IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

MUSOMA SUB REGISTRY

AT MUSOMA

CRIMINAL APPEAL NO 84 OF 2021

(Arising from Serengeti District Court at Mugumu in Criminal Case No 273 of 2020)

JUSTINE S/O GESABO @ SIAMBAHI..... APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

JUDGMENT

10th FEB. & 14th FEB, 2022.

BEFORE F.H. MAHIMBALI, J

The appellant Justine Gesabo Siambahi has been aggrieved by the decision of the trial court (Serengeti District Court) in which convicted and sentenced him to serve a custodial sentence of 30 years for the offence of attempted rape contrary to section 132(1) of the Penal code. The particulars of the offence state that Justine s/o Gesabo Siambahi on 8th July 2020 at Machochwe village within Serengeti District in Mara Region, did attempt to have sexual intercourse with one XY (name withheld to disguise her identity), a girl of 11 years old.

The facts of the case can be summarized as follows; The appellant and the victim (PW2) are father and daughter respectively. It has been alleged by the prosecution that on the 8th July, 2020 while at his home Machochwe village within Serengeti district in Mara Region, the appellant attempted to have sexual intercourse with his own biological daughter (PW2), a girl of 11 years. As the victim girl was asleep (at night), the father (appellant), sneaked into the room in which the victim had slept. No sooner had he undressed her underpants and put her legs aside in the final preparation of inserting his penis into the vagina of his own daughter than when the said daughter got up from asleep and noted that her own dad was about to have sexual intercourse with her. She raised an alarm where her siblings (PW3 and PW4) got up, and she told them what happened to her. They were flabbergasted. When they went to knock the door of their dad, he neither responded nor opened the door. The incident was then reported to their mother (PW1 - who is also the wife to the appellant) upon her return home on 25th July, 2020 from Hospital – Musoma where she was attending her son who was admitted there for some weeks. Puzzled with the sad news, she first inquired about it from her husband (the appellant)

who just remained silent before she reported the matter to the police where this case then got its genesis.

Upon hearing of the case, the trial court having been satisfied with the evidence by the prosecution side, convicted the appellant and consequently sentenced him to 30 years imprisonment. Aggrieved by both conviction and sentence, the appellant has preferred a total of five grounds of appeal which in digest, all boil into one main ground that the case at the trial court was not proved beyond reasonable doubt. Thus, this appeal.

During the hearing of the appeal, the appellant who appeared in person, had nothing valuable to argue but just prayed that his grounds of appeal dully filed in court be adopted by the Court and that this Court upon full digest of the said grounds as filed, should allow his appeal and acquit him from the charges as it is a fabricated case put against him by his own wife following a matrimonial conflict surfacing their marriage.

On the other hand, the respondent – Republic which was dully represented by Mr. Malekela, learned state attorney conceded to the appeal but basing on defectiveness of the charge sheet.

He submitted that, according to the preferred charging section which is section 132(1) of the Penal Code, Cap 16 R.E 2019, the charging was not complete for an offence of attempted rape to stand. He clarified that an offence of attempted rape is only complete when is charged in full i.e section 132(1) and (2) of the Penal Code. Supporting his position, he referred this Court to the decision of the Court of Appeal in the case of **Isidori Patrice V. Republic**, Criminal Appeal No. 224 of 2007. That unfortunately, in this appeal, the charge falls under section 132 (1) only of the penal code. Thus, it was a defective charge and that it amounted to unfair trial to the appellant.

As what is the legal remedy to this anomaly, Mr. Malekela was of the firm view that as per section 388 of the CPA, the defect is legally incurable. In that stance, he submitted that the appellant was not properly charged before the trial court, thus wrongly convicted and sentenced. He therefore, urged this Court to allow the appeal, quash conviction and set aside the sentence. That was all about the appeal case.

In determining this appeal, the vital question is whether the appeal is meritorious as submitted. For purposes of understanding, I will reproduce the charging section as appearing in the trial court record.

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.

I agree with Mr. Malekela, learned state attorney, that as charged by the prosecution at the trial court, the appellant was not legally charged with the offence of attempted rape as alleged. The wording of the charging section, only establishes the general punishment for attempted rape offence and not particulars of rape as per current law (a charging section). The prosecution was therefore duty bound to prefer a proper charge stating the particulars of the charged offence clearly as per law.

The Penal Code on attempted rape provides as follows:

132 (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 inrelation to the girl or woman, applying any act of intimidation over her for sexual purposes;

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.

In my considered view, the Prosecution was supposed to charge the appellant under both proviso of section 132 i.e 132(1) and (2) of the Penal Code while also citing a proper sub section thereof (between "a" and "d") stating the appropriate particulars of the said offence, which is lacking in this case. In the case of **Isidori Patrice V. Rep,** Criminal Appeal no. 224 of 2007, Court of Appeal while making reference, to the case of Musa **Mwaikunda V. R,** Criminal Appeal no.174 of 2006 directed as follows:

"... *It is interesting to note here that in the above charge sheet the particulars or statement of offence did not allege anything on threatening which is the catchword in the paragraph. The principle has always been that an accused person must know the nature of the case facing him. This can be achieved if a*

charge discloses the essential elements of an offence. Bearing this in mind the charge in the instant case ought to have disclosed the aspect of threatening which is an essential element under paragraph (a) above. In the absence of disclosure it occurs to us that the nature of the case facing the appelant was not adequately disclosed to him. The charge was, therefore, defective in our view."

In totality of the prosecution's case at the trial court, neither the particulars of the said offence have been stated nor the appropriate charging section have been preferred.

As what is the way forward following the charge sheet being defective, the Court of Appeal in the same case of **Isidori Patrice V. Rep** (Supra), held that:

"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".

Apart from this legal anomaly conceded by the Republic – Respondent which has a decisive effect of this appeal, before I pen off, just for legal knowledge, the trial court appears to have not strictly complied with what is provided by law under section 127(2) of the Tanzania Evidence Act, Cap 6 on the reception of evidence of a witness who is of tender age. The trial court's records do not exhibit what was the promise of telling the truth before the court by the said PW2 (a child, witness of 11years). What is vivid is the remark of the trial court that the PW2 (Child witness of tender age) has promised to tell the truth. The law requires a statement of a promise by the said witness tender age and not the remark of the trial court. For easy of reference, the said provision is hereby reproduced;

> " *127(2). A child of tender age may give evidence without taking an oath or making an affirmation but shall, before giving evidence, promise to tell the truth to the court and not to tell any lies".*

The proper interpretation of that section was once given by the Court of Appeal in the case of **Selemani Moses Sotel @ White V. Republic**, Criminal Appeal No. 385 of 2018, while making reference the case of **Godfrey Wilson V. Republic,** Criminal Appeal No. 168 of 2018. It stated

that it is clear from the amendment to s. 127 of the Evidence Act that the purpose was to do away with the old procedure of conducting voiredire examination on the child witness. That procedure was intended to ascertain first, whether the child understands the nature of oath and whether or not he or she has sufficient intelligence to justify reception of the evidence of a child witness. Obviously, the provision is silent on the procedure which a trial court should apply to decide whether a child witness should give evidence on oath or affirmation or upon a promise to tell the truth and on undertaking not to tell lies. Addressing that lacuna, the Court had this to say while making reference to the case of **Godfrey Wilson V. Republic**, Criminal Appeal No. 168 of 2018

> "*The question, however, would be on how to reach at that stage. We think, the trial magistrate or judge can ask the witness of a tender age such simplified questions which may not be exhaustive depending on the circumstances of the case as follows:*

1. *The age of the child.*
2. *The religion which the child professes and whether she/he understands the nature of oath.*

3. *Whether or not **the child promises** to tell the truth and not to tell lies."*

This then ought to have been considered by the trial magistrate when receiving the evidence of a child of tender age as witness. In the current case, the said simplified questions leading to the promise of telling the truth do not appear in the proceedings. What is evident is just a remark by the trial magistrate that the child witness promised to tell the truth. How has she promised telling the said truth is what is missing in the record. That said, there was no legal promise by the said child witness. Her evidence has not qualified for the reception as it was irregularly received. It ought to have been discarded.

All said and done, I allow this appeal for the reasons given, quash the conviction and set aside the sentence. The appellant should be released forthwith from prison unless he is otherwise lawfully held.

DATED at MUSOMA this 14th day of February, 2022.

F.H. Mahimbali

Judge

14/02/2022

Court: Judgment delivered this 14th day of February, 2022 in the presence of Malekela, state attorney for the respondent and Mr. Mugoa – RMA, the appellant being absent.

Right of appeal is explained.

F.H. Mahimbali

Judge

14/02/2022