

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA**

**(IN THE DISTRICT REGISTRY OF KIGOMA)**

**AT KIGOMA**

**APPELLATE JURISDICTION**

**(DC) CRIMINAL APPEAL NO. 27 OF 2021**

(Arising from Criminal Case No. 82 of 2020 of Kigoma District Court Before K.V.  
Mwakitalu, RM)

**JUMA S/O CHESA @ JUMA..... APPELLANT**

**VERSUS**

**THE REPUBLIC.....RESPONDENT**

**J U D G M E N T**

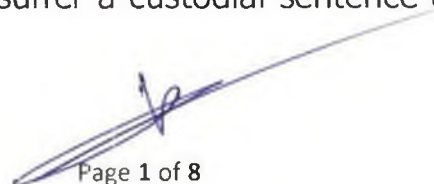
10<sup>th</sup> & 10<sup>th</sup> November, 2021

**A. MATUMA J.**

The appellant stood charged in the District Court of Kigoma for Attempted Rape Contrary to section 132 (1), (2) (a) of the Penal Code, Cap. 16 R.E. 2019.

He was alleged to have attempted to rape a victim girl aged twelve (12) years old on the 13<sup>th</sup> day of June, 2020 at Gezaulole street within the District and Region of Kigoma.

After a full trial, the learned trial magistrate found him guilty, convicted him and sentenced him to suffer a custodial sentence of ten (10) years.



In addition, thereto, the appellant was ordered to pay the victim girl Tshs. 500,000/= as compensation.

Aggrieved with such conviction and sentence, the appellant is now before this honourable court by way of appeal with several grounds whose major complaint is that; ***the prosecution case was not proved beyond reasonable doubts against him.***

At the hearing of this appeal, the appellant was present in person while the Respondent/Republic was represented by Mr. Riziki Matitu learned Senior State Attorney and Regional Prosecutions Officer for Kigoma Region.

The appellant opted the learned Senior State Attorney to start addressing the court for or against the Appeal and for him to respondent thereafter.

The learned Senior State Attorney started to address the Court stating at the earlier beginning that he was opposing the appeal. He submitted that the prosecution evidence proved the case beyond reasonable doubts against the appellant sailing into the victim's evidence PW2 and that of PW3 Omary Salum.

He submitted that the evidence of the two witnesses elaborated sufficiently that the Appellant attempted to rape the victim girl as he

tricked her to enter into his room, therein he told the girl that he wanted to rape her, the girl having been refused for the intended felony the appellant threatened her with a knife, assaulted her, torn her clothes apart until when PW3 came into her rescue.

The learned Senior State Attorney also faulted the sentence of ten years imprisonment as being contrary to the provisions of the law under which the Appellant was charged and convicted which attracts a life imprisonment or in any other case not less than thirty years imprisonment.

The Appellant on his party submitted that the prosecution case was not proved beyond reasonable doubts against him as the victim failed to identify him in court, he had grudges with PW3 who purported to have rescued the victim and some contradictions in the prosecution testimonies.

After hearing the parties for and against this appeal, the issue for determination is whether the prosecution case was proved beyond reasonable doubt against the appellant.

The ingredients of the offence upon which the appellant was charged are; ***the intent to procure prohibited sexual intercourse with a girl or woman,*** and ***manifestation of such intent by threatening the victim girl or woman for sexual purposes.***

In that regard, one cannot be found guilty of **attempted rape** until the ingredients of such offence are clearly reflected in the charge sheet for his understanding of the offence he stands charged and which he is to answer, and the evidence is given during trial to establish such ingredients.

In the instant case both ingredients were not reflected in the charge sheet. The charge does not disclose whether the appellant had intent to procure the prohibited sexual intercourse with such victim girl nor whether such intention was manifested by threats against the girl by the appellant for the purposes of sexual intercourse.

In that regard, the conviction could not stand on such a charge as it was held in the case of ***Chesco Mhyoka v. Republic***, *Criminal Appeal No. 82 of 2014*.

In that case the court of appeal found that the charge of attempted rape against the appellant Chesco Mhyoka did not state the ingredient of '**threatening**'. In that respect the court found that the charge did not inform the appellant in a reasonable manner of the nature of the offence he was to answer. It thus held at page eight to nine;

*'The particulars of the offence ought to have disclosed the basic attributes of the offence where the word **threatening***

*is the key element. As it is, the words '**did unlawfully attempt to rape**' in the charge sheet under scrutiny here were not enough because they did not reasonably inform the appellant the nature of the case he was to answer'.*

The charge under scrutiny in the instant appeal faces similar defects to that of Chesco supra as it merely state that the appellant herein '**did attempt to have carnal knowledge**' of the victim girl. It does not further state whether such attempt was manifested by any threat. Instead, the charge states that the appellant beaten the victim which is not an ingredient altogether for the offence of attempted rape.

In Chesco's case supra, the Court of Appeal gave an example of how the charge sheet for attempted rape would at least be considered proper and enough to inform the accused of a case he is to answer. It stated at page nine;

*'At least, the words **with intent to procure prohibited sexual intercourse threatened...**' ought to have featured in the particulars of the offence'*

Again, there is no evidence on record which indicates how the appellant manifested his intention to procure the alleged rape. Instead the victim gave evidence on how the appellant caughted her, how the appellant told her that he wanted to rape her how she refused, and how the appellant

started to assault her with a knife and fist. She also explained how the appellant torn apart her blouse. No any explanation of an overt act towards the alleged attempted rape itself sufficiently to reveal that the appellant was indeed intended to have such prohibited sexual intercourse. It is like the appellant had a different intent altogether, just to assault, harm or humiliate the victim girl. The overt acts that would by itself explain the intended rape are missing in this case and thus becomes dangerous to presume that he wanted to rape the victim. In fact, the prosecution witness PW3 one Omary Salum who is allegedly rescued the victim girl from the hands of the appellant explained in evidence that by the time he was rescuing the girl, he heard the appellant lamenting that the sister of that victim girl was his lover and had given the girl Tshs. 15,000/= to take it to her sister but she has spent the money by herself. So, he was beating her for consuming the money which she was entrusted by the appellant for her to take to her sister who is the appellant's lover. With that prosecution's own evidence and that of the victim it is clearly that there is no evidence on record to establish the intent of the appellant to rape the victim girl. A different offence was committed but not attempted rape.

In the similar vein, the Court of Appeal in Chesco's case supra found that the victim was not lead to disclose the acts of the accused that manifested his intent to rape. Instead the evidence was lead to disclose a different offence other than the charged offence. It thus acquitted the appellant. In the same manner, there was no explanation in the instant case as to whether the victim was undressed or attempted to be undressed the under pants or whether the appellant undressed himself or attempted to do so. The offence was committed each party dressing his under pants and without any indication that there was an attempt to undress either party. The appellant herein was not guilty of the offence for the reasons herein above stated and was wrongly convicted. His appeal is hereby allowed, the conviction quashed, the sentence of ten years imprisonment and compensation order are set aside. It is ordered that he be released from custody unless otherwise held for some other lawful cause.

It is so ordered.



  
**A. Matuma**

**Judge**

**10/11/2021**

**Court:** Judgment delivered in the presence of the Appellant in person under custody and in the presence of Mr. Riziki Matitu learned Senior State Attorney. Right of further appeal is explained.

**Sgd: A. Matuma**

**Judge**

**10/11/2021**