IN THE COURT OF APPEAL OF TANZANIA

AT DODOMA

(CORAM: LUANDA, J.A, MKUYE, J.A AND MWAMBEGELE, J.A.)

CRIMINAL APPEAL NO. 580 OF 2015

JEREMIA CHIDOLE ..... APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

(Appeal From the Decision of the High Court of Tanzania at Dodoma)

(R.I Rutta, Extended Juris.)

Dated the 18th day of November, 2015
in
PRM Criminal Appeal No 25 of 2015

JUDGMENT OF THE COURT

17th & 24th May, 2017

MWAMBEGELE, J. A.:

In the District Court of Mpwapwa sitting at Mpwapwa, the appellant Jeremia Chidole, was charged with and convicted of the offence of attempted rape. Upon conviction, he was sentenced to serve a thirty (30) years' jail term and ten (10) strokes of the cane. The conviction and sentence did not amuse the appellant. He thus appealed to the High Court where his conviction and sentence were upheld. Undaunted, he has come to this Court for his second appeal. The appellant has lodged a seven-

ground memorandum of appeal seeking to challenge the decisions of both courts.

We find it apt to narrate the background material facts of theappeal as they can be gleaned in the charge sheet and in the evidence adduced at the trial on 25.06.2003 when the prosecution fielded its three witnesses and on 03.09.2003 when the appellant testified in defence. We do so because, as will be clear later in this judgment, the facts of the case are determinant on the proper provisions of attempted rape under which the appellant should have been charged.

The facts go thus: on 23.02.2002 at about 1830 hours at Mkoka village, Kongwa District, Mariam d/o Iddi; the victim, who testified as PW1, was returning home from a *shamba* at Ndebesi. The path home passed through a water well. The appellant was there; at the well. PW1 greeted the appellant but the latter never replied. He just said "mama huwa nakutongoza unanikataa" after which he got hold of her right hand and kicked her right leg felling her down in that process. The appellant then forcibly removed PW1's undergarment (Exh. P1) tearing it in the process. In the meantime, PW1 was raising an alarm. The alarm was heard by

PW1's husband Iddi Msumi PW2, Asmin d/o Hussein PW3 and a certain Juma Chikorogo who was not called to testify.

The trio went thither only to find the appellant still struggling to rape PW1. On seeing them, the appellant aborted the mission and disappeared in the bush threatening in the process to hurt with a "jugo" whoever followed him. PW1 reported the matter at the Police Station on the following day and the appellant was arrested in 2003 as he, so the prosecution alleged, had escaped to Dar es Salaam after the incident. After the arrest, the charge of attempted rape was preferred against him.

In defence, the appellant completely dissociated himself from the charges leveled against him. His defence is comprised in only three sentences:

> *"I live at Mkoka. I do not know Mariamu Iddi. On 23/2/2002 I was at home. I did not attempt to rape the said woman nor do I know her".*

The appellant was firm on his defence even in cross-examination insisting that PW1 was a stranger to him and that he had no grudges with

her. That he came to know her after he was arrested in relation to the offence the subject of the present appeal.

The appeal was argued before us on 17.05.2017 during which the appellant appeared in person and unrepresented. He therefore fended the appeal for himself. The respondent Republic had the services of Ms. Beatrice Nsana, learned State Attorney. At the hearing, the appellant had nothing to add to the grounds of appeal earlier filed. He only prayed to adopt and rely on them as part of his submissions. We think the appellant was right to take that course because the memorandum of appeal he filed had been drafted in a rather verbose style. We think it is so because the same was drafted by a lay hand.

Ms. Nsana, learned State Attorney, supported the appellant's appeal. As a true officer of the court, it was her view that the appellant's conviction and sentence by the trial and first appellate courts was inappropriate. She anchored her argument in support of the appellant's appeal on a defective charge sheet. She stated that the charge sheet was defective in that it did not contain the necessary elementof the charge of attempted rape as stipulated by the provisions of section 132 (2) (a) of the Penal Code, Cap.

16 of the Revised Edition, 2002 (henceforth "the Penal Code"). She stated that "threatening" is an essential ingredient of the offence of attempted rape and failure to refer to itin the charge sheet makes the charge sheet fatally defective. The learned State Attorney did not cite any authority to support her propositionbut promised to supply some after the hearing. Up to the moment of composing this judgment, the learned State Attorney had not walked the talk.

Upon close consideration of the seven grounds of appeal, we, like the learned State Attorney, think the present appeal can be disposed of on the sixth ground of appeal which challenges the charge sheet as being defective, though on a different reason of defect; not on failure to state the age of the victim as put by the appellant.

We should mention at the very outset of our determination that we agree with the learned State Attorney that the charge sheet was indeed defective for failure to, *inter alia*, refer to the aspect of "threatening" which is an essential ingredient of the offence of attempted rape with which the appellant was charged. As will become apparent shortly, the charge sheet has other ailments as well.

For easy reference, we find it appropriate to reproduce hereunder the provisions under which the appellant was charged as well as the particulars thereof. The charge sheet, in the statement of the offence part, reads:

> *"Attempted rape c/s 132 (2) of the Penal Code, Cap. 16 of the Laws as amended by section 8 of Act No. 4 of 1998 of [the] Sexual Offences Special Provisions [Act]"*

And the particulars of the offence thereof go thus:

> *"That Jeremia s/o Chidole charged on the 23rd day of February 2002 at about 1800 HRS at Ndebesi Mkaka village within Kongwa District in Dodoma Region did attempt to rape to (sic) one Mariam d/o Iddi."*

Section 132 (2) of the Penal Code under which the appellant was charged reads:

> *"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;

(b) being a person of authority or influence in relation to the girl or woman, applying any act of intimidation over her for sexual purposes;

(c) making any false representations for her for the purposes of obtaining her consent;

(d) representing himself as the husband of the girl or woman, and the girl or woman is put in a position where, but for the occurrence of anything independent of that person's will, she would be involuntarily carnally known."

Juxtaposing the above provision of the law with the charge sheet, it becomes apparent that the charge sheet in the present case had three

major flaws. First,it did not mention subsection (1) of section 132 which creates the offence of attempted rape. Secondly, it did not state the paragraph of subsection (2) of section 132 of the Penal Code under which the appellant was charged. Thirdly, the particulars of the offence did not state anything about the aspect of "threatening" whichis an essential element for the offence of attempted rape with which the appellant was charged. We shall demonstrate.

We start with the first ailment; that is, omission to cite in the charge sheet subsection (1) of section 132 of the Penal Code which creates the offence of attempted rape. As we observed in **David Halinga v. R.**, Criminal Appeal No. 12 of 2015and **Mussa Ramadhani v. R.**, Criminal Appeal No. 368 of 2013 (both unreported), section 135 (a) (ii) of the Criminal Procedure Act, Cap. 20 of the Revised Edition, 2002 (henceforth "the CPA") describe the mode in which the statement of the offence should be framed. It reads:

> *"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.***"

[Emphasis supplied]

Reverting to the case at hand, the offence of attempted rape is created by statute. It is created by section 132 (1) of the Penal Code, which reads:

"Any person who attempts to commit rape commits 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."

This provision creating the offence of attempted rape does not feature in the charge sheet preferred against the appellant. Failure to

make reference to the section of the enactment creating the offence, is an incurable irregularity offending against the mandatory provisions of section 135 (a) (ii) of the CPA cited above. In the present case, we have no iota of doubt that the statement of offence in the charge sheet ought to have cited both sections 132 (1) and (2) (a) of the Penal Code failure of which made it fatally defective – see: **Chesco Mhyoka v. R.**, Criminal Appeal No. 82 of 2014 (unreported).

Next for consideration is the second ailment; that is, failure to state the specific paragraph of subsection (2) of section 132 of the Penal Code under which the appellant was charged. Subsection (2) of section 132 has four subparagraphs each of which caters for a different circumstance. Let the subsection speak for itself:

> *"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;*

(b) being a person of authority or influence in relation to the girl or woman, applying any act of intimidation over her for sexual purposes;

(c) making any false representations for her for the purposes of obtaining her consent;

(d) representing himself as the husband of the girl or woman, and the girl or woman is put in a position where, but for the occurrence of anything independent of that person's will, she would be involuntarily carnally known."

The facts of the case we narrated at the beginning of this judgment make it apparent that the paragraph of subsection (2) of section 132 under which the appellant should have been charged is (a). Failure to cite the relevant paragraph is a fatal irregularity as it did not make the appellant present a fair defence – see: **Marekano Ramadhani v. R.**, Criminal Appeal No. 201 of 2013 and **Kastory Lugongo v. R.**, Criminal Appeal No.

251 of 2014; both unreported decisions of the Court cited in **David Halinga** (supra).

The third ailment is the one relied upon by the learned State Attorney to support the appellant's appeal. This is failure to state in the particulars of the offence the element of "threatening" which is an essential element for the offence of attempted rape with which the appellant was charged. Paragraph (a) of subsection (2) of section 132 of the Penal Code under which the appellant should have been charged provides in no uncertain terms that a person attempts to commit rape if, with the intent to procure prohibited sexual intercourse with any girl or woman, he, *inter alia*, manifests his intention **by threatening the girl or woman for sexual purposes**. The particulars of the offence of the charge sheet in the present matter did not mention anything about the aspect of threatening. This, we are certain, was fatal.

Luckily, we have had occasions more than once, to deal with an akin situation in our previous decisions. Such occasion occurred in **Mussa Mwaikunda v.R.** [2006] TLR 387 and an unreported decision **Chesco**

Mhyoka(supra). In **Mussa Mwaikunda**, for instance, we stated at p. 392:

> *"... It is interesting to note here that in the above charge sheet the particulars of 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 supplied].

We reiterated that stance in **Chesco Mhyoka** (supra). In both cases, like in the present, the appellant was charged with and convicted of the offence of attempted rape and the charge sheet lacked the element of threatening. As shown above, we were firm in both cases to hold that the charge sheet was incurably defective for failure to state anything on threatening which is the catchword in the paragraph (a) of subsection (2) of section 132 of the Penal Code.

The above stated and on the authorities cited, we are of the firm view that the charge sheet preferred against the appellant was incurably defective and therefore prejudiced the appellant in his defence. It offended against the mandatory provisions of section 135 (a) (ii) of the CPA. The defect was, and still is, fatal to the conviction of the appellant.

For the avoidance of doubt, we are certain in our minds that the three ailments discussed above cannot be saved by the provisions of Section 388 of the CPA as held by the Full Bench in ***Bahati Makeja v. R.***, Criminal Appeal No. 118 of 2006 (unreported).

In the end of it all, we find merit in this appeal and allow it. Consequently, we quash the conviction and set aside the sentence meted out to the appellant. As the appellant has been behind bars for about thirteen years now, we order that he should be released from custody forthwith unless he is held for some other lawful cause.

Order accordingly.

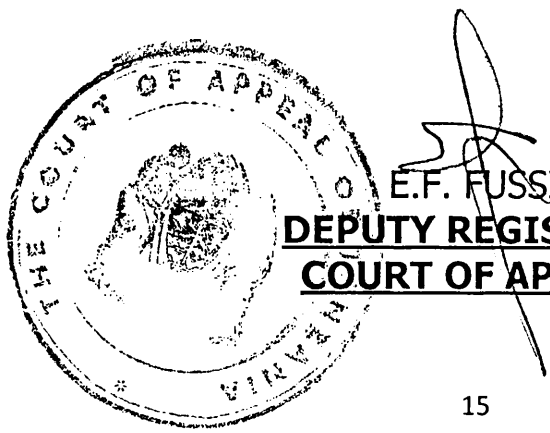
DATED at **DODOMA** this 23rd day of May, 2017.

B.M. LUANDA
JUSTICE OF APPEAL

R.K. MKUYE
JUSTICE OF APPEAL

J.C.M. MWAMBEGELE
JUSTICE OF APPEAL

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



E.F. FUSSI
DEPUTY REGISTRAR
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