

IN THE COURT OF APPEAL OF TANZANIA

AT BUKOBA

(CORAM: MBAROUK, J.A., MKUYE, J.A. And WAMBALI, J.A.)

CRIMINAL APPEAL NO. 571 OF 2017

ALEX MEDARD .....APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

(Appeal from the decision of the High Court of Tanzania at  
Bukoba)

(Mallaba, J.)

dated the 16<sup>th</sup> day of November, 2017

in

Criminal Session No. 67 of 2013

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**RULING OF THE COURT**

24<sup>th</sup> & 29<sup>th</sup> August, 2018

**MKUYE, J.A.:**

In the High Court of Tanzania at Bukoba, the appellant Alex Medard was arraigned for an offence of attempted murder contrary to section 211 of the Penal Code, Cap. 16 R.E 2002 (the Penal Code). It was alleged that the appellant on 12<sup>th</sup> day of January, 2013 at Kishujo Village within Muleba District and the Region of Kagera, did attempt to murder Victoria Muchunguzi by a sharp object on her stomach and other parts of the body.

Upon a full trial the appellant was found guilty, convicted with the offence of attempted murder and sentenced to a term of four (4) years imprisonment.

The appellant is aggrieved with both the conviction and sentence. Hence, he has lodged this appeal to this Court.

On 12<sup>th</sup> day of April, 2018 the appellant lodged a memorandum of appeal consisting of two grounds of appeal with a total of five paragraphs. However, for a reason that will be apparent shortly, we shall not reproduce the said grounds of appeal.

At the hearing before us, the appellant was represented by Mr. Aaron Kabunga, whereas the respondent Republic had the services of Ms. Chema Maswi, learned State Attorney.

From the outset we required the parties to address us on the propriety or otherwise of the charge against the appellant. The reason for such inquiry was that we observed at page 1 of the record of appeal that the appellant was charged with an offence of attempted murder contrary to section 211 of the Penal Code as a stand alone provision. At pages 48 and 49 of the record, the trial judge in his

judgment substituted the charge and took that the appellant was charged under section 211(b) of the Penal Code. Yet at page 59 of the record, the trial judge convicted the appellant under section 211 of the Penal Code.

Mr. Kabunga was the first to respond to the concerns we had raised. He readily conceded that the charge against the appellant was defective. He said, it was not proper to charge him under section 211 of the Penal Code without showing the paragraph under which the offence was predicated. Without mentioning the provision of the law, he contended that, the law requires in framing the charge to state or specify a particular law which is contravened. In that regard he argued that, on account of the defective charge, the appellant did not know the nature of the offence he was charged with and hence, he could not be in a position to follow the proceedings and prepare his defence. In his view, the appellant was prejudiced for not having afforded a fair trial, the effect of which is to render the whole proceedings and judgment nullity. He added that, even the move of the trial judge to amend the charge when composing judgment was not proper since the appellant was not given an opportunity to

respond. For those reasons, he implored the Court to nullify the proceedings and judgment, quash the conviction and set aside the sentence thereof.

As to whether the defect was curable under section 388 of the Criminal Procedure Act, Cap 20, R.E. 2002 (the CPA), he was of the view that it was not curable as the irregularity was fatal and it prejudiced the appellant.

In reply, Ms. Maswi did not resist to the defect observed by the Court. She, however, held a different view in that the defect was curable under section 388 of the CPA. She, adamantly argued that, since the appellant was given a chance to defend himself, there was no prejudice occasioned to him. As to the way forward in case the proceedings and judgment are nullified, she implored the Court to leave the matter in the hands of the Director of Public Prosecutions to determine.

As was alluded earlier on, the appellant was charged with the offence of attempted murder contrary to section 211 of the Penal Code. The said section is couched as follows: -

*"211. Any person who -*

*(a) attempts **unlawfully to cause the death of another**; or*

*(b) with **intent unlawfully** to cause the death of another, **does any act or omits to do any act which it is his duty to do, the act or omission** being of such a nature as to be likely to endanger human life,*

*is guilty of an offence and is liable to imprisonment for life".*

[Emphasis added]

The above provision creates two categories of the offence of attempted murder with different ingredients. The ingredient in paragraph (a) is the unlawfulness to cause the death of another without showing its nature. As to paragraph (b), the ingredients are the intent which will normally be an ill intent; and the unlawfulness of an act or omission which by its nature is likely to endanger the human life.

In the case under consideration the charge sheet/ information was under section 211 of the Penal Code as a stand-alone provision. The said charge reads as hereunder:-

***"STATEMENT OF THE OFFENCE***

*ATTEMPTED MURDER, contrary to section 211  
of the Penal Code.*

***PARTICULARS OF OFFENCE***

*ALEX S/O MEDARD on 12<sup>th</sup> day of  
January, 2013 at Kishujo Village within Muleba  
District in Kagera Region did attempt to murder  
VICTORIA D/O MUCHUNGUZI by her (sic) with  
a sharp object on her stomach and other parts  
of the body."*

*Signed at Bukoba this 31<sup>st</sup> day of August, 2013*

***(sgd)***

***G.T.Komba***

***STATE ATTORNEY."***

As it can be clearly seen in the above charge, though the appellant was charged under section 211 of the Penal Code, it was not indicated in the statement of the offence the specific provision which classify the circumstances under which the offence of attempted

murder was committed. As it is, it does not show the category of attempted murder either in paragraph (a) or (b) committed by the appellant. Though Mr. Kabunga was not specific with the relevant provision which guides the framing of a charge, we are mindful of section 135 (a) (ii) of the CPA which requires the statement of offence to have a correct reference of section which creates the particular offence. We take the liberty to quote part of the said section. It provides as follows:

*"135 (a)(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 reference to the section of the enactment creating the offence.**" [Emphasis added]*

We have highlighted part of it to show the importance of indicating the specific provision of the law contravened. The reason for so doing is to enable the accused to understand the nature of the offence he stands charged and be able to prepare an informed defence which will guarantee a fair trial. This position was stated in the case of **Charles Mlande v. Republic**, Criminal Appeal No. 270 of 2013 Pg. 10 (unreported) when the Court quoted with approval the case of **Abdallah Ally v. Republic**, Criminal Appeal No. 253 of 2013 (unreported). In the latter case, it was observed as follows:

*"Being found guilty on a defective charge, based on wrong and/ or non-existent provisions of the law, it cannot be said that the appellant was fairly tried in the Courts below ... In view of the foregoing shortcomings, it is evident that the appellant did not receive a fair trial in court. The wrong and/or non – citation of the appropriate provisions of the Penal Code under which the charge was preferred, left the*

*appellant unaware that he was facing a serious charge of rape ...”*

Likewise framing of a proper charge would reduce the chances of appellant to be prejudiced. For instance, in the case of **Marekano Ramadhani v. Republic**, Criminal Appeal No. 201 of 2013 (unreported) while quoting with approval the case of **Simba Nyagura v. Republic Criminal**, Appeal No 144 of 2008 (unreported) the Court stated as follows:

*“...this lack of particulars unduly prejudiced the appellant in his defence...”*

See also **Kastory Lugongo v. Republic**, Criminal Appeal No. 251 of 2014 (unreported).

On our part, we subscribe to the above cited cases. In this case, we are satisfied that the charge was incurably defective. Much as the trial judge amended it in the judgment, we think that it could not salvage the situation in so long as the appellant was not given an opportunity to be heard on the amended charge. As the charge did not disclose the category of the offence of attempted murder, the appellant could not have been in a position to understand the nature

of offence and prepare an informed defence. Besides that, since the charge was not clear to him for being defective, it cannot be said he was fairly tried. Definitely, he might have been prejudiced. Consequently, since the appellant was charged with the charge which was incurably defective, it renders the whole proceedings and judgment nullity.

As to whether the defective charge could be salvaged, we do not agree with Ms. Maswi's stance that the defect can be cured under section 388 of the CPA. To the contrary, we think, as was argued by Mr. Kabunga, it cannot be cured as the appellant did not receive a fair trial. This position was stated in a number of cases decided by this Court. Just to mention a few, they include **Isdori Patrice v. Republic**, Criminal Appeal No. 224 of 2007; **Khatibu Khanga v. Republic**, Criminal No. 290 of 2008; **Joseph Paul @ Miwela v. Republic**, Criminal Appeal No. 379 of 2016; **Maulid Ally Hassan v. Republic**, Criminal Appeal No. 439 of 2015 (all unreported); and **Mussa Mwaikunda v Republic**, [2006] TLR 387.

For instance, in case of **Isidori Patrice v. Republic** (supra) when the Court was faced with a situation like the one at hand, it

emphasized that a defective charge is incurable under section 388 of the CPA. It stated as follows:

*"A charge which did not disclose any offence in the particulars of offence is manifestly wrong and cannot be cured under section 388 of the Criminal Procedure Act, 1985."*

Also in the case of **Joseph Paul @ Miwela** (supra) the Court stated as follows:-

*"On the effect of the flaw in the charge, we agree with Ms. Ngilangwa that it is fatal as it cannot be cured under section 388 of the CPA."*

In both cases the Court nullified the proceedings and judgments, quashed the convictions, set aside the sentences and proceeded to set the appellants free.

On our part, we fully subscribe to the stance taken in **Isdori Patrice** (supra) and **Joseph Paul @ Miwela** (supra). As the charge against the appellant was incurably defective as we have endeavoured to demonstrate hereinabove, it prejudiced the

appellant and, therefore, it cannot be cured under section 388 of the CPA.

Lastly, Ms. Maswi pleaded that should the Court decide to nullify the whole proceedings and judgment, the matter be left to the Director of Public Prosecutions (DPP) to determine its fate. We think, in advancing such prayer Ms. Maswi might have had in mind the case of **Emmanuel Ruta v. Republic**, Criminal Appeal No. 357 of 2014 (unreported) where the Court left the fate of the appellants to be dealt with by the DPP. However, that case is distinguishable to this case because the appellants in that case were tried in a subordinate court on both economic offence and non-economic offence without a valid certificate issued under section 12 (4) of the Economic and Organised Crime Control Act Cap. 200, R.E. 2002 which could have vested jurisdiction to that court to try them. In this case the charge which instituted a complaint against the appellant was defective on the face of it. We, therefore, do not see any relevance to this case.

Given the circumstances, in the exercise of the powers vested on us by section 4(2) of the Appellate Jurisdiction Act, Cap 141,

R.E. 2002, we hereby nullify the proceedings and judgment of the trial court, quash the conviction and set aside the sentence meted out to the appellant. We further order that the appellant be released from prison forthwith unless he is held for some other lawful cause.


**DATED** at **BUKOB**A this 29<sup>th</sup> day of August, 2018.

M. S. MBAROUK  
**JUSTICE OF APPEAL**

R. K. MKUYE  
**JUSTICE OF APPEAL**

F. L. K. WAMBALI  
**JUSTICE OF APPEAL**

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

  
E. Y. MKWIZU  
**SENIOR DEPUTY REGISTRAR**  
**COURT OF APPEAL**

