

TANZANIA / JUDGMENT

Shadrack Thomas vs Republic Draft Judgment

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IN THE HIGH COURT OF TANZANIA DODOMA SUB REGISTRY AT DODOMA CRIMINAL APPEAL
NO 19471 OF 2024 (From the Judgment in Criminal Case No 1068 of the 2024 before the District
Court of Manyoni) BETWEEN SHADRACK THOMAS APPELLANT
VERSUS THE REPUBLICRESPONDENT

JUDGMENT

Date of last Order: 11/12/ 2024 Date of Judgment: 26/02/2025 LONGOPA, J.: The appellant, one Shadrack Thomas stood charged, convicted and sentenced to serve a 10 years' imprisonment term for the offence of attempted rape contrary to section 132(1) of the Penal Code, Cap 16 R.E. 2022. It was alleged that on 8th January 2024 at Sayuni area within the Manyoni Ward in Manyoni District, the appellant did attempt to have sexual intercourse with the victim JH (name withheld) a girl of 15 years old. 1|Page The appellant was dissatisfied with the decision of Manyoni District Court dated on 9th May 2024 thus instituted an appeal on 15th July 2024 to challenge the Conviction and sentence whereby a set of four grounds were preferred. However, on 13th November 2024 when the matter was set for hearing, the appellant applied to have additional grounds of appeal be filed and this Court granted it. The appellant complied with the order by filing nine additional grounds of appeal thus making the appeal being founded on the following grounds of appeal namely:

1. That, the trial court erred to convict and sentence the appellant basing on weak evidence of PW1 who in her evidence did not elaborate which situation she found at the scene after the accused to run away from inside of the room.
2. That, the trial Court erred in law and fact as PW2 the victim when adducing her evidence did not address the court whether the accused used the force when attempted to rape her but only he said "he will do by force" 2|Page
3. That, the proceedings are marred with irregularities as the appellant stayed at the police lock up for about seven days without being arraigned to the court in order to answer the allegation against me.

4. That, the learned trial magistrate erred in law and in fact by convicting me while the prosecution side did not submit the appellant's caution statement before court.
5. That, the trial magistrate grossly erred in law and fact when convicted the accused person(appellant) while prosecution side failed to prove the case against the appellant beyond reasonable doubts.
6. That, the learned trial magistrate grossly erred in law and fact by failing to comply with the provision of section 10(3) and 9(3) both of the CPA (Cap 20 R.E.
- 2022) as this enable the prosecution side to pirate the court and vaguely inject their witnesses then build up this case from a case already heard in court.
7. That, the learned trial magistrate grossly erred in law and fact by failing to draw an adverse inference against 3|Page the prosecution side when deliberately ignored to call one HALIMA and JAMES to testify during the trial without undisclosed reason to be shown.
8. That, the learned trial magistrate grossly erred in law and fact when convicted the appellant whilst the trial unprocedurally conducted whereas it is not clear from the court record whether the memorandum of undisputed facts of the Preliminary Hearing was read to the appellant lucidly before the court over c/s 192(3) of the CPA (Cap 20 R.E. 2022).
9. That, the learned trial magistrate grossly erred in law and fact by failing to warn himself about the evidence of the witnesses with interest to serve has to be corroborated first.
10. That, the learned trial magistrate grossly erred in law and fact by failing to notice that the appellant was arrested on 8/1/ 2024 but he was arraigned before the court on 15/1/2024 contrary to the procedure of the law. 4|Page
11. That, the learned trial magistrate grossly erred in law and fact by failing to note that the case against the appellant was cooked and fabricated due to diverse reason from the prosecution side that is why the failed to call even one police officer to testify during the trial leave alone an investigation of the case without undisclosed reason and this omission occasioned miscarriage of justice against the appellant.
12. That, the learned trial magistrate grossly erred in law and fact by failing to circumspect the verity of the evidence adduced by the prosecution witnesses hence arriving at the wrong verdict against the appellant this is because the one who is of acumen could ask himself that how the one who was on struggling not to be raped could get chance of calling someone.
13. That, the learned trial magistrate grossly erred in law and fact when ignored the defence. 5|Page It was the appellant's prayer that on strengths of all those grounds, it was pertinent for this Court to allow the appeal, quash the conviction and set aside the sentence imposed thereto and order immediate release from prison of the appellant with immediate effect. On 4th December 2024, the parties appeared before this Court for a viva voce hearing. The appellant appeared in person fending for oneself while the respondent enjoyed the legal services of Mr. Francis Mwakifuna and Amani Japhet, both learned State Attorneys. The

appellant adopted all the grounds of appeal to form part of the appellant's submission in this appeal. He reiterated that there was failure of the prosecution to call Halima and James who are said to have witnessed the incident especially when the alarm calling for help was made against the appellant. It was stated that one Halima came to court but surprisingly she did not testify. According to the appellant, this witness was material witness. With regard to arrest, it was submitted that the arrest was on an allegation of rape but upon investigation they found nothing thus 6|Page fabricated the case of attempted rape. It was the appellant's version that he did not plead guilty to the offence he stood charged as allegedly he had not committed the offence. In respect of failure to prove the case, it was submitted that evidence of the prosecution on record was not sufficient/ satisfactorily to prove the case beyond all the reasonable doubts. It was the appellant's prayer that this appeal is merited thus the appeal be allowed. On the other hand, Mr. Amani Japhet learned State Attorney stated that the respondent was not supporting this appeal but urged that both conviction and sentence be upheld. The respondent argued that PW 1 was at home and sent the victim to collect something somewhere. However, the victim having been late to return home, PW 1 had to make follow ups and found the appellant with the victim in the appellant's room. The appellant opened the door and ran away. The victim stated that the appellant wanted to rate her. She raised an alarm to call for help as PW 1 found the victim and appellant in the room while calling for help. 7|Page On the second ground, it is submitted there was use of force. It was PW 2 that upon entering the appellant's room, the appellant did close the door and pushed the victim to the bedroom. The appellant managed to undress the victim's clothing. There was attempted rape. Thus, this ground should be overruled. With regard to time of incarceration/detention before being arraigned to court which forms 3rd ground, it was argued that it was true that appellant was arrested on 8/1/ 2024 and arraigned in court on 15/1/ 2024 which is seven days' period from the arrest. The respondent argued that seven days in the police lock-up is reasonable time as it is not long time and that the appellant had not shown any violation of a right or prejudices suffered by the appellant. On the 4th ground regarding failure to tender cautioned statement, it was respondent's view that failure to tender cautioned statement does not affect the appellant's rights nor the validity of the proceedings. There is no law compelling the prosecution to tender cautioned statement as mandatory requirement. 8|Page On 5th ground, it was submitted that attempted rape was committed. There were three witnesses. PW 1 stated to have known the appellant to be a business man at Sayuni area selling potato chips. She is the one who sent the victim but the victim delayed to return back whereas PW 1 knocked the appellant's room door, it was opened and the appellant ran away. PW 1 raised an alarm to call for help to arrest the appellant. PW 2 stated that the appellant did attempt to rape her by closing the door while the victim in the appellant's house, undressing her and finally undressing himself ready for unlawful sexual intercourse. The victim was pushed to the bed in preparation for forceful sexual intercourse. PW 2 stated to have seen the erected penis of the appellant, she resisted making love and the appellant stated that he will do it by force. The appellant threatened the victim that if she raised any alarm then the appellant would hurt the victim. It is obvious that the victim ably identified the appellant. This is the victim of the offence as the evidence

of the victim is the best evidence in all sexual related offences as categorically held in the case of Selemani Makumba versus Republic [2006] TLR 379. 9 | Page According to the respondent, the evidence was watertight to prove the case against the appellant. PW 3 testified that the victim was not penetrated but semen was found. Circumstantial evidence is that semen/ sperms belonged to the appellant as the victim was taken to the hospital immediately after she was rescued by PW 1 from the appellant's room. There was proof beyond reasonable doubts. With regard to 6th ground, it was submitted that section 10(3) and 9(3) of the Criminal Procedure Act, Cap 20 RE. 2022 require the statement of the complainant to be availed to the accused/ appellant. However, the same was not availed to the appellant. It did not prejudice any rights of the appellant as the parties were dully heard and the complainant appeared in court to testify as PW 1. The appellant was allowed to cross- examine the person (PW 1). In the case of Abdallah Seif versus R, Criminal Appeal 122/ 2020 (TANZLII) - it was observed that there is always no prejudice where the complainant gives evidence in presence of the accused person and the right to cross examine is availed and exercised. This anomaly is curable under Section 388 of the CPA. 10 | Page On 7th and 11th grounds jointly, it was submitted that no number of witnesses is required to prove a case as per Section 143 of the Evidence Act, Cap 6 R.E. 2022. The number of witnesses and choice of them is exclusive powers of the prosecution. It is not important to call a witness when there is sufficient evidence to prove a case against an accused person. There is nothing to render the available evidence on record incompetent to prove the case. The appellant has not stated any rights violated or prejudices suffered. The respondent cited the principle in Khatibu Kanga versus Republic, Criminal Appeal No 209/ 2008, where the Court observed that it is not compulsory for the investigation officer to testify. On 8th ground, it was submitted that Preliminary Hearing (PH) was conducted properly as reflected in page 6 of the proceedings. The undisputed facts were read before the Court in presence of the accused person /appellant. On 9th ground, it was submitted that all witnesses of the prosecution's evidence were consistent and reliable without an iota of contradiction. It was the evidence of PW 1 was corroborated by the PW 3 11 | Page who stated that he found semen/ sperms on the victim though penetration was not there. The respondent further addressed the 10th ground of appeal. It was submitted that evidence of PW 1 and PW 2 indicates that the victim raised alarm to call for assistance having heard the door being knocked as her sister is the one who knocked the same. On 12th ground, it was submitted that the trial magistrate considered the defence evidence as per page 4 of the judgment where the defence evidence was considered, analysed and evaluated before the trial court reached to the finding that the same did not impair the prosecution's evidence that was strong, consistent and there was proof beyond reasonable doubts. The evidence of the prosecution left nothing unturned. In the case of John Makolabela Kulwa and Erick Juma versus Republic [2002] TLR 96 is illustrative on this matter. It was the respondent prayer that this appeal be dismissed for lack of merits and the decision of the trial court be upheld as it was based on sound legal principles. 12 | Page Having heard rival submissions of the parties, this Court has earnestly considered all the available records in light of the grounds of appeal to find out whether this appeal has merits or otherwise. It is important to address

the issues to elucidate the findings on the validity of this appeal. Essentially, these grounds of appeal focus on two main broad aspects. First, failure of the prosecution to prove the case to the required standard. Second, procedural irregularities touching on the root of the case which marred the proceedings invalidating them. The first category of grounds on proof of the case would entail 1st, 2nd, 4th, 5th, 7th, 9th, 11th, 12th and 13th grounds of appeal. This set of grounds touches on weakness of the prosecution evidence, absence of proof of use of force/threats to use force, lack of cautioned statement, proof not meeting the standard of proof and discharging the burden, failure to apply adverse inference for failure to call necessary witnesses, use uncorroborated evidence, fabrication of the case by failure to call any police officers to testify on findings of the investigation, impossibility of one calling for help while struggling, and ignoring of the defence. 13 | P a g e On the other hand, the second category of procedural irregularities touching the root of the case entails failure to arraign the accused to court timeously, non-compliance with provisions of section 10(3) and 9(3) of the Criminal Procedure Act, and improper Preliminary Hearing on the undisputed facts Memorandum. This caters for 3rd, 6th, 8th and 10th grounds of appeal. The first aspect to address is the proof of the case against the appellant. Proof of the case to the required standard is the main issue reflected in various grounds of appeal preferred by the appellant. In order to address the proof of the case, the law is settled that it is the duty of the prosecution to prove the case against the accused/appellant and the standard is that of beyond reasonable doubts. This is what section 3(2) (b) of the Evidence Act, Cap 6 R.E. 2022 envisages by stating that:

- (2) A fact is said to be proved when-(a) in criminal matters, except where any statute or other law provides otherwise, the court is satisfied by the prosecution beyond reasonable doubt that the fact exists. 14 | P a g e The principle on the burden and standard of proof in criminal cases was elucidated in the case of Pascal Yoya @ Mganga vs Republic (Criminal Appeal No. 248 of 2017) [2021] TZCA 36 (24 February 2021) (TANZLII), at pages 16-17, where the Court observed that: It is a cardinal principle of criminal law in our jurisdiction that, in cases such as the one at hand, it is the prosecution that has a burden of proving its case beyond reasonable doubt. The burden never shifts to the accused. An accused only needs to raise some reasonable doubt on the prosecution case and he need not prove his innocence. See the cases of Woolmington v. Director of Public Prosecutions [1935] AC 462; Abdi Ally (supra) and Mohamed Haruna @ Mtupeni & Another v. Republic, Criminal Appeal No. 25 of 2007 (unreported). In the just cited case of Mohamed Haruna @ Mtupeni & Another (supra) the Court stated that: "Of course, in cases of this nature the burden of proof is always on the prosecution. The standard has always been proof beyond reasonable doubt. It is trite law that an accused person can only be 15 | P a g e convicted on the strength of the prosecution case and not on the basis of the weakness of his defence." Further, in the case of James s/o Msumule @ Jembe & Others vs Republic (Criminal Appeal No. 284 of 2021) [2024] TZCA 176 (13 March 2024) (TANZLII), at page 12, the Court of Appeal of Tanzania illustratively stated that: In the first place, we are in accord with both counsel on the key principles in proving criminal cases in that, one, in criminal matters mens rea and actus reus are to be proved.

Two, the duty of proving criminal cases lies on the prosecution. Three, the standard of proof required in criminal cases is beyond reasonable doubt. Four, conviction cannot base on uncorroborated confession. Five, conviction cannot be found on the basis of weakness of defence but on the strength of the prosecution evidence. Six, circumstantial evidence can be relied upon to mount a conviction so long as it irresistibly points to the guilty of the accused. Seven, whenever a doubt is 16 | P a g e established, it is to be resolved in favour of the accused. Considering all these guiding principles enunciated by the Court, it is the settled view of this Court that instant appeal is meritorious as these principles were not met. First, the conviction cannot be based on weakness of the defence. It is on record that the trial court magistrate convicted the appellant on basis of what it was considered that defence evidence was not reliable. The conclusion was reached as a result of trial court asking itself that why did the appellant herein ran away if nothing happened. The court concluded that the only logical answer is that appellant wanted to escape from being apprehended for the evil he committed. The trial court therefore rejected the defence evidence. Simply, totality of prosecution evidence of PW 1 and PW 2 is that the alleged victim spent about three hours from 11 hours to 14 hours at the appellant house/room. At all this time of three hours the alleged victim did not raise any alarms except when her sister knocked the door. This was contradicted by the appellant. It was appellant's evidence that the victim arrived at his place of business at 12:00 hours and that the appellant proceeded to his room to collect a bag for assisting the alleged victim to 17 | P a g e carry the potatoes' peels for rabbits when the victim arrived at that place. It was within no time that PW 1 arrived, shouted to raise alarm and the crowd of people gathered. In fact, the evidence of the defence on timing of arrival of the alleged victim and PW 1 at his house was not challenged at. The prosecution never challenged that it was at around 12 hours when the victim arrived and within no time PW 1 also arrived whereas she shouted to raise an alarm. There is nothing touching on the offence that accused person did not cross-examine. The trial court ought to have entered a finding on this aspect of difference in timing of arrival of the victim at the appellant's place and failure of the prosecution to cross examine on such aspect to have succinctly raised reasonable doubts that alleged offence never happened. The law in this jurisdiction is clear that failure to cross-examine on important matter amounts to admission. This principle was reiterated in the case of Issa Hassani Uki vs Republic (Criminal Appeal No. 129 of 2017)

[2018] TZCA 361 (10 May 2018) (TANZLII), at pages 16-17, where the Court of Appeal stated that: 18 | P a g e It is settled in this jurisdiction that failure to cross-examine a witness on a relevant matter ordinarily connotes acceptance of the veracity of the testimony - see. Damian Ruhele v. Republic, Criminal Appeal No. 501 of 2007, Nyerere Nyague v. Republic, Criminal Appeal No. 67 of 2010 and George Maili Kemboge v. Republic, Criminal Appeal No. 327 of 2013 (all unreported). In Nyerere Nyague for instance, we relied on our previous decisions of Cyprian A. Kibogoyo v. Republic, Criminal Appeal No. 88 of 1992 and Paul Yusuf Nchia v. National Executive Secretary, Chama Cha Mapinduzi & Another, Civil Appeal No. 85 of 2005 (both Unreported) to observe: "As a matter of principle, a party who fails to cross examine a witness on a certain matter is deemed to have accepted that

matter and will be estopped from asking the trial court to disbelieve what the witness said.” Likewise, in Damian Ruhele, again relying on the case of Cyprian Athanas Kibogoyo (supra), we underlined: 19 | P a g e “We are aware that there is a useful guidance in law that a person should not cross-examine if he/she cannot contradict. But it is also trite law that failure to cross- examine a witness on an important matter ordinarily implies the acceptance of the truth of the witness's evidence.” It should be noted at this juncture that page 3 of the Judgment, the trial court emphatically reasoned that appellant’s failure to cross examine on the age of the victim (PW 2) meant acceptance of the evidence on age of the victim. In the view of this court, there was no need of the appellant to cross-examine on that fact as it was immaterial as it does not form any part of elements of the offence. However, failure by the prosecution to cross-examine on time of the incident stated by the appellant has dire consequences on the case. Simply, failure to cross examine that victim met the appellant at 12hours and immediately within short time of that hour victim’s sister (PW 1) arrived and shouted to raise alarm contradicts the version of PW 1 and PW 2’s testimonies that the victim and appellant spent three hours from 11:00 20 | P a g e hours to 14:00 hours together. Such contradiction goes to the root of the case. Indeed, the analysis by the trial court that appellant was bound to explain the cause for him to run away tend to shift the burden of proof to the accused person. It is not acceptable in law unless such burden has been shifted by the law to the accused. In the case of Miraji Idd Waziri @ Simwana & Another vs Republic (Criminal Appeal 14 of 2018)

[2020] TZCA 387 (7 July 2020) (TANZLII), at page 17, the Court observed that: It is an elementary principle of law that an accused person has no duty to prove his innocence, but there are times when lies by such an accused may be resolved against him. The trial court was duty bound to consider, analyse critically the evidence from both sides and weigh the strengths of the prosecution’s case in order to arrive at a fair decision. Trial court could only be able to find the guilt of the accused person upon being satisfied that evidence on record was establishing the offence beyond all reasonable doubts. 21 | P a g e It is settled law that proof of the case is beyond reasonable doubt and it is the prosecution which is duty bound to establish that the appellant actually committed the actus reus and had mens rea thus establishing all the elements of the offence. Second, it is on record that Exhibit PE 1 which is PF 3 was admitted to form part of the evidence in Court. This Exhibit PE 1 as well as the whole of the evidence of PW 3 has nothing touching on the appellant’s participation in commission of the offence of attempted rape. It neither corroborates nor add anything tangible with regard to the alleged commission of the offence. Thus, this evidence has nothing valuable at all in proving the offence of attempted rape. However, in the judgment of the trial court it was unfortunate that learned trial magistrate considered this piece of evidence as an important and crucial in establishing the attempted rape. The trial court missed the boat on two main aspect. One, the finding that age was established that the victim was aged 15 years thus statutory attempted rape was proved. Two, that semen was found in labia majora of the victim thus circumstantially proving that the same originated from the appellant. 22 | P a g e It must be stated at this juncture that in attempted rape as a

criminal offence there is no element of age is required to be prove. Thus, allegedly statutory attempted rape is neither part of the offences under statutory law nor case law of this jurisdiction. Further, the question that semen was found in the victim's labia majora is neither supporting the evidence of other two prosecution witnesses. PW 2, the victim did not state at all that in the allegedly attempts by the appellant seminal fluids were released by the appellant. Neither, PW 2 stated that the appellant touched her body with penis rather the appellant requested to have sexual intercourse which was not agreed to by the victim. PW 2 stated only to have seen erected penis of the appellant. Thus, Exhibit PE 1 does not support any of the PW 1 or PW 2's evidence on record. Similarly, PW 1 never testified the manner in which she found the victim at the appellant's room. PW 1 failed to inform the trial court if she found the victim naked, her pants and clothing undressed or otherwise. Neither PW 2 informed the court at what time she dressed up her clothing in the appellant's house. This conspicuous absence of such evidence raises reasonable doubts on the possibility that nothing happened. There is no 23 | P a g e evidence that actually the appellant had made all preparatory acts to commit the offence of rape. In the circumstances, it is considered view of this court that the trial court magistrate misapprehended the evidence on record to convict the appellant. There was no cogent evidence to warrant conviction and sentence of the appellant herein. Indeed, the evidence of the appellant was credible and reliable. To address this matter, it is important to reiterate the guiding principle on credibility of witnesses that essentially provides that every competent witness is entitled to be regarded as credible witness unless there are sound reasons to hold otherwise. On record, there was no cogent reasons to so hold. The principle is illustrative in the case of Nyakuboga Boniface vs Republic (Criminal Appeal No. 434 of 2016) [2019] TZCA 461 (29 November 2019) (TANZLII), at pages 5-7, where the Court of Appeal held that: 24 | P a g e To begin with, we would wish to make it plain that any person, who is a competent witness in terms of the provisions of section 127 of the Law of Evidence Act, Cap. 6 R.E. 2002 (the TEA), is entitled to be believed and hence, a credible and reliable witness, unless there are cogent reasons as to why he/she should not. See: Goodluck Kyando Vs Republic [2006] T.L.R. 363. There are no rules of thumb in determining the credibility, truthfulness or reliability of a witness. It all depends on how the demeanour of the witness, has been assessed by the presiding Judge/magistrate, and the assessment which is made to the evidence which he/she gives in court. This is because the assessment of demeanour, is the monopoly of the presiding Judge/magistrate. In the proceedings and judgment on record, there is nothing demeanour of the appellant noted during the trial to warrant a trial judge discarding the whole of the defence evidence. Having re-evaluated the available records, this court being the first appellate court with all the 25 | P a g e powers to step into the shoes of the trial court, found nothing warranting discrediting the appellant's evidence. Third, the charge was only premised on Section 132(1) of the Penal Code, Cap 16 R.E. 2022. In this Court's view this charge was incurably defective as the same did not disclose important elements of the offence. The mental element of the offence is not covered at all. To be precise, the charge reads as follows: STATEMENT OF THE OFFENCE ATTEMPTED RAPE Contrary to section 132(1) of the Penal

Code, Cap 16 R.E. 2022. PARTICULARS OF THE OFFENCE SHADRACK S/O THOMAS on 8th day of January 2024 at Sayuni area, Manyoni Ward within Manyoni District in Singida, did attempt to have sexual intercourse with one J D/O H, a girl of 15 years old. It is the law of this jurisdiction that charge must contain necessary particulars describing the nature of the offence including those disclosing 26 | P a g e the complained acts/omissions and mental element of the offence. For instance, in Elihuruma Emmanuel Mushi vs Republic (Criminal Appeal No. 447 of 2020) [2024] TZCA 208 (20 March 2024) (TANZLII), at pages 7-8, the Court of Appeal emphasized that: It is a mandatory requirement under section 132 of CPA for a charge in a subordinate court to contain, not only a statement of specific offence with which the accused is charged but also such particulars necessary for giving reasonable information as to the nature of the offence charged. As we held in Isidori Patrice (supra): "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 27 | P a g e circumstances without which the offence cannot be committed, they must be included in the particulars of the offence. Relying on Musa Mwaikumba v. Republic

[2006] T.L.R. 387 to which reference was made in Isidori Patrice, we are satisfied that the wanting particulars in the count on which the appellant was tried and convicted were fatal to such conviction and the ultimate sentence. In respect of the attempted rape, the offence is created by both section 132(1) and (2) of the Penal Code. It the provision of subsection (2) that provides for circumstances under which the offence is said to have been committed in terms of mens rea. In the case of Isidori Patrice vs Republic (Criminal Appeal 224 of 2007) [2007] TZCA 2 (30 October 2007) (TANZLII), at pages 15-16, the Court of Appeal stated that: That apart, it will be immediately realized that the particulars of the charge lack the basic attributes of a charge for an offence under section 132 (1) and (2) of the Penal Code which would have reasonably informed him the nature of the case he was to answer. This is so because 28 | P a g e these particulars do not allege the specific intent of the offence that is an intent to procure prohibited sexual intercourse nor do they allege or disclose any essential fact of the offence as specified in sub-section (2) (a), (b), (c) and (d). At least the words "with intent to procure prohibited sexual intercourse threatened Selestina Michael a girl/woman aged 25 years for sexual purposes" ought to appear in the charge sheet. This deficiency was not remedied by the evidence of PW1 herself. Accordingly, a charge without inclusion of essential facts on the intention to procure prohibited sexual intercourse made the charge incomplete and incurably defective. In the case of Damian Ruhele vs Republic (Criminal Appeal 501 of 2007) [2012] TZCA 160 (2 March 2012) (TANZLII), at pages 5-6, the Court noted that: For our purposes in this case, paragraphs (b), (c) and (d) of the above sub-section do not apply. Paragraph (a) is the appropriate provision in the matter before us. The 29 | P a g e catchword under paragraph (a) is

"threatening". So, in a charge of attempted rape the evidence must show that the perpetrator of the crime in issue threatened the victim for sexual purposes. We are supported in this view by this Court's decision in *Mussa Mwaikunda v Republic*, Criminal Appeal No. 174 of 2006 (unreported). In the case of *Abubakari Msafiri vs Republic* (Criminal Appeal 378 of 2017) [2021] TZCA 611 (28 October 2021) (TANZLII), at page 20, the Court of Appeal reiterated that: Simply stated the offence of attempted rape is committed when a person's intention to commit the offence of rape is frustrated before he commits it fully-see *Joseph Paul @ Alex Makua v. Republic*, Criminal Appeal No. 342 of 2019 (unreported). Further, one of the essential ingredients of the offence of attempted rape and which the prosecution has a duty to prove beyond reasonable doubt is an intent to procure prohibited sexual intercourse. The 30 | P a g e intent is in most cases manifested by some actions preceding sexual intercourses. Having considered all these precedents that essentially cement on the need for a charge to contain both facts on actus reus and those on mens rea without which such charge becomes defective. It is lucid that the conviction and sentence against the appellant cannot stand as it was based on incurably defective charge. On the basis of the first broad category of grounds on proof the case to the required standard, it is lucid that both conviction and sentence of the appellant was improper for lack of any sufficient legal basis. Thus, this court is certainly of the view that 1st, 2nd, 4th, 5th, 7th, 9th, and 13th have iota of merits. They deserve to be upheld. On this category, 11th and 12th grounds would be destitute of merits thus overruled. This set of grounds is sufficient to dispose the appeal. It would be an academic exercise to analyse the second limb of procedural irregularities in respect of the appeal. Thus, the first limb being meritorious entitles this court to allow the appeal. 31 | P a g e In upshot, this appeal has merits and it is hereby upheld. The decision of the trial court cannot stand. The conviction entered upon the appellant is hereby quashed and the sentence set aside. It is ordered that appellant be set at liberty immediately unless his continued incarceration in custody is otherwise for other lawful cause. It is so ordered. DATED at DODOMA this 26th day of February 2025. E.E. LONGOPA JUDGE 26/02/2025. 32 | P a g e

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