

**IN THE COURT OF APPEAL OF TANZANIA
AT IRINGA**

CRIMINAL APPEAL NO. 121 OF 2016

(CORAM: MUSSA, J.A., LILA, J.A., And WAMBALI, J.A.)

FRED S/O NYENZI APPELLANT

VERSUS

THE REPUBLIC RESPONDENT

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

(Mkuye, J.)

Dated the 22nd day of October, 2008

in

Criminal Appeal No. 31/2008

JUDGMENT OF THE COURT

29th April & 6th May 2019

MUSSA, JA.:

In the District Court of Mufindi, the appellant was arraigned for attempted rape and, in the alternative, he was facing a charge of indecent assault. It is noteworthy that the alleged victim was a child aged eight (8) years and, in order to disguise her identity, we shall henceforth refer to her by the prefix letters XYZ. We deem it apposite to fully extract the charge sheet which went as follows:-

"1st COUNT

OFFENCE SECTION AND LAW: *Attempted rape C/S 132 and 131 of the Penal Code, Cap. 16 of the Laws.*

PARTICULARS OF OFFENCE: *FRED NYENZI charged on 21st day of November, 2006 at about 18:00 hrs at Igowole village within Mufindi District in Iringa Region, did unlawfully attempted to rape one XYZ a girl aged 8 yrs.*

2nd COUNT

IN ALTERNATIVE CHARGE:

OFFENCE SECTION AND LAW: *Indecent assault C/S 135 (1) of the Penal Code, Cap. 16 of the Laws as amended by section 9(1) of SOSPA 1998.*

PARTICULARS OF OFFENCE: *FRED s/o NYENZI charged on 21st day of November, 2006 at about 18:00 hrs at Igowole Village within Mufindi District, Iringa Region, did unlawfully and indecently assault the said XYZ with intent to rape her."*

The appellant denied the charge, whereupon the prosecution featured three witnesses and one documentary exhibit in support of its claim. In a nutshell, the case for the prosecution as narrated by the alleged victim (PW2) was to the effect that, on the fateful day, around 4:00 p.m. or so, she was taking care of a herd of cattle at Ngwazi area grazing grounds. As she was thereabouts, a male person emerged and immediately grabbed her hand and pushed her towards a nearby bush. In the ensuing process, the assailant fell the girl to the ground and, soon after, he lay on top of her and drew out his manhood. As he was about to undress her underpants, the girl screamed out loudly and, within a while, several people arrived at the scene. The assailant then abandoned the act and took to his heels but, as it were, he was followed in hot pursuit by several persons who had attended the scene. Amongst the pursuers was a certain Francis Sanga (PW3) who, in the company of others, closed on the assailant and apprehended him.

According to PW3, the apprehended man turned out to be the appellant herein. Furthermore, again, according to PW3, the

appellant allegedly "*admitted to have raped the girl.*" Nonetheless, the latter contention is in sharp contrast with the appellant's account in the cautioned statement in response to the question whether or not he raped the victim. The appellant stated therein:-

"Ninakumbuka sikufanikiwa kubaka kabisa ingawa ni kweli huyo binti nilifanikiwa kumkamata na nika mvutia kwenye kichaka na nikamlaza chini ili nimbake na wakati najaribu kumtoa chupi kwa mikono yangu watu walitokea baada ya kusikia kelele zake na nilipoona watu nilikurupuka na kukimbia ..."

The foregoing detail concludes the version of the occurrence as told by the prosecution witnesses.

In reply, the appellant completely dissociated himself from the prosecutions' factual setting as well as its accusation. In contrast, the appellant gave an entirely different version of the occurrence which we fully extract thus:-

"I was working as a herdman to Mzee mtweve for about three (3) years. While I

was claiming for a salary arrears (sic) of Tsh. 300,000/= for the said years. He told me that I should wait, he went to the shop to take it, while he was back (sic) he was together with civilians whom were strange to me.

Thereafter, he caught me and told me I was a thief thus he started beating me. They took me to the police station and I was charged with the offence."

As is quite apparent from the foregoing tale, the appellant refrained from associating himself with the occurrence of attempted rape. He did not, however, elaborate as to who this Mzee Mtwewe was and whether or not the latter was related to PW2.

On the whole of the evidence, the trial court accepted as truthful the prosecution version of the occurrence as told by PW2. In addition, the trial court found the victim's testimony to have been materially corroborated by the testimony of PW3 as well as the appellant's cautioned statement. The appellant's defence was considered but found to fall short of casting any doubt on the case

for the prosecution. In the upshot, the appellant was found guilty as charged on the first count, convicted and sentenced to a term of thirty (30) years imprisonment. He was dissatisfied, but his first appeal to the High Court was dismissed in its entirety (Mkuye, J., as she then was).

Still aggrieved, the appellant presently seeks to impugn the decision of the first appellate court upon a memorandum of appeal which is comprised of seven (7) points of grievance. For a reason that will shortly become apparent, we need not recite the details of the memorandum of appeal.

At the hearing before us, the appellant was fending for himself, unrepresented, whereas the respondent Republic had the services of Mr. Adolf Maganda, learned Senior State Attorney, who was being assisted by Ms. Edna Mwangulumba, learned State Attorney.

The appellant fully adopted the memorandum of appeal which he did not elaborate but instead impressed upon us to permit the respondent Republic to address us first while he reserved his right to

rejoin, if need be, after the submissions of the learned Senior State Attorney.

On his part, Mr. Maganda declined to support the appellant's conviction for the reason that the charge sheet under which the appellant was arraigned and convicted is incurably defective. The learned Senior State Attorney contended that the defectiveness of the charge sheet is palpably vivid on the statement of offence which referred to sections 132 and 131 instead of section 132 (1) of the Penal Code, Chapter 16 of the laws (the Code). After a brief dialogue with us, Mr. Magamba further submitted that the statement of offence is additionally undermined for want of reference to subsection 2(a) of section 132 of the Code.

On the effect of the referred shortcomings, the learned Senior State Attorney urged that the defect is fatal and, as such, it cannot be cured by section 388(1) of the Criminal Procedure Act, Chapter 20 of the laws (the CPA). To buttress his contention Mr. Maganda referred us to the unreported Criminal Appeal No. 379 of 2016 - **Joseph Paul @ Miwela v. The Republic**. In sum, the learned

Senior State Attorney impressed on us to invoke our revisional jurisdiction under section 4(2) of the Appellate Jurisdiction Act, Chapter 141 of the laws (the AJA) and, respectively, quash the conviction and set aside the sentence imposed on the appellant.

Having heard the submissions of the learned Senior State Attorney, the appellant fully supported him in a brief rejoinder and urged that, on account of the defective charge sheet, he should be released from prison custody forthwith.

We have dispassionately considered and weighed the submissions from both sides which boil down to the issue of defectiveness of the charge sheet and its effect on the trial. For a better understanding of the issue of contention, it is necessary to reproduce the relevant portions of the provisions of law under which the appellant was charged. To begin with the offence of attempted rape which was the subject of the first count, section 132(1) and (2) of the code provides thus:-

"132 -(1) 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.

*(2) A person attempts to commit rape if, **with 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) N/A

(c) N/A

(d) N/A”

[Emphasis supplied]

As regards the alternative count of indecent assault, section 135(1) provides:-

"Any person who, with intent to cause any sexual annoyance to any person utters any word or sound, makes any gesture or exhibits any word or object intending that such word or object shall be heard, or the

gesture or object shall be seen by that other person, commits an offence of sexual assault and is liable on conviction to imprisonment for a term not exceeding five years or to a fine not exceeding three hundred thousand shillings or to both the fine and imprisonment."

Addressing the submissions of the learned Senior State Attorney, it should be recalled that Mr. Magana contended, with respect to the first count, that the statement of offence is defective for predicating the offence under sections 132 and 131 instead of the appropriate sections 132(1) and 2(a) of the Code. The learned Senior State Attorney took the position that the anomaly is fatal and the same cannot be cured by section 388(1) of the CPA.

In this regard, we are keenly aware of what was recently decided by the Court in the unreported Criminal Appeal No. 21 of 2017 – **Khamisi Abderhemani VS The Republic**. In that case, the statement of offence in the charge sheet under which the appellant stood arraigned for rape, cited sections 130(1) (2) (e) and 131 (1) instead of the applicable sections 130(1), (2) (b) and 131

(1) of the Code. Addressing itself on the anomaly, the Court concluded that the defect did not prejudice the appellant much as the particulars of the offence on the charge sheet were explicit enough to inform him of the nature of the offence he was facing. Also taken into account were the appellant's response when the charge was read over to him; his focused cross examination of the prosecution witnesses and the way he defended himself which, it was said, were not consistent with a person who did not understand the nature of the charge facing him. In sum, it was concluded that, as the appellant was not prejudiced, the anomaly was curable under section 388 of the CPA.

Thus, going by the case of **Khamisi Abderehemani** (supra), in the determination as to the fatality or otherwise of a misdescription of the charged offence, the bottom line is whether or not the person accused was prejudiced by the anomaly. It remains to be determined whether or not the appellant in the case under our consideration was prejudiced by the misdescription in the statement of offence.

Going by the factual setting in the case under our consideration, we think it is apt to observe that the situation obtaining in the appeal at hand is a distant different from the one in **Khamisi Abderehemani** (supra) in that, apart from the misdescription of the offence charged in the statement of the offence, the matter at hand is further undermined by the particulars on the charge sheet which, we think, omitted to state at least two essential ingredients of the offence of attempted rape.

We think that the situation at hand is closer to the one which obtained in the unreported Criminal Appeal No. 35 of 2001 – **Isidori Patrice V. The Republic** where the particulars of charge sheet just as well did not disclose essential ingredients of the offence charged. More particularly, the particulars did not allege the specific intent of the offence, that is, an "*intent to procure prohibited sexual intercourse*" and neither did it disclose how the intent was manifested. On the whole, the Court observed:-

"In a charge under section 132(1) and (2) of the Penal Code, the factual circumstances

which of necessity must be stated in the charge are those specified in paragraphs (a), (b), (c) and (d) of subsection (2) in addition to the mentioned specific intent to procure prohibited sexual intercourse”.

In sum, the Court further held that a charge which did not disclose any offence in the particulars is manifestly wrong and cannot be cured under section 388(1) of the CPA.

Back to the appeal under our consideration, from the factual setting, it is beyond question that the apparent prosecution’s intent was to predicate the offence under section 132(1) and 2(a) of the Code. Thus, at least the words “... *with intent to procure prohibited sexual intercourse, attempted to rape XYZ aged 8 by threatening the girl for sexual purposes...*” ought to have been posted in the particulars of the offence.

In the light of the position we have taken, we are of the firm view that the first count of attempted rape to which the appellant was facing was patently defective and the conviction on it cannot

stand. The next crucial issue now becomes whether or not the appellant can be convicted on the charged alternative count of indecent assault.

To us, for a charge of indecent or sexual assault to stand, the statement of principle enunciated in the case of **Isidori Patrice v. The Republic** (supra) is equally valid. Accordingly, the particulars of the offence ought to have at least alleged that the wrong doer indecently assaulted the victim "*with intent to cause any sexual annoyance...*" Furthermore, the alleged acts constituting the assault also ought to have been disclosed. Such details were not disclosed in the alternative charge which, for that matter, falls into the same fate of being miserably defective.

All said, we find the defect on both counts of the charge sheet to be fatal and the same cannot be cured by section 388 (1) of the CPA. We note that the defectiveness was not raised by the appellant in any of his seven (7) points of grievance. Nevertheless, we are minded to invoke our revisional jurisdiction under section 4(2) of AJA and, in fine, the conviction and sentence imposed on the

appellant are hereby, respectively, quashed and set aside. The appellant should be released from prison custody forthwith unless he is held for some other lawful cause. Order accordingly.

DATED at **IRINGA** this 3rd day of May, 2019.


K. M. MUSSA
JUSTICE OF APPEAL

S. A. LILA
JUSTICE OF APPEAL

F. L. K. WAMBALI
JUSTICE OF APPEAL

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




A.H. MSUMI
DEPUTY REGISTRAR
COURT OF APPEAL