CRIMINAL APPEAL 224 OF 2007- COURT OF APPEAL OF TANZANIA AT ARUSHA- MROSO, J.A., KAJI, J.A. And RUTAKANGWA, J.A.	**ISIDORI PATRICE Vs. REPUBLIC (Appeal from the Decision of the High Court of Tanzania at Moshi)- Criminal Appeal No. 35 of 2001- Jundu, J.**	Attempted rape contrary to section 132 of the Penal Code.- District Court of Moshi convicted the appellant as charged- sentenced him to thirty years imprisonment. **Attempted Rape-** there is now a special specie of the offence of attempted rape. This was brought about by the Sexual Offences (Special Provisions) Act, 1998, No. 4, (SOSPA henceforth). Before the advent of SOSPA, the offence of attempted rape was found in section 132 of the Penal Code. **Attempted Rape-** With the coming into force of the SOSPA, the offence of attempted rape has assumed a new dimension. It has been statutorily defined and its essential ingredients spelt out, outside

		which there can be no offence of attempted rape. The same is found in section 132 of the Penal Code. However, unlike the repealed section 132, this one has two sub-sections. **Particulars of any charge must disclose essential ingredients of offence-** 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. In a charge under section 132 (1) and (2), of the Penal Code, the factual circumstances which of necessity must be stated in the charge are those specified in paragraphs (a), (b), (c) and (d) of sub-section (2), in addition to the mentioned specific *"intent to procure prohibited sexual intercourse"* **A charge which did not disclose any offence in the particulars of offence** is manifestly wrong and cannot be cured under section 388 of the Criminal Procedure Act, 1985.

IN THE COURT OF APPEAL OF TANZANIA

AT ARUSHA

(CORAM: MROSO,J.A., KAJI, J.A. And RUTAKANGWA, J.A.)

CRIMINAL APPEAL 224 OF 2007

ISIDORI PATRICE ..... APPELLANT
VERSUS
THE REPUBLIC ..... RESPONDENT

(Appeal from the Decision of the High Court of Tanzania at Moshi)

(Jundu, J.)

dated the 24th day of July,2006
in
Criminal Appeal No. 35 of 2001

JUDGMENT OF THE COURT

17 & 30 October, 2007

RUTAKANGWA, J.A.:

The District Court of Moshi convicted the appellant as charged of the offence of attempted rape contrary to section 132 of the Penal Code. It sentenced him to thirty years imprisonment. He appealed against the conviction and sentence to the High Court at Moshi. The appeal was dismissed in its entirety. Still believing to be innocent he has lodged this appeal.

The appellant's memorandum of appeal contains five grounds of appeal. These are to the effect that:- **One,** the prosecution did not prove the charge beyond reasonable doubt. **Two,** the trial court erred in law in not holding a preliminary hearing contrary to the mandatory requirements of section 192 of the Criminal Procedure Act, Cap. 20 R.E. 2002 (the Act). **Three,** the trial court erred in law in failing to comply with the mandatory provisions of section 240 (3) of the Act. **Four,** the two courts below erred in law and fact in holding that the appellant was positively identified. **Five,** the two courts below erred in fact in failing to hold that failure to summon the investigator in the case violated the provisions of sections 142 and 143 of the Act.

Before discussing these grounds of appeal and the respondent Republic's response thereto, it will be refreshing to state briefly the facts which prompted the prosecution of the appellant.

The victim of the attempted rape was one Selestina d/o Michael (PW1) of Shirimatunda Moshi District. On 12th December, 1998 at about 7:00 pm she was walking on her way back home from work

when the appellant got hold of her, dragged her into a *shamba* and undressed her. She raised an alarm which was promptly responded by one Joseph Kijolo (PW3) and Daniel Stephen (PW2). It was PW3 who first arrived at the scene of the attempted rape. However, neither PW2 nor PW3 found the appellant at the scene. But PW3 testified that as he was heading towards the said scene of the crime he met the appellant along the way who was *"running fast"*. PW1 told the two witnesses that the appellant had attempted to rape her. PW2 told the trial court that the crime was committed in the bush and PW1 was "soaked in mud". On his part PW3 testified to the effect that the offence was committed in a coffee plantation and PW1's body was covered in dust. The appellant was apprehended and charged accordingly.

In defending himself the appellant testified that when he returned home from work on the evening after the alleged incident he was told by his father that rumours were circulating to the effect that he had raped a girl. He never said anything in response to that accusation. He went about his work until after one week when he

was arrested and taken to Shirimatunda Police Post and subsequently charged. He denied committing the alleged offence.

As already pointed out above the trial District Court convicted the appellant as charged. It was satisfied that on the evidence of PW1, PW2 and PW3 which it took to be wholly true, the charged offence had been proved. It was also held by the trial court that the culprit was positively identified by PW1 and PW3 to be the appellant. The learned first appellate judge was equally settled in his mind that PW1 did not mistake the identity of her assailant. He said:-

> *"There was no mistaken identity as to who had dragged PW1 in the coffee plantation and attempted to rape her. It was the appellant".*

In this appeal the appellant advocated for himself. At first he had nothing to say, opting to hear first the respondent's response to his grounds of appeal.

The Republic was represented by Mr. Mzikila, learned State Attorney, who resisted the appeal. The learned State Attorney urged us to dismiss the appeal because the charge against him was

satisfactorily proved by the credible evidence of PW1 which was supported by that of PW3. He impressed on us that the offence of attempted rape is committed when a person's resolve to commit the full offence is frustrated before he commits it fully. He was candid enough to admit that he had no decided authority to support his proposition. Once the appellant had dragged PW1 into the plantation and began to undress her only to run away when some people arrived, that was sufficient to constitute the offence of attempted rape under section 132 (2) (a) of the Penal Code, he maintained.

On non-compliance with the mandatory provisions of sections 192 and 240 (3) of the Act, Mr. Mzikila conceded that that was an error. All the same he urged us to hold that the omissions were curable as they did not occasion any injustice. The appellant was not prejudiced at all by the failure to hold a preliminary hearing and/or to call the doctor who filled in the PF3, he argued. He went further and submitted that the conviction would stand even without the PF3. On section 142 and 143 of the Act Mr. Mzikila was of the view that the prosecution had the sole discretion in deciding which witness to call and which one to omit. If the appellant thought the evidence of the

investigator was material to his case, he ought to have requested the trial court to summon him as his witness, he argued. He accordingly urged us to dismiss the appeal.

In response to Mr. Mzikila's submission the appellant argued that injustice was caused to him because he was sentenced to thirty years imprisonment. On the issue of identity, he argued that he was mistakenly identified as at the alleged time he was on duty at Kibo Match Factory.

We think the issue of non-compliance with the provisions of the Act, mandatory as they are, need not detain us. Having gone through the record of proceedings and the submissions of both sides in this appeal, we have decided to accept the reasoning of Mr. Mzikila. The appellant was not prejudiced at all by the conceded non-compliances. We note with satisfaction that the trial of the appellant began within ten (10) days of his formal arraignment. The prosecution closed its case within one month after the commencement of the trial. The appellant had more than 30 days at his disposal to marshal his defence. Clearly, failure to conduct a

preliminary hearing did not prejudice the appellant. We agree with Mr. Mzikila that to establish an offence of attempted rape in this particular case, did not need the receipt of the PF3 in evidence. We also do not see the relevance of section 143 of the Act because no witness summons was issued to the investigator and he or she failed to appear. So the issue of issuing an arrest warrant could not have arisen. Regarding the complaint based on section 142 we accept Mr. Mzikila's contention that if the appellant thought the investigator would have given material evidence in the case and the prosecution, either deliberately or inadvertently, failed to produce him/her, he would have sought the assistance of the trial court to have the investigator summoned either as a court witness or as his witness.

The remaining ground of appeal is a bit intractable. Mr. Mzikila has urged us to hold that the charge of attempted rape was proved to the hilt. The appellant is of the opposite view. In approaching this issue we shall remain alive to the fact that there is now a special specie of the offence of attempted rape. This was brought about by the Sexual Offences (Special Provisions) Act, 1998, No. 4, (SOSPA

henceforth). Before the advent of SOSPA, the offence of attempted rape was found in section 132 of the Penal Code.

Before its repeal by section 6 of SOSPA, the said section 132, in full, read as follows:-

> *"Any person who attempts to commit rape is guilty of a felony and is liable to imprisonment for life, with or without corporal punishment".*

As this section did not contain a definition of attempted rape, the courts used to resort to section 380 of the Penal Code which defines the crime of ***"attempt"***. Section 380 defines ***"attempt"*** as follows:-

> *When a person, intending to commit an offence, begins to put his intention into execution by means adapted to its fulfillment, and manifests his intention by some overt act, but does not fulfil his intention to such extent as to commit the offence, he is deemed to attempt to commit the offence.*

For this reason, a charge for attempted rape, as for any attempt for other statutory offences, was always framed on the format of the charge for the full offence of rape by inserting the words ***"attempted to"*** before the words charging the full offence, i.e. *"to have carnal knowledge of ….. without her consent".*

With the coming into force of the SOSPA, the offence of attempted rape has assumed a new dimension. It has been statutorily defined and its essential ingredients spelt out, outside which there can be no offence of attempted rape. The same is found in section 132 of the Penal Code. However, unlike the repealed section 132, this one has two sub-sections. The full section reads as follows:-

> *"132 – (1) Any person who attempts to commit rape commits the offence of attempted rape and except for the cases specified in sub-section (3) shall be 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 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;

(b) being a person of authority or influence in relation to the girl or woman, applying any act or intimidation over her for sexual purposes;

(c) making any false representations to her for the purpose of obtaining her consent;

(d) representing himself as a husband of the girl or woman, and the girl or woman is put in a position where,, but for the occurrence of anything independent of that person's will, she would be involuntarily carnally known;

(3) ….. not relevant".

Having carefully considered the evidence on record, we are of the settled view that an appropriate charge against the appellant ought to have been laid under paragraph (a) of section 132 (2).

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*: See section 132 of the Act. 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.

In a charge under section 132 (1) and (2), therefore, the factual circumstances which of necessity must be stated in the charge are those specified in paragraphs (a), (b), (c) and (d) of sub-section (2), in addition to the mentioned specific *"intent to procure prohibited sexual intercourse".*

It is now incumbent upon us to look at the nature of the charge which the appellant had to answer in the trial District Court. As already shown it was a charge of *"Attempt Rape c/s 132 of the Penal Code"*. The particulars of the charge read as follows:-

> *"That Isidori s/o Patrice Masawe charged on 12th day of December, 1998 at about 19:00 hours at Shirimatunda Village, within the District of Moshi, Kilimanjaro Region, did attempt to have carnal knowledge to (sic) one Selestine d/o Michael the age of 25 years (sic) without her consent"*.

This charge was framed on the model of the charges under the repealed section 132 of the Penal Code. 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 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* <u>*threatened*</u> *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. In the light of this glaring defect in the charge, can it be held confidently that the appellant was properly tried for and rightly convicted of attempted rape?

The answer to the above posed question was conclusively provided by this Court in the case of **Mussa Mwaikunda** v **R,** Criminal Appeal No. 174 of 2006 whose decision was delivered on 31st August, 2006. Apart from the names of the victims and accused, the dates and places where the offences were allegedly

committed, the facts of that case and this case are identical. Dealing with an identical issue, the Court said:-

> *"….. It is interesting to note here that in the above charge sheet the particulars or statement of offence did not allege anything on threatening which is the catchword in the paragraph.*
>
> *The principle has always been that an accused person must know the nature of the case facing him. This can be achieved if a charge discloses the essential elements of an offence. Bearing this in mind the charge in the instant case ought to have disclosed the aspect of threatening which is an essential element under paragraph (a) above. In the absence of disclosure it occurs to us that the nature of the case facing the appellant was not adequately disclosed to him. The charge was, therefore, defective in our view."*

We subscribe wholly to the above reasoning and holding. In addition to the reasons we attempted to give, we are of the firm view that the

charge the appellant was facing was patently defective. 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.

All said, we allow this appeal for the reason given, quash the conviction and set aside the sentence. The appellant should be released forthwith from prison unless he is otherwise lawfully held.

DATED at ARUSHA this 26th day of October, 2007.

J. A. MROSO
JUSTICE OF APPEAL

S. N. KAJI
JUSTICE OF APPEAL

E.M.K. RUTAKANGWA
JUSTICE OF APPEAL

I certify that this is a true copy of the original.

(F. L. K. WAMBALI)
SENIOR DEPUTY REGISTRAR