

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA  
IN THE SUB- REGISTRY OF DAR ES SALAAM**

**AT DAR ES SALAAM**

**CRIMINAL APPEAL NO. 27 OF 2022**

**ALLY MOHAMED SULE ..... APPELLANT**

***VERSUS***

**THE REPUBLIC ..... RESPONDENT**

**(Appeal from the decision of the District Court of Rufiji at Utete in  
Criminal Case No. 24 of 2021)**

**JUDGMENT**

3<sup>rd</sup> and 11<sup>th</sup> October, 2022

**KISANYA, J.:**

The appellant was arraigned with the offences of armed robbery and attempt rape. He was tried by the District Court of Rufiji sitting at Utete. Pursuant to the statement of offence, the offence of armed robbery was predicated under section 287A of the Penal Code, Cap. 16, R.E. 2019 [now, R. E. 2022], while the offence of attempt rape was preferred under section 132(1)(2)(a) of the Penal Code (supra). After the trial, the appellant was found not guilty and acquitted of the offence of armed robbery. With regard to the offence of attempt rape, he was found guilty as charged, convicted and sentenced to thirty (30) years imprisonment.

Being aggrieved, the appellant has come to this Court in search of justice. He is armed with seven grounds of appeal. For the reasons which will soon become

apparent, I find no need of reproducing the grounds of complaints registered in his petition of appeal.

The appeal was initially heard on 6<sup>th</sup> September, 2022, whereby, the appellant appeared in person, while the respondent enjoyed the services of Ms. Fidesta Uisso, learned State Attorney.

In the course of composing the judgment, I found it apt to recall the parties and probe them to address the Court on the propriety of the charge of offence of attempt rape subject to this appeal. To be specific, parties were asked to address the Court on two issues as follows: *One*, whether the particulars of the offence of attempt rape disclosed the ingredients of attempt rape and if the answer is affirmative, whether the defect is curable. *Two*, whether the charge and evidence were compatible in the manner the appellant committed the offence of attempt rape.

Given that any criminal case is founded on the charge, I propose to begin with the issues raised by the Court before considering the grounds of appeal.

Upon being invited to address the court on the foresaid issues, the appellant opted to let the learned State Attorney submit first. He reserved his right to reply after hearing the respondent's submission.

Addressing the Court on the first issue, Ms Uisso submitted that some of the ingredients of attempt rape set out by section 132(1) and (2) (a) of the Penal Code referred to in the charge sheet are “intent to procure prohibited sexual intercourse” and “threatening the girl or woman for sexual purposes”. She went on to submit that the particulars of the charge did not disclose the two ingredients. In that regard, she was of the view that the charge sheet is incurably defective on the account that the appellant was prejudiced. To support her submission, the learned State Attorney cited the cases of **Isdori Patrice vs R**, Criminal Appeal No. 224 of 2007 and **Leonard Mwanashika vs R**, Criminal Appeal No. 226 of 2014 (both unreported). With regard to the second issue, Ms. Uisso conceded that the charge and evidence were at variance.

On the foregoing reasons, she asked this Court to nullify the proceedings of the trial court, quash the judgment and set aside the sentence thereon and discharge the appellant.

Rejoining, the appellant was in agreement with the learned State Attorney. He had nothing to add.

I have dispassionately considered the submission from the learned State Attorney on the issue raised by the Court. My starting point is to revisit section 132 of the Criminal Procedure Act [Cap 20 R.E. 2022] (the CPA) which provides for the contents of the charge or information. The section reads:

*"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."*

Reading the above cited provision together with section 13(a) (ii) (a) (ii) of the CPA, it is clear that the particulars of the offence of the charge or information must be given in ordinary language and state all the essential ingredients establishing the offence. This requirement aims, *inter alia*, at according the accused a fair trial and enabling him to prepare his defence. It also requires the prosecution to prove the offence. See the case of **Isdori Pastory** (supra) where it was held that:-

*"It is now trite law that the particulars of the charge shall disclose the essential elements 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 the accused a fair trial in enabling him to prepare his defence, must allege the essential facts of the offence and any intent specifically required by law.*

Given that the appellant was charged under section 132(1) (2) (a) of the Penal Code, I agree with Ms. Uisso one of the ingredients of attempt rape in the

case at hand were intent to procure prohibited sexual intercourse and threatening the girl or woman for sexual purposes. Therefore, the facts disclosing the said ingredients ought to have been stated in the charge sheet.

In the present case, the particulars of offence of attempt rape preferred against the appellant read as follows:-

*"Ally s/o Mohamed Sule on 2<sup>nd</sup> day of March, 2021 at Mloka Village within Rufiji District in Coast Region did attempt to rape HAPINESS MANYAMA by use of violence and threatened to injure her by using knife"*

As it can be glanced from the above particulars of the charge, it was alleged that the appellant did attempt to rape the victim by use of violence and that the appellant threatened to injure the appellant by using a knife. As rightly observed by Ms. Uisso, the particulars as to intent to procure prohibited sexual intercourse are missing. As if that was not enough, it was not stated whether the appellant threatened the victim for sexual purpose. In the circumstances, the charge is defective for failure to disclose two ingredients of attempt rape. Being guided by the settled law, the said omission is fatal for being prejudicial to the appellant. It cannot be cured under section 388 of the CPA as held in the case of **Isdori Patrice** (supra) that:-

*"The next crucial issue now becomes, what should be the fate of this appeal. In Mwaikunda's case (supra), the Court*

*followed the path taken in the case of **Uganda v Hadi Jamal** [1964] E.A. 294. In this latter case it was held that a charge which did not disclose any offence in the particulars of offence was manifestly wrong and could not be cured under section 341 of the Criminal Procedure Code (the equivalent of our section 388 of the Act). We are decidedly of the same view in this case. The charge was fatally defective."*

In the light of the foregoing position of law, this Court finds the proceedings of the trial court a nullity. In the result, the judgment and sentence made on the nullified proceedings cannot be allowed to stand.

In the event, this Court employs its revisional powers under section 372 and 372 of the CPA and proceed to nullify the proceedings and judgments of the trial court, quash the conviction and set aside the sentence meted upon the appellant. As the State Attorney conceded that the evidence adduced was at variance with the charge, the Court orders that the appellant be released from prison unless he is otherwise confined there for other lawful cause.

DATED at DAR ES SALAAM this 11<sup>th</sup> day of October, 2022.



S.E. Kisanya  
JUDGE  
11/10/2022

