IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(SUMBAWANGA DISTRICT REGISTRY)

AT SUMBAWANGA

DC. CRIMINAL APPEAL NO. 92 OF 2021

OSCAR S/O MITAWA @ OSEA ..... APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

(Appeal from the decision of the District Court of Nkasi at Namanyere)

(N. S. Mwakibibi, RM)

Dated 30th day of July 2021

In

Criminal case No. 68 of 2020

JUDGMENT

06/06 & 18/07/2022

NKWABI, J.:

The appellant's defence that he did not commit attempted rape was not accepted by the trial court. He was thus convicted and sentenced to 30 years imprisonment. The trial court was satisfied with the credibility of two prosecution witnesses to the effect that authentically the appellant committed the offence. The incidence was said to have happened when the mother of PW2 (the victim of the offence) had gone to attend to a clinic. The victim, who at the material time was aged 9 was at home. The appellant

paid a visit which to him said it was for an errand to collect and send an exercise book to the father of the victim of the offence.

The appellant is determined to challenge the conviction and sentence with the following justifications of appeal:

1. That, the evidence of PW1 and PW2 was not proved beyond reasonable doubt by the trial magistrate.
2. That, I was convicted without any evidence from hospital or PF3.
3. That, the said W.E.O. to whom they reported the case did not come before the court to give evidence.
4. That, the prosecution side did not prove their case beyond reasonable doubt.

It was then the exhortations of the appellant that this Court allows the appeal, quashes the conviction and sentence and ultimately sets him free from prison.

Meanwhile, at the hearing, the appellant appeared in person, fending for himself while the respondent was aptly represented by Mr. John Kabengula, learned State Attorney.

It was the submission in chief of the Appellant that the trial court erred in law as no medical evidence to prove the charge. No witness witnessed him while raping. He prayed the Court to adopt his grounds of appeal as his submission.

While determined to resist the appeal, Mr. Kabengula asserted that the mother of the victim testified and her evidence is very clear that she found the accused with her daughter. Mr. Kabengula added that, also the victim said the accused (now the appellant) was in need to do the offence.

Mr. Kabengula also pointed out that the appellant too ran away after he was told he was to be sent to leadership. It was also his explanation that the victim too testified on how the appellant wanted to commit rape. The appellant did not cross examine to show any grudges with the witnesses, Mr. Kabengula stated and added that there is sufficient evidence that prove the case beyond reasonable doubt. He was also of a firm view that the offence the appellant was charged with, there was no need of tendering a PF3.

Basing his argument on section 143 of the Evidence Act, Mr. Kabengula maintained that there is no number of witnesses needed to prove a fact. He stressed therefore that it is not fatal for the W.E.O. to be not brought to give evidence.

Mr. Kabengula was of the further view that the evidence of the victim of offence is the basis for conviction. He insisted that they proved the case beyond reasonable doubt that the appellant attempted to commit the offence of rape hence attempted rape was committed. He also brought to the attention of this Court that they proved the age of the victim of the offence.

Mr. Kabengula also submitted on the cross examination of the appellant to the effect that it was very weak and he admitted that he went to the scene of offence after being sent to run an errand. Mr. Kabengula prayed that this appeal be dismissed for being wanting in merits while the conviction and sentence be upheld.

To finalize the submissions, the Appellant contended that the mother of the victim in evidence testified that he did not rape the victim. He then stressed

that he did not commit the offence of attempted rape. Lastly, he prayed this Court to find him not guilty and acquit him.

What amounts to attempted to commit an offence was authoritatively decided by the Court of Appeal of Tanzania in **Rashid Mrope v. Republic** [2008] T.L.R. 313 in which it was decided:

> *"The appellant herein stripped the underpants of PW1, undressed his trousers, and lay on his victim only to be prevented from having forced sexual intercourse with PW1 by the appearance of PW2 on the scene. We are of the settled view that the Appellant had clearly put his intention into execution by means adapted to its fulfilment as manifested by that act."*

With that clear position of the law, I now undertake to consider the merits or demerits of this appeal.

The evidence that the trial court accepted and grounded conviction is that of PW1 Grace who testified that she found the appellant at her home at around 12:00 noon inside while the door being closed and the appellant was blocking her to enter inside. The appellant claimed to be inside with a woman

by the name of Mama Kadogo. Further evidence of PW1 is that she heard her daughter's sound. When she entered inside, she found a prepared place where the appellant was about to rape her daughter. Her daughter narrated to her the incidence. They reported the matter to the Ward Executive Officer, then to the police.

The evidence of PW1 was supported with the evidence of PW2 (the victim of the offence) who said that the appellant found her at home and told her that he loves her. She resisted his attempt to sleep with her. He undressed her, closed the door and produced his penis and tried to insert it into her vagina but the appellant was unable because PW2 resisted his attempt. Also, the appellant was unable to rape her because her mother reached at home at that moment.

The appellant's defence that was rejected by the trial court is that the appellant had gone to the house to fetch for exercise book sent to collect by the father of PW2 who happened to be his friend. He admitted to find there PW2 and that PW1 found him in the house with PW2.

The criticism over the conviction by the trial court to the effect that there was no PF3 tendered to prove the offence is misconceived on the part of the appellant because, he was not charged with rape offence. Even if it were rape offence, PF3 or hospital evidence would only act as corroborative evidence. The 2nd ground of appeal has no merit. It is dismissed. The 3rd ground of appeal concerning the complaint that the W.E.O. was not called to testify has no merit just as Mr. Kabengula argued that there is no legal requirement to prove a fact by more than one witness. What is important is the credibility of the witness who is the victim of the sexual offence. The 3rd ground of appeal crashes to the ground.

I will decide the 1st and 4th grounds of appeal together as they have the same gist that the case against the appellant was not proved beyond reasonable doubt. Like Mr. Kabengula, I find these grounds of appeal are unmerited. Despite the clear evidence of PW1 and PW2, no any cogent defence was raised by the appellant. In fact, the appellant advanced the prosecution case by admitting material facts that the appellant was at the home of the PW1 and was with the victim of the offence inside the house. That was the position taken by the Court of Appeal of Tanzania in **Paschal Kitigwa v. Republic** Criminal Appeal No. 161 of 1991 where it held:

"...it is common ground that corroborative evidence may well be circumstantial or may be forthcoming from the conduct or words of the accused. On this, numerous decisions have been made by the them court of Appeal for Eastern Africa- see R v Said Magombe (1946) EACA 1645 and Migea Mbinga v. Uganda (1967) EA 71"

The appellant, in his defence only denied to have committed the offence. I do not buy that defence just as the trial court did not. The appellant's running away corroborates the evidence on the prosecution side to the effect that the appellant ran away because he knew that what he had done was a criminal wrong, so does his conduct. For this approach, I am guided by the decision of the Court of Appeal of Tanzania in **Kulwa Machibya v. Republic,** Criminal Appeal No. 47 of 1999 (Unreported) where it was clearly stated:

.... the appellant conduct during the incident also raises doubts on the credibility of his story. There is no evidence to show that force of any kind was used to restrain him from running away from the scene. The deceased, his relative with his family was brutally attacked inside the house. Unless he was tied up or guarded with some dangerous

weapon it is strange that he did not run away to enlist assistance or raise alarm. Instead, he stood by throughout. It is also unusual for a group of bandits having robbed and killed a person would release the appellant who had seen them commit the crime, his subsequent conduct supports the evidence that he was present at the scene of the incident as a participant in the robbery that led to the death of the deceased."

For the above reasons, the 1st and 4th grounds of appeal maintained by the appellant crumble to the ground.

As to the complaint about the sentence, I am of the considered view that the sentence of thirty years imprisonment is in accordance with the law.

Finally, I dismiss the appeal for being wanting in merits. Conviction and sentence are hereby upheld.

It is so ordered.

DATED at **SUMBAWANGA** this 18th day of July 2022.

J. F. NKWABI

JUDGE