

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA**

**IN THE DISTRICT REGISTRY OF BUKOBA**

**AT BUKOBA**

**CRIMINAL APPEAL NO. 47 OF 2022**

*(Originating from Criminal Case 15/2022 District Court of Ngara)*

**MKIZA PHILEMON..... APPELLANT**

**VERSUS**

**REPUBLIC..... RESPONDENT**

**JUDGMENT**

14<sup>th</sup> and 17<sup>th</sup> February, 2023

**BANZI, J.:**

Before the District Court of Ngara at Ngara, the Appellant was charged and convicted with the offence of Attempted Rape contrary to section 132 (1) (2) (c) (3) of the Penal Code [Cap. 16 R.E. 2019] ("the Penal Code"). He was then sentenced to life imprisonment. It was alleged that on 11<sup>th</sup> February, 2022 at Mubinyange village, within Ngara District in Kagera Region, the Appellant attempted to rape (name withheld) a girl aged seventeen (17) years. To conceal the victim's identity and for purposes of protecting her privacy, I shall henceforth refer her as 'PW1'.

Aggrieved with his conviction and sentence, the Appellant preferred an appeal before this Court with seven grounds but for the apparent reason, I shall not reproduce them.

Briefly, the facts of the case leading to the conviction of the Appellant runs as follows; on 11<sup>th</sup> February, 2022 around 06:00 am, PW1 was on her way to school and upon reaching Kibimba area, she met with the Appellant who pushed her down. Then, he began to undress her skirt and under pants. At that juncture, he had already undressed his trousers. In the course of trying to insert his male organ into her genitals, PW1 began to struggle while raising alarm which was positively responded by her school mate (PW2) but the Appellant managed to run away. Eventually, the Appellant was arrested and arraigned to court.

In his defence, the Appellant categorically denied the alleged offence. He also denied to know PW1 or to have been at the crime scene. According to him, sometimes in February, 2022 around 3:00 pm he was with his colleague returning home from work. Upon reaching Nyamiaga area, two people appeared and arrested him. He was then taken to police station where he was questioned about raping a certain girl. After that, he was kept in custody until he was arraigned in court.

At the hearing, the Appellant appeared in person, unrepresented while the Respondent had the services of Mr. Emmanuel Luvinga, learned Senior State Attorney. Before the hearing commenced, the Court raised *suo moto* an issue of the propriety or otherwise of the charge.

Addressing that issue, Mr. Luvinga submitted that, section 132 of the Criminal Procedure Act [Cap. 20 R.E. 2022] ("the CPA") requires a charge to contain a statement of the specific offence(s) together with such particulars giving reasonable information as to the nature of the offence charged. He was quick to admit that, in the case at hand, the charge was defective for lacking essential ingredients for the offence of attempted rape as provided under paragraph (c) of subsection (2). The particulars did not contain information on how the Appellant made false representation to PW1 as essential ingredients under paragraph (c) of subsection (2). He added that, the defect is incurable because even the evidence of only prosecution witnesses, PW1 and PW2 did not establish how the Appellant made such false representation. He concluded that, the conviction cannot stand on fatally defective charge.

Being a layperson, the Appellant had nothing to add and he left everything to the court and prayed to be released from prison.

Having considered the record of the trial court and submission by the learned Senior State Attorney, the issue for determination is *whether the charge against the Appellant disclosed the offence known to law.*

Section 132 of the CPA provides that and I quote;

*"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).*

Emphasising the importance of contents of a charge, the Court of Appeal in the case of **Isidori Patrice v. Republic**, Criminal Appeal No. 224 of 2007 (unreported) stated 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."*

The Court went on to hold 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. 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.**"*(Emphasis is mine).

The appellant in our case was charged with the offence of attempted rape. For such offence to be complete under section 132(1) and (2) of the Penal Code, the charge in its particulars must contain the essential

ingredients constituting *mens rea* specified under sub-section (2) paragraph (a), (b), (c) or (d). The particulars of the charge in the present case read as follows;

***"Particulars of offence***

*That MKIZA S/O PHILIMON on 11<sup>th</sup> February 2022 at Mubinyange village within Ngara District in Kagera Region did attempted (sic) to rape one (name withheld) aged 17 years old".*

Obviously, the above quoted particulars do not disclose the specific intent of the offence that is "*an intent to procure prohibited sexual intercourse*" nor do they disclose any essential fact of "*making false representation for the purposes of obtaining her consent*" as specified in sub-section (2) (c) with which the Appellant is charged.

Since the charge did not contain the essential ingredient as specified under section 132 (2) (c) of the Penal Code, it is apparent that, the nature of the offence facing the Appellant was not adequately disclosed to him. In other words, charge laid at the Appellant's door disclosed no offence known to law. In that regard, upon full trial, the Appellant could not in law have been convicted of the offence charged based on the fatally defective charge.

For those reasons, I allow the appeal by quashing the conviction and setting aside the sentence imposed on the Appellant. The appellant is hereby released forthwith from prison unless he is otherwise lawfully held.

It is so ordered.



A handwritten signature in blue ink, appearing to read "I. K. Banzi".

**I. K. BANZI  
JUDGE  
17/02/2023**

Delivered this 17<sup>th</sup> February, 2023 in the presence of Ms. Evarista Kimaro, learned State Attorney for the Republic, Respondent and the Appellant in person. Right of appeal duly explained.



A handwritten signature in blue ink, appearing to read "I. K. Banzi".

**I. K. BANZI  
JUDGE  
17/02/2023**