

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA**

**[ARUSHA DISTRICT REGISTRY]  
AT ARUSHA.**

**CRIMINAL APPEAL NO. 75 OF 2019**

*(Originating from the District Court of Ngorongoro at Loliondo, Criminal  
Case No. 57 of 2018)*

**SINGIYO BUDAA THOMAS ..... APPELLANT**

***Versus***

**REPUBLIC ..... RESPONDENT**

**JUDGMENT**

*Date of Last Order: 02/04/2020*

*Date of Judgment: 12/06/2020*

**Masara, J.**

In the District Court of Ngorongoro sitting at Loliondo, the Appellant, **Singiyo Budaa Thomas**, was charged with the offence of Attempted Rape, contrary to section 132(1) and (2)(a) the Penal Code, Cap. 16 [R.E 2002]. It was alleged that on 14<sup>th</sup> December, 2018 at or about 18:00hrs at Bwelo area, Digodigo Village within Ngorongoro District, Arusha Region he unlawfully attempted to rape one HM, a girl aged 10 years. The Appellant was, after trial, convicted and sentenced to serve a custodial term of 30 years. The Appellant was aggrieved by the decision of the trial court therefore he appealed to this Court on the following grounds:

- a) That, the trial magistrate erred in law and fact in convicting the appellant basing on a defective charge sheet;*

- b) That, the trial magistrate failed miserably to look at the whole evidence as to ascertain whether there was evidence against the accused person/appellant adduced by the prosecution to warrant conviction of the appellant; and*
- c) That, the trial magistrate erred in law and fact by not complying with the provision of section 127(2) of the Evidence Act as amended by Act No. 4 of 2016.*

The Appellant therefore prays that this Court allows the appeal by quashing the conviction, set aside the sentence and let him at liberty. During the hearing of this Appeal, the Appellant appeared in person unrepresented. The Respondent was represented by Ms. Blandina Msawa, learned State Attorney. The Appellant asked the Court to consider the grounds of appeal as presented. Ms. Msawa supported the Appellant's Appeal as will be shown hereunder.

Before dealing with the substance of the appeal, it is pertinent that a brief encapsulation of the evidence tendered at the trial is made. It was the prosecution case that, on the evening of 14<sup>th</sup> December, 2018 Meriana Magania, the victim's mother, sent her daughter to fetch water at the nearby river. She later heard the victim crying for help. She went to where the alarm was coming from and, to her surprise, she saw the Appellant lying on top of the victim trying to rape her. On seeing Meriana, the Appellant ran away. Meriana then called her relative and they inspected the victim. Fortunately, she had not been raped but that they noticed men sperms outside her vagina. They took the victim to the police station and later to the hospital for examination. She was examined by PW4, Revocatus Mzee, who testified that he did not notice any bruises and that

there was no penetration of the victim's private parts. The victim, herself, stated that while on the way to fetch water she met the Appellant who grabbed her, covered her mouth with his hands and undressed her. He laid her down and tried to rape her. That the Appellant ejaculated on her thighs. She raised an alarm for help whereby her mother, Meriana, appeared. That on seeing her, the Appellant fled away.

The Appellant on his defence denied to have committed the offence he stood charged with. He admitted that on the fateful day he met the victim on the way and assisted her in carrying a bucket of water. That the victim's mother came there and upon seeing the Appellant she said that the he was trying to rape the victim.

As already shown above, Ms. Msawa did not support the trial court's decision to convict the Appellant. The learned State Attorney supported the appeal on the basis of the first ground stating that as the Appellant was charged of attempted rape contrary to section 132(1)(2)(a) of the Penal Code, the wording of the particulars of offence had shortcomings in that they did not include the word "threat" which is an important ingredient of the offence. Thus, she submitted, the Appellant was charged and convicted on a defective charge sheet. On that light, she did not see the reasons to traverse the other two grounds canvassed by the Appellant. The learned counsel, cited the Court of Appeal decision in ***Projestus Zacharia Vs. Republic***, Criminal Appeal No. 162 of 2018 which was cited in affirmation in ***Mussa Mwaikunda Vs. Republic*** [1986] TLR 378. In the latter case,

the court held that "threatening" ought to be shown failure of which section 388 of the Criminal Procedure Act could not salvage it as it prejudices the Appellant to know which offence is before him. The defects to her view make the whole trial a nullity.

I agree with the Appellant and the learned state Attorney that the Appellant was convicted on a defective charge. The Appellant was charged of Attempted Rape contrary to Section 132(1) and (2)(a) of the Penal Code, which for the purpose of clarity is reproduced hereunder:

*"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;**"*

[Emphasis supplied]

From the above provision, it is apparent that important ingredients in proving the offence of attempted rape are those provided in subsection 2 of section 132, paragraphs a, b, c and d; that is, attempt, intent to procure prohibited sexual intercourse and the use of threat. These ingredients must be reflected on the particulars of offence in the charge so as to enable the accused to prepare his defence and know the offence against him. These ingredients were canvassed by the Court of Appeal in the case of **Fred Nyenzi Vs. Republic**, Criminal Appeal No. 121 of 2016 (Unreported) while

citing with approval its previous decision in the case of ***Isidori Patrice Vs. Republic*** Criminal Appeal No. 35 of 2001 (Unreported) which held;

*"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 the instant appeal for easy of reference I will reproduce what is contained in the charge;

**"IN THE DISTRICT COURT OF NGORONGORO  
AT LOLIONDO  
REPUBLIC  
VERSUS  
SINGIYO s/o BUDAA THOMAS**

**Statement of Offence: Attempt (sic) Rape:** *Contrary to Section 132(1) and (2)(a) of the penal code cap 16 Vol 1 of the Laws [R.E 2002]*

**Particulars of the offence:** *That SINGIYO s/o BUDAA THOMAS charged on the 13<sup>th</sup> December, 2018 at about 18:00hrs at Bwelo area in Digodigo Village within Ngorongoro District Arusha Region did attempt to rape a school girl (H D/O M) (name mentioned in full) aged 10 years.*

***Dated at Loliondo this 19th day of December 2018***

***(Sgd)  
Public Prosecutor***

***Presented and filed on 19<sup>th</sup> day of December 2018  
(Sgd)  
Court Registry Officer"***

It can be rightly said, as submitted by the learned State Attorney, that the word **"threat"**, which is one of the important ingredients in the offence the Appellant stood charged was not reflected in the particulars of offence. Such defect cannot be cured under section 388 of the CPA. The Court of Appeal in the case of ***Fred Nyenzi Vs. Republic*** (supra) was faced with a charge with similar defects. It observed thus:

*"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."*

Several other decisions have amplified similar decisions. Those include: **Mussa Mwaikunda Versus Republic** (Supra), **Projestus Zacharia versus Republic** (Supra), **Alex Merdard Versus Republic, Criminal appeal No.571 of 2017** (Unreported) all to effect that such a defect is incurable as it prejudices the accused.

Since the charge against the Appellant miss the important ingredients which create the offence of attempted rape, the offence the Appellant was charged with, and since such defect cannot be cured under section 388 of the CPA, there is no doubt that the Appellant was convicted on a defective charge. Such defect is incurable as it prejudiced the Appellant. As the

foundation of any trial lies on a charge, I see no reasons to deal with the rest of the issues raised in the petition of appeal.

Consequently, the Appellant's conviction cannot be left to stand. The appeal is accordingly allowed. The conviction of the Appellant by the trial court is hereby quashed and the sentence set aside. The Appellant is to be released from custody forthwith unless he is otherwise lawfully detained for some other lawful offence.

It is so ordered.

  
Y. B. Masara

**JUDGE**

June 12, 2020

