

**IN THE HIGH COURT OF TANZANIA**  
**(DAR ES SALAAM SUB DISTRICT REGISTRY)**  
**AT DAR ES SALAAM**  
**CRIMINAL APPEAL NO 120 OF 2022**

(Originating from Criminal Case No 51 of 2020 of Mkuranga District Court at Mkuranga  
before Hon. H.I. Mwilolo – RM dated 30<sup>th</sup> July 2020)

**OMARY ALLY HEMED.....APPELLANT**

**VERSUS**

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

**JUDGMENT**

*Date of last Order: 21<sup>st</sup> February 2022*

*Date of Judgment: 24<sup>th</sup> February 2023.*

**E.E. KAKOLAKI, J.**

Before the District Court of Mkuranga sitting at Mkuranga, the appellant Omary Ally @ Hemed was arraigned for one count of **Attempted Rape**; contrary to section 132 (1) of the Penal Code, [Cap 16 R.E 2019] (Now R.E 2022). The accusation against the appellant was to the effect that, on 16<sup>th</sup> day of October 2019 at about 10:00hrs at Kiparanganda B village within Mkuranga District in Coast Region, he attempted to rape the victim, a school girl aged 5 years, who for the purpose of this appeal will be referred as “NP”.

Facts of this case in brief goes thus, on 16<sup>th</sup> October 2019, while on the way to school, NP met the appellant who gave her a ride on his bicycle, before

he unexpectedly stopped nearby bushes and threatened her with a knife not to raise any alarm in which NP stopped crying. The appellant stripped off her skirts while removed his penis from his trouser and rubbing it on the victim's thighs. The victim started crying and two people (PW2 and PW3) came to her rescue before the appellant attempted to run but couldn't make it, as he was arrested by the said two people who took him to the victim's school where the police went to re-arrest him interrogated him and caused his arraignment before the trial Court.

When called to enter plea the appellant flatly denied the charge, the fact which prompted the prosecution to parade five (5) witnesses to prove their case, while defendant fended for himself. After a full trial was conducted, the trial court was convinced that, the prosecution case was proved to the hilt, thus convicted the appellant as charged and accordingly awarded him a prison term of 30 years. Irritated with conviction and sentence, the appellant lodged this appeal equipped with five (5) grounds of grievances which can be paraphrased as follows:

1. That there was variance of dates between the date of interrogation which is 17/10/2019 and the date allegedly to be arraigned before the court on 12/02/2019

2. Failure of the trial Court to consider defence evidence.
3. Failure of prosecution to call medical expert to prove there was penetration.
4. Conviction based on contradictory evidence of PW1 and PW2.
5. That appellant's case was not proved to the hilt.

Basing on those grounds, the appellant is praying this court to quash his conviction, set aside the sentence of the trial court and set him at liberty.

On the date fixed for hearing, appellant appeared in person unrepresented, while the respondent enjoyed the services of Ms. Rose Ishabakaki, learned State Attorney. In addressing the grounds of appeal, the appellant being a lay person invited this Court to consider his grounds of appeal as were self-elaborative and allow the appeal by quashing the conviction and set aside the sentence meted on him. On her side, Ms. Ishabakaki supported the conviction and sentence while submitting on each and every ground of appeal.

In determining this appeal and before composing the judgment, this Court chose to deal first with the fifth ground of appeal in which the appellant is faulting the trial court for convicting him in a case which was not proved to

the required standards. And in so doing though not raised as one of the grounds of appeal, the Court suo motu raised and wanted to satisfy itself as to the competence of the charge sheet, whether the same sufficiently disclosed the offence against the appellant to require him enter defence and warrant his conviction. To respond to that issue, parties were on 21/02/2023 summoned to appear and address the court on that issue in which the appellant like before appeared in person while the respondent represented by Ms. Elizabeth Olomi, learned State Attorney.

It was Ms. Olomi who took the floor first and said, having revisited the charge sheet, she noted some missing ingredients of the offence as provided under section 132 (1) and (2) (a)-(d) of the Penal Code, [Cap. 16 .E 2022]. According to her, the missing ingredients are the words "*prohibited sexual intercourse*", and that it was not indicated whether the victim was threatened or not by the appellant. She admitted that, the particulars of the offence were not sufficiently disclosed to inform the appellant of the nature of the offence for him to prepare his defence. To buttress her point, Ms Olomi cited to the Court the case of **Isidori Patrice Vs. R**, Criminal Appeal No 224 of 2007 (CAT) at page 14, where the Court of Appeal observed that, where the definition of the offence specifies factual circumstances without which the

offence cannot be committed, the same must be included in the particulars of the offence. She was of the view therefore that, in this case since particulars of the offence missed some important words like *intent to procure prohibited sexual intercourse*, the charge was rendered defective.

Ms. Olomi went on arguing that, having gone through the evidence of PW1 and PW2, as reflected at page 7 and 9 of the proceedings, the same do not prove the offence of attempted rape, but rather the offence of Grave Sexual Abuse in which the appellant was not charged with. In her view, since that offence is cognate offence to attempted rape, this Court acting under section 300 (2) of CPA, be pleased to convict the appellant with lesser offence of Grave Sexual Abuse. She went on submitting that, under section 366 (1) (a) (ii) of the CPA, this Court can interfere with the lower court's findings /conviction and substitute it with the offence of Grave Sexual Abuse; contrary to section 138 C (1) (a) of the Penal Code [Cap. 16 R.E 2022], and so implored the Court to do. On the other hand, the appellant being a lay person had nothing useful to submit rather than praying the court to allow his appeal.

I have dispassionately considered and weighed the submission by the learned state attorney in relation to the issue under discussion on the

defectiveness of the charge sheet and its effect towards appellant's conviction. It is a settled principle that, charge is a foundation of a criminal trial thus, a Court of law should satisfy itself that it is drawn in compliance with the law before admitting it from the prosecution. Further, the law under section 132 of the Criminal Procedure Act, [Cap. 20 R.E 2022] (the CPA) is instructive on how charge sheet should be drawn together with its contents. Section 132 of CPA provides thus:

*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.*** (Emphasis supplied).

It is apparent to this Court that, the provisions of section 132 of the CPA provides for the mandatory requirement that, the offence with which the accused person is being charged with, must be specified in the charge or information, together with such particulars as may be necessary to provide him with reasonable information regarding the nature of the offence he is facing. It is so as the principle is that, the accused has to sufficiently be informed of his accusations before he is called to enter his defence for him

to be in a position to adequately devise his defence, hence a fair trial. In similar vein, disclosure of necessary ingredients of the offence entitles the trial Court satisfy itself to whether the offence before the accused's door has been proved by the prosecution beyond reasonable doubt, before entering conviction against him. This sound principle of law was articulated by the Court of Appeal in the case of **Isidori Patrice** (supra) where the Court held that:

*It is a mandatory statutory requirement that every charge in a 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...** 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 with the necessary mensrea. 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.*

It is uncontroverted fact that in this appeal, appellant was charged with the offence of attempted rape contrary to section 132 (1) of the Penal Code, [Cap. 16 R.E 2002] (now R.E 2022). For easy reference I find it pertinent to reproduce the material part of the said charge sheet:

*REPUBLIC*

*VS*

*OMARY ALLY HEMED*

***CHARGE***

***STATEMENT OF THE OFFENCE***

***Attempted Rape: C/S 132 (1) of the Penal Code Cap 16 [R.E 2002]***

***PARTICULARS OF THE OFFENCE***

*That OMARY ALLY HEMED charged on 16<sup>th</sup> day of October 2019 at about 10:00 hrs. at Kiparanganda B village within Mkuranga District in Coast Region willfully and unlawfully did attempt to rape one NP a school girl aged 5 years.*

From the above excerpt of the charge sheet, it is apparent that the charge is in contravention of section 132 which makes it mandatory that, apart from stating the statement of specific offence, particulars necessary for giving reasonable information as to the nature of the offence charged must be



disclosed too. I so view as particulars of offence therein does not disclose specific appellant's alleged intent, that, he intended to procure prohibited sexual intercourse and how did he manifest his intention as specified in subsection 2 (a), (b) (c) and (d) of section 132 of the Penal Code, as it was emphasized in the case of **Isidory Patrice** (Supra) where the Court to Appeal observed that:

*"...in a charge under 132 (1) and (2) of the Penal Code, the factual circumstances which of necessity must be stated in the charge are those specified in paragraph (a), (b), (c) and (d) of subsection (2) in addition to the mentioned specific intent to procure prohibited sexual intercourse".*

The Court went on and further stated that:

*"A charge which did not disclose any offence in the particulars is manifestly wrong and cannot be cured under section 388 (1) of the CPA".*

Similar stance was taken by the Court of Appeal in the case of **Fred s/o Nyenzi Vs. Republic**, Criminal Appeal No. 121 of 2016.

In the present appeal, as demonstrated above and rightly submitted by Ms. Olomi, the charge sheet did not disclose some essential ingredients of the offence, sufficient enough to call the appellant to enter his defence and

entitle the trial Court to base conviction on it. I therefore find the charge of Attempted Rape laid against the appellant was patently defective, thus appellant's conviction on it could not stand. The appeal is therefore allowed.

The follow up question is what remedy the appellant is entitled to under the circumstances. Ms. Olomi impressively invited this court to invoke its powers under section 366 (1) (a) (ii) of the CPA, and apply the provisions of section 300 (2) of CPA, to substitute the offence of Attempted Rape with the offence of Grave Sexual Abuse; contrary to section 138 C (1) (a) of the Penal Code [Cap 16 R.E 2022], since the prosecution evidence of PW1 and PW2 on record proves that offence and not Attempted Rape.

With due respect to Ms. Olomi, I am not prepared to heed to her prayers since as earlier on stated, the charge sheet was fatally defective hence cannot be cured under section 388 (1) of the CPA, as it is as good as there was no charge at all against the appellant. I do not therefore find legal basis for convicting appellant with an alternative offence basing on the defective charge.

Consequently, I proceed to quash the conviction and set aside the sentence meted on the appellant. I order his immediate release from prison unless otherwise lawful held.

It is so ordered

Dated at Dar es Salaam this 24<sup>th</sup> February, 2023.



E. E. KAKOLAKI

**JUDGE**

24/02/2023.

The Judgment has been delivered at Dar es Salaam today 24<sup>th</sup> day of February, 2023 in the presence of the appellant in person, Ms. Fidesta Uiso, State Attorney for the respondent and Ms. Tumaini Kisanga, Court clerk.

Right of Appeal explained.



E. E. KAKOLAKI

**JUDGE**

24/02/2023.

