IN THE HIGH COURT OF TANZANIA

(MTWARA DISTRICT REGISTRY)

AT MTWARA

CRIMINAL APPEAL NO. 26 OF 2021

(Originating from Lindi District Court in Criminal Case No.46 of 2020)

SAID MOHAMED CHILEMBA..... APPELLANT

VERSUS

THE REPUBLIC..... RESPONDENT

JUDGMENT

Date of Last Order:11/4/2022
Date of Judgment: 8/6/2022

LALTAIKA, J.:

The appellant, **SAID MOHAMED CHILEMBA** was arraigned in the District Court of Lindi at Lindi charged with the offence of attempted rape contrary to section 132 (1) of the Penal Code, [Cap. 16 R.E. 2019].

The particulars of the offence are that on 10/05/2020 at Likong'o area within the Municipality and Region of Lindi, appellant did attempt to have carnal knowledge of one Somoe Juma Kambona. The trial court convicted the appellant and sentenced him to serve thirty (30) years in prison for conviction for attempted rape. Hence, this appeal to this court.

After a full trial, the the learned trial Magistrate (E.D. MASSAWE—SRM) concluded that the appellant was found guilty of the offence of attempted rape, convicted him and meted a sentence of thirty (30) years imprisonment. Aggrieved with the decision of the trial court, the appellant

has filed the petition of appeal featuring seven grounds of appeal. Later on, the appellant filed two additional grounds of appeal. The grounds of appeal which I rephrase as follows: -

1. *That the trial Magistrate erred in law and fact when he convicted the appellant without warning himself that there was big contradiction between the evidence of PW1 and PW3 to this allegation.*
2. *That the trial court erred in law and fact in convicting the appellant because the said case was false hood planted by PW1 and PW3 (the family members) PW1 told the trial court that at the fateful day she was with her young brother by he name of IKRAM.But this one was not mentioned by PW3 or called to testify as witness.*
3. *That the trial court erred in law and fact for convicting and sentencing the appellant when in her evidence nowhere in the proceedings she let her child by anyone but for his own benefits and against the law PW3 was lied before the trial court that PW1 was left her child to her mother at the river whenever PW1 was told the trial court that she was with her young brother. In fact, the trial magistrate failed to evaluate this matter in his judgment.*
4. *That the trial court erred in law and fact in convicting the appellant when the evidenve of PW2 was the hearsay evidence and PW2 was done which was not acceptable before the eyes of the law to conduct dock identification at his place against the appellant was out of the procedure.*
5. *That the trial court erred in law and fact to convict and sentence the appellant because PW1 and PW2 did not report this crime to*

the local leader or to the police station even PW2 was asked PW1 the description and the appearance of the culprit or rapist.

6. *That PW3 failed to mention the spaces between him and PW1 who had accompanied by the culprit or rapist since PW3 was behind them to identify the rapist was difficult since the face was not seen.*
7. *That the trial court erred in law and fact in convicting and sentencing the appellant while the prosecution side did not prove the case against the appellant and the trial magistrate convicted the appellant by relying on his weak defence rather than on the strength of the evidence from the prosecution side.*

As to the additional grounds: -

1. *That the trial Magistrate erred grossly in point of law in convicting and sentencing the appellant without taking into consideration that section 132 (1) of the Penal Code [Cap 16 R.E. 2019] which the appellant was charged with the offence of attempted rape. The Court of Appeal had commented on the punishment for attempted rape as just opposed to the sentence of actual rape. See the case of Kalos Punda vs Republic, Criminal Appeal No.153 of 2003.*
2. *That the trial Magistrate erred in law and facts by failing to comply with the requirement of sections 235 (1) and 312 (1) of the Criminal Procedure Act [Cap 20 R.E. 2019] when composing his judgment.*

At the hearing of this appeal on 11/4/2022, whereas Mr. Wilbroad Ndunguru appeared for respondent Republic the appellant appeared in

person, unrepresented. The appellant submitted largely on what had transpired during trial especially what PW1 testified and what he cross examined. Besides, the appellant prayed his grounds of appeal to form part of his submission. In addition, he submitted that the victim did not produce any evidence that she was treated since she claimed that her neck was strangled.

In reply, Mr. Ndunguru supported the appeal in the reason that the charge sheet is defective. In the light of that view, the learned Senior State Attorney argued that the appellant was charged with the attempted rape contrary to **section 132 (1) of the Penal Code [Cap.16 R.E. 2019].** Thus, Mr. Ndunguru stressed that the charge sheet ought to bear section 132 (1) and (2)(a) of the Penal Code. In addition, the learned Senior State Attorney submitted that the particulars of the offence missed some essential ingredients specifically as to sub section 2(a). He further stressed that section 2(a) provides that intention must be manifested by (a) threatening the girl or woman for sexual purpose the explanation which was not there. Basing on that argument the learned Senior State Attorney submitted that the charge sheet was defective.

Apart from that, Mr. Ndunguru argued that despite the presence of evidence on attempt to threaten in the proceedings was supposed first to appear in the charge sheet and late on evidence to support the charge. The learned Senior State Attorney maintained that section 132 of the CPA directs how to prepare a statement of the offence and particulars of offence. He went further and argued that the referred section provides those necessary particulars should be incorporated in the particulars of the offence. In view of that observation by Mr. Ndunguru, he thus argued that charge against the appellant is incurable under section 388 of the

CPA. To that end, the learned Senior State Attorney argued this court to allow the appellant's appeal.

In a short rejoinder, the appellant thanked the learned Senior State Attorney for his submission and further argued this court to find the trial court treated unfairly thus he is entitled for an acquittal order.

On my part, having considered the learned Senior State Attorney's submission that in line with the trial court record particularly as to the charge sheet and the evidence adduced it is quite clear that the charge arraigned against the appellant was defective. The defectiveness of the charge arises from the fact that first it has not featured subsection 2 of section 132 of the Penal Code. Second, as well argued by Mr. Ndunguru, the particulars of the offence miss important ingredients which are found under section 132 (2) of the Penal Code. For clarity, the excerpt hereinbelow is the charge brought in the trial court and arraigned against the appellant: -

> "**STATEMENT OF OFFENCE**
>
> **ATTEMPTED RAPE**, Contrary to Section 132 (1) of the Penal Code [Cap 16 R.E. 2019]
>
> **PARTICULARS OF OFFENCE**
>
> **SAID S/O MOHAMED CHILEMBA** on 10th day of May,2020 at Likong'o Area within the Municipality and Region of Lindi, did attempt to have carnal knowledge of one **SOMOE D/O JUMA KAMBONA**."

Whereas, the general provision creating the offence of attempted rape is provided under section 132 which is as follows: -

"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 the 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;

(b) being a person of authority or influence in relation to the girl or woman, applying any act of intimidation over her for sexual purposes; The Penal Code [CAP. 16 R.E. 2019].

(c) making any false representations for her for the purposes of obtaining her consent;

(d) representing himself as the husband of the girl or woman, and the girl or woman is put in a position where, but for the occurrence of anything independent of that person's will, she would be involuntarily carnally known.

(3) Where a person commits the offence of attempted rape by virtue of manifesting his intention in the manner specified in paragraph (c) or (d), he shall be

liable to imprisonment for life and in any case for imprisonment of not less than ten years.

(4) Where the offence of attempted rape is committed by a person who is of the age below eighteen years, he shall-

(a) if a first time offender, be sentenced to corporal punishment of five strokes;

(b) if a second time offender, be sentenced to a term of six months;

(c) if a third time offender or habitual offender, be sentenced to twelve months.

As the above reproduced excerpt indicates, it is clear that the charge arraigned against the appellant contained only subsection one which defines attempted rape and also provides for the sentences of attempted rape in case the accused is found guilty and convicted. Now, the issue I need to resolve before going to the grounds of appeal raised by the appellant is whether the submitted defect prejudiced the appellant to the extent that there was no fair trial.

In the present case the charge sheet did not contain subsection 2 of section 132 of the Penal Code. The subsection 2 of section 132 is so crucial since it provides various ways of how attempted rape may be committed. Indeed, subsection 2 gives us different types of ingredients which may constitute attempted rape. For clarity, under paragraph (a) attempted rape is manifested by threatening a girl or woman for procuring prohibited sexual intercourse. On the other hand, under paragraph (b) attempted rape is manifested by a person of authority or influence in relation to the girl or woman, applying any act of intimidation over her for sexual purposes.In the same domain, under paragraph (c) attempted rape is

established by making any false representations for her for the purposes of obtaining her consent and as to paragraph (d) attempted rape is manifested when a person represent himself as the husband of the girl or woman, and the girl or woman is put in a position where, but for the occurrence of anything independent of that person's will, she would be involuntarily carnally known.

In line of the above observation, the charge sheet in the impugn judgment did not feature subsection 2 of section 132 with any of the specific paragraph containing a peculiar element of attempted rape. Also, I am in agreement with the learned Senior State Attorney that the particulars of the offence have no particulars which features the ingredients of the offence specifically as provided either under paragraph (a) or (b) or (c) or (d) of subsection 2 of section 132 of the Penal Code.

Taking into consideration the above observation, I have no doubt that it cannot be gain said that the charge arraigned against the appellant under section 132(1) of the Penal Code for the purpose of providing the particulars of the offence of attempted rape generally was intended to be premised under which subsection after subsection one and also under which paragraph of either of the subsection after subsection one of section 132 (1) of the Penal Code.

Despite the fact that the evidence of PW1 and PW3 provides some elements of threat used by the appellant when wanted to procure his intention of having carnal knowledge with the victim. This evidence is not supported in the particulars of the offence as far as the charge is concerned. I wonder how the learned trial Magistrate imported in his judgment subsection 2 (a) of the section 132 of the Penal Code as seen

at page 7 of the typed judgment while the charge sheet which laid the foundation of the case had neither the specific subsection and paragraph nor particulars of the offence which provided for the facts of the use of threat or promises before the appellant attempted to rape the victim.

On the same premises, the charge sheet brought against the appellant does not show if the victim was a woman or girl. This was important in order to enable the appellant on the intensity of the punishment he would deserve when convicted and the type of the defence evidence he would have prepared. The absence of that prejudiced the appellant on the basis of lack of the fair trial which resulted into conviction and sentence meted against the appellant. To fortify this, I would like to refer to case of **Jackson Venant vs Republic**, Criminal Appeal No.188 of 2018(Criminal Appeal 118 of 2018) TZA 187 whereby the Court of Appeal stated: -

> *"We need to emphasize that, in any Criminal trial, a charge is an important aspect of the trial as it gives an opportunity to the accused to understand in his own language the allegations which are sought to be made against him by the prosecution. It is thus important that the law and the section of the law against which the offence is said to have committed must be mentioned and stated clearly in a charge. The charge therefore must tell the accused precisely and concisely as possible the offence and the matters in which he stands charged."*

Also, I am in a settled position that, the aim of citing a specific provision and featuring it in particulars of the offence in the charge is to

give an accused person reasonable information as to the nature of the offence charged. This is in accordance with sections 132 and 135 of the CPA. In addition, such information is helpful to the accused at the moment of preparing his defence. See: **Gimbu Masele & Another vs Republic**, Criminal Appeal No.491 of 2017.

Besides, I am of the firm view that the evaluated defect on the charge brought against the appellant has a defect which is incurable. I am being guided by the established principles that curability or incurability of the defective charge depends on the circumstances of each case. See: **Isidori Patrice vs The Republic,** Criminal Appeal No.224 of 2007 (unreported), **Mussa Mwaikunda vs The Republic** [2006] TLR 387 and also the case of **Joseph Paul @Miwela vs Republic,** Criminal Appeal No.379 of 2016 at Iringa (unreported).

In that regard, I do concede with the learned Senior State Attorney that the defect of the charge in the case at hand is incurable under section 388 of the Criminal Procedure Act. Now, with due respect, I see no reason to proceed determining the grounds of appeal while this issue is only capable of completely the matter at hand.

In the upshot, I do exercise my powers of revision under section 373 of the Criminal Procedure Act, [Cap 20 R.E. 2019] and nullify all the proceedings and judgment entered by the trial court and quash the conviction. I also set aside the sentence of thirty (30) years imprisonment imposed to the appellant. Since the foundation of the case namely the charge is wanting, it is not proper to make an order of retrial.

From the aforesaid reasons, I accordingly order the appellant be released from custody and set free forthwith unless he is held for some other lawful cause.

It so ordered.

E. I. LALTAIKA

JUDGE

08.06.2022

Court:

This Judgment is delivered under my hand and the seal of this Court on this 8th day of June,2022 in the presence of the Mr. Wilbroad Ndunguru, the learned Senior State Attorney and the appellant who have appeared in person and unrepresented.

E. I. LALTAIKA

JUDGE

08.06.2022