IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
IN THE DISTRICT REGISTRY OF SHINYANGA

AT SHINYANGA

CRIMINAL APPEAL NO.23 OF 2020
(Originating from Criminal Case No. 56 of 2016 of the Kahama District Court)

MUKUNGU MAKOYE .... APPELLANT

VERSUS

THE REPUBLIC.....RESPONDENT

JUDGMENT

Date of the last Order: 13st August, 2020
Date of the Judgment: 14rd August, 2020

MKWIZU, J.:

This is an appeal arising from Criminal case No. 769 of 2016 of Kahama District Court whereby the appellant was charged with an Attempted Rape contrary to section 132 (1)(a) of the Penal Code [Cap 16 RE 2002]

Brief facts are that, on 27th November, 2016 at 17 in evening hours at Mbizi Village within Kahama District in Shinyanga Region, the appellant accompanied with his colleague who were not arrested, attempted to rape the victim who for purposes of this decision will be referred to as "MN". It

was stated that, at the material time the Appellant with his colleague met the victim, seduced her that they want to have sexual intercourse with her, she refused the proposal and started to run away in vain, appellant's friend got hold of her hand and the appellant raided her to fall down the victim and the other started to undress her clothes, they on the process, tone the victim's underpants ,fortunately, victim was rescued before the commission of the intended rape.

The appellant denied to have commit the offence. He testified that he was arrested on 30th October, 2016 for beating the victim. After a full trial, the District court found the appellant guilty of the offence of Attempted rape contrary to section 132 (1) of the Penal Code and sentenced him to 10 years imprisonment plus corporal punishment.

Aggrieved, appellant has lodged this appeal under section 362(1) and (2) of the Criminal Procedure Act Cap 20, on five grounds which sum up into three main issues that the conviction was based on the weakness of defence evidence, prosecution failed to prove the charge against the

appellant and lastly that, the appellant was not given an opportunity to cross examine prosecution witnesses.

The appellant opted to have his appeal heard and determined in his absence. By the order of the court, the respondent/ Republic, represented by Ms Immaculate Mapunda learned State Attorney filed written submissions.

Though the caption of the written submissions suggested that the written submissions are in support of the appeal, the details were to the contrary, Ms. Mapunda, submitted in opposition of the appeal. She, argued grounds 1,2 and 5 together and 3 and 4 grounds separately. Starting with the third ground of appeal, Ms Mapunda said, threatening to have sexual intercourse is among necessary ingredient for an offence of attempted rape under section 132 of the Penal Code Cap 16. Reverting to the present case, she said, there was enough evidence to prove that force was used.

Ms. Mapunda also opposed the complaint in ground four of appeal where the trial Magistrate is faulted for not allowing the Appellant to cross

examine the Prosecution witnesses, She said, appellant was afforded an opportunity to cross examine witnesses, but opted not to cross examined PW4 and PW5 She cited the case of **Edwin Thomas Paul V. Republic**, Criminal Appeal No. 130 of 2017 (Unreported) arguing that non cross examining a witness meant that appellant admitted the evidence.

On the 1, 2 and 5 grounds of appeal, Ms. Mapunda submitted that, the Prosecution through its 5 witnesses proved the case in the sense that PW1 and PW3 gave direct evidence which incriminated the appellant. She said while PW1 re accounted on what appellant did to her, PW3 evidence was to the effect that she saw appellant lying on the chest of the victim while trying to rape her. Ms. Mapunda contended that, PW1's evidence was supported by the testaments of PW2, PW3, PW4 and PW5. She on the above submissions, supported both the conviction and sentence.

Having considered the evidence on the records, the grounds of appeal and the submissions by the learned State Attorney, and before determining the appeal, the court noted that the charge sheet is defective. Appellant was charged with non-existing law. He was charged under section 132(1) of the

penal code. This issue was neither raised by the appellant in his grounds of appeal, nor addressed by the learned State Attorney. For the interest of justice, I summoned the learned State Attorney to address the court on this issue. On 13th August, 2020, the learned State Attorney, Ms. Immaculate Mapunda appeared for the respondent /Republic. Addressing the court on this point, she conceded that, the charge sheet is defective but added that it is curable under section 388 of the CPA. She, said, the particulars of the offence and the entire proceedings were clear such that the appellant was informed of the charge against him that is why he was able to defend himself when he was required to do so. Ms. Mapunda supported her argument by the case of **Elia John Vs Republic,** Criminal Appeal No. 306 of 2016. Probed by the court on whether the facts in that case and our case are similar in that the charge in the case at hand, rested on a totally non exiting law. Ms. Mapunda insisted that, provided the particulars of the offence were broadly and exhaustive enough to cover everything that made the appellant aware of the charges, it doesn't matter whether the charge cited a nonexistent law or not.

It is a fact that appellant was charged for an **Attempt Rape C/S 132 (1) (a)** of the Penal code Cap 16 (RE: 2002). I have traversed the whole of the Penal code, I have failed to find such a provision. The existing section 132 (1) does not have sub sections. And even if it is taken that the prosecutions aimed at section 132 (1) without (a), which is not the case, again, section 132 (1) is a definition section to an attempted rape. It says:

> *"132-(1) it read, Any person who attempts to commit rape commits the offence of attempt rape and except for the cases specified in sub-section (3) shall be liable upon conviction to imprisonment for life, and in any case shall be liable to imprisonment for not than thirty years with or without corporal punishment."*

It is true as submitted by the Counsel for Respondent that threatening to have sexual inter course is among the ingredient for an offence of attempt rape but it doesn't fall under the provision of the law the appellant stand charged with. The Court of Appeal in **Isidori Patrice V. The Republic** Criminal Appeal No. 224 of 2007 at page 15 the court had this to say:

"We are of the settled view that an appropriate charge against the appellant ought to have been laid under paragraph (a) of section 132 (2)

It is a mandatory statutory requirement that every charge in the subordinate court shall contain not only a statement of the specific offence with which the accused is charged but such particulars as may be necessary for giving reasonable information as to the nature of the offence charged .see section 132 of the Act it is now trite that the particulars of the charge shall disclose the essential element or ingredients of the offence. This requirement hinges on the basic rules of criminal law and evidence to the effect that the prosecution has to prove that the accused committed the actus reus of the offence charged with the necessary mens rea. Accordingly, the particulars in order to give an accused a fair trial in enabling him to prepare his difence must allege the essential facts of the offence and any intent specifically required by law. We take it as settled law also that where definition of the offence charged specifies factual circumstances without which of the offence

cannot be committed, they must be included in the particulars of the offence."

Ms. Mapunda has relied on the decision of the Court of Appeal in **Elia John** (Supra). In that case, the appellant was charged for unnatural offence under section 154 of the penal code. The charge omitted to cite subsection (1) (a) of the same section which creates the offence, relying on the case of **Jamal Ally @ Salum V, Republic,** Criminal appeal No. 52 of 2017, the Court of Appeal said, the court should go ahead into considering the particulars of the offence, the prosecution evidence as a whole and the line of defence taken by the appellant so as to determine whether the charge was not informative enough to the appellant. Frankly speaking, that decision is distinguishable, while in that case the prosecution omitted relevant subsection, in our case, the appellant was charged with non-existing provision of the law. This is a solemn mistake which if permitted, there is a danger of allowing the prosecution to ground charges on whatever provisions they wish. This would be to allow capriciousness in criminal justice. This is a criminal case, a person is charged of an offence created under the law and not otherwise. The

Mode on which the charge must be preferred is stated under section 135 (a) (ii) of the CPA which categorically states as follows:

> *"The following provisions of this section shall apply to all charges and information end, notwithstanding any rule of law or practice, a charge or an information shall, subject to the provisions of this Act not be open to objection in respect of its form or contents if it is framed in accordance with the provisions of this section*
>
> *(a)(i) A count of a charge or information shall commence with a statement of the offence charged, called the statement of the offence*
>
> *(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 end.* ***If the offence charged is one created by enactment, shall contain a reference to the section of the enactment creating the offence.*** *" [Emphasis supplied].*

The bolded expression unconditionally requires the charge sheet to contain reference to the section of the enactment which creates an offence. The provision under which the appellant in this case has been charged and prosecuted on, is not a creature of the Penal code. In the case of **Kastory Lugongo Vs Republic**, Criminal Appeal No. 251 of 2014 (unreported) the Court of Appeal observed:

> *"We are keenly aware that* ***not every defect in the charge sheet would vitiate the trial. As to the effect the defect could lead, would depend on the particular circumstances of each case the overriding consideration being whether the defect worked to prejudice the accused person****. Our particular concern here is in the reality that the appellant was arraigned under a nonexistent provision of the law. [bold is mine]*

While taking cognition of the fact that not every defect in the charge renders the proceedings a nullity, the court went ahead concluding that being charged on a non-show section of the law, the appellant was

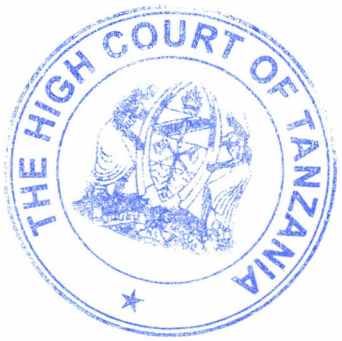
prejudiced. Equally, it cannot be said that the appellant in this case was impartially tried.

The above said, I find the charge sheet fatally defective. Trial court's proceedings are nullified for being grounded on a nullity. Conviction and the sentence are quashed and set aside. I order an immediate release of the appellant unless he is held for another lawful cause.

DATED at **SHINYANGA** this **14th** day of **AUGUST,** 2020.

E.Y.MKWIZU
JUDGE
14/08/2020

COURT: Right of appeal explained.



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JUDGE
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