

IN THE HIGH COURT OF TANZANIA

(MTWARA DISTRICT REGISTRY)

AT MTWARA

CONSOLIDATED CRIMINAL APPEALS NOS.27 & 45 OF 2020

(Arising from Lindi District Court Criminal Case No. 89 of 2019)

DPP.....APPELLANT

VERSUS

JUMA JUMA MUHIDIN.....RESPONDENT

JUDGMENT

17 & 24 March & 25 June, 2021

DYANSOBERA, J.:

Before me there are two appeals: the first being Criminal Appeal No. 27 of 2020 between the DPP v. Juma Juma Muhidini while the second appeal is Criminal Appeal No.45 of 2020 between Juma Juma Muhidini v. R, both arise from the same proceedings, that is Criminal Case No.89 of 2019 of Lindi District Court. Owing to this fact, I have decided to consolidate the two appeals for convenience purposes.

The matter started when Juma Juma Muhidini (whom I will be referring to as the accused) was arraigned before the District Court of Lindi at Lindi for attempted rape contrary to section 132 (1)(2)(a) of the Penal Code [Cap 16 R.E. 2002]. It was alleged by the prosecution that the accused, on 1st day of December, 2019 at Mnazi Mmoja area within the District and Region of Lindi, with intent to procure prohibited sexual intercourse, did threatening one Zulfa d/o Salum. The accused denied the charge. After a full trial, however, he was found guilty, convicted and sentenced to ten years (10) years' prison term. Both the Director of Public Prosecutions and the accused were aggrieved hence these appeals which are consolidated as indicated above.

The factual background of these appeals is that Zaituni Mohamed (PW1), Mwanahamis Rashid (PW3) and the accused are tenants of one landlord at Mnazi mmoja area. PW 1 is the mother of the victim who, for purposes of hiding her identity shall be referred to as 'ZY'. On 1st day of December, 2019 at night she was at a roadside selling some food. Her daughter, 'ZY' was at home preparing evening meal. The accused who was at the door to his room asked her to go to him after she had finished cooking the food. 'ZY' obliged and the accused gave her Tshs.1000/= and then pulled her right hand inside his room, lied her on the mattress and took off her under pants. 'ZY' raised an alarm and the accused released her. She got outside the accused's room and went straight

to PW 3 crying. She told PW 3 that the accused wanted to rape her. PW 3 took 'ZY' to one neighbour called Shangazi where PW 1 was called. PW 1 went to the Kitongoji leader and reported. They then went to the room, called the police who apprehended the appellant and took him to Mnazi Mmoja police outpost.

In his defence, the accused told the trial court that on 19th day of December, 2019 at 0600 hrs outside he was collected by a person who took him to harvest coconuts for him. The accused then went back home and found 'ZY' lighting fire. He argued that since he was tired he gave her Tshs. 1000 so that she bought medicine for him when going to the shop to buy flour. The accused then went to sleep inside his room but was then awakened by PW 1 who slapped him. The police arrived and collected him and took him to Mingoyo alleging that 'ZY' he had attempted to rape 'ZY'.

The accused admitted to have rented at the same house with PW 1. He also admitted to have given 'ZY', Tshs. 1000 after she had prepared for an evening meal.

The learned Resident Magistrate found 'ZY' as a credible witness and her evidence reliable. She also found her evidence unshaken after the accused failed to cross examine him. The learned Resident Magistrate, in consequence, found the accused guilty of the offence charged, convicted him and punished him accordingly.

In challenging the trial court's finding, the DPP filed only one ground of appeal, that is:-

1. That the trial Magistrate erred in law in imposing a sentence of ten years to the respondent contrary to the law.

The accused's grounds of appeal were the following:-

1. That, the trial court erred in law and fact in convicting and sentencing the appellant basing on the demeanour of PW2 whole testifying before the court and failed to assess the evidence of PW2 as a child of tender age as required by the law.
2. That the trial court erred in law and in fact in convicting and sentencing the appellant basing in admitting and considering the evidence of PW1 as direct evidence.
3. That the trial court erred in law and fact to convicting and sentencing the appellant because the prosecution side did not prove its case to the require standard.
4. That the trial court erred in law and fact in the convicting and sentencing the appellant with no basis for such conviction as no issue for determination was raised.

5. That the trial court erred in fact in convicting and sentencing the appellant basing on the weakness of defence side rather than on the strength of prosecution side.

The same accused, on 10th March, 2021 filed the following two additional grounds of appeal, namely,

1. That the offence was not proved beyond reasonable doubt if it was the appellant who did the alleged offence since during the occurrences of the alleged incident the conditions of identification was not favourable for the alleged victim to identify the appellant. No prosecution witnesses ever proved how they came to know that it was the appellant who tried to rape the victim no description was given on the clothes worn, distance between the appellant and the victim the intensity of the light or the any particular mark that could have proved that it was the appellant who attempted to rape the victim.
2. That being a layman of the law, I pray upon your court to scrutinize the notice of appeal of the respondent to rule out its validity. The notice fails to have a stamp of the court where it was lodged, secondly the exact date when it was lodged, it shows it was lodged on 2nd March, 2020 already the prescribed time to lodge a notice of

appeal had expired, furthermore the signature of the registry officer as seen differs with the signature who rectified the date of filling it while it was not supposed to differ it was the same person who was supposed to make the alterations”.

At the hearing of the appeal by the DDP, the appellant, was represented by Ms Caroline Matemu, learned State Attorney whereas the accused, respondent, appeared in person and unrepresented.

Arguing in support of the appeal, Ms Caroline Matemu submitted that the trial court was satisfied that the case was proved beyond reasonable doubt and sentenced the respondent to 10 years term of imprisonment. According to her, the sentence was illegal as the stipulated sentence is life imprisonment or an imprisonment of not less than 30 years with or without corporal punishment. The learned State Attorney contented that the trial court had no discretion to sentence the appellant to ten years. Being of the view that the law was not followed, she prayed the illegal sentence be set aside and a sentence of not less than 30 years be meted out.

In response the respondent had no comment and therefore, there was no rejoinder by the appellant.

With respect to the appeal brought by the accused, during the hearing, the accused as the appellant appeared in person whereas the respondent enjoyed

the services of Mr. Paul Kimweri, learned Senior State Attorney. He reiterated that he had filed a total of seven ground of appeal, the first five being the principal grounds of appeal while the two were additional grounds of appeal. He had nothing useful to add when invited to argue them. Amplifying the grounds of appeal, the accused d that his petition of appeal has five grounds while his additional ground of appeal covers two grounds.

In his response, Mr. Kimweri, submitted that the appellant was charged with attempted rape contrary to section 132(1) and 2 and was convicted and sentenced to ten years term of imprisonment.

Attacking the accused's 1st ground of appeal on the reception of evidence, the learned Senior State Attorney, referring to page 8 of the proceedings, contended that the trial court asked and recorded PW2 to have promised to tell the truth and not lies, a procedure which was in compliance with the current legal requirement of section 127(2) of the Evidence Act as amended by Act N.4 of 2016. He cemented his argument by citing the case of **Hamis Issa v. R**, Crim. Appeal No.274 of 2018 CAT-Mtwara. In his view, the reception of the victim's evidence was legal.

With regard to the rest grounds of appeal, including the first ground on additional grounds, Mr. Kimweri submitted that one of the ingredients of the offence of attempted rape, is preparation which was going to occur but was

prevented. He supported of his argument by referring to the case of **James Kilimo v. R**, Crim Appeal No.25 of 2004 CAT-Tanga. Furthermore, Mr. Kimweri argued that at page 8 of the proceedings, PW2 testified on what the accused did, that is, he laid PW2 down and undressed the victim but before he proceeded further, the victim raised an alarm causing the accused to release her and she managed to go outside. It was learned further arguent of the learned Senior State Attorney that there were sufficient preparations as stated in the case of **James Kilimo** (supra). He stressed that PW3 was the immediate person to get information from the victim and together reported to the chairman and that there was enough evidence to prove the offence charged.

Responding to the fourth ground on the complaint that the court raised no issue for determination, learned Senior State Attorney argued that at page 2 of the typed proceedings the court raised the issue of whether the accused attempted to rape the victim. The fourth ground is, therefore, baseless, Mr. Kimweri argued.

The 5th ground of appeal is on the complaint that the trial court did not consider the strength of the prosecution case but only the weakness of the defence is concerned. In response, Mr. Kimweri argued that at the last paragraph of page 12 of the typed judgment, the trial court stated that the

prosecution had proved its case by considering the evidence of PW1 which was corroborated by the evidence of PW2 and PW3.

On the second ground of the additional grounds Mr. Kimweri was of the view that it is not clear what the appellant is intending to say as the respondent did give notice unless the appellant is against his own notice. He urged this court to find this ground also without basis.

Learned Senior State Attorney, in conclusion, reiterated that the sentence of 10 year's imprisonment was not only on the lowest side but also illegal as the legal sentence is thirty years.

The accused had nothing to re-join to learned Senior State Attorney's submission in reply.

On my part, having perused the record of the trial court and considered the grounds of appeal together with the submissions from both sides in respect to both appeals, I think, the issues calling for determination in this appeal are twofold, that is whether the case against the accused was proved beyond reasonable doubt and if the answer is affirmative, then the next issue will be whether the sentence of ten years meted by the trial court was valid/legal?

It is a settled principle that proof of any offence depends on the positive test of the ingredients of the offence charged in conjunction with the gathered

evidence from the prosecution witnesses. To determine whether or not the ingredients were prove, regard must be had to the relevant law and the admissible evidence unfurled before the trial court.

According to the charge sheet, the law under which the accused was charged with is Section 132(1) and (2) (a) of the Penal Code [Cap 16 R.E. 2002 now 2019] which provides as hereunder:-

"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 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 charge brought against the accused indicates that the accused, on 1st day of December, 2019 at Mnazi Mmoja area within the District and Region of Lindi, with intent to procure prohibited sexual intercourse, did threatening one 'ZY'. Indeed, this is in line with the directions stipulated by the Court of

Appeal in the case of **Fred Nyenzi vs. Republic**, Criminal Appeal No.121 of 2016 (unreported) which cited with approval its previous decision in the case of **Isidori Patrice vs. Republic**, Criminal Appeal No.35 of 2001(unreported) which held: -

“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 subsection (2) in addition to the mentioned specific 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”.

Although these ingredients have been reflected in the particulars of the offence in the charge sheet as shown above, the question is whether these ingredients have been proved in evidence.

In finding that the case against the accused was proved beyond peradventure, the learned Resident Magistrate was satisfied that the evidence of PW2 (the victim) which she believed to be truthful was corroborated by the evidence of PW1 and PW3. However, a scrutiny of the evidence on record shows that the evidence of PW 3 depended on what PW 2 had told her. Likewise, the evidence of PW 1 was dependent on what PW 3 had told her. In other words, the evidence of PW 1 and PW 3 was a hearsay and, strictly inadmissible.

The remaining evidence is that of PW 2, the victim of the crime. As seen at page 8 of the typed copy of proceedings, PW 2's testimony was to the following effect:-

"This accused person is called Juma. On 1/12/2019 at night I was at home cooking Ugali for me. Juma told me "Ukimaliza Ugali alafu uje"at that time Juma is standing at his door room when I finished eating ugali I went to the accused person room. I find the accused person sitting at his door. Then accused gave me Tshs.1000/= .There then accused pulled my hand the right hand on the mattress. Accused take off my underpants. At the time accused is still wearing his clothes. Then I raised alarm by crying. Thereafter accused released me and I went outside the accused room. When I left the accused room "I went to Mama Ally's room. There I find Mama Ally and I told her that "Juma anataka kunibaka".

I am alive to the well cherished principle that the true evidence in rape cases comes from the victim provided that the evidence is credible. This position was illustrated in the case of **Selemani Makumba vs. R**, [2006] TLR 379. Did the evidence of PW 2 establish the ingredients of the offence of attempted rape? I think not.

Generally, an attempt is an inchoate crime where an individual, with intent to actually commit a crime, undertakes an action in furtherance of that crime

but fails. The three elements are first, an intent. An attempt is categorised as a specific intent crime. Second, some conduct towards completion. There must be a substantial step which goes beyond a mere preparation to commit a crime and third, there must be a failure to complete the crime.

In our case, the ingredients of attempted rape are an intent to procure prohibited sexual intercourse, with any girl or woman and the manifestation of that intention by threatening the girl or woman.

As the evidence clearly shows, the accused had asked the victim to go to him after she had completed 'ugali'. The victim volunteered and went to him, he then gave her Tshs. 1000 which she accepted. He then pulled her right hand taking her inside his room and lied her on the mattress. He then undressed her under pants but at the same time the accused was still wearing his clothes. The victim raised an alarm, the accused released her and she went outside the room.

Although the evidence tends to prove the accused's intent to procure prohibited sexual intercourse with the victim who was a girl aged nine years, there was no evidence whatsoever indicating the accused's manifestation of the intention by threatening the victim. This means that there was no substantial step of some conduct toward completion of the crime which went beyond mere preparation to commit the crime.

In his submission, Mr. Paul Kimweri in arguing that the offence of attempted rape was committed relied on the case of **James Kilimo v. R.**, Criminal Appeal No. 25 of 2004. With unfeigned respect to learned Senior State Attorney, the facts in that case are quite different from those obtaining in the case under consideration. In that case the prosecution proved the offence of attempted rape with all ingredients of the offence including the ingredient of threatening. This is clearly shown at p. 4 of the typed judgment where the Court of Appeal observed:-

'at any rate, the fact that the appellant wrestled the complainant, took off her pair of trousers while brandishing a knife and demanding sexual favours, and the ensuing scuffle, will all go along to show that there was the attempt to rape. The facts show that the appellant went beyond mere preparation, as correctly reasoned out by Mkwawa, J. indeed, the facts further indicate that the appellant was close or sufficiently proximate to the complainant, to strengthen the point that he was all out to rape the complainant'

In the case under consideration, there was nothing showing that the accused wrestled 'ZY', brandished anything demanding any sexual favour and there was no ensuing scuffle. With the available evidence, it is clear that the prosecution failed to prove the offence of attempted rape.

In the light of the above observation the first issue has been answered in the negative thus the second issue cannot be dealt with. This disposes of the appeal by the Director of Public Prosecutions.

However, since this court is the court of record, it should not leave pertinent issues not properly addressed to by the lower court unattended to. It is apparent that trial court after convicting the accused, it sentenced him to ten (10) years term of imprisonment term. A reading of section 132(1) of the Penal Code reveals that the punishment for the offence of attempted rape is life imprisonment or an imprisonment of not less than thirty years imprisonment with or without corporal punishment. The sentence of ten years term of imprisonment for a person convicted of attempted rape as was with the case with the accused was illegal and needed court's interference. Nonetheless, in view of the fact that the conviction was against the weight of evidence and the law, even that sentence was to that, extent, illegal.

This being the case, the consideration of other grounds of appeal would be an academic exercise tantamount to wastage of time. I refrain from discussing them.

The appeal by the Director of Public Prosecutions against the sentence crumbles.

In the upshot, the appeal is hereby allowed. The appellant's conviction is quashed and sentence meted is set aside. In consequence, I order an immediate release of the accused/appellant from prison unless he is otherwise lawfully held.

It is so ordered.




W.P. Dyansobera

Judge

25.6.2021

This judgment is delivered under my hand and the seal of this Court this 25th day of June, 2021 in the presence of the Juma Juma Mhidini, the accused/appellant and Mr. Paul Kimweri, learned Senior State Attorney for the appellant/respondent.

Rights of appeal to the Court of Appeal explained.




W.P. Dyansobera

Judge