IN THE HIGH COURT OF TANZANIA
AT SHINYANGA

CRIMINAL APPEAL NO.74 OF 2023
[Arising from Criminal Case No. 107 of 2023 in the District Court of Kahama at Kahama]

SAID WILLIAM MASANJA.....APPELLANT

VERSUS

REPUBLIC .....RESPONDENT

JUDGMENT

Date of last Order: 02.11.2023
Date of Judgment: 15.11.2023

MWAKAHESYA, J.:

In the District Court of Kahama Said William Masanja, the appellant, was charged with the offence of attempted rape contrary to section 132(1) of the Penal Code. At the end of the trial, he was convicted as charged and sentenced to imprisonment for thirty years. Aggrieved with the conviction and sentence, the appellant has preferred the present appeal.

A brief background of the case is that, on the morning of 16.03.2023 PW2, name withheld to protect her identity, while on her way home from school came across the appellant who took her to an unfinished building and proceeded to undress her. The appellant then went outside only to be arrested by passersby. At the trial two witnesses testified for the

prosecution, the same being PW2 who is the victim and PW1, PW2's father. The appellant was the sole witness in his defence.

Aggrieved by the trial court's findings, the appellant has lodged a petition of appeal containing five (5) grounds which are to the effect that:

1. The prosecution failed to prove the offence of attempted rape beyond reasonable doubt;
2. The trial magistrate erred by convicting the appellant basing on hearsay evidence and disregarding that the prosecution failed to call important witnesses such as those said to have arrested the appellant;
3. The age of the victim was not proved;
4. The appellant was convicted without the trial court considering his defence; and
5. The trial magistrate convicted the appellant by using an incomplete judgment which did not contain evidence given by the chairman and police officer who investigated the case.

At the hearing of the appeal the appellant appeared unrepresented, while Ms. Happy Chacha, learned State Attorney appeared for the

respondent Republic. The appellant opted for the respondent to reply to his grounds of appeal while reserving his right of making a rejoinder.

Ms. Chacha began her submission by informing the court that the respondent was opposing the appeal. She then responded to the grounds of appeal in seriatim.

On the first ground of appeal, she submitted that the offence of attempted rape was proved beyond reasonable doubt. She elaborated that, in attempted rape two things must be proved: **one** that rape was attempted; and **two** the person who attempted to rape. She submitted that, during trial PW2 narrated in detail how the appellant took her to an unfinished house and proceeded to take off her clothes and attempted to rape her but was unable to do so because he went outside and was arrested. Ms. Chacha submitted that PW2 proved that rape was attempted and that it was the appellant who committed the crime and that PW2 was able to make dock identification of the appellant. Ms. Chacha referred the court to the case of **Selemani Makumba vs The Republic** [2006] TLR 376 where the Court of Appeal held that in rape offences the best evidence is that of the victim herself. She concluded her submission on the first

ground by stating that in the present appeal PW2 proved beyond any doubt that the appellant committed the offence.

On the second ground of appeal, the learned State Attorney submitted that, the prosecution was not bound to bring a particular number of witnesses in order to prove their case and so long as the victim testified that the offence of attempted rape was committed by the appellant that was enough. She cited section 143 of the Evidence Act which provides that no particular number of witnesses is required to prove a fact.

On the third ground of appeal the learned State Attorney submitted that, the age of the victim was proved through PW1 who is the father of the victim. PW1 testified that, his daughter born on 04 October, 2016 was six (6) years old.

Ms. Chacha submitted that, in sexual offences age can be proved by a parent or any relative of the victim or even a medical doctor. A medical certificate is unnecessary. She made reference to the Court of Appeal decision of **Issaya Renatus vs The Republic**, Criminal Appeal No. 542 of 2015 (unreported) where the Court held that, the age of a victim of a

sexual offence can be proved by the victim, relative, parent, medical practitioner or medical certificate.

On the fourth ground of appeal Ms. Chacha submitted that, the appellant's defence was taken into considerations as it shows at page 4 of the judgment, but since it could not shake the prosecution's case the trial court was correct to convict him.

On the fifth ground of appeal, the learned State Attorney submitted that, the judgment was complete because, as per the requirements of the law, specifically section 143 of the Evidence Act, there is no particular number of witnesses required to prove a case.

In rejoinder, the appellant had nothing intelligible to submit apart from insisting that he was innocent and that this court should set him free.

Having gone through the records before me and the parties' relevant submissions for and against the appeal, I will proceed to determine whether the appeal is meritorious.

I have noted that, the trial court failed to enter a conviction according to section 235(1) and 312 (2) of the Criminal Procedure Act

(CPA). I reproduce the relevant part of the trial court's judgment to support my observation. At page 6 of the judgment, it reads:

> *"...as a result I find the accused guilty of attempted rape as charged and consequently I hereby convict him for attempted rape forthwith under section 235(1) of the Criminal Procedure Act..."*

Meanwhile, section 235(1) of the CPA provides:

> *"235(1) The court, having heard both the complainant and the accused person and their witnesses and the evidence, shall convict the accused and pass sentence upon or make an order against him according to law or shall acquit or discharge him under section 38 of the Penal Code."*

Section 312(2) of the CPA provides:

> *"In the case of conviction the judgment shall specify the offence of which, and the* ***section of the Penal Code or other law under which, the accused person is convicted*** *and the punishment to which he is sentenced" (emphasis added).*

It is clear that the trial magistrate did not specify the section of the Penal Code under which the appellant was convicted thereby making the so-called conviction inadequate which in turn makes the judgment equally wanting. However, basing on the Court of Appeal decision of Mabula

Makoye and Another vs The Republic, Criminal Appeal No. 227 of 2017 (unreported) I shall treat that omission as non-fatal but rather curable under section 388 of the CPA. I have done so having also satisfied myself that the error by the trial court has not occasioned a failure of justice to either party. Having done so, I shall proceed to determine the appeal on merit.

I will start by reproducing, minus the true identity of the victim of course, the relevant charge that was facing the appellant at the trial court:

STATEMENT OF OFFENCE

ATTEMP RAPE *contrary to section 132(1) of the Penal Code [Cap 16 R.E. 2022]*

PARTICULARS OF THE OFFENCE

SAID S/O WILLIAM MASANJA *the 16th day of March, 2023 during evening hours at Nyashimbi area in Kahama District Shinyanga Region did attempt to have sexual intercourse* ***XYZ*** *a girl of 6 years*

A quick glean at the charge reveals that the appellant was charged with attempted rape contrary to section 132(1) of the Penal Code. The relevant provision regarding the offence of attempted rape is reproduced as follows:

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

As it can be seen section 132(1) of the Penal Code does not provide for the ingredients of the offence. The necessary ingredients of the offence are provided under subsection (2)(a), (b) or (c). In the appellant's case since the victim, PW2, was alleged to be six (6) years old the relevant provision should have been **section 132(1)(2)(a)** of the Penal Code. The charge facing the appellant was therefore defective by not being preferred under the relevant provisions and thus not disclosing the essential ingredients of the offence. By doing so the appellant was clearly prejudiced at the trial which in turn made him unable to comprehend the offence that was facing him and mount a proper defence.

Assuming that the appellant was charged under the proper provision, the next question I shall pose is: was the evidence adduced enough to sustain a conviction? The answer is in the negative, being mindful that threatening is an essential ingredient of the offence of attempted rape, see **Khatibu Kanga vs The Republic**, Criminal Appeal No. 290 of 2008 CAT (unreported). None of the prosecution witnesses put forward any evidence towards the appellant threatening PW2 in order to procure prohibited sexual intercourse. PW2 testified only to the effect that she was taken to an unfinished house by the appellant, was undressed by the appellant and

the appellant going out of the unfinished house only to be arrested. PW1's evidence, apart from confirming the age of PW2 and the events subsequent to the arrest of the appellant, was hearsay and he testified that he was not at the scene. Therefore, the first ground of appeal is allowed.

Turning to the second ground of appeal, the trial magistrate at page 3 of the judgment had this to say:

> *"In the case at hand, staring (sic) with the issue as to whether the accused was clearly identified at the scene, this will not detain this court much as the incidence (sic) occurred in broad daylight, second there is evidence of pw1 that, on 18/03/2023 when the victim was coming from school going home meet (sic) the accused on the way who stopped her and..."*

The trial magistrate took into consideration that PW1 testified that PW2 met the appellant on her way from school. However, in his testimony PW1 did not testify towards what the trial magistrate stated in the judgment and thus the trial magistrate took into consideration extraneous matters when analysing the evidence produced at the trial. Also, PW1 having categorically testified that he was not at the scene, as it can be seen at page 7 of the proceedings, makes what the trial magistrate wrote in the judgment regarding PW1 testifying towards the appellant meeting

PW2 hearsay, if at all PW1 testified to that effect. I therefore allow the second ground of appeal.

Regarding the third ground of appeal, as correctly submitted by the learned State Attorney, age of a victim of a sexual offence can be proved by a parent, any relative of the victim or even a medical doctor and a medical certificate is not always necessary. PW1, the victim's father, testified that PW2 was his daughter and that she was born on 04.10.2016. PW1's testimony is entitled to credence and I see nothing that can negate that. I therefore find that the age of PW2 was established to be six (6) years. The third ground of appeal is thus devoid of merit.

The fourth ground of appeal need not detain us much. It is shown at page 4 of the judgment that the trial magistrate considered the appellant's defence but found it an afterthought and gave reasons at arriving at that conclusion. The trial magistrate had this to say:

> *"Coming to the defence offered by the accused that, he stopped the victim so as he can interrogate her as the victim was known to the accused since 2019 as the victim's mother used to come with her at Ukerewefish (sic) market, this court finds his defence as an afterthought on the following reasons: -..."*

So as opposed to what the appellant is alleging, the trial magistrate did take into consideration the appellant's defence but dismissed it by giving reasons as to why it was found to be inadequate. The fourth ground of appeal fails.

On the fifth ground of appeal, again, as correctly submitted by the learned State Attorney, the law does not demand a particular number of witnesses in order to prove a fact. Section 143 of the Evidence Act is explicitly clear on that. It provides:

> *"143. Subject to the provisions of any other written law, no particular number of witnesses shall in any case be required for the proof of any fact.,"*

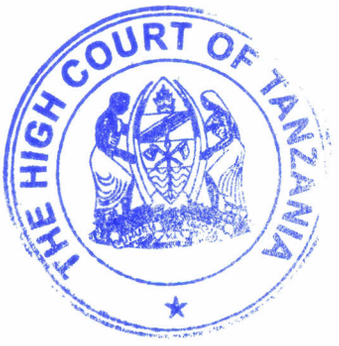
Barring adverse inference being drawn, the prosecution was at liberty to bring any number of witnesses it deemed fit to prove the charge against the appellant. Furthermore, the Court of Appel decision of **Selemani Makumba vs The Republic** (supra) and section 127(6) have shown that the evidence of PW2 itself could have been relevant to prove the charge. Therefore, find the fifth ground of appeal fails.

Having found the first and second grounds of appeal meritorious I allow the appeal in its entirety, quash the conviction and set aside the

sentence of the trial court. The appellant is to be set free unless he is otherwise lawfully held.

It is so ordered.

DATED at **SHINYANGA** this 15th day of November, 2023



N.L. MWAKAHESYA

JUDGE

15/11/2023