IN THE HIGH COURT OF TANZANIA

(Dar es Salaam District Registry)

AT DAR ES SALAAM

CRIMINAL APPEAL NO. 137 OF 2014

JULIUS MSOMI.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

Mwandambo,J

The Appellant was charged before the District Court of Morogoro with the offence of attempted rape contrary to section 132 (1) and 2(a) of the Penal Code, Cap 16 R.E. 2002. At the end of the trial in which four prosecution witness testified, the trial court found the Appellant guilty of the offence charged and convicted him accordingly sentencing him to 30 years imprisonment.

Aggrieved, the Appellant has preferred an appeal by way of a petition of appeal containing twelve grounds of appeal which in effect boil down to only one ground

namely, the trial court erred in convicting the Appellant because the prosecution did not prove the case beyond reasonable doubt.

During the appeal, the Appellant who appeared in person did not have anything to add. He simply urged the court to consider the grounds of appeal and do justice to him. The Respondent duly represented by LilianRwetabura, Ms. Makakala and BatildaMushi, State Attorney did not oppose the appeal and urged me to allow it.

Addressing the court, Ms.Lwetabura submitted that the Appellant was wrongly convicted of attempted rape contrary to S. 132 (1) and (2) (a) of Cap 16 because an essential ingredient of the offence was not disclosed in the charge sheet neither did any of the prosecution witnesses testify that the Appellant threatened the victim in order to commit the offence of attempted rape. In elaboration, Ms. Lwetabura submitted that under S. 132 (2) (a) an offence of attempted rape is committed if a person threatens a girl or woman to procure prohibited sexual intercourse but the charge sheet did not indicate that the Appellant threatened the complainant to commit the offence. Relying on a

decision of the Court of Appeal in **Musa MwaikundaVs.R**[2006] TLR 387, the learned State Attorney submitted that the Appellant was not tried fairly because the essential ingredients of the offence were not disclosed for him to understand the nature of the case and put up his defence accordingly. On the strength of the said decision, Ms. Lwetabura urged me to find that the charge sheet was incurably defective and thus could not form any basis for finding the Appellant guilty and be convicted and sentenced thereby. In the upshot, Ms. Lwetabura invited me to allow the appeal and set aside the trial court's judgment.

I have carefully followed the submissions by the learned State Attorney and I must with respect agree with her. It is not in dispute that the Appellant stood charged with the offence of attempted rape contrary of section 132 (1) and (2) (a) of Cap 16 as amended by S. 8 of the Sexual OffencesSpecial provision Act, 1998. It was alleged at the trial that the Appellant attempted to rape Bertha Julius his own daughter at a hotel in Morogoro Districtthe charge sheet was crafted as follows:-

OFFENCE, SECTION AND LAW: ATTEMPTED RAPE C/S 132, (1) (2) (9) OF THE PENAL CODE CAP 16. VOL 1 OF THE LAWS (R.E. 2002) PARTICULARS OF THE OFFENCE: That **JULIUS S/O MSOMI** charged on 22nd day of September 2012, at about 20:00hurs at Msamvu area within the District Municipality and Morogoro Region did attempt to rape one **BETHA D/O JULIUS** without her consent....."

As rightly submitted by the learned State Attorney, the charge sheet is conspicuously silent about threatening to commit an attempted rape which was a very essential ingredient to support the charge. In effect, the charge was, as it were defective which could not have been acted upon by the trial court. In**Musa MwaikundaVs.R**(supra) the charge sheet read as follows:

> "That*MussaS/Oof Mwaikunda charged on 22 May, 2000 at about 19:05 hours at Bulongwe Village within Rungwe District Mbeya Region did attempt to rape Happy daughter of Owden a girl of fifteen years old."*

The trial court convicted the accused and his attempt to appeal to the High Court did not succeed. On appeal, the Court of Appeal found the charge sheet wanting in material respect and held it incurably defective. Stressing the point the Court of Appeal stated:-

> *"The principle has always been that an accused person must know 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..." (at pp. 392 - 393"*

Having so found the Court held that the charge could not be cured under S. 388(1) of the Criminal Procedure Act, Cap 20. As submitted by Ms. Lwetabura, the facts in the instant appeal are in all fours with the facts in **MussaMwaikundaVs.R** (supra). Not only threatening was not disclosed in the particulars of the offence but also none

of the prosecution witnesses led any evidence to support that the Appellant threatened the complainant. In the instant appeal, the complainant who did not testify at the trial did not give particulars of any threat in her statement which was admitted as exhibit **P1** at the trial. Accordingly, like in **MussaMwaikundaVs.R** (supra) there cannot be any basis for saying that the Appellant knew the nature of the case facing him. In the circumstances, I am constrained to hold as I do that the trial court wrongly convicted the Appellant because the essential ingredient of the offence he was charged was not disclosed renderingthe charge defective. On the authority of **Musa MwaikundaVs.R**(supra) the charge sheet cannot be cured under S. 388(1) of Cap 20.

For the foregoing reasons the appeal is hereby allowed and the conviction and sentence of the trial court are hereby set aside. Having so held, I order that the Appellant be released forthwith unless he is held for other lawful purpose.

It is so ordered.

L.J.S Mwandambo

JUDGE

15/04/2015