

**THE UNITED REPUBLIC OF TANZANIA**  
**JUDICIARY**  
**IN THE HIGH COURT OF TANZANIA**  
**(DISTRICT REGISTRY OF MOROGORO)**  
**AT MOROGORO**

**CRIMINAL APPEAL NO.51 OF 2022**

*(Originates from judgement of the District Court of Mvomero at Mvomero,  
in Criminal Case No. 51 of 2021)*

**ABDALAH NICHOLAUS.....APPELLANT**

**VERSUS**

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

**JUDGEMENT**

*Hearing date on: 8/11/2022*

*Judgement date on: 15/11/2022*

**NGWEMBE, J:**

The trial court upon finding the appellant guilty for the offence of attempted rape contrary to **section 132 (1), (2)(a) of the Penal Code [Cap. 16 R.E 2019]**, proceeded to convict him and passed sentence of thirty (30) years imprisonment. The appellant, **Abdalah Nicholas** being dissatisfied with that conviction and sentence, within five (5) days, issued notice of intention to appeal and finally appeared to this court armed with

five (5) grievances as follows; **one** that the trial magistrate erred in law and facts for failure to consider the defence evidence for assuming as afterthought, while the appellant raised doubt on the evidence adduced by putting critical questions to PW1, PW2, PW3 & PW4; **two** that the trial magistrate erred in law and facts for failure to comply with the requirement of law of evidence in taking evidence of the alleged victim (PW1); **three** that, the trial magistrate erred in law and facts for failure to consider that, the alleged incident occurred on 30 May, 2021 and the appellant brought to court on 1<sup>st</sup> July, 2021 no evidence show where he was and for which reasons as per requirement of the Laws; **four** that the trial magistrate erred in law and facts to convict the appellant without corroborative evidence to show how the appellant brought to police station and who investigated the case; **five** that the trial magistrate erred in law and facts to convict the appellant without watertight evidence as the prosecution side failed to prove the case beyond reasonable doubt.

For convenience purposes, it was alleged in the particulars of the charge sheet that, Abdallah Nicholas on 30<sup>th</sup> May, 2021 at Maplotini area, Wami Village, Dakawa Ward within Mvomero District in Morogoro Region, attempted to have carnal knowledge to a girl of eight (8) years (her name is served because of age).

On the hearing date of this appeal, the appellant did not procure services of learned advocate, thus he had no useful arguments on all grounds of appeal, rather he prayed to this court to consider his grounds of appeal.

In turn, the learned State Attorney Ms. Jamila Mziray, strongly opposed all grounds of appeal and supported the conviction and sentence meted by the trial court. On the first ground, she submitted briefly that the evidence of PW1, PW2, and PW4 were corroborative to each other, and the fact that the appellant failed even to cross-examine on crucial issues meant admission.

On the second ground, Ms. Mziray submitted that the court was satisfied that the child was knowledgeable on what she was testifying, such evidence if were taken without oath or affirmation it should be corroborated, she referred this court to page 14 where the victim proved that the appellant attempted to rape her and in page 15 where PW2 and PW3 corroborated the same, hence this ground lacks merits.

Submitting on the third ground that, the alleged incident occurred on 30 May, 2021 and the appellant was brought to justice on 1<sup>st</sup> July, 2021 no evidence was shown where he was and for which reasons as per requirement of Laws. Ms. Mziray discredited it as not related to the offence of attempted rape.

On the fourth ground Ms. Mziray submitted that, the case against the appellant was proved. He cited section 132 of the Penal Code which provide elements of attempt which were established and proved against the appellant.

On the last ground that the appellant was convicted without the offence being proven beyond reasonable doubt Ms. Mziray objected it and insisted that, the offence was proved beyond reasonable doubt. Finally, she

prayed that all grounds of appeal lack merits and that the appellant should continue serving his sentence as justice so demand.

In considering those grounds of appeal, I find calling to begin with the 5<sup>th</sup> ground which is a summary of the whole prosecution case. This ground invites this court as a first appellate court to analyse the whole evidences adduced during trial and find out if the offence was established and proved as required by law that is, beyond reasonable doubt.

Always in criminal justice, the cornerstone of any criminal case is the charge sheet. It is the most important document which informs the accused person on the nature of the accusation so as to allow him to make necessary preparations for his defence during trial. Likewise, the prosecution knows exactly the expected evidences from whom. Lastly the charge sheet informs the trial court on the nature of the accusations and channels the roadmap of trial from the beginning to the end. Consequently, what is proved in criminal trials is the contents of the charge sheet. Thus makes the charge sheet as the most important documents in the whole criminal justice. Section 135 of **Criminal Procedure Act Cap 20 R.E. 2019** (CPA), provided guidance on how to draft and the contents of legally acceptable charge sheet.

Following the above understanding, the Court of Appeal in the case of **Charles S/O Makapi Vs. R, Criminal Appeal No. 85 of 2012** categorically held that, section 135 of CPA, imposes mandatory requirements that a charge sheet must describe the offence and make reference to the proper section and law creating the offence.

In seminal vein, the Court of Appeal in **Criminal Appeal No. 202 of 2013 between Marekano Ramadhani Vs. R**, at page 7 provided guidance as follows: -

*"Framing of charge should not be taken lightly, we think it is imperative for the prosecution to carefully frame up a charge in accordance with the law. It becomes even more vital to do so where an accused is faced with a grave offence attracting a long prison sentence".*

In light of above, the instant appeal, the appellant was charged before the trial court for the offence of attempted rape contrary to section 132 (1)(2)(a) of the Penal Code [Cap. 16 R.E. 2019]. For clarity, the excerpt hereinbelow is the charge sheet brought in court against the appellant: -

### **STATEMENT OF OFFENCE**

**ATTEMPTED RAPE**, Contrary to Section 132 (1)(2)(a) of the Penal Code [Cap 16 R.E. 2019]

### **PARTICULARS OF OFFENCE**

**ABDALAH NICHOLAUS**, on 30<sup>th</sup> May, 2021 at Maplotini area, Wami Village, Dakawa Ward within Mvomero District in Morogoro Region, attempted to have carnal knowledge of "RA" (her name is served because of her age) a child of 8 years old.

The provision creating the offence of attempted rape is provided for under section 132 as quoted hereunder: -

**Section 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"

(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; .....

The ingredients of the offence of attempted rape in the charge sheet are: **the intent to procure prohibited sexual intercourse with a girl or woman, and manifestation of such intent by threatening the victim girl or woman for sexual purposes.** In that regard, one cannot be found guilty of attempted rape until the ingredients of such offence are clearly reflected in the charge sheet for him to understand the offence he stands charged and which he has to answer. Even the evidence given during trial should establish such ingredients.

In the case at hand, despite the fact that the appellant was rightly charged under section 132 (1)(2)(a) of the Penal Code, but the required ingredients of the offence were not reflected in the particulars of the offence. The charge does not disclose whether the appellant had intent to procure a prohibited sexual intercourse with such victim girl nor whether

such intention was manifested by threats against the girl by the appellant for the purposes of sexual intercourse.

There is no shortage of precedents from the Court of Appeal and old legal books on this important point of law. For instance, in the case of **Chesco Mhyoka Vs. R, Criminal Appeal No. 82 of 2014, the court held:-**

*"The particulars of the offence ought to have disclosed the basic attributes of the offence where the word threatening is the key element. As it is, the words did unlawfully attempt to rape in the charge sheet under scrutiny here were not enough because they did not reasonably inform the appellant the nature of the case he was to answer"*

The charge in this appeal faces similar defects as above case, for failure to provide necessary ingredients of attempted rape. A mere statement that the appellant herein did attempt to have carnal knowledge with a victim girl is not enough. The charge required further disclosure of whether such attempt was manifested by any threat. In **Chesco's case (supra)**, at page 9, the Court of Appeal gave an example of how the charge sheet for attempted rape would at least be considered proper and enough to inform the accused on a case he is to answer it prescribed that:

*At least, the words **with intent to procure prohibited sexual intercourse threatened...** 'ought to have featured in the particulars of the offence'*

Though, the evidence of PW1 provide some elements of threat used by the appellant when wanted to procure carnal knowledge with her. This evidence does not support the particulars of the offence as far as the charge sheet is concerned. Also, the age of PW1 was not certain while the charge stated that the age of the victim was eight (8) years, the victim herself testified that, she was eleven (11) years. To fortify this, the case of **Jackson Venant Vs. R, Criminal Appeal No.118 of 2018 TZCA 187** whereby the Court of Appeal held: -

*"We need to emphasize that, in any Criminal trial, a charge is an important aspect of the trial as it gives an opportunity to the accused to understand in his own language the allegations which are sought to be made against him by the prosecution. It is thus important that the law and the section of the law against which the offence is said to have committed must be mentioned and stated clearly in a Charge. The charge therefore must tell the accused precisely and concisely as possible the offence and the matters in which he stands charged."*

Always the purpose of citing a specific provision and featuring it in particulars of the offence in the charge is to give an accused person reasonable information as to the nature of the offence charged. This is in accordance with sections 132 and 135 of the CPA. In addition, such information is helpful to the accused at the moment of preparing his defence. See the case of **Gimbu Masele & Another Vs. R, Criminal Appeal No. 491 of 2017.**



It is known a defective charge is curable by amendments, for instance if the defect is only on specific section, but its particulars leave no doubt the accused knew the nature of the offence charged such defect is curable. However, when particulars of the offence are defective, the accused may not know exactly the nature of the offence charged. This position was also considered by the late judge Mwakasendo in the case of **R. Vs. Temaeli Nalomba [1971] HCD 442.**

The defect in the current charge is on particulars of the offence, which is serious, the question now is how can a case be proven beyond reasonable doubt with a defective charge? Obvious such charge cannot be proved.

Equally important is the issue of age of the victim. Repeatedly, this court and the Court of Appeal has insisted that on sexual related offences, proof of age is fundamental. The law as it is now, the question of age differentiates even the level of punishment. If the offence involves a child below the age of ten (10) years, its sentence is life imprisonment, while the age above ten years is thirty years and above. Even on attempt rape proof of age is fundamental for its sentence differs according to the age of the victim.

In respect to this appeal, the question is whether the age of the victim was established and proved as required by law? Unfortunate not, While the charge sheet provides the age of the victim was eight (8) years, but the evidence adduced in court was different that is eleven (11) years old.



As an obiter dictum, I find important to insist here that there are certain mistakes either done by the prosecution or investigators of the offence or trial court which defeat the ends of justice expected by the society. When the offender, in the eyes of society walk freely in the courts of law simply because of mistakes capable of being avoided, create serious outcry, damage the integrity of the court of law, sometimes facilitate innocent people in the society feel insecure against those suspects/criminals. Hence take an action of defending themselves. Always, the investigators of crime, prosecutors and the court are builders of strong legal system in the society and build confidence of the society to the judiciary.

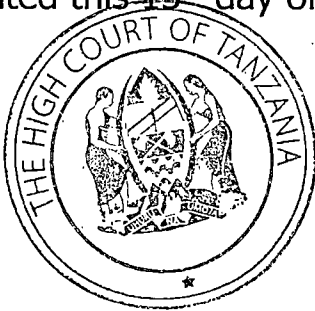
Mistakes in framing a charge sheet against an accused of serious offence like rape, attempted rape, robbery and alike, touches directly the daily life of people in the society. Therefore, the three organs of justice, that is court, prosecution and investigation each must perform its duties professionally, competently and completely. Failure of one affect another and at the end justice may be seen not to be done in the eyes of society. I am aware, court's decision is not aimed into pleasing anyone in the society rather is given mandate to do justice not otherwise.

Having so said and for the reasons so stated, the prosecution in this appeal failed to frame a proper charge and failed to prove the age of the victim, consequently failed to establish and prove the offence of attempted rape. I therefore, proceed to allow this appeal in its entirety. The conviction of the appellant is accordingly quashed and set aside the

sentence meted by the trial court. I order an immediate release of the appellant from prison, unless otherwise lawfully held.

**Order accordingly.**

Dated this 15<sup>th</sup> day of November, 2022.



A handwritten signature in black ink, appearing to read "P.J. Ngwembe".

**P.J. NGWEMBE**

**JUDGE**

**15/11/2022**

**Court:** Judgment delivered at Morogoro in Chambers on this 15<sup>th</sup> day of November, 2022, **Before Hon. J.B. Manyama, AG/DR** in the presence of the appellant in person through Video Conference while at Ukonga Prison and the presence of Ms. Jamila Mziray learned State Attorney for Republic/Respondent.

**SGD. HON. J.B. MANYAMA**

**AG/DEPUTY REGISTRAR**

**15/11/2022**

