IN THE COURT OF APPEAL OF TANZANIA
AT IRINGA

(CORAM: MUNUO, J.A., LUANDA, J.A., And MJASIRI, J.A.)

CRIMINAL APPEAL NO. 336 OF 2008

AUZEBIO NYENZI ..... APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

(Appeal from the decision of the High Court of Tanzania at Iringa)

(MKUYE, J.)

dated the 10th day of October, 2008
in
Criminal Appeal No. 29 of 2008

JUDGMENT OF THE COURT

16th & 20 June and 2011

MJASIRI, J.A.

This is a second appeal from the judgment of the District Court of Mufindi District at Mafinga, where the appellant Auzebio Nyenzi was convicted as charged for the offence of attempted rape contrary to sections 132(1) of the Penal Code, Cap 16 [RE 2002] and was sentenced to thirty (30) years imprisonment. He was aggrieved by this decision and unsuccessfully appealed to the High Court. Still dissatisfied with the decision of the High Court, the appellant has preferred this appeal to this Court. The appellant appeared in

person, unrepresented, whereas the respondent Republic was represented by Ms Andikalo Msabila, Senior State Attorney.

The appellant denied the charge. In the memorandum of appeal to this Court the appellant listed 7 grounds of appeal essentially challenging the credibility of the testimony of PW1, PW2, & PW5. He stated that their testimony was unreliable. The appellant was also of the view that given the totality of the evidence, the prosecution had failed to prove its case beyond reasonable doubt.

Briefly the background to the case is that PW1, Haruna Kisonga was returning home from school accompanied by her cousin, Bariki Ngairo. The two met the appellant who began to follow them. He then blocked the way so that PW1 was not able to move forward. When she attempted to escape the appellant by running away, he chased her, grabbed her by the neck. PW2 ran home to seek for help. The appellant pushed her down, removed her pants and was on top of her. What saved her from being raped was the quick response by PW5 who rushed to the scene after the complaint made by PW2. He found the appellant lying on top of PW1. His trousers were pulled down. He arrested the appellant. According to the

doctor's testimony, PW4 nothing happened, that is PW1 was not raped.

On his part the learned Senior State Attorney supported the conviction. She submitted that the appellant's grounds of appeal have no basis. PW1 gave a solid account of what had transpired. Her evidence was supported by that of PW5 who came to the scene and witnessed the incident. This is also supported by the account given by PW2, that he ran home to seek for help after his cousin was dragged into the bush by the appellant.

The crucial issue in this appeal is whether or not the offence of attempted rape was committed and whether or not it was the appellant who committed the offence.

According to **Black's Law Dictionary** (Abridged) Sixth Edition rape is defined as follows:

> *"Unlawful sexual intercourse with a female without her consent. The unlawful carnal knowledge of a woman by a man forcibly and against her will."*

In **Smith and Hogan on Criminal Law** (9th Edition), it is stated thus:-

> *'The essence of rape is the absence of consent. It is for the prosecution to prove that the victim did not consent"*

To constitute an attempt to rape there must be an intention to have intercourse with a woman notwithstanding resistance on her part, plus and attempt to put this intention into effect. See **Adamu Mulira v R.**, (1953) 20 E.A.C.A. 223.

In addition to challenging the credibility of PW5, the appellant also complained in one of his grounds of appeal that a witness who has not been listed at the preliminary hearing gave evidence at the trial. He was referring to PW5. The appellant must have had in mind section 289 of the Criminal Procedure Act Cap.20 R.E.2002. Section 289 (1) provides as under:-

> *"No witness whose statement or substance of evidence was not read at the committal proceedings shall be called by the prosecution at the trial unless the prosecution has given a reasonable notice in writing to the accused person or his advocate of the intention to call such witness."*

However section 289 (supra) does not apply to this case. It applies to trials in the High Court. This is because trials in the High Court are normally proceeded by committal proceedings in a subordinate court at which statements of prospective prosecution witnesses are read out in the open court in the presence of the accused. If at the trial witnesses other than those whose statements were read during the committal proceedings are called as additional witnesses, section 289 of the Criminal procedure Act has to be complied with. There is no equivalent provision for trials in the subordinate courts. As there is no law which prevented the prosecution from calling PW5 as a witness, there is no basis in the Appellant's complaint. See **Bandoma Fadhil Makaro and Another v Republic,** Criminal Appeal No. 14 of 2005 (CA).

In a second appeal the Court may only interfere with findings of fact by the Courts below where it is shown that there has been a misapprehension of the evidence, a miscarriage of justice or a violation of some principle of law or practice. See **Ambrose Severin Lekule @ China v Republic** Criminal Appeal No. 145 of 2007 (unreported) and **Daniel Nguru v Republic,** Criminal Appeal No 178 of 2004 (unreported).

The central issue therefore is whether or not there is a basis for us to interfere with the concurrent findings of facts by the Courts below that the evidence of PW1, PW2 and PW5 established the appellant's guilt beyond reasonable doubt.

In looking at the evidence of PW1, PW2 & PW5, it has been clearly established that the offence of attempted rape was committed. Our own evaluation of the evidence of these key witnesses has led us to the conclusion that said witnesses gave the trial Court a truthful account of what had transpired.

In criminal cases, the prosecution is required to prove the case against the accused person beyond reasonable doubt. Given the evidence on record we have no doubt in our minds that the prosecution has met the standard required under the law. Clear evidence was produced to prove that there was an attempt by the appellant to rape PW.1.

Having said the foregoing we are satisfied that there is sufficient evidence to warrant the appellant's conviction. We therefore dismiss the appeal, and uphold the sentence of 30 years imprisonment. It is so ordered .

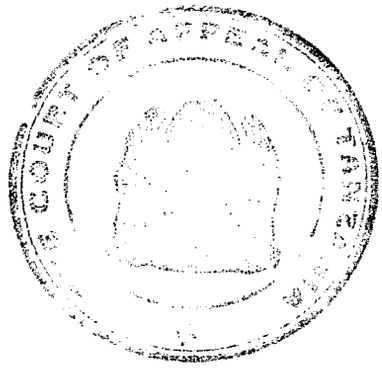
DATED at IRINGA this 17th day of June, 2011.

E. N. MUNUO
JUSTICE OF APPEAL

B. M. LUANDA
JUSTICE OF APPEAL

S. MJASIRI
JUSTICE OF APPEAL

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



J.S. MGETTA
DEPUTY REGISTRAR
COURT OF APPEAL