IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

MOSHI DISTRICT REGISTRY

AT MOSHI

CRIMINAL APPEAL NO. 25 OF 2023

(Originating from Criminal Case No. 215 of 2022 of Rombo District Court at Mkuu)

GERVAS JOSEPH NJAU ..... APPELLANT

VERSUS

REPUBLIC ..... RESPONDENT

JUDGMENT

28/08/2023 & 02/10/2023

SIMFUKWE, J.

Before the District Court of Rombo at Mkuu (the trial court), the appellant Gervas Joseph Njau stood charged with the offence of Attempted rape contrary to **section 132 (1)(2) of the Penal Code**, [Cap. 16 R.E. 2022] According to the charge sheet, the particulars of the offence were that on 09/10/2022 at about 15:00hrs at Nessae village within the District of Rombo in Kilimanjaro region, the appellant attempted to rape one PR, a woman of 84 years old (name concealed).

During the trial, the prosecution case was to the effect that; on the fateful day PW2 the victim while at home heard someone touching the house. She stood up, and found that it was the accused whom PW2 identified as her step son. He suddenly pushed her down, took off her underpants,

took off his trouser and entered her. PW2 screamed for help. The first person to respond to the screaming was PW1 who narrated that at first, she saw the accused passing at her business and greeted her. Suddenly she heard the screaming from PW2 saying that Gervas (accused) was killing her. She headed to the scene, where she found the victim on the ground and her pants were beside her. PW1 said that she saw the accused running while holding his trouser. PW1 called other people who chased the accused. PW4, the militia man was among the witnesses who were called by PW1 and informed that the accused attempted to rape the victim. It was PW4 who handled the accused to the police station.

The matter was reported at the police station. PW3, the police officer interrogated the accused. According to PW3, the accused denied to have committed the offence though he admitted to have visited the victim on the material date.

In his defence, the appellant denied to have committed the offence. He explained circumstances which led to his arrest by militiamen on allegation that he had raped the victim. He said that he was taken to Tarakea Police Station and then arraigned in court facing the above charge. He conceded that he knew the victim as her mother who was married to his father. Besides that, the victim raised him from his childhood and had no grudges.

After a full trial, the trial court was satisfied that the case against the appellant was proved beyond reasonable doubts. The appellant was therefore convicted and sentenced to 30 years imprisonment. On top of that, the trial court ordered the appellant undergo corporal punishment of twelve strokes.

The appellant was aggrieved, he appealed to this court on three (3) grounds of appeal:

1. *That the trial court magistrate erred in law and facts to convict and sentence appellant charged with defective charge sheet.*
2. *That the trial court magistrate erred in law and facts to convict and sentence appellant based on contradictory evidence.*
3. *That the trial court magistrate erred in law and facts to convict and sentence appellant while prosecution failed to prove the offence beyond reasonable doubt against the appellant.*

During the hearing of the appeal, the appellant was represented by Mr. Sweetbert Rwegasira, learned advocate whereas the respondent/Republic was represented by Mr. John Mgave, learned State Attorney.

On the first ground of appeal that the appellant was convicted based on the defective charge; Mr. Rwegasira noted two defects. ***First,*** that the charge did not show the subsection in section 132 (2) to show the category of attempted rape; ***second***, the charge did not clearly state factual circumstances which as of necessity must be stated in the charge as featured in paragraphs (a), (b), (c) and (d) of subsection (2). He said, the said principle was established in the cases of **Musa Mwakunda vs Republic,** Criminal Appeal No. 176 of 2006 and **Isdori Patrice vs Republic**, Criminal Appeal No. 224 of 2007 which were cited with approval in the case of **Leonard Mwanashoka vs Republic**, Criminal Appeal No. 226 of 2014, Court of Appeal (unreported), at page 10 of the judgment.

On the second ground of appeal which concerns contradictory evidence, Mr. Rwegasira submitted that according to the evidence adduced by PW1 and PW3, the victim was not raped but there was an attempt to rape her. PW2 (the victim) in her testimony at page 7 of the typed proceedings stated that the appellant succeeded to penetrate and had carnal knowledge of her. It was stressed by Mr. Rwegasira that such contradictory evidence did not suffice to convict the appellant. He buttressed his contention with the case of **Leonard Mwanashoka** (supra), in which the Court of Appeal held that:

> *"We believe that had the two courts below considered these patent contradictions and embellishments, side by side with the appellant's defence, his evidence most likely would have been believed."*

On the last ground of appeal, Mr. Rwegasira believed that the prosecution did not manage to prove their case beyond reasonable doubt because of the following reasons: **First,** he said that the prosecution did not call material witnesses who were involved in the alleged arrest of the appellant. That, PW1 testified that upon arrival at the scene, she saw the appellant running while holding her trouser and she called people who chased the appellant and took him back, obvious under arrest. That, those who were involved in the alleged arrest were named as Dorin Njau and other people, were not called in court to testify as to what transpired on the fateful day. No reason was given for failure of the prosecution to procure them. The learned counsel was of the view that the trial court ought to have drawn an adverse inference against the prosecution and

acquitted the appellant. He cited the case of **Aziz Abdallah vs Republic [1991] TLR 71,** which held that:

> *"The general and well know rule is that the prosecution is under prima facie duty to call those witnesses who, from their connection with the transaction in question, are able to testify on material facts. If such witnesses are within reach but are not called without sufficient reason being shown, the court may draw inference adverse to the prosecution."*

Further reference was made to the case of **Boniface Kundikira Tarimo vs Republic,** Criminal appeal No. 350 of 2008 in which the above position was reiterated, that:

> *"It is now settled that, where a witness who is in a better position to explain some missing links in a party's case is not called without any sufficient reason being shown by the party, an adverse inference may be drawn against that party."*

The second reason which Mr. Rwegasira believed dismantled the prosecution case was contradiction as stated under the second ground of appeal. On top of what was submitted under the second ground of appeal, the learned advocate stated that, the appellant testified that he was arrested at PW1 's shop where he went to buy pork meat, whereas, PW1 testified that she heard PW2 screaming and run at the scene and saw the appellant running holding his trouser and was arrested. However, no one who was involved in the arrest was called as a witness. Mr. Rwegasira was of the opinion that such kind of doubt was a benefit to the appellant.

It was prayed by Mr. Rwegasira that the appeal be allowed and the conviction and sentence of the appellant be nullified and the court order for immediate release of the appellant.

In reply, the learned State Attorney did not support the appeal. Reacting to the allegations under the first ground of appeal that the charge was defective, Mr. Mgave admitted that the charge against the Appellant was brought under **section 132 (1) (2) of the Penal Code** (supra) without citing sub section. However, the learned State Attorney was of the view that the omission to cite subsection is cured by particulars of the offence and the evidence that led to prove the charge. He explained that the particulars of the offence enabled the Appellant to appreciate the nature and seriousness of offence facing him and eliminated all possible prejudices. Thus, the irregularity over non-citation is curable under **section 388 (1) of the Criminal Procedure Act** [Cap 20 R.E 2022]. He referred to the case of **Halfan Ndubashe vs Republic,** Criminal Appeal No. 493 of 2017 TZCA 617 (Tanzlii) at page 8 where the Court stated that the particulars of the charge and evidence of PW2 in the trial court proceedings were able to make sure that the appellant understood the seriousness of the offence. Therefore, the ailment in the charge is curable under the provision of **section 388 of the Criminal Procedure Act,** CAP 20 R.E 2022. He added that, the Appellant failed to show which rights were prejudiced due to the said omission.

Responding to the second ground of appeal which concerns contradiction of evidence, Mr. Mgave disagreed with the contention made by the learned counsel for the appellant. That, there were contradictions of evidence. He clarified that, PW1 testified that she saw the appellant

running from the house of the victim. PW2 mentioned the name of the appellant as observed at page 6 of the typed proceeding. Also, PW2 the victim testified that the appellant pushed her down, took off her underpants, attempted to rape her and she immediately screamed for help as the appellant ran away. Mr. Mgave recommended that the fact that the victim (PW2) testified that she was carnally known by the appellant, does not take away the fact that the appellant did attempt to rape her since PW2 said the rape was not successful as the appellant ran away after the victim had screamed. Thus, such fact alone is enough to show that the appellant attempted to rape the victim.

Regarding the third ground of appeal that the prosecution case was not proved beyond reasonable doubt; Mr. Mgave replied that the prosecution was able to prove their case beyond reasonable doubt since all the witnesses of the prosecution side were credible and reliable and their evidence sufficiently proved the case. That, on convicting the appellant, the trial court believed the evidence given by PW2 which was to the effect that it was the appellant who attempted to rape her. That, the victim was able to explain that the appellant threatened her, undressed her pants and attempted to rape her. Also, the appellant was identified by the victim and PW1 who saw him running from the house of the victim. The learned State Attorney commented that, it was the appellant who attempted to rape the victim as he was properly identified. And for that, the case was proved beyond reasonable doubt.

Responding to the allegations that the prosecution failed to summon witnesses who arrested the Appellant, Mr. Mgave replied that; **first**, there is no number of witnesses required by the law to prove the prosecution

case as provided for under **section 143 of the Evidence Act,** CAP 6 R.E 2022; **second,** the learned State Attorney said that there is nowhere in record the Appellant denied that he was not at the scene of crime; **third,** the incident happened during the day time and PW2 and the Appellant knew each other well because the Appellant is PW2's step son. That, as rightly decided by the trial court that there is no mistake of identity; **fourth,** evidence of PW2 was supported by the evidence of PW1 who testified that when she was rushing to the scene of crime to respond to the screaming of PW2 he saw the Appellant fleeing from the scene holding his trouser. Mr. Mgave commented that the appellant didn't explain to what extent such failure to summon the said witnesses occasioned injustice. To support his views, the learned State Attorney referred to the case of **Skona Rolyani Munge & Others vs Republic** (Criminal Appeal No. 51 of 2020) TZCA 773 (Tanzlii), in which at page 14 to 15 the Court cited the case of **Mwita Kigumbe Mwita & Another V Republic**, Criminal Appeal No. 63 of 2015 (Unreported) which held that:

> *"In each case, the court looks for quality and not the quantity of evidence placed before it. The best test for the quality of any evidence is its credibility. It was for the prosecution to determine the witness should prove whatever fact it wanted"*

Mr. Mgave went on to argue that the victim named the Appellant at the earliest opportunity to PW1**.** That, such ability of a witness to name the Appellant at the earliest opportunity is all of the importance and assurance of her reliability as stated in the case of **Marwa Wangiti Mwita Vs Republic [2002] T.L.R 39.**

Based on the above submission, the learned State Attorney implored this court to dismiss this appeal and uphold the conviction and sentence of the trial court.

Rejoining on the defectiveness of the charge, Mr. Rwegasira submitted that the omission prejudiced the appellant's right to defend himself. He added that, evidence itself is contradictory since it is hard to know whether the appellant was charged with rape or attempted rape.

On the second ground of appeal, apart from reiterating his submission in chief, the learned advocate added that the charge sheet established an offence of attempted rape while the victim's evidence established the offence of rape. To cement the issue of contradiction, the learned advocate relied on the cases of **Said Ally Ismail vs Republic, Criminal Appeal No. 249 of 2008** (unreported) which cited with approval the case of **Sylvester Stephano vs Republic,** Criminal Appeal No. 527 of 2016 (unreported) and the case of **Mohamed Said Matula vs Republic [1995] TLR 3.**

Concerning the third ground of appeal, the learned advocate reiterated his submission in chief. He insisted that the issue is not the number of witnesses required to prove the case, but the doubt raised for failure to call witnesses who are very important link of the case.

Having summarised what was argued for and against the appeal and having considered the trial court records and the grounds of appeal, I now turn to the merit or otherwise of this appeal.

On the first ground of appeal Mr. Rwegasira asserted that the charge is defective for two reasons. First, that the charge did not show specific

subsection of **section 132(2) of the Penal Code** (supra) and second, it does not state factual circumstances which ought to be stated in the charge. In his rejoinder, Mr. Rwegasira insisted that the charge sheet established the offence of attempted rape while the victim herself said that she was raped. He stated that, it is hard to know whether the appellant was charged for rape or attempted rape.

In reply, the learned State Attorney admitted that the charge did not cite specific sub section. However, he was of the view that such omission is curable under **section 388 of the Criminal Procedure Act** (supra) as the appellant knew the seriousness of the offence through the particulars of the offence and evidence of PW2.

I agree with the learned counsels that the appellant was charged with an offence of attempted rape contrary to **section 132(1)(2) of the Penal Code** and there is an omission to cite specific subsections of **section 132(2) of the Penal Code**.

The issue for determination is *whether the defects of the charge rendered the charge fatally defective and not curable*. In the case of **Abubakari Msafiri vs Republic** (Criminal Appeal 378 of 2017) [2021] TZCA 611 Tanzlii the Court of Appeal held that:

> *"In determining whether a charge is fatally defective or otherwise, the test is whether from the statement of the offence and the particulars of the offence the accused is able to fully understand the nature and seriousness of the offence he stands charged or not. Where a charge omits to cite relevant provisions of law in the statement of offence*

or where particulars of the offence omit some essential ingredients, such defect will be curable if from the evidence on record the accused is sufficiently informed of the nature and seriousness of the charge he faces."

In our case, although the charge did not cite specific provision, the particulars of the offence state that the appellant attempted to rape the victim. However, evidence of the victim at page 7 of the typed proceedings shows that the appellant raped her and not attempted to rape her as stated in the charge sheet. In the circumstances of such contradiction on the offence alleged to have been committed by the appellant, it is hard to conclude that the appellant understood the nature and seriousness of the offence.

The above arguments take me to the 2nd ground of appeal. From the noted variance between the charge sheet and evidence of the victim, I am of considered opinion that the contradiction touches the root of the case. Respectively to Mr. Mgave, the noted contradiction cannot be cured with **section 388 of the Criminal Procedure Act** (supra).

Moreover, through the testimony of PW2 (the victim) I have observed that the victim did not mention the act of attempt rape to PW1 who was the first to respond to her screaming. According to PW1's testimony at page 6 of the typed proceedings she said:

"I asked mama what happened she said Gervas violence me…"

According to the evidence of PW1, I am of the opinion that failure by the victim to narrate what the appellant did to her at the earliest possible time creates doubts and renders her credibility questionable.

Having resolved the above grounds of appeal as such, the third ground of appeal is resolved automatically. Meaning that, the prosecution failed to prove its case beyond reasonable doubts.

Consequently, I hereby quash the appellants' conviction and set aside the sentence imposed against him and allow the appeal accordingly. The appellant should be released from custody immediately, unless held for other lawful reasons.

Order accordingly.

Dated and delivered at Moshi this 2nd day of October 2023.

X

S. H. SIMFUKWE
JUDGE
Signed by: S. H. SIMFUKWE

02/10/2023