IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

IN THE DISTRICT REGISTRY OF SHINYANGA

AT SHINYANGA

CRIMINAL APPEAL NO. 19 OF 2023

(Arising from the District Court of Bariadi Criminal Case No. 15 of 2022)

NYABENDA JOSEPH @ MABADA..... APPELLANT

VERSUS

THE REPUBLIC..... RESPONDENT

JUDGMENT

Date of last Order:01.11.2023

Date of Judgment: 13.11.2023

MWAKAHESYA, J.:

In the District Court of Bariadi District at Bariadi the appellant, Nyabenda Joseph @ Mabada was charged and convicted with the offence of attempted rape contrary to section 132(1)(2)(a) of the Penal Code. He was sentenced to thirty (30) years imprisonment.

A brief background of the case, as argued by the prosecution, is that on the in the evening of the 21st of January, 2023 at Imalamate Village within Busega District, Simiyu Region, the appellant was found naked on

top of the victim (PW5), name withheld in order to protect her identity, a child of five years. To prove their case the prosecution brought a total of five (5) witnesses, while the appellant was the sole witness in his defence. The appellant's defence being that while bathing at a river, several children started throwing stones at him and one of the stones eventually hit him on the head. He was able to catch one of the children and when he was in the process of taking her to her parents a woman approached her claiming that he had raped her child. At the end of the trial as highlighted previously the appellant was convicted and sentenced accordingly.

Aggrieved by the sentence and convictionthe appellant lodged a petition of appeal containing four (4) grounds that are to the effect that:

1. The case was not proved beyond reasonable doubt;
2. The appellant's defence was not considered;
3. *Voire dire* was not properly conducted; and
4. There were no independent witnesses for the prosecution.

At the hearing of the appeal the appellant appeared in person unrepresented; while Mr. Katandukila Kadata and Ms. Happy Chacha appeared for the respondent republic. The appellant opted for the

respondent to reply to his petition of appeal while reserving his right to make a rejoinder.

Mr. Kadata was informed the court that, the respondent was resisting the appeal and intimated that he will respond to the grounds of appeal in seriatim. Submitting on the first ground of appeal Mr. Kadata was of the opinion that, the prosecution proved the case beyond the required standards. He submitted that, although the prosecution brought five (5) witness and tendered one exhibit the testimony of only two witnesses was enough to prove the case against the appellant. This is the testimony of PW2, Josephat Christian, and PW3, NkunuKichunga.

PW3 was an eye witness who testified that on the material day he found the appellant, with his trousers removed, on top of PW5 thus the prosecution proved the offence beyond reasonable doubt and the appellant was not able to shake the prosecution's case.

On the second ground of appeal, the learned State Attorney submitted that, the trial court considered the appellant's evidence as shown at page 7 of the judgment but found that the same did not raise doubts on the prosecution's case.

Moreover, at the same page, the trial court considered the appellant's defence but found that the prosecution's case was proved beyond reasonable doubt.

Mr. Kadata conceded on the third ground of appeal, that *voire dire* was not properly conducted, and moved the court to disregard the evidence of PW5. However, he prayed for the court to regard the evidence of the remaining prosecution's witnesses, PW2 and PW3, which in his view was enough to ground a conviction. He referred to the Court of Appealdecision in **Wiliam Ntumbi vs The Director of Public Prosecutions**, Criminal Appeal No. 320 of 2019 (unreported) where the Court, faced with a similar scenario,expunged the evidence of a child of tender years and held that a conviction can be arrived at without the evidence of the victim.

On the fourth ground of appeal, the learned State Attorney submitted that, section 143 of the Evidence Act provides that no particular number of witnesses is required in order to prove a fact.

In rejoinder, the appellant submitted that, PW1's evidence was nothing but hearsay and that, PW2, the doctor, testified that he found bruises in the victim's vagina but stated that he did not know what caused the bruises. Thus, there was not a single witness who came to court to testify and prove the offence beyond reasonable doubt.

Having considered the records of the case and the rival submissions what is left for this court is to decide whether the appeal has merit.

As highlighted before, the appellant was charged and convicted of the offence of attempted rape contrary to section 132(1)(2)(a) of the Penal Code. The provision reads:

132.-(1) Any person who attempts to commit rape commits the offence of attempted rape, and except for the cases specified in subsection (3) is liable upon conviction to imprisonment for life, and in any case shall be liable to imprisonment for not less than thirty years with or without corporal punishment.

(2) A person attempts to commit rape if, with the 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 for her for the purposes of obtaining her consent; (d) representing himself as the 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.

(3) N/A

(4) N/A

Threatening a girl or woman for sexual purposes is one of the essential ingredients for the offence of attempted rape, read: **Mussa Mwaikunda vs R** [2006] TLR 387; **Joseph Paulo vs The DPP**, Criminal Appeal No. 191 of 2008 (unreported); and **Khatibu Kanga vs The Republic**, Criminal Appeal No. 290 of 2008 CAT (unreported). In **Joseph Paulo** (supra) the word "threat" was defined to mean a declared/communicated intent to inflict physical or other harm on a person or property, and that the threat need not be oral but cold also be by conduct.

Regarding the appeal at hand, at the trial court, the prosecution neither alleged in the charge that there was a threat communicated by the appellant nor proved the same through any of its witnesses. In **Mussa Mwaikunda** (supra) the Court of Appeal held that Failure to mention "threatening" in the charge was fatal and incurable under section 388 of the Criminal Procedure Act. The relevant charge that the appellant faced ran as follows (name of the victim withheld):

STATEMENT OF THE OFFENCE

ATTEMPT RAPE; *Contrary to section 132(1), (2) (a) of the Penal Code, [Cap 16.R.E 2019]*

PARTICULARS OF THE OFFENCE

NYABENDA S/O JOSEPH @ MABADA *on 21st day of January, 2022 at Imalamate Village, within Busega District in Simiyu Region, attempted to have Carnal knowledge with* ***XY*** *a girl of Five (05) years old.*

In light of the position of the law and the prosecution's case against the appellant at the trial court, the offence of attempted rape was not proved and hence the first ground of appeal, which is to the effect that the offence was not proved beyond reasonable doubt, is allowed.

The second ground of appeal alleges that the appellant's defence was not considered at the trial court. It is the respondent's contention that the trial court did consider the appellant's defence but found it lacking when pitted against the prosecution's evidence.

The relevant part of the judgment, found at page 7, ran as follows:

> *"...although the accused tried to raise doubt that it was because he wanted to be paid since he was beaten with the stone and that the mother of the victim was the one who fabricated the issue, but PW3 said he was the one who found the accused person in the act and was the one who raised alarm.*
>
> *Therefore, from the above explanation I found that the prosecution side have managed to prove the offence of attempted rape beyond reasonable doubt."*

The learned trial magistrate merely mentioned the appellant's version of events but did not proceed to make a thorough analysis and evaluation and then come up with plausible reasons as to why his evidence was found wanting when weighed against the prosecution's evidence. In light of this I find that the second ground of appeal has merit and is sustained.

I am aware that this court being the first appellate court is duty bound to step into the shoes of the trial court and re-evaluate the evidence having found that the trial court abdicated from that duty, however for reasons which will seem apparent I do not find it necessary to do so.

Turning to the third ground of appeal, the learned State Attorney acquiesced that *voire dire* was not properly conducted. Although it is my take that the term *voire dire* was used inadvertently since the current position of the law is that a child of tender age may give evidence without

taking an oath or making an affirmation so long she promises to tell the truth. At page 16 of the proceedings when PW5 was about to testify the court observed that; *"The victim is unable to communicate properly so she will give her evidence without oath"* and PW5 proceeded to testify. This was in clear violation of section 127(2) of the Evidence Act which provides that:

> *127(2) -A child of tender age may give evidence without taking an oath or making an affirmation but shall, before giving evidence, promise to tell the truth to the court and not to tell any lies.*

Therefore, regardless of the inadvertent use of the term *voire dire* the third ground of appeal has merit and is sustained.

The fourth ground of appeal alleges that there were no independent witnesses for the prosecution. As correctly submitted by the learned State Attorney section 143 of the Evidence Act provides that no particular number of witnesses is required in order to prove a fact. During trial a total of five (5) witnesses testified for the prosecution. These included one Nkunu Kichunga, PW3, who testified to the effect of catching the appellant committing the offence he was charged with. Therefore, this ground of appeal is devoid of merit and is dismissed.

Having found merit on all but the fourth ground of appeal, this appeal is allowed and the conviction of the trial court is hereby quashed

and the sentence meted to the appellant is set aside. The appellant is to be immediately released unless he is otherwise lawfully held.

It is so ordered.

DATED at **SHINYANGA** this 13th day of November, 2023

N.L. MWAKAHESYA

JUDGE

13/11/2023