THE UNITED REPUBLIC OF TANZANIA

JUDICIARY

IN THE HIGH COURT OF TANZANIA

MBEYA DISTRICT REGISTRY

AT MBEYA

CRIMINAL APPEAL NO. 3 OF 2022

(Originating from Criminal Case No. 88 of 2018 of the Court of the Resident Magistrate of Mbeya at Mbeya)

Between

YOHANA JASON .....APPELANT

VERSUS

THE REPUBLIC .....RESPONDENT

JUDGMENT

Date of last order: 14th June, 2022

Date of judgment: 19th July, 2022

NGUNYALE, J.

The appellant was incarcerated in the Court of Resident Magistrate of Mbeya at Mbeya in Criminal Case No. 88 of 2018 for the offence of attempted rape contrary to section 132(1) of the Penal Code Cap 16 R: E 2002 now R: E 2019. It was alleged by the prosecution that on 31st day of March, 2018 at Ikuti area within the City and Region of Mbeya the appellant did attempt to have carnal knowledge of PW1. When the charge was read over to him, the appellant denied to commit the offence thereby the court entered a plea of not guilty. To prove the case the prosecution

paraded three witnesses and one documentary exhibit P1 (cautioned statement of the accused). The appellant defended oneself.

It was the prosecution case that on 31st March, 2018 while PW1 was coming from shamba met a young man (the appellant herein) who was going on the different direction. They greeted each other. Afterward the appellant returned back and held the shoulder and arm of PW1 who was pulled toward the middle of the maize farm. There the appellant ordered PW1 to undress clothes, she did and was asked to lay on the clothes. She tried to run but was successfully chased and held. Then followed some confrontation at loud voice while PW1 naked and the appellant had not undressed. While disputing some people emerged and the appellant ran away but was chased and apprehended. As the result the appellant was send at Iyunga police post and subsequently charged before the court.

In defence the appellant stated that on 31st March, 2018 he went to see his farm, on the way he went for short call in a farm while moving therein some people emerged running after him in angry manner he decided to run away. He was apprehended and sent to court with the offence he was charged.

The trial court after full trial was satisfied that the prosecution had proved the case against the appellant beyond reasonable doubts. It found him

guilty, accordingly convicted and was sentenced him to thirty (30) years term of imprisonment. Aggrieved the appellant filed five (5) grounds of appeal in his petition of appeal, namely;

1. *That the trial court erred in law and fact by convicting and sentencing the appellant without considering that the prosecution side did not prove the offence of attempted rape beyond reasonable doubt.*
2. *That the trial court erred in law and fact by convicting the appellant while evidence of the victim did not prove the offence of attempted rape.*
3. *That the trial court erred in law and fact by accepting the caution statement of the appellant (accused person) who narrated that the confession was taken out of torture by the police officers.*
4. *That the trial court erred in law and fact by convicting the appellant by mere believe that the victim was alone and naked in the middle of maize's (sic) with the appellant, the fact which was not proved by the prosecution side.*
5. *That the trial court erred in law and fact by convicting and sentence(sic) the appellant without evaluating the evidence brought by the prosecution witness(s).*

When the appeal was called on for hearing the appellant was represented by Osia Adem, learned advocate whereas the respondent Republic appeared through Ms. Annarose Kasambala, learned State Attorney.

Mr. Adem submitted on all grounds of appeal generally to the effect that the prosecution did not prove the case beyond reasonable doubts. Elaborating his stance, he stated that the appellant was supposed to be convicted on strength of the prosecution evidence after looking all ingredients of the case. He added that in this case evidence did not prove

attempted rape. Regarding caution statements he submitted that it was obtained involuntary as the appellant was tortured.

In reply Ms. Kasambala submitted that the offence of attempted rape was proved as there was no dispute that the victim and appellant met whereby, he pulled the victim and forced her to undress her pants ready for sexual intercourse. She added that the threat made the victim to undress because of fear. It was further submission that PW2 rescued the victim while the appellant was undressing himself. Regarding cautioned statement Ms Kasambala submitted that there was no proof of torture.

I have passionately considered submission for and against the appeal. The appellant's counsel tried to submit that all ingredients of the offence of attempted rape was not proved but he did not explain in detail. After fully scrutinising the charge, I have found it pertinent to discuss the issue on whether the charge was proper.

It need not be overemphasized that the charge is a foundation of a criminal trial. Hence, any court admitting the charge from the prosecution must ensure that it is drawn in compliance with the law. Scrutinising the propriety of the charge is fundamental, irrespective of the arguments from the parties, because it touches on the court's jurisdiction. In the case of **Antidius Augustine v. Republic**, Criminal Appeal No. 89 of 2017

(unreported) the court underscored the importance of scrutinising propriety of the charge before going ahead with a case. The court held that;

> *'We wish to emphasis that it is most important that before assuming trial of case a magistrate or a judge must thoroughly peruse the charge or information, as the case may be, which is presented before that court to ensure fair administration of justice and to give credence and respect to the criminal justice system as a whole. Failure to do so may lead into unexpected consequences to both sides to the case.'*

I have deliberately started with the above discussion because in the present appeal the charge against the appellant was framed in the following manner;

> *STATEMENT OF THE OFFENCE*
>
> *ATTEMPTED RAPE contrary to section 132(1) of the penal code [cap 16 R: e 2002]*
>
> *PARTICULARS OF OFFENCE*
>
> *YOHANA S/O JASON on the 31st day of March, 2018 at Ikuti area within the City and Region of Mbeya did attempt to have carnal knowledge of one M D/O W.*

Reading the above statement and particulars of the offence, the charge suffered one important defect that it did not disclose the essential element of threatening which is the important ingredient of the offence of attempted rape. The offence of attempted rape is defined under the provisions of Section 132(2) of the Penal Code, it states

132(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;***

(b) being a person of authority or influence in relation to the girl or woman, applying any act of intimidation over her for sexual purposes;

(c) making any false representations to her for the purposes of obtaining her consent;

(d) representing himself as a husband of the girl or woman, and the girl or woman is put in a position where, but for the occurrence of anything independent of that person's will, she would be involuntarily carnally known.

In this case, paragraphs (b), (c) and (d) of the above sub-section do not apply. Paragraph (a) is the appropriate provision in the matter at hand The catchword under paragraph (a) is *threatening.* The importance of disclosing all elements of the offence of attempted rape was underscored in the case of **Mussa Mwaikunda v Republic** [2006] TRL 387 in which the court held that;

The charge in this case ought to have disclosed the aspect of threatening which is an essential element of the offence of attempted rape under section 132(2)(a) of the Penal Code and, in the absence of such disclosure, the nature of the case that the appellant faced was not adequately disclosed to him; the charge was, therefore, defective.

In the present appeal the prosecution omitted to include the ingredient of threatening in the charge toward procuring sex. I have gone through

evidence of PW1 and found that nowhere the victim did testify that she was threatened to have sexual intercourse which did not materialise after PW2 intervened. Her evidence was that when they reached in the maize farm, she was asked to undress which she did, she was asked to lay down she refused then followed some confrontation it is when rescuing team emerged. Given the kind of evidence adduced by PW1 it is pertinent that it did not disclose any kind of threat. The importance of disclosing threat as essential element of the offence of attempted rape was emphasized in the case of **Damian Ruhele v Republic**, Criminal Appeal No. 501 Of 2007, CAT at Mwanza (Unreported)

> *So, in a charge of attempted rape the evidence must show that the perpetrator of the crime in issue threatened the victim for sexual purposes.*

In the case of Damian Ruhele (supra) the omission in indicating ingredient of threatening in the particular of offence was held not to have prejudiced the appellant because evidence adduced disclosed that there was threat in obtaining sexual intercourse.

The facts of the present case are in fours with the case of **Mussa Mwaikunda** (supra) in which no evidence was led by the victim to established that she was threatened for sex purpose. The court held that;

> *"... the defect of the charge in this case was not curable under section 388(1) of the Criminal Procedure Act 1985 because threatening, an*

essential element of the offence of attempted rape was omitted from the particulars of the charge and ***the complainant did not say anywhere in her evidence that she was threatened by the appellant,*** *and there was as such no room for saying that the appellant knew the nature of the case that was facing him; a charge that does not disclose any offence in the particulars of the offence is manifestly wrong and incurable.'.*

see also the recent cases of **Charles Kakubo @ Kolin v Republic**, Criminal Appeal No. 49 of 2018, **Kassimu Mohamed Selemani v Republic**, Criminal Appeal No. 157 of 2017 (both unreported).

Mis. Kasambala attempted to submit that the victim was forced to undress so as to have sexual intercourse with the appellant and the appellant was undressing himself. With due respect to State Attorney those words do not feature in the records of the trial court. The victim never testified to be forced or threatened in anyway and there is no any evidence from the prosecution witnesses that the appellant was undressing his clothes. The victim was candid, that the appellant was not undressed. In addition, PW1 never gave evidence that she was told that the appellant wanted sexual intercourse with her. To say the least a phrase sexual intercourse was never said by the victim.

That being said and done, I have come to the conclusion that the charge laid at the door of the appellant was defective and the appellant was prejudiced as already hinted above. The resulting outcome is that the

prosecution did not prove the offence of attempted rape against the appellant beyond reasonable doubt.

In view of the aforesaid, I find merits in the appeal though for a different reason. Conviction and the sentence melted to the appellant are hereby quashed ad set aside respectively. This court order the immediate release of **Yohana Jason** from prison forthwith unless incarcerated therein for any other lawful cause.

DATED at MBEYA this 19th day of July, 2022

D.P Ngunyale
Judge
19/7/2022