IN THE COURT OF APPEAL OF TANZANIA

AT ARUSHA

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

CRIMINAL APPEAL NO. 75 OF 2011

RIZIKI DAMAS .....APPELLANT

VERSUS

THE REPUBLIC .....RESPONDENT

(Appeal From the Judgment of the High Court of Tanzania

at Moshi)

(Rutakangwa, J.)

Dated the 6th day of March, 2004
in
Criminal Appeal No.67 of 2002

.....

JUDGMENT OF THE COURT

11th & 25th June, 2013

ORIYO, J.A:

The appellant, being aggrieved by the conviction of attempted rape, contrary to Section 132(1), (2)(a) of the Penal Code as amended and the sentence of thirty (30) years imprisonment, came to the Court upon the dismissal of his first appeal to the High Court. He preferred six (6) grounds of complaint as follows:-

1. Non compliance with section (240)(3) of the Criminal Procedure Act in admitting PF3
2. Convicted on contradictory evidence of prosecution witnesses on the date of incident-whether it was 28/12/2001 or 25/12/2002 or 28/12/2002.
3. The judgment did not comply with section 312(1) of the Criminal Procedure Act.
4. Failure to take note that the appellant was a boy of eighteen (18) years at the commission of offence and was not liable to corporal punishment.
5. Failure to summon independent witnesses to support the allegations.
6. Non compliance with section 192(3) of the Criminal Procedure Act in that the trial was conducted without a Preliminary Hearing, thus offending section 192 (3) thereof.

Briefly, the prosecution case was this. The incident took place on 28/12/2001, at 7.00.pm, when Paulina Frumes, PW1, whose residence was at Kirima Juu, Kibosho, Moshi Rural, went out to fetch water from a nearby spring. She was carrying her baby strapped on her back. As she approached the water spring, she noticed the appellant walking behind her. She gave him the right of way and told him to pass **(Pita)**. The appellant appeared to have refused the offer by maintaing the position behind PW1.

Unexpectedly, the appellant grabbed PW1 by the neck, took off the baby from PW1's back and threw it aside. Then he got hold of and threw PW1 on the ground, tore her clothes including her underwear. The appellant proceeded to unfasten his trousers and laid ontop of PW1 in an attempt to rape her. PW1 screamed and shouted for help. Her husband, Joseph Kinosa, (PW2) and her mother- in- law, Monica Kinosa, went to her rescue. At the scene, PW2 and PW4 found the appellant half naked on top of PW1. Upon seeing PW2 and PW4, the appellant fled.

The incident was thereafter reported to the ten cell leader and later to the police. PW1 was subsequently sent to the hospital with a PF3. At the hospital, PW1 was treated for haematoma and bruises she had sustained on the left side of the neck and forehead. The appellant was arrested by PW3, No. E 2072 P.C Mohamed and charged.

The appellant denied the charge. He claimed that the charge was fabricated because he had quarreled with PW2 over a debt of Shs 20,000/= the latter owed him. Then the story changed. The source of the quarrel between PW2 and the appellant was because the appellant had cut down a banana belonging to PW2, he contended.

At the close of the hearing, the learned trial magistrate believed the prosecution witnesses as truthful, convicted him as charged and sentenced him to 30 years imprisonment.

At the hearing of the appeal, the appellant appeared in person without legal representation. Being not conversant with legal matters, he opted to hear first the respondent's responses to his grounds of appeal. The respondent Republic was represented by Ms Stella Majaliwa, learned State Attorney who did not support the appellant's conviction and sentence. She gave her reasons. **Firstly,** the learned State Attorney said that the charge sheet was defective in that the essential ingredients of the offence of attempted rape were missing. She referred us to Section 132(1) and (2)(a) of the Penal Code, which shows what particulars are to be included in the Charge Sheet. Ms Majaliwa submitted that the evidence of the victim that the appellant **threatened** her will be prejudicial to the appellant because the offence read to him for plea purposes did not disclose the basic ingredients of the offence, namely, **threatening**. She referred to us the Court's decision in the case of **Lulunge Lekale vs Republic,** Criminal Appeal No. 40 of 2010 (unreported).

Ms Majaliwa submitted that the charge is not curable and cannot be cured by section 388 of the Criminal Procedure Act, either. She made reference to the Court's decision in **Mussa Mwaikunda v R,** [2006] TLR 387 at 392, in support.

The learned State Attorney urged us to declare the proceedings in the lower courts null and void and order for the release of the appellant.

The appellant had nothing useful to say after the respondent Republic supported his appeal.

We shall begin with Ms Majaliwa's legal position as exposed above and in the event it is found necessary, we shall discuss the appellant's remaining grounds of appeal.

The offence of **attempted rape** is provided for under section 132 of the Penal Code, Cap 16, as hereunder:-

> *"132.- (1) Any person who attempts to commit the offence of **attempted rape**, and except for the cases specified in subsection (3) is liable upon conviction to imprisonment for life, and in any case shall be liable to imprisonment for not less than thirty years with or without corporal punishment .*

(2) A person attempts to commit ***rape if, with the intent to procure prohibited sexual intercourse with any girl or woman,*** *he manifests his intention by*

(a) ***threatening the girl or woman for sexual purposes...*** *" (emphasis ours).*

According to the Record of Appeal in this case, the Charge Sheet reads as hereunder:

"**TANZANIA POLICE FORCE**

CHARGE SHEET

NAME AND TRIBE OR NATIONALITY

OF THE PERSON(S) CHARGED

NAME: RIZIKI S/O DAMAS

TRIBE: CHAGGA

AGE : 18 YEARS

OCC : PEASANT

RES : KIRIMA JUU

OFFENCE, SECTION AND LAW:-

Attempt Rape c/s 132 of the Penal Code Cap 16 Vol I of the laws as amended by Section 8 of Sexual Offences Special Provisions Act No. 4 of 1998.

PARTICULARS OF OFFENCE:-

That Riziki s/o Damas charged on 28th day of December, 2001 at about 19.00 hours at Kirima Juu area within the Rural District of Moshi Kilimanjaro Region did unlawfully attempt to have carnal knowledge of one PAULINA D/o FRUMES without her consent.

STATION : MOSHI Sgd:

PUBLIC PROSECUTOR

DATE: 7/1/2002 MOS/IR/43/2002. "

A quick look at the charge which was before the trial court, reveals that it was not drawn in terms of section 132(1) and (2)(a) of the Penal Code. The charge sheet is deficient in that it lacks the basic essential ingredients of an offence under section 132(1) and (2) (a) of the Penal Code which would have clearly informed the appellant the nature of the case that he was required to answer. The charge does not disclose **the intent, which is to procure prohibited sexual intercourse** and the

element of **threatening** the victim which are essential for courts to uphold the charge. In the absence of these basic attributes of the offence of attempted rape, any conviction will be prejudicial to the appellant because from the beginning he did not know what offence he was pleading to and could not be in a position to effectively put up an appropriate defence to such a charge.

A charge which is deficient and does not include all the essential ingredients of the offence as in this case, is incurably defective and cannot be remedied by the evidence of the victim.

In the case of **Mussa Mwaikunda vR,** [2006] TLR 387 at 392 this Court stated the following:-

> *"...it is interesting to note here that in the above charge sheet the particulars or statement of offence did not allege anything on* ***threatening*** *which is the catchword in the paragraph. The principle has always been that an accused person must know the nature of the case facing him. This can be achieved if a* ***charge discloses the essential elements of an offence****. Bearing this in mind the charge in the instant case ought to have disclosed the aspect of* ***threatening*** *which is an*

essential element under paragraph (a) above. In the absence of disclosure it occurs to us that the nature of the case facing the appellant was not adequately disclosed to him. The charge was, therefore, defective; in our view." (Emphasis ours).

We associate ourselves fully with the above reasoning and conclusion.

In the case of **Isidore Patrice vs R**, Criminal Appeal No. 224 of 2007 (unreported), this Court observed:-

"*It is a mandatory statutory requirement that every charge in a subordinate court shall contain not only a statement of the specific offence with which the accused is charged but such particulars as may be necessary for giving reasonable information as to the nature of the offence charged.*

It is now trite law that the particulars of the charge shall disclose the essential elements or ingredients of the offence. This 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."

Also see **Lulunge Lekale** (supra)

As we have already observed, since the charge sheet discloses no offence known in our laws, and in view of the legal principles stated above, the charge sheet is incurably defective.

We think that the single ground raised by Ms Majaliwa, learned State Attorney suffices to dispose of the appeal. We agree with her and we see no need to deal with the appellant's remaining grounds of appeal as enumerated above.

For the reasons we have stated we are satisfied that the appellant should not have been convicted of attempted rape. Accordingly, we allow the appeal, quash the conviction and set aside the sentence imposed upon him. We order that the appellant be released forthwith unless lawfully detained in connection with another matter. We are alive that this state of affairs was reached due to the trial having been illegal. Under normal

circumstances, we would have ordered a **retrial**. However, under the circumstances of this case, we do not think that the interests of justice demand that a retrial should be ordered, (see **Fatehali Manji vs R,** (1966) E.A 343).

It is ordered.

DATED at ARUSHA this 24th day of June, 2013.

K. K. ORIYO
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