IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

AT DAR ES SALAAM DISTRICT REGISTRY

CRIMINAL APPEAL NO. 303 OF 2017

(Originating from Criminal Case No 441 of 201`6 at Temeke District Court)

IDDY MOHAMED .....APPELLANT

VS

REPUBLIC ..... RESPONDENT

JUDGEMENT

MWENEMPAZI, J.

The appellant, **Iddy Mohamed** was charged and convicted with the offence of **Attempted Rape** Contrary to Section 132(1) of the Penal Code [cap. 16. R.E.2OO2]. He was sentenced to 30 years imprisonment. Being aggrieved by the conviction and sentence he lodged this appeal. In the trial court the prosecution evidence which was tendered was to the effect that on the 14th day of July, 2016 at around 2:00PM while at Yombo Dovya area within the District of Temeke, the appellant was found holding Hadya Athuman, a girl of six years old, in the lap, while both the appellant and the girl had their underpants removed. The appellant

was touching private parts of the Hadya Athumani. Three witnesses were called to testify in court. Mahafudhi Ahamad (PW1) is person who claims to have found the duo in an unfinished house, Asha Khatibu(PW2), who is the mother of Hadya Athuman. She was told by PW1; and Hadya Athuman (PW3). The appellant was the sole witness in the defence case.

When the appeal was called up for hearing, the appellant was representing himself and the respondent was represented by Clara Charwe, State Attorney. In his challenge to the decision of the trial court, the appellant filed six (6) grounds of appeal which upon reading I have summarized them thematically as focusing on the following areas; namely, that the evidence tendered in court was not properly analyzed by the trial magistrate so as to gauge the credibility of the evidence and the prosecution case as a whole and that the evidence by prosecution witnesses was contradictory. In submitting before this court, the appellant simply prayed to the court to adopt his grounds of appeal when considering the appeal and what the Respondent will submit. On the other side, the learned state attorney raised two points worthy of consideration by court. First, that the evidence tendered in court was not sufficient to warrant conviction of the appellant with the offence of attempted rape. Second, that the charge against the appellant was in essence defective to the effect that it failed to disclose clearly to the accused the offence with which he was charged.

The learned State Attorney, in her submission, opted to capitalize on the defectiveness of the charge as the main point of focus. She stated that the charge against the appellant was defective both in its statement of the offence and the particulars of the offence. The provisions which are necessary to be cited in the statement of the offence of attempted rape were not cited. Also, the particulars of offence did not disclose clearly the necessary **intent to commit an offence** and the ***actus reus*** with elements necessary to constitute the offence of attempted rape according to the provisions of section 132 of the Penal Code, Cap. 16 R.E. 2002 as amended by section 8 of the Sexual Offences Special Provisions Act, No. 4 of 1998. As a result, the defect is fatal and incurable under section 388 of the Criminal Procedure Act, Cap. 20 Of R.E 2002. In support to her argument she referred the case of ***Isidori Patrice vs. Republic,*** Criminal Appeal No. 224 of 2007 Court of Appeal of Tanzania at Arusha(unreported). She submitted further quoting the referred case that: "the principle has been that the 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." The Court of Appeal also stated that absence of disclosure renders the nature of the case facing the accused not to be adequately disclosed to him which vitiated the need to give the accused a fair trial and enable him to prepare his defense.

Reading the charge which was read over to the accused, it is open and clear that the learned state attorney is right. It is further observed that the charge was

indeed not clear enough to allow the appellant (accused) to understand clearly the allegations leveled against him. The statement of offence did not contain the necessary provisions of the law as it stands now and the statement of offence was general lacking in the necessary elements of the offence of attempted rape. For the sake of clarity, it will assist if the wording of the charge in the statement of offence and the particulars of offence are produced below.

"STATEMENT OF THE OFFENCE

ATTEMPTED RAPE: Contrary to Section 132(1) of the Penal code [Cap. 16 R.E 2002]

PARTICULARS OF OFFENCE

IDDY MOHAMED, on 14th day of July, 2016 at Yombo Dovya area within Temeke District in Dar es Salaam Region, did attempt to have carnal knowledge of on Hadya Athumani a girl of 6 years old.

Dated at Dar es Salaam this 20th day of July 2016

It is clear that there is something important missing in the legal provisions cited and the description of the offence in the particulars of offence do not disclose the necessary elements as provided in the law, section 132 of the Penal Code as amended by SOSPA. The Position of law (**Isidori Patrice V. Republic)** is that:

"where the definition of the offence charged specifies factual circumstances without which the offence cannot be committed, they must be included in the particulars of the offence. In a charge under section 132 (1) and (2), therefore, the factual circumstances which of necessity must be stated in the charge are those specified in paragraphs (a), (b), (c) and (d) of sub-section (2), in addition to the mentioned specific "intent to procure prohibited sexual intercourse".

In that case of ***Isidori Patrice V. Republic*** the appellant was charged and convicted with the offence of attempted rape contrary to section 132 of the Penal Code. It was alleged that on the 12th December, 1998 the appellant attempted to rape Selestina d/o Michael of Shirimatunda in Moshi District. The charge of against the appellant was drafted and coached, in the statement of the offence and the particulars of offence, in similar wording as above. When the case went for appeal to the Court of Appeal, it took the opportunity to explain the proper mode of preparing a charge of attempted rape in view of the new law following the amendment of section 132 of the Penal Code by the Sexual offences (Special Provisions) Act, No. 4 of 1998. The court stated as follows:

"This charge was framed on the model of the charges under the repealed section 132 of the Penal Code. That apart, it will be immediately realized that the particulars of the charge lack the ***basic attributes of a charge*** *for an*

offence under section 132 (1) and (2) of the Penal Code which would have reasonably informed him the nature of the case he was to answer. This is so because these particulars do not allege the specific intent of the offence that is ***an intent to procure prohibited sexual intercourse*** *nor do they allege or disclose any essential fact of the offence as specified in sub-section (2) (a), (b), (c) and (d). "*

In this case the law cited on the statement of offence ought to have been Section 132(1) and (2) (a) of the Penal code, Cap. 16 R.E.2002. In that line, the particulars of offence were supposed to include all the necessary words to show ***mens rea*** and ***actus reus***. The court therefore found that there was material defect to the charge affecting the message intended to be sent to the accused person so that he can understand the nature of offence facing him. Under these circumstances the important question is whether the defects can be cured using the provisions of section 388 of the Criminal Procedure Act, Cap. 20 R.E 2002. In that same case the court followed the decision in the case of **Mussa Mwaikunda v. Republic [2006] T.L.R.387** where it was held that that a charge which did not disclose any offence in the particulars of offence was manifestly wrong and could not be cured under section 388 of the Criminal Procedure Act.

This appeal is therefore allowed for the reason that the charge was fatally defective. The conviction is quashed and the sentence is set aside. The appellant should be released forthwith from the prison unless he is otherwise lawfully held.

T.M. MWENEMPAZI

JUDGE

15 JUNE 2018