IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

IRINGA DISTRICT REGISTRY

AT IRINGA

(RM) MISCELLANEOUS CRIMINAL APPEAL NO. 42 OF 2020

(Originating from Njombe Resident Magistrate Court in Criminal Case No. 93 of 2019).

DAUD KIWOVELE.....APPELLANT

VERSUS

THE REPUBLIC .....RESPONDENT

JUDGEMENT

Date of last Order: *10/11/2021*
Date of Judgement: *01/12/2021*

MLYAMBINA, J.

The Appellant Daud s/o Kiwovele was, charged of Attempted Rape contrary to *Section 132 (1) and (2)(a) of the Penal Code Cap 16 [R.E. 2002]* before the Njombe Resident Magistrate Court at Njombe. Upon trial, he was convicted and sentenced to 10 years imprisonment. Dissatisfied, he is now appealing to this Court against both conviction and sentence on the following grounds:

1. That, the Learned Trial Court erred in law and in fact by convicting the Appellant basing on evidence of tender age of PW1.
2. That, the Learned Trial Court erred in law and in fact by convicting the Appellant basing on the evidence of PW1 and PW3 which was un collaborated with any other independent evidence.
3. That, the Learned Trail Court erred in law and in fact by not taking into account that the prosecution side totally failed to bring before the

Court the essential and potential witnesses as mentioned in the list of witness (PW2, PW4 and PW5).

4. That, the evidence of PW1 was totally contradiction for what he said before the Ten Cell Leader and the evidence adduced before the Court and that given to the Police Station.
5. That, the Learned Trial Magistrate erred in law and fact by not taking into the consideration of time when the commission of the offence taken place and the time when the Appellant was apprehended. It was time bared.
6. That, the Trial Magistrate erred in law by not taking into the account the defense of the Appellant.
7. That, the Prosecution did not prove their case beyond all reasonable doubt.

Wherefore, the Appellant prayed that the decision of the Trial Court be quashed and both sentences be set aside.

The Appellant is a lay person who was unrepresented. At the hearing, the Appellant simply prayed his grounds of appeal be accepted and he be set free after conviction and sentence being nullified.

In reply, at the outset, Senior State Attorney Alex Mwita did object this appeal on account of the reason that the Appellant was charged on attempt to rape *Contrary to Section 132(1) and (2) (a)* of the *Penal Code Cap 16 [R. E. 2002] but* the sentence issued was not proper.

On the first ground, Mr. Mwita told the Court that the victim of this case was a girl of 14 years old. Before her testimony, she promised to say the truth.

The Trial Magistrate was proper in convicting the Appellant basing on the evidence of PW1. As per *Section 127 (2) of the Evidence Act Cap 6 [R.E. 2002]* as *amended by Misc. Amendment No. 2 of 2016* which amended *Section 127* and removed the test of *vore dire*. The witness of the age below 14 years can give her evidence without oath or affirmation but she must promise to say the truth. The Court can proceed to convict the accused based on that evidence.

According to Mr. Mwita, PW1 promised to say the truth. She then gave her evidence to the effect that; the Appellant closed the door and attempted to rape her. That is when she went to inform PW2. The latter is the Ten Cell Leader who corroborated the evidence of PW1 as it is reflected at page 12 of the proceedings.

On the *second ground,* Mr. Mwita admitted that there was no any other witness but in his view the evidence of PW1 and PW2 were consistent. Thus, as per *Section 132 (2) (a) –(d) of the Penal Code (supra),* the Appellant closed the door and attempted to undress her for rape. For Mr. Mwita, that was enough to prove attempted rape.

Mr. Mwita also admitted the *third ground*. That, the prosecution listed five witnesses but did not call all. He however, relied on *Section 143 of the Evidence Act (supra)* by arguing that there is no given number of witnesses required to prove a case. Thus, the Republic did not need to parade all the listed witnesses. It looked on the witnesses who could prove the case. In the case of **Yohanes Msigwa v. Republic** [1990] TLR 148, the Court stated what is required under *Section 143 of the Evidence Act (supra).*

As regards the *fourth ground*, Mr. Mwita asserted that; it is not supported with the record. There is no evidence of PW1 stated at Police and before the Ten Cell leader. There is the evidence before the Court only. Above all, the evidence of PW1 and of PW2 were corroborating each other. There is no any contradiction. This ground is an afterthought.

On the *fifth ground*, the Appellant did argue that; the Magistrate did not take into account on the time when the Commission of offence took place and the time when the Appellant was apprehended.

However, Mr. Mwita, apart from contending that the charge having unknown date is not fatal, he conceded that the charge sheet was fatal for lack of information to show when the incident was reported at police and when the accused was arrested. As such, Mr. Mwita conceded that the conviction and sentence were not proper. Hence, he prayed the appeal be upheld.

I have given consideration to both parties' arguments. It is well settled that; this Court will not interfere on an issue of defective charge if it is clear from the records of the proceedings that the accused knew what charge he was to face, was neither embarrassed nor prejudiced and there is no miscarriage of justice. In the case of **Kastory Lugongo v. The Republic**, Criminal Appeal No. 251 of 2014 (unreported), the Court held:

> *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...*

However, the charge sheet in the instant case, as admitted by the Republic, was serious defective as it lacked information to show when the incident was reported and the date of arrest of the accused. As such, the trial Court lacked jurisdiction to try the case because the process which initiated the proceedings was incompetent. The trial Court lacked jurisdiction to make an order touching on merits of the case based on serious defective charge.

Preferring the charge of Attempted Rape against the Appellant without information to show when the incident was reported at police and when the accused was arrested was thus contrary to the dictates of *Section 132 of the Criminal Procedure Act, Cap 20 [R.E. 2019]* which require every charge to specify the necessary particulars. *Section 132 (supra)* provides that:

> *Every charge or information shall contain, and shall be sufficient if it contains, a statement of the specific offence or offences with which the accused person is charged, together with such particulars as may be necessary for giving reasonable information as to the nature of the offence charged.*

Since one cannot put something on nothing, the whole trial was a nullity. [See **Oswald Abubakari Mangula v. R** [2000] TLR 271]. Indeed, in the case of **Musa Ramadhani v. R,** Criminal Appeal No. 388 of 2013, the Court held:

> *The charge sheet ought to have been framed according to the provisions of Section 135 (a) (2) of the Criminal Procedure Act. Accused being found guilty on defective*

charge....it cannot be said, that the Appellant was fairly tried in the Court below.

From the above, it goes without saying that the Appellant was prosecuted on a defective charge. In the case of **Mussa Mwaikunda v. R** (2006) TLR 387 the Court of Appeal observed that:

The principle has always been that an accused person must know the nature of the case facing him.

In **Mussa's case** (*supra*) Court took the position that such defect is not curable. I am therefore satisfied that the charge sheet being defective, the appeal should succeed.

In the circumstances, the conviction and sentence meted against the Appellant are quashed and set aside. The Appellant be released forthwith unless charged and convicted on lawful cause.

Y.J. MLYAMBINA

JUDGE

01/12/2021

Judgment pronounced and dated 1st December, 2021 before the Appellant in person and learned State Attorney Radhia Njovu for the Respondent.

Y.J. MLYAMBINA

JUDGE

01/12/2021