IN THE COURT OF APPEAL OF TANZANIA
AT ARUSHA

(CORAM: OTHMAN, C.J., LUANDA, J.A., And ORIYO, J.A.

CRIMINAL APPEAL NO. 191 of 2008

JOSEPH PAULO.....APPELLANT
VERSUS

THE DIRECTOR OF PUBLIC PROSECUTIONS.....RESPONDENT

(Appeal from the Judgment of the High Court of Tanzania

at Arusha)

(Bwana, J.)

Dated 23rd day of November, 2007
in
Criminal Appeal No. 71 of 2006

JUDGMENT OF THE COURT

3RD & 9TH NOVEMBER, 2011

OTHMAN, C.J.:

In this second appeal, Joseph Paulo, the appellant challenges the decision of the High Court (Bwana, J. as he then was) rendered on 23/11/2007 whereby his appeal against conviction and sentence for attempted rape c/s 132(1) of the Penal Code (Cap. 16, R.E. 2002) entered by the Arusha Resident Magistrates' Court on 1/11/2005 was dismissed.

At the hearing of the appeal on 3/11/2011, the appellant, unrepresented, appeared in person. The Respondent Director of Public Prosecutions, which did not resist the appeal was represented by Ms. Javelin Rugaihuruza, learned State Attorney.

In brief, at the trial, the prosecution case was this. On 10/4/2008 at 1800hrs, while on her way home from the farm Calista Qumbalali (PW1) was grabbed, dragged aside and fell down by the appellant. He tore her underpants and took out his penis. Responding to PW1's cries, Boay Bura (PW2) found both on the ground struggling. The appellant ran away, but was immediately apprehended.

In his defence, the appellant claimed that he was arrested for not having paid school contributions.

The trial court convicted him of attempted rape and accordingly sentenced him to a term of thirty years imprisonment and six strokes of the cane. His appeal to the High Court was dismissed.

Before us, **ground one** of the appeal faults the High Court for relying on his confessional cautioned statement (Exhibit 1) recorded contrary to section 50(1)(a) of the Criminal Procedure Act (Cap. 20, R.E. 2002). The appellant submitted that the cautioned statement was recorded

outside the periods prescribed under section 50(1)(a) of the Criminal Procedure Act as he was arrested on 10/4/2005 and the cautioned statement was taken by the police on 13/4/2005. This was, he indicated, far beyond the 4 hours or an extra 8 hours extension, permissible under the law.

For the Director of Public Prosecutions, Ms. Rugaihuruza agreed with appellant. However, she correctly indicated that the High Court had not relied on it. It had found the evidence of PW1 and PW2 cogent and sufficient to establish the offence.

On our part, we would agree with Ms. Rugaihuzura that as long as the High Court did not rely on the cautioned statement (Exh. P.1), it could not be faulted as alleged in this ground of appeal. Accordingly, ground 1 of the appeal has no substance.

The complaint in **ground two** of the appeal is that both the lower courts erred in relying on the uncorroborated evidence of PW1. No village chairman had testified in support of PW1's story.

Disagreeing, Ms. Rugaihuruza submitted that the evidence of PW1 was corroborated by PW2 who found the appellant on top of PW1.

With respect, we need not be detained by this ground of appeal. Both the lower courts placed reliance on the evidence of PW1 which was amply supported in material facts by that of PW2.

In **ground three** of the appeal, the Appellant faults the High Court for wrongly finding that all the elements of the offence of attempted rape had been proved. On her part, Ms. Rugaihuruza considered this ground of appeal valid. Relying on **Khatibu Kanga V. R.,** Criminal Appeal No. 290 of 2007 (CAT) (unrepresented) she submitted that, "threat" as an element of attempted rape under section 132(2)(a) of the Penal Code had not been proved by the prosecution. The circumstances, she argued, did not reveal the commission of any threat against PW1 committed by the appellant. That the charge sheet in the particulars of the offence also did not disclose details on any threat administered. Questioned by the Court, she acknowledged that the appellant's acts had constituted violence against PW1. However, she maintained that there was no threat.

Generally, on the ingredients of the offence of attempted rape, the High Court in its Judgment held:

> *"The Appellant's act of grabbing and dragging PW2 and falling her down, then tearing her underparts,*

followed by taking out his penis, are proof of the existence of an overact, an essential element in proving an offence of attempted rape."

Now, section 132(2)(a) of the Penal Code provides:

> **"132(2) – A person attempts to comment rape, if with the intention to procure prohibited sexual intercourse with any girl or woman, he manifests his intention by-**
>
> **(a) threatening a girl or women for sexual purposes,**
>
> **(b) ....." (Emphases added).**

PW1 gave evidence that:

> *"When I was about to pass him (the Appellant) he grabbed me and fell me down..... I struggled and tried to escape. I ran away. He ran after me and caught me again. I was crying alone. He dragged me aside and fell me down. He tore off my underpants and took out his penis. Just then people came following my cries".*

PW3 who responded to PW1's cries stated:

"I found two people on the ground struggling..... The man got up abruptly and ran away".

In **Khatibu Kanga's** case, the Court stated that the term "threat", which is not defined in the Penal Code, was used in section 132(2)(a) therein in its ordinary grammatical meaning. **The Concise Oxford Dictionary**, 5th Ed,p.1350 defines it thus:

> "**Declaration of intention to punish or hurt** (law) such reliance of bodily hurt or injury to reputation or property as may restrain a person's freedom of action."

In **Black's Law Dictionary**, 6th Ed;p.1030 the term is said to mean:

> "**A communicated intent to inflict physical or other harm on any person** or property. **A declaration of intention to injuire another** or his property **by some unlawful act**...."(Emphasis added).

In our consideration view, a declaration of intention to punish, hurt or injure or the communication of an intention to inflict physical or other

harm on a victim of attempted rape need not be oral. It could also be by conduct.

Having closely examined the matter, in our considered view, the facts constituting "threat" in **Khatibu Kanga's case,** that is, the bitting of the victim's cheek by the appellant, are readily distinguished from those of the events in this case, which were cogently narrated by PW1 and PW2. Taking the sequence of events and the totality of the appellant's conduct, we are of the settled mind that they not only constituted a threat, but went further and amounted to the use of actual force. Not only did he assault her. PW1 was also the subject of restraint and acts of violence committed by the appellant. Taken together, the appellant's conduct constituted more than a sufficient communication of his intention to inflict serious physical injury or harm on PW1 by means of multiple unlawful acts and for sexual purposes. By this conduct, in our respectful view, "threat", as an element of the offence of attempted rape had been proved beyond all reasonable doubt. The particulars of the offence in the charge sheet were also sufficient to put the appellant on notice of the offence charged. Accordingly, we find no merit in ground three of the appeal.

All considered, the conclusion is inevitable that there is no appealable error in the concurrent findings of the facts and the application of the law by the courts below that would have invited our interference. In the result, the appeal is hereby dismissed.

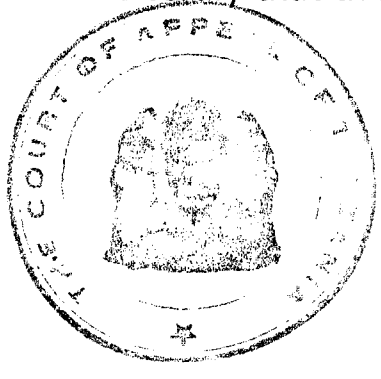
DATED at **ARUSHA** this 7th day of November, 2011.

M. C. OTHMAN
CHIEF JUSTICE

B. M. LUANDA
JUSTICE OF APPEAL

K.K. ORIYO
JUSTICE OF APPEAL

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



Z. A. Maruma
DEPUTY REGISTRAR