IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

DAR ES SALAAM SUB-REGISTRY

AT DAR ES SALAAM

CRIMINAL APPEAL NO. 154 OF 2022

(Appeal from the decision of the District Court of Mkuranga at Mkuranga in Criminal Case No. 120 of 2020 dated 23/02/2021 as per Hon.H.I.Mwailolo RM)

MALIMI GAMBO@ LUHEBEZE..............................APPELLANT

VERSUS

THE REPUBLIC...RESPONDENT

JUDGMENT

Date of last Order: 25/10/2023

Date of Judgment: 03/11/ 2023

HON.GONZI,J.;

In the District Court of Mkuranga, the Appellant was charged with the offence of rape. The relevant part of the charge laid at the door of the Appellant is reproduced verbatim and it reads:

"STATEMENT OF THE OFFENCE

RAPE: C/S 130(1)(2)(a) of The Penal Code (Cap 16 RE 2002).

PARTICULARS OF THE OFFENCE

That **MALIMI GAMBO LUHEBEZI** charged on **31st day of May 2020** at about 1:00hrs Nyanzole - Kisegese Village within the Mkuranga District in Coast Region did have sexual intercourse with one **JJ** 20 years."

(The true name of the victim is withheld by the Court for preserving her dignity)

According to the proceedings and Judgment of the District Court, on 5th June 2020 when the appellant was arraigned in Court for plea taking, he pleaded not guilty. On 2nd July 2020 a Preliminary hearing was conducted under section 192 of the Criminal Procedure Act, Cap 20 whereby the appellant admitted his personal particulars and the fact that on 31st May 2020 he was at Nyazole_Kisegese Village in Mkuranga District. He also admitted to have been arrested and arraigned in court.

The Prosecution called 3 witnesses namely PW 1 Athasia Lameck Mlimakifi, a Medical Officer at Kilimahewa Health Center. PW 1 also tendered Exhibit P1 being the PF 3 she filled. PW 2 was WP 5439 D/CPL Grace a Police Officer at Mkuranga. PW3 was JJ a 20 years old woman, peasant and resident of Kisegese who is the victim of the crime. Upon closure of the Prosecution case and when the accused was found with a case to answer, the defence case opened and the Defence called one witness being the appellant who testified as DW 1. No exhibit was tendered by the defence during the trial.

It was the prosecution's case through PW3, that she was living with her husband and at the time she had 2 children. The first child was aged 2 years and 9 months old while the second one was one year old. Also she was about 5 to 6 months pregnant at the time of the rape incident. She testified that on 31st May 2020 at 01:00hrs, she was at home sleeping with her two children in a semi-fished make-shift house described as a "pagala" which had no doors save for a piece of worn-out linen cloth in place of a door. PW3's husband had travelled to Mwanza. It was alleged that at about 01:00hrs, the victim saw the appellant who is her neighbour, passing near her window. The appellant was naked and was holding a torch shining it towards the victim through the window and soon the appellant entered the victim's bedroom and forcefully had sexual intercourse with her under threat of a knife and before doing it the appellant slapped the two children so as to be quiet.

The victim (PW3) testified further that when the appellant ejaculated, he ran away and the victim had a chance to raise an alarm whereby some neighbours responded to her alarm and followed the appellant to his home while others took the victim to hospital immediately. The victim testified further thats he knows the Appellant very well as he used to visit their home and was friends with her husband whereby the appellant in the past months had brought his son to the husband of the victim for medical treatment; as the victim's husband was a traditional healer.

PW 1, the medical officer testified that on 31st May 2020 at 10:40hrs, she was at her work station at Kilimahewa Health Center and that while she was there she treated a patient by the name of JJ who was pregnant and was complaining of having pains in her private parts. Upon examination, PW1 found that the victim had sperms in her vagina and that her vagina was loose which signified that she had sexual intercourse on the same day. PW 1 tested the victim for HIV and the victim was negative. PW1 then prescribed to the victim HIV protection drugs and filled the PF3. The witness tendered the PF 3 as Exhibit P1.

PW 2 was WP 5439 D/CPL Grace a Police Officer at Mkuranga who investigated the case. She testified that on 2nd June 2020 at 11:00hrs she was assigned to investigate the case which had been opened at Kimanzichana Police Station. She found that the accused had already been interrogated there and so she proceeded to call him for further interrogations whereby the appellant denied to have committed the offence. She visited the house of the victim and read the doctor's report in PF 3. She testified that the victim had identified the appellant as the perpetrator of the rape against her on the fateful day.

Upon closure of the prosecution case and when he was found with a case to answer, the appellant opted to testify under oath and to call other witnesses in addition to himself. However, at the end, the appellant was the only witness who testified for the defence. In his defence, the appellant who testified as DW1, denied to have committed the offence alleging that the case had been fabricated by the husband of the victim in order to fix the appellant and deprive him of his piece of land. He testified that on 31st May 2020 at about 01:00hrs, he was sleeping at his home. He testified that some months earlier he had he had taken his son to the husband of the victim for treatment, as the victim's husband is a witchdoctor. Further that they had agreed on medical charges of Tshs.500,000/= which however the appellant did not have in cash. Instead, the appellant had charged his 3 acres piece of land in the village as security. The appellant stated that the victim's husband failed to cure his son who died; and in turn the Appellant refused to pay the victim's husband the agreed medical charges of Tshs.500,000/= nor the 3-acres piece of land as agreed earlier. The appellant testified that the victim's husband, being angry at the Appellant's breach of his bargain to pay for medical charges, had sworn to make the Appellant regret for his failure to fulfil their agreement. The Appellant had reported this threat by victim's husband to village chairperson. The

Appellant testified that there was a day when he found the victim and her husband clearing his land without his permission and a dispute ensued thereby where the appellant used a panga to chase away the victim and her husband. Later that day the Appellant went to file a report at Kimanzichana Police station about the farm incident but surprisingly he was arrested and detained there. The appellant testified that she did not commit the offence charged and that PW 3 could have been penetrated by any other man including her own husband. He stated that the semens could come from any other man or even the husband of PW3. The appellant concluded that at the village government office there is no any report of the alleged rape incident. The appellant also challenged her recognition by the victim in the fateful night by virtue of his voice only.

In its Judgment, the District Court found that the Prosecution had established its case beyond any reasonable doubt and convicted the Appellant of rape. The Appellant was sentenced to 30 years imprisonment.

The appellant being dissatisfied with conviction and sentence lodged the present appeal on 10 grounds of appeal which were drafted for him while he was in the Prison. The grounds of appeal are not immaculately written and look more like submissions as they contain arguments and are broken down into subpoints with reference to provisions of the law but they can be substantially re-stated as follows:

1. That the learned trial Resident Magstrate erred in law and fact by convicting the appellant while the charge was defective for not indicating the sentencing provision section 131 of the Penal Code.
2. That the learned Resident Magistrate erred in law and fact by convicting the appellant by disregarding the appellant's defence whereby the Court did not summon defence witness one Neema Nussa Kibesa whom the appellant had indicated he would call.
3. That the Learned Resident Magistrate erred in law and fact by convicting the Appellant relying on Exhibit P1 the PF 3 whose contents were not read over loudly to the court.
4. That the learned Resident Magistrate erred in law and fact for convicting the appellant while the Prosecution failed to call neighbours who were within reach so as to clear doubts in the case.
5. That the learned Resident Magistrate erred in law and fact by convicting the Appellant based on discredited visual identification of the appellant at night without strong source of light.
6. Repetition of ground 5 above.
7. Repetition of ground 5 above.
8. Repetition of ground 5 above.
9. That the Resident Magistrate erred in law and fact by convicting the Appellant while the charge was not read over and explained to the appellant before entering his plea.

10. That the Resident Magistrate erred in law and fact for convicting the appellant without having addressed him on his trial rights after establishing a case to answer against him.

When presenting his written submissions, the Appellant sought leave of the court to introduce and argue one more ground of appeal. There being no opposition from the Respondent, the court allows the new ground of appeal which now becomes ground of appeal number 11 :

11. That the learned Trial Magistrate erred in law and fact in believing and relying on the evidence of PW1 (medical Officer) who did not establish her credentials.

The appeal was heard by way of written submissions. Both sides filed the written submissions. However, there is one anomaly regarding the written submissions filed by the Respondent Republic. The National Prosecutions Service has filed 2 different and contradictory versions of written submissions. One version of the Respondent's written submissions is in support of the appeal while another version is resisting the same appeal.

On 19th day of April 2023 the case was called before the predecessor Judge where the Appellant appeared in person while the Respondent appeared through Ms. Soja Bumbga learned State Attorney. On that date, the proceedings show that the learned state attorney said as follows:

> **"My Lord, the matter is coming today for hearing. However, the lower court records are not available but we have filed written submissions on our part".**

Then the court made an order fixing another hearing date and ordered for call of records from the lower court. But the court file shows that indeed, as it was stated by the Learned State Attorney in court that day, the Respondent Republic had already filed in Court its "Reply to Written Submission" dated 19th April 2023. These submissions show that they were drawn and filed by Rachel Dann Mwaipyana from National Prosecutions service, Kibaha. These submissions are in full support of the appellant's appeal and conclude that the appeal be allowed on the strength of grounds 5,6,7 and 8 in the petition of appeal. In her submissions Ms Rachel Mwaipyana concluded that**: "this ground is sufficient to determine the appeal hence appeal supported for weak and doubtable identification."**

The records as per the proceedings show that the case was adjourned several times and on 2nd August 2023 when the case was called for hearing, the appellant appeared in person while the Respondent Republic was represented by Mr. Maleko Senior State Attorney. On that date the appellant prayed to dispose of the Appeal by way of written submissions.

Mr. Maleko for the Respondent agreed, whereupon the court fixed the schedule for the parties to file their written submissions. The Appellant was directed by the Court to file his written submissions on 2nd August 2023 as he had already prepared the same and had come to court with the submissions in hands where he prayed to file them on the same date. The Respondent was ordered to file reply written submissions by 16th August 2023 and Rejoinder submissions were ordered to be filed by the Appellant by 30th August 2023.

In responding to the Court order of 2nd August 2023, the submissions in chief by the Appellant were filed on 2nd August 2023. The Respondent's reply submissions were filed on 25th August 2023 being 9 days outside the given time schedule and without there being an extension of time to file the submissions outside the prescribed time. The rejoinder submissions were filed on 30th August 2023.

The reply written submissions by the Respondent Republic filed in court on 25th August 2023, were drawn and filed by Mr. Emmanuel Maleko, Senior State Attorney from the National Prosecution Service at Kibaha. In his submissions Mr. Maleko resisted the appeal and concluded, and I quote verbatim, as follows:

“and now we pray to your honourable court to dismiss this appeal and upheld conviction and sentence. So prayed”

Therefore, in the present appeal, the National Prosecutions Service Kibaha for the Respondent Republic, has filed two reply written submissions and which are in sharp contrast to each other. The first was filed on 19th April 2023 suo mottu by the Respondent’s counsel without there being any court order directing the parties to procced by way of written submissions. These submissions support the Appellant’s appeal to be allowed. The second set of submissions were filed on 25th August 2023, in violation of the court order and outside the prescribed time frame which the court had directed the reply submissions be filed, namely by 16th August 2023. The second submissions are opposing the appeal.

Before going into the submissions by the parties, I had to resolve the problem of there being two different versions of reply written submissions filed by the Respondent Republic so that I can consider one set of the reply submissions and not both as the same are diametrically opposed to each other. In this regard, I had to ask myself as to which one between the two versions of the reply submissions for the Respondent is correctly before the court. The Reply submissions of 19th April 2023 were filed unilaterally before the court allowed the parties to argue the appeal by way of written submissions but the learned state attorney Soja Bumbga duly informed the Court of her having already filed the reply submissions and the Court did not expressly endorse or reject the course taken by the learned State Attorney. The court simply fixed another date for hearing. The second version of written submissions were filed on 25th August 2023 in contravention of the Court order which had fixed 16th August to be the deadline for the Respondent to file written submissions in court. The proceedings show that the Respondent never asked for ,nor was granted, an extension of time to file the reply written submissions outside the time specified in the Court order of 2nd August 2023.

In my considered view, the position of the law is not difficult in the circumstances at hand. The pertinent question is what happens where a party to the case fails to file written submissions in support of the appeal on the due date? I understand the position of the law is that written submissions stand in the same position like oral submissions made before the court when the case is called for hearing. Failure to file written submissions on the date ordered by the court without a prior order by the court, tantamount to failure to appear when the case is called for hearing in court. I borrow leaf from the decision of the High Court of Tanzania at Dar es Salaam in the case of **Allan T. Materu Versus Akiba Commercial Bank,** Civil Appeal No.114/2002 where the Court observed:

> ***"Counsel did not file submissions by the deadline and did not seek extension of time to do so. Instead he unilaterally filed the submissions out of time and without leave of the court. I feel constrained to agree with the respondent that the counsel for the applicant was negligent the way he handled his client's case in this respect.***
>
> ***Applying the Court of Appeal principles to the facts of the case at hand; the inability or failure by the applicants counsel to file the written submissions within time and/or subsequent failure to apply for the enlargement of time is not a slight lapse or mere inadvertence. Counsel here was obviously not diligent in handling the case. I find counsel lapses here to be serious and of fundamental nature.*** "

The consequences of a party or his counsel failing to file written submissions were stated in the case of **Tanganyika Motors Limited and 4 Others versus Baharudali Ebrahim Shamji**, Civil Application No. 65/2001 decided by the Court of Appeal of Tanzania sitting at Dar es Salaam. In this case counsel unilaterally filed written submissions in the

High Court 2 days outside the schedule fixed by the Judge. The Judge did not consider the late filed submissions in making his decision. On an appeal to the Court of Appeal, the court held:

> ***"The written submissions being late, they were just not before him. So, the learned judge was right."***

In the case at hand, the order of the Court on 2nd August 2023 was explicitly clear that the reply submissions by the Respondent were to be filed in court by 16th August 2023. The Respondent's counsel however unilaterally filed the reply submissions on 25th August 2023 without prior seeking leave of the court to bring the same outside the given time schedule. Those reply submissions of 25th August 2023 are simply not before me, in law, and I will simply ignore them in my judgment. Therefore, in the present appeal, we have an appeal by the Appellant and which appeal is not opposed by the Respondent Republic for failure to file written submissions on time. I observed that the written submissions filed on 19th April 2023 were filed prior to the order by the court for parties to argue the appeal by way of written submissions; however I find that the learned state Attorney Ms. Soja Bumbga had specifically brought to the attention of the then presiding Judge and it is on records of the proceedings of 19th April 2023 that the Respondent Republic had already filed their reply submissions. But the Presiding Judge did not make any order or directions on that point after it was brought to his attention, this means the court had not granted the Respondent Republic permission to file the written submissions and therefore the reply written submissions of 19th April 2023 also should not form part of the court records. Court orders cannot be implied or inferred. Therefore, as it stands, there are no written submissions at all by the Respondent Republic. I have also stated above that the way the Petition of Appeal is drafted by the Appellant as a lay-man gives a picture as if it is both a petition of appeal and written submissions because the grounds of appeal are written followed by an extensive explanation and reference to legal authorities in respect of the respective grounds of appeal underneath. In my view that style of drafting the petition of appeal is what made the learned state Attorney to prematurely file reply submissions on 19th April 2023 thinking that the Appellant had combined the petition of appeal with the written submissions in support thereof. But the state Attorney should have sought guidance of the court. The Appeal therefore is not contested as there are no reply submissions by the Respondent Republic.

I will start with the first ground of appeal. In the first ground of appeal, the appellant submitted that the learned trial Resident Magistrate erred in law and fact by convicting the appellant while the charge was defective. The appellant attacked the charge for not indicating the sentencing provision namely section 131 of the Penal Code. As said, the Respondent did not in law, file any reply submissions to respond to the appellant's submissions on this particular ground of appeal. Therefore, it is left upon the Court to determine the first ground of appeal. It is trite that the court cannot take for granted that once an appeal is not opposed or is supported by the other side, then it should ipso facto be allowed in wholesome. It is still the duty of the court to scrutinize the records of the lower court and satisfy itself as to the correctness or otherwise of the decision in conformity with the relevant law.

I pause to ask myself whether or not the charge laid against the appellant at the trial court was defective as alleged in ground 1 of the appeal or at all? The relevant part of charge leading to conviction of the accused for rape and being sentenced to 30 years imprisonment is reproduced again as follows:

"STATEMENT OF THE OFFENCE

RAPE: C/S 130(1)(2)(a) of The Penal Code (Cap 16 RE 2002).

PARTICULARS OF THE OFFENCE

That **MALIMI GAMBO LUHEBEZI** charged on **31st day of May 2020** at about 1:00hrs Nyanzole - Kisegese Village within the Mkuranga District in Coast Region did have sexual intercourse with one **JJ** 20 years."

That charge was drawn and filed by the Public Prosecutor and was not amended or substituted by the Prosecution throughout the trial. Was this charge correct in terms of the ingredients of the law cited therein? For this I wish to reproduce section 130(1)(2)(a) of the Penal Code as follows:

130.-(1) It is an offence for a male person to rape a girl or a woman.

(2) A male person commits the offence of rape if he has sexual intercourse with a girl or a woman under circumstances falling under any of the following descriptions:

(a) not being his wife, or being his wife who is separated from him **without her consenting to it at the time of the sexual intercourse**; (emphasis supplied)

This provision has been interpreted many times by the courts. In **Godi Kasenegala versus The Republic,** Criminal Appeal No.10 of 2008, the

Court of Appeal of Tanzania at Iringa held at page 12 of the Judgment that:

> ***"Under our Penal Code rape can be committed by a male person to a female in one of these ways. One, having sexual intercourse with a woman above the age of eighteen years without her consent. Two, having sexual intercourse with a girl of the age of eighteen years and below with or without her consent (statutory rape)."***

It is clear from the above quoted legal provision and the excerpt from the charge that the charge against the appellant in the trial court omitted an extremely essential constituent component forming the ingredients of the offence of rape for a woman above 18 years old. That is lack of consent to have carnal knowledge. The mere act of an adult male person to have sexual intercourse with an adult female person has never been a criminal offence under the laws of Tanzania. It must be shown and proved, in case of adult women, that it was an unlawful sexual intercourse and that it was done without the woman's consent to it or with an improperly procured or vitiated consent. In the case at hand, as PW3, the victim, was 20 years old, it is not an offence for a male person to have sexual intercourse with her unless it is shown that she never consented to it at the time of doing the sexual intercourse. The element of lack of consent ought to have been included in the charge. PW3 in the case at hand is a woman who is capable of consenting to sexual intercourse. At the time of the alleged rape, she was married with two children and was also 5 months pregnant. Absence of her consent is the necessary missing link in the charge laid at the door of the appellant, before the Appellant could be correctly charged with, and possibly convicted of rape, The charge would otherwise be correct if the victim was below 18 years.

In the case of **Isidori Patrice Versus The Republic, Criminal Appeal No. 224 of 2007,** the Court of Appeal sitting at Arusha considered the legal position where a charge does not disclose all the statutorily prescribed constituent ingredients of an offence. The court of appeal held:

> ***"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 <u>but such particulars as may be necessary for giving reasonable information as to the nature of the offence charged</u>……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. We take it as settled law also that where the definition of the offence charged specifies factual circumstances without which the offence cannot be committed, they must be included in the particulars of the offence.

The appellant in the present appeal was therefore prosecuted and convicted in the trial court for a charge that did not disclose or contain the statutory ingredients constituting the full actus reus and mensrea of the offence charged. The charge was defective.

I would now like to consider the effect of charging, trying and convicting a person under a defective charge like in the circumstances of the case at hand. Once again a similar question was asked and answered by the court of Appeal in the case of **Isdore Patrice versus Republic** (supra). I quote:

"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. It is unfortunate that the issue we have just determined was not brought to the attention of the first appellate judge. Had it been done he definitely would have quashed the conviction."

As it has been held by the Court of Appeal of Tanzania in the case above, where the charge is defective for not disclosing the statutory ingredients of the offence, on an appeal, the Court should quash the conviction. I am therefore obliged to quash the conviction of the appellant on the basis of the first ground of appeal only.

Having made a decision to quash the conviction on the strength of the first ground of appeal, I find it needless and of no practical purpose, to determine the remaining 10 grounds of appeal while the decision thereon would be inconsequential to the outcome of the present appeal.

In the upshot, this appeal is allowed on the basis of the first ground of appeal only which is enough to dispose of the entire appeal. I do hereby quash and set aside the Judgment, conviction and sentence imposed upon the appellant by the District Court of Mkuranga in Criminal Appeal No.120/2020 as per Hon. Mwailolo R.M dated 23/02/2021. I order the immediate release of the appellant from Prison unless held lawfully otherwise therein. Right of appeal explained.

It is so ordered.

A. H. Gonzi
Judge
03/11/2023

The Judgment is delivered in court this 3rd day of November 2023 in the presence of the Appellant and Mr. Clarence State Attorney for the Republic.

A. H. Gonzi
Judge
03/11/2023