IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(SUMBAWANGA DISTRICT REGISTRY)

AT SUMBAWANGA

DC. CRIMINAL APPEAL NO. 4 OF 2021

PETER S/O SIMON ..... APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

(Appeal from the Judgment of the District Court of Mpanda at Mpanda)

(R. M. Mwalusako, RM)

Dated 4th day of November 2020

In

Criminal case No. 109 of 2020

JUDGMENT

14/06 & 09/08/2022

NKWABI, J.:

Against the charge of attempted rape contrary to section 132(1) (2) (a) of the Penal Code, the appellant vigorously defended himself saying he did not commit the offence. His defence, anyway, was not purchased by the trial court. He was as such convicted and sentenced to 30 years imprisonment. Clearly, the trial court was of a firm finding that the prosecution witnesses were credible.

The incidence was said to have happened when the victim of the offence was from the well going to her home. She met the appellant on the way whereas the appellant held her and made her to fall down. The appellant undressed her under pant and he also undressed himself getting out his male organ. He laid on her, but only to be interfered with the appearance of PW4.

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

1. That, the trial court erred at law and fact by convicting the appellant on the offence which was not proved beyond reasonable doubt as the ingredient of offence of rape was not proved.
2. That, the Trial Court erred at law and fact by not considering the evidence of PW5 (medical officer) who examined the victim and found her genital parties was normal and she was not raped.
3. That, the trial Court failed to discover that the evidence testified by the prosecution witnesses were contradictory evidences on the matter of time when the incident occurred at the scene of the crime.

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 Ms. Safi Kashindi, learned State Attorney.

In his submission, the appellant told this court that the trial court did not do him justice. He then prayed this Court to adopt his grounds of appeal.

In response, Ms. Kashindi objected the appeal. Therefore, she supported the conviction and sentence. To that end she contended that the respondent proved the charge beyond reasonable doubt. The appellant committed the offence of attempted rape. She referred me to the case of **Joseph Paul V. Republic,** Criminal Appeal No. 342/2019 at page 11. She added that PW1 proved the charge. She is the victim herself who was aged 8 years. She insisted, the best evidence is that of the victim and cited for me the case of **Mbaga Julius V. Republic,** Criminal Appeal No. 131/2015 which cited with approval the case of **Selemani Makumba.**

She further asserted that her testimony was corroborated by PW4. The appellant was identified. Even the Doctor's evidence is correct and still it is an opinion of a medical doctor not binding to the court. Still the offence was still an attempted rape, contended Ms. Kashindi.

Ms. Kashindi also maintained that the claim that there was contradiction in respect of time is minor and does not go to the root of the case. The root of the case is that the appellant attempted to rape her, explained Ms. Kashindi. She added that the victim had no watch. She then prayed all the grounds of appeal be dismissed. The appeal be dismissal and the decision of the trial court be upheld.

As if to reinforce his appeal, the Appellant insisted that he did not commit the offence. He prayed this Court finds him not guilty and releases him.

I have carefully considered the arguments of both parties in this appeal. 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."

That being the position of the law, I now consider the merits of this appeal.

I am minded to start deciding the 2nd ground of appeal. In it the appellant complains that the Trial Court erred at law and fact by not considering the evidence of PW5 (medical officer) who examined the victim and found her genital parties were normal and she was not raped.

Admittedly, as maintained by Ms. Kashindi, attempted rape does not require prove of penetration. The appellant was under an illusion that proving attempted rape offence requires proof of penetration however slight in the degree required in proving rape. In any way, even in rape cases, conviction on rape could be sustained even where there is no evidence of PF3 or that

of a medical doctor. This is the position taken by the Court of Appeal in **Selemani Makumba v R. [2006] TLR 379** CAT

> *It is, of course, for the prosecution to prove the guilty of an accused person beyond a reasonable doubt and an accused person does not assume any burden to prove his innocence.*
>
> *A medical report or the evidence of a doctor may help to show that there was sexual intercourse but it does not prove that there was rape, that is unconsented sex, even if bruises are observed in the female sexual organ. True evidence of rape has to come from the victim, if an adult, that there was penetration and no consent, and in case of any other woman where consent is irrelevant, that there was penetration. In this case under our consideration the victim, Ayes, said the appellant inserted his male organ into her female organ. That was penetration and since she had not consented to the act, that was rape notwithstanding that no doctor gave evidence and no PF3 was put in evidence. The appeal against conviction, therefore fails.*

That proposition advanced by the appellant on the 2nd ground of appeal in this appeal is untenable, as such, the 2nd ground of appeal is found unmerited and is dismissed.

On the 3rd ground, the appellant laments bitterly that the trial court failed to discover that the evidence testified by the prosecution witnesses were contradictory evidence on the matter of time when the incidence occurred at the scene of the crime.

Ms. Kashindi did not purchase this ground of appeal. To expound her stance she argued that the claim that there was contradiction in respect of time, the same is minor and does not go to the root of the case. The root of the case, observed Ms. Kashindi, is that the appellant attempted to rape her. The victim had no watch, added Ms. Kashindi.

In the first place, I have to observe that the appellant did not elaborate this complaint in his submissions. I have then to go through the evidence and see for myself if the complaint is justified. Of course, in his defence the appellant testified that PW1 testified that the event happened in the

morning. PW2 said it happened at 12:30 hours while PW3 said it was 12 hours, worse enough, PW4 said the incidence took place at 11 hours.

I have gone through the prosecution evidence in respect of the complaint on contradiction in respect of time of the incidence. In fact, PW1 the victim of the offence said the incidence occurred in the morning. The eye witness PW4 said he saw the appellant about to rape PW1 and when the accused person saw him, the appellant ran away. It was at 11:30 hours. PW3 is not eye witness as he was merely informed by PW4 at around 12:30 hours. So, 12:30 hours was not the time when the incidence took place but it was the time PW4 met and informed PW3 that he had seen an unusual incidence.

PW1 is a rural girl and a standard II pupil at the time of the incidence who had no watch, even the appellant did not say PW1 had not only a watch but also a correctly functioning watch which would indicate the time correctly. As per PW4 the incidence happened at 11:30 hours morning which is truly in the morning as said by PW1. In my view there is no any contradiction in respect of time as claimed by the appellant. I am fortified by the decision of **Tunutu Mayasule v. Republic** [1980] TLR 204 (CAT):

"A rural country girl cannot be expected to tell the exact hour an incident occurred."

One could also have recourse to the decision in **Mohamed Said Matula vs. R. [1995] TLR 3** (CA) where it was held:

"(i) Where the testimonies by witnesses contain inconsistencies and contradictions, the court has a duty to address the inconsistencies and to resolve them where possible; else the court has to decide whether the inconsistencies and contradictions are only minor, or whether they go to the root of the matter."

In the circumstances, the 3rd ground of appeal has no merit. It is dismissed.

I now go back to decide on the 1st ground of appeal which is that the offence is not proved beyond reasonable doubt. Ms. Kashindi was certain that the respondent proved the case beyond reasonable doubt and the appeal should be dismissed. On his side, the appellant insists that he did not commit the offence and thus he should be acquitted, sentence be set aside and he be released from prison.

Going through the evidence on both sides but to start with the respondent's evidence, the evidence of PW4 Hassan Bengwe who found the appellant in the act said he heard an alarm in a bush. When he looked around he saw the appellant holding a girl by the neck while covering her mouth. At the same time the appellant was undressed and the child was undressed (nilimuona kijana akiwa amemkaba motto shingoni na kumziba mdomo wake). That the appellant was lying on top of the girl. PW4 in reply to cross-examination said he was clear that the appellant wanted to rape the victim since he had held the girl by her neck and lying on top of her while naked. The evidence of PW4 clearly corroborates the evidence of PW1 that indeed the appellant was attempting to rape her only to be cut short of fulfilling intention by the appearance of PW4.

In his defence, the appellant merely prayed the court to discharge him because the prosecution witnesses were telling falsehood against him. On being cross-examined by the prosecuting attorney, he said PW2 and other witnesses do not love him, that they hate him.

I am of a firm view, that the respondent had/has a strong case against the appellant. As to the alleged ill blood brought up by the appellant in re-

examination during his defence, they are afterthought because he did not raise the alleged bad blood with the witnesses of the prosecution when they were testifying against him. I dismiss it. Indeed, there is the behavior of the appellant disappearing from his home after the incidence. In my view, such behavior corroborates the respondent's case as per Also, the behavior of the appellant to disappear from his home cannot go unnoticed by this court as per **Amiri Mohamed v. Republic** [1994] TLR 138 CAT where it was stated:

> *"There was also the behavior of the appellant soon after the event. He disappeared from his abode and his story that he went off to look for a job, while he had another job uncompleted and without saying goodbye to his family, convinces us that he went into hiding, because he was responsible for the dastardly deed. If he innocently spent the night at the house of his uncle and innocently again travelled with him one would have expected him to call that uncle or at least explain why he did not do so."*

As such, I find the prosecution witnesses credible and I find the 1st ground of appeal unfounded. It crumbles to the ground.

The above said and done, I dismiss the appeal for being wanting in merits. Conviction and sentence are accordingly upheld.

It is so ordered.

DATED at **SUMBAWANGA** this 09th day of August 2022.

J. F. NKWABI

JUDGE