IN THE COURT OF APPEAL OF TANZANIA
AT ARUSHA

(CORAM: MSOFFE, J.A., KAIJAGE, J.A., And MUSSA,J.A.)

CRIMINAL APPEAL NO. 161 OF 2012

EMANUEL MKWIZU .....APPELLANT
VERSUS
THE REPUBLIC..... RESPONDENT

(Appeal from the Judgment of the High Court of Tanzania at Arusha)

(Sambo, J.)

dated the 30th day of December, 2010
in
Criminal Appeal No. 67 of 2009

JUDGMENT OF THE COURT

20th & 24th June, 2013

MSOFFE, J. A.:

The District Court of Ngorongoro (Raphael, PDM.) convicted the appellant of attempted rape and sentenced him to a term of 30 years imprisonment and corporal punishment of four strokes of a cane. Aggrieved, he preferred a first appeal to the High Court of Tanzania at Arusha where Sambo, J. dismissed the appeal. Still aggrieved, he has lodged this second appeal.

A number of points are raised in the memorandum of appeal. In brief, the major points are two. **One,** the charge was defective. **Two,** the evidence on record did not establish the prosecution case against the appellant beyond reasonable doubt.

The appellant appeared before us in person and in his oral submission he essentially repeated the contents of the memorandum of appeal. On the other hand, Mr. Hangi Matekeleza, learned State Attorney, represented the respondent Republic and argued in support of the appeal.

We propose to begin with the first major complaint. In this context the relevant parts of the charge sheet subject of the trial in issue read as follows:-

> ***OFFENCE SECTION AND LAW:*** *ATTEMPTED RAPE: S/O 132 (1) of Penal Code Cap. 16 Vol. 1 of the Laws as Revised 2002.*
>
> ***PARTICULARS OF THE OFFENCE:*** *That* ***EMMANUEL S/O MKWIZU @ TOBOLEE*** *charge on 18th day of December, 2008 at about 16:00 hrs at Lewasso river within Ngorongoro District and Arusha Region lawfully and*

without lawfully did attempt rape with one ***NOLOTOI S/O SITOI.***

Likewise, section 132(1) provides for the offence of attempted rape. Subsection (2) thereto provides for instances which manifest the intention to commit the offence. For purposes of this case, the relevant instance would fall under paragraph (a) of subsection (2) thereto which covers the element of "threatening". It follows therefore, that in this case subsection (2) (a) ought to have been cited in the charge sheet. The failure to do so offended the law and our observations in **Mussa Mwaikunda v. R**(2006)TLR 387 at page 392, **Isidore Patrice v. R** Criminal Appeal No.224 of 2007 (unreported and **Sulunge Sekale v.R** Criminal Appeal No. 40 of 2010 (unreported). In **Isidore Patrice**,(*supra*) in particular, we 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 of the offence and any intent specifically required by law.

In this sense, it follows that in this case the charge sheet did not disclose the offence, a defect which goes to the root of justice. As it is, "threatening" which is an essential element of the offence was not disclosed. It ought to have been reflected in order to give the appellant the opportunity to prepare his defence based on, among other things, the important ingredient of the offence in issue.

Assuming a proper charge sheet had been laid out at the appellant's door, still the evidence on record did not establish the prosecution case beyond reasonable doubt. PW1 Noloitoi Sitoi was the victim of the alleged offence. Her evidence was basically that on 18/12/2008 at 3.00 p.m. she was on her way home. The appellant came to her, fell her down, closed her face and mouth with her piece of cloth and raped her but "*could not discharge sperms because people arrived there*". Of course, in an ideal

case the charge ought to have been one of rape because the above piece of evidence appears to disclose the element of penetration which is an essential ingredient in terms of section 130(4) (a) of the Penal Code. Anyhow, that is not the issue of the moment. The above testimony given by PW1 raises one basic question on the aspect of identification. That is, did PW1 identify the appellant? Admittedly, the incident took place in broad daylight. But the said PW1 ought to have led evidence to show whether or not she identified the appellant. This was no doubt a sudden ambush. If so, PW1 ought to have been more forthcoming and state whether she knew the appellant before that day, whether the appellant had any distinctive marks, whether the appellant was dressed in a particular clothing, etc. In the absence of descriptive evidence of some sort it may be fair to say that in the justice of this case the appellant was not identified on the date of incident. Admittedly, it is on record that PW2 Kimani Kitutu, PW4 Peter Kihayo and PW5 Togoge Ambu arrived at the scene one hour after the incident and allegedly met the appellant while still there. The incident took place at 3.00 p.m. These witnesses went to the scene at 4.00 p.m. With respect, this evidence was worthless because none of these witnesses testified to have seen the appellant committing the said offence.

Since they went to the scene one hour after the incident they could not have witnessed the said incident.

When all is said and done, this appeal has merit. We accordingly allow it, quash the conviction and set aside the sentence. The appellant is to be released from prison unless he is lawfully held therein.

DATED at ARUSHA this 21st day of June, 2013.

J. H. MSOFFE
JUSTICE OF APPEAL

S. S. KAIJAGE
JUSTICE OF APPEAL

K. M. MUSSA
JUSTICE OF APPEAL

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

Malewo, M.A
DEPUTY REGISTRAR
COURT OF APPEAL