IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

ARUSHA SUB- REGISTRY

AT ARUSHA

CRIMINAL APPEAL NO. 92 OF 2022

(Originating from the decision of the District Court of Babati at Babati in Criminal case No. 57 of 2022)

TIOFIL FAUSTINE ..... APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

JUDGMENT

09th March & 27th April 2023

KAMUZORA, J.

The Appellant herein is challenging the conviction and sentence of 30 years imprisonment imposed to him by the District Court of Babati at Babati (the trial Court). The Appellant stood charged for the offence of attempt Rape Contrary to section 132 (1) of the Penal Code Cap. 16 R.E 2019. The incident took place on 13th day of March 2022 at Dareda Village within Babati District in Manyara Region. The Appellant was arrested following an allegation that he attempted to rape a girl aged 16 years. The trial court found the Appellant guilty of the offence and

convicted him as above stated. Being aggrieved, the Appellant brought the present appeal on the following grounds: -

1) *That, the trial Magistrate grossly erred in law by convicting and sentencing the Appellant basing on defective charge sheet.*
2) *That, the trial Magistrate grossly erred in law and facts by convicting and sentencing the Appellant while the prosecution side did not prove the ingredient of the offence of attempt rape.*
3) *That, the trial Magistrate grossly erred in law and facts by convicting and sentencing the Appellant while the charge sheet did not disclose whether the Appellant had intended to procure the prohibited sexual intercourse with such victim girl or whether such intention was manifested by threat against the girl by the Appellant for purpose of sexual intercourse.*
4) *That, the trial Magistrate grossly erred in law and facts by convicting and sentencing the Appellant while the prosecution side did not prove its case to the required standard.*
5) *That, the trial Magistrate grossly erred in law and facts by convicting and sentencing the Appellant basing on the weakness of defence side rather than the strength of prosecution side.*
6) *That, the trial Magistrate grossly erred in law and facts by convicting and sentencing the Appellant considering the evidence of PW1 (the victim) who claimed that she was raped while PW2, PW3, PW4 and PW5 claimed that the Appellant attempted to rape the victim.*

7) *That, the trial Magistrate grossly erred in law and facts by convicting and sentencing the Appellant in considering the evidence of PW2 who did not recognize the Appellant's face.*
8) *That, the trial Magistrate grossly erred in law and facts by convicting and sentencing the Appellant in considering the evidence of PW4 with no descriptions on clothes worn and without proof of the distance between the Appellant and the victim.*
9) *That, the trial Magistrate grossly erred in law and facts by convicting and sentencing the Appellant while the Appellant was not given an opportunity to cross-examine prosecution witness.*

During hearing of this appeal which proceeded orally, the Appellant was dully represented by Mr Imran Juma, learned advocate while the Ms. Riziki Mahanyu, learned State Attorney appeared for the Respondent, the Republic. Mr. Juma submitted for the 1st ground of appeal and abandoned the rest of the grounds; 2, 3, 4, 5, 6, 7, 8 and 9.

Referring first page of the judgment Mr. Juma submitted that the Appellant was charged with two counts, attempt rape contrary to section 132(1) of the Penal code and threatening violence contrary to section 89(2) (a) of the Penal Code. He contended that, the charge was defective for failure to cite proper enabling provision for offence of attempt rape. That, section 132(1) only prescribe punishment for the

offence of attempt rape but does not prescribe the ingredients of the offence of attempt rape. That, the proper provision for the offence of attempt rape is section 131(1) (2) of the Penal Code. That, under section 131(2) there are four elements of the offence and the Appellant had no opportunity to understand the elements of the offence he was charged with. He contended that, such defect contravened the provision of section 132 of the CPA Cap 20 which requires a charge to contain important information regarding the offence to which the accused is charged. To cement on this, he cited the cases of **Anathe Paulo and others Vs. Republic,** Criminal Appeal No. 119 of 2020 (Unreported), **Mathayo Kingu Vs. Republic**, Criminal Appeal no 589 of 2015 (Unreported) and **Riziki Damas Vs. Republic**, Criminal Appeal No 75 of 2011(Unreported).

Mr. Juma went on and submitted that, the law requires the particulars of the charge to disclose the essential elements or ingredients of the offence and the requirement is a basic rule of criminal law and evidence. That, the charge sheet discloses no offence known in our law and in lieu of the legal principle stated above he was of the view that the charge sheet is incurably defective. He therefore prays that the

appeal be allowed and the judgment of the trial court be quashed and set aside.

In response Ms. Riziki, learned State Attorney supported conviction and sentence passed against the Appellant by the trial court. She also informed the court that they made follow up but were unable to obtain the chargesheet in the court file hence her submission on the charge sheet was based on the facts obtained from the first page of the trial court's judgment. Opposing the appeal, the learned State Attorney submitted that the Appellant was charged for attempt rape contrary to section 132(1) of the Penal Code Cap 16 R.E 2019 and in alternative, he was charged for the threatening violence contrary to section 89(2) (a) of the Penal Code.

The learned State Attorney conceded to the fact that the offence of rape is found under section 132(1) (2) of the Penal Code. She however argued that failure to cite subsection 2(a) in the charge sheet did not prejudice the Appellant as he was made to understand the offence, the date and place the offence was committed. That, the ingredients of the offence of attempt rape were met in this case and the Appellant threatened the victim with the intention of raping her. That, the Appellant well understood the offence and he was able to raise his

defence and while the victim was testifying, he cross examined her meaning that he agreed to what the victim testified. She added that the defect can be cured under section 388 (1) of the CPA. To support this, she cited the case of **Jamal Ally Salumu Vs. Republic**, Criminal Appeal No 52 of 2017 CAT. She prays the appeal to be dismissed and the Appellant to save the sentence.

In a brief rejoinder, Mr. Juma argued that a charge sheet is the only document that can inform the accused of the offence he is charged with. He maintained that, failure to cite proper provision for the offence of attempt rape prejudiced the Appellant and denied him a right to make sound defence. He was of the view that the defect cannot be cured by section 388 of the CPA. To buttress his submission, he cited the case of **Mussa Mwaipunda Vs. Republic** [2006] TLR 38.

I have considered the record of the trial court, the ground of appeal and the submission by the parties. It is prudent to point out that the charge sheet was not found in the trial court record. The parties were also asked to submit copy from their records but neither of them has a copy. Parties' submissions in relation to the charge sheet was based on facts garnered from the trial court's judgment. The fact that the charge sheet is not on record does not mean that the Appellant was not

charged and or convicted. The trial court proceedings on 19/04/2022 indicate that the charge was read over and explained to the accused (Appellant herein) who pleaded thereto. Before the Preliminary hearing was conducted, the charge was read again to the Appellant. All parties to the present appeal parties are in agreement that there was a charge that was laid against the Appellant. The facts gathered from the trial court judgment reveals that the Appellant was charged for the offence of attempt rape contrary to section 132 (1) of the Penal Code and in alternative, the offence of threatening violence contrary to section 89 (2)(a) of the Penal Code. Section 132 (1) reads: -

> *"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."*

From the wording of the above provision, it is clear that the section does not introduce elements of the offence of attempt rape rather it prescribes punishment for the person convicted for the offence of rape. Elements of the offence of attempted rape are found under subsection 2 (a) of section 132 of the Penal Code. The said provision read: -

*"**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;"

From the facts gathered, subsection 2 was not referred as charging provision. The question is whether non-citation of subsection 2 which introduces the elements of the offence of attemp rape was fatal.

This court is mindful of section 135 (a) (ii) of the CPA which requires the statement of offence to have a correct reference of the section which creates a particular offence. The said section provides as follows:

"135 (a)(ii) the statement of offence shall describe the offence shortly in ordinary language avoiding as far as possible the use of technical terms and without necessarily stating all the essential elements of the offence and, ***if the offence charged is one created by enactment, shall contain reference to the section of the enactment creating the offence."*** [Emphasis provided]

There is no doubt that the charge in this case did not refer the subsection creating the offence of attempt rape. The Appellant claimed that he was prejudiced for being charged under the section which does

not introduce the offence of attempt rape. But the Respondent was of the view that the defect is curable under section 388 of the CPA.

It is trite law that burden of proof in criminal cases lies on the prosecution to prove the case beyond reasonable doubt. For one to conclude that an offence was proved beyond reasonable, the accused must be properly aligned before the court of law. A charge is an important aspect in trial as it tells the accused precisely and concisely the offence he stands charged. Section 132 of the CPA requires a charge sheet to contain a statement of 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.

This court is much aware of the principle that a defective charge may be cured as long as the accused person is not prejudiced or embarrassed in his defence or it does not otherwise occasion to failure of justice. See the case of **R Vs. Ngidipe Bin Kapirama & others** (1939) 6 E.A CA 118 which was cited in approval in the case of **Omary Abdallah @ Mbwanagwa Vs. The Republic**, Criminal Appeal No 127 of 2017 CAT at Mwanza (Unreported).

In the matter at hand, the issue is whether non-citation of the subsection introducing elements of offence of attempt rape occasioned to failure of justice. In order to respond to that, it is prudent to assess if the particulars of offence were sufficient to make the accused understand the nature of the offence that faced him and the ingredients of such offence that could have enabled him prepare a sound defence and achieve a fair trial. In doing so I gathered the particulars from the trial court judgment as well as the facts during preliminary hearing. At page 3 of the trial court's proceedings item 5 of the Preliminary hearing read: -

> *"The accused did sit on top of her and threat her with the words that, Nilikuwa nakutafuta sikupati. Leo nimekupata nitakuchinja kama kuku. Nilikuwa nakuongelesha hunisikiagi. Leo nimekupata vizuri, Others he started to undress her clothes, which was skirt and gens trouser."*

The above quoted words were captured by the trial magistrate at page 1 of the judgment and they were considered as facts forming the offence of attempt rape. In my view, the above words are not precise facts which constitute the offence of attempt rape.

There is no connection of the words uttered with the *mens rea* of the offence of attempt rape and they give more than one suggestion. The act of the Appellant to sit on top of the victim does not relate with the uttered words to suggest that such siting was intended for nothing else except rape. The facts suggested that the appellant undressed the victim's clothes but we do not see fact suggesting that the appellant also undressed his own closes and tried to penetrate the victim.

That being pointed out, it is my firm stand that the defectiveness of the charge in this case is not curable under section 388(1) of the CPA. The circumstances of this case raise doubt if the Appellant was made aware of the particulars and seriousness of the offence against him for him to prepare a sound defence. The Appellant was even unable to cross examine any of the prosecution witnesses and he only raised a general defence of alibi.

Again, the victim's evidence contradicts the charge in relation to alternative count of threatening violence. Her testimony did not disclose if the Appellant uttered the above quoted words captured in the charge and the facts of the case. Thus, the alternative count of threatening violence was also not proved.

In the final analysis, it is my considered view that the defect in the charge in the present case occasioned to failure of justice. In the case of **Alex Medard Vs. The Republic,** Criminal Appeal No 571 of 2017 CAT at Bukoba (Unreported) it was held that,

> *" .... since the charge was not clear to him for being defective, it cannot be said he was fairly tried. Definitely, he might have been prejudiced. Consequently, since the Appellant was charged with the charge which was incurably defective, it renders the whole proceedings and judgment nullity.*

Subscribing to the position above, I hereby nullify the whole proceedings, judgment, conviction and sentence imposed to the Appellant by the trial court. I however hesitate from making order for retrial because I did not find water tight evidence that could entail this court to give such order. I therefore find merit in this appeal and order immediate release of the Appellant from prison unless lawfully held for any other valid cause.

Appeal allowed.

DATED at **ARUSHA** this 27th day of April, 2023

D.C. KAMUZORA

JUDGE