) of the Penal Code. Having given due consideration to the shortcomings in the impugned notice of appeal, we came to the conclusion that the said defects are neither innocuous nor excusable and that they render the notice entirely invalid for 5 failing to state substantially, in terms of Rule 68 (2) of the Rules, the nature of the two convictions the appellant intended to challenge in the appeal. We so hold in view of the following: first, the omission from the impugned notice of subsection (2) (e) of section 130 of the Penal Code implies that the notice failed to indicate that the appellant sought to challenge a conviction of rape of a girl aged under eighteen years (otherwise known as statutory rape). We are decidedly of the view that since section 130 (1) of the Penal Code only creates the general offence of rape and that five different categories of rape are defined or created by section 130 (2) of the Penal Code, it was not sufficient for the notice to simply cite section 130 (1) and, at the same time, fail to disclose the relevant category of rape mentioned in section 130 (2) (a), (b), (c), (d) and (e) of the Penal Code that the appellant was convicted of. Secondly, since the appellant was convicted of rape of a girl aged 6 years contrary to section 130 (1) and (2) (e) of the Penal Code and was sentenced to mandatory life imprisonment in accordance with section 131 (3) of the Penal Code, the citation in the notice of appeal of section 131 (1) of the Penal Code as the source of the punishment was erroneous in that the punishment under that subsection is a minimum of thirty years' imprisonment and a maximum of life imprisonment. Thirdly, the citation of section 154 (91) (a) of the Penal Code as the basis of the conviction and 6 sentence in respect of unnatural offence is simply erroneous as it is non-existent in the Penal Code. Based on the foregoing analysis, we are constrained to strike out this appeal, as we hereby do, as it is incompetent due to having been instituted by a defective notice of appeal. Should the appellant desire to pursue his right of appeal in the future, he is at liberty, subject to the law of limitation, to start the appeal process afresh. DATED at IRINGA this 11th day of May, 2018. B. M. LUANDA JUSTICE OF APPEAL R. E. S. MZIRAY JUSTICE OF APPEAL G. A. M. NDIKA JUSTICE OF APPEAL I certify that this is a true copy of the original.

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