IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(KIGOMA SUB – REGISTRY)

AT KIGOMA

DC CRIMINAL APPEAL NO. 44 OF 2023

SHAMILI EZEKIEL..... APPELLANT

VERSUS

THE REPUBLIC.....RESPONDENT

(Arising from Kibondo District Court at Kibondo)

(Makonya-SRM)

dated 13th day of June 2023

in

Criminal Case No. 17 of 2023

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JUDGMENT

8th December 2023 & 23rd February 2024

Rwizile, J.

The appellant was charged with attempted rape contrary to sections 130(1) and 132(1)(2)(a) of the Penal Code [CAP 16 R.E 2022]. Factually, it was alleged that, on the way to school, the victim and her colleague met the appellant who started chasing them. Each of them took her route. The appellant pursued the victim and caught her. He forced her into the nearby bush and slit her skirt.

At that moment someone appeared to her rescue and the appellant took to his heels. Later, the accused was arrested and arraigned. Before the trial in District Court, she denied the charges. He was tried and found guilty as charged. He was sentenced to a minimum sentence of 30 years imprisonment. Aggrieved by the decision, he has now appealed against both conviction and sentence. He has advanced four grounds of appeal.

At the hearing of this appeal, the appellant was unrepresented while the respondent was under the services of Ms Antia Julius, learned State Attorney. The appellant had nothing to argue.

Therefore, the learned Attorney supported the conviction and sentence. She argued that the appellant was charged under section 132(1)(2) of the Penal Code. From the stated law, she argued, the intention to commit the offence, which is the element of the offence, was proved.

According to her, the evidence of the victim was plain that she was captured by the appellant and dragged to the forest with threats, and the victim's skirt was slit. The learned counsel added, he wanted to rape the victim but was interrupted and run away. In totality, she argued, the appellant had an evil intention of raping the victim but was interrupted.

She further argued that the appellant did not cross-examine Pw4 when she gave evidence. She added that such an act was proof that, the appellant agreed with what was testified by Pw4. To support her submission on failure to cross-examine a witness, she cited the case of **Christopher Marwa Mturu vs R,** (CAT), Crim appeal No. 561 of 2019.

In the second place, it was submitted that at the trial, the case was proved and it was not shaken by the defence. On proof of age, she submitted that the age of the victim was proved to be 13 years.

Supporting the appeal, it was argued by the appellant that the age of the victim was not proven. He argued that age as an element of the offence ought to be proved by documentary evidence, which was not done at the trial. He also submitted that the prosecution evidence was weak. He added that there was no evidence which showed that the skirt of the victim was slit. The appellant continued submitting that if indeed, there was an attempted rape, why didn't she raise an alarm. According to the appellant, the case was not proven. He asked this court to allow the appeal.

Having considered submissions, the issue for determination is whether the appeal has merit. Starting with proof of age. At law, a parent is the right person to prove the age of the child. This was clearly illustrated in the case of **Hamis Chuma @ Hando Mhoja vs. R,** (CAT), Criminal Appeal No. 36 of 2018, on page 31 where it was stated;

> *"...it is settled law that the age of a child can be proved by himself or a parent, birth certificate or a doctor..."*

Pw1, the mother of the victim testified that her daughter was 13 years old.

Further, in the case **Andrea Francis Appellant vs. R,** (CAT), Criminal Appeal no. 173 of 2014 at page 5. It was stated that;

> *"... where the victim's age is the determining factor in establishing the offence, the evidence must be positively laid out to disclose the age of the victim..."*

From the cases above, age is a requirement if it is an element of the offence. Such as in statutory rape. In the case at hand, the appellant

was charged with the offence of attempted rape as provided under section 132(1)(2)(a) of the Penal Code, which states that;

(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) N/A

(c) N/A

(d) N/A

In my view, there is no requirement of age as a determinant factor to prove the offence of attempted rape. Therefore, whether proven or not, still if the offence is proven committed, a conviction would be founded, proof of age notwithstanding.

Dealing with the second complaint that the offence was not proved. As the first appellate court, this court is entitled to re-evaluate the evidence and may come up with its conclusion. In doing so, the extraction from the records of the trial court shows that the prosecution side brought four witnesses. The first witness was the mother of the victim, she did not

witness the commission of the offence. Pw2 is a victim while Pw3 is her fellow pupil, and Pw4 is a woman who is alleged to have witnessed the commission of the offence.

The evidence of Pw2 was to the effect that on the way to school they met the appellant who chased them and succeeded in catching the victim. He slit her skirt, unfortunately, the appellant saw a man and decided to run away. Pw4 supported her evidence. She, too, said she witnessed the appellant holding the victim and led her to the bush. According to her, when the appellant noticed was seen by her, he warned her not to follow him otherwise she would be killed. This is what she said;

> *"I did not leave them; I begged the accused to leave the victim but he did not. The accused person had a knife in his hand. A moment thereafter a certain man came. The accused person having seen him ran away."*

Pw4 saw the appellant dragging the victim to the bush. The appellant also saw Pw4 and they had a conversation.

The appellant denied the allegation, he said, he was called by the mother of a victim when standing with Pw2. He was later told, he attempted to rape her (Pw2). There is evidence the appellant ran away and then came back. This is found in the evidence of a victim. She said;

> *"When he saw her, the accused person ran away. Thereafter, he started conflicting with Felistor D/O?"*

It was also testified that the skirt of Pw2 was slit, but the same skirt was not tendered as an exhibit to support the prosecution case.

It is a principle of law that for the offence of rape to be established, there must be an attempt to rape a female person under threats for sexual purposes. In the case at hand, there is no evidence suggesting that there were threats by the appellant on the victim for sexual purposes. In the case of **Abubakari Msafiri vs R,** (CAT), Criminal Appeal No. 378 of 2017, it was held that;

> *"...one of the essential ingredients of the offence of attempted rape and which the prosecution has to prove beyond a reasonable doubt is an intent to procure prohibited sexual intercourse. The intent is in most cases manifested by some actions preceding sexual intercourse."*

In connection with the appeal at hand, there is no evidence showing the subsequent events of the appellant in the bush after he had slit the skirt of a victim. A mere tearing of a victim's skirt without other actions does not suggest that he could only rape the victim. There must be established evidence that the tearing of the victim's skirt was for sexual purposes and nothing more or less.

Apart from the above discussion, there is an important person who was not summoned to testify, this is a person whom Pw2 and Pw4 testified to have arrived at the crime scene, leading the appellant to run away. The significance of diverging from the accepted standard of summoning important witnesses was explicit in the case of **Baya Lusana vs R.** (CAT), Criminal Appeal No. 593 of 2017 on page 12, it was stated that;

> *"Failure to call the material witnesses entitles this Court to draw an inference adverse to the prosecution".*

It should be noted in conclusion that attempted rape is an inchoate crime. As inchoate as it is, by its nature it should be proved beyond reasonable

doubt. The evidence procured left gaps as to what then could be the intention of the appellant after tearing apart the skirt of the victim. In terms of Pw4, there was a conversation between the two, he held a knife, and neither Pw4 nor Pw2 knew what the appellant intended to do. To assault her, to sexually assault her, to kill her, to cut her private parts, name any. There was a series of offences that could be committed thereafter which may not necessarily be rape. Take an example of a person who breaks into the building. Before doing any other thing, he gets interrupted. The only offence that can be apparent is breaking into the building but one cannot suggest that he did so for stealing. Should such an offence be preferred acquittal remains the only option.

I therefore entertain doubt that the offence of attempted rape was proved beyond reasonable doubt. Therefore, the appeal succeeds. The conviction and sentence imposed on the appellant are quashed and all orders are set aside. The appellant should be released from prison unless otherwise held for some other lawful cause.

ACK. Rwizile

JUDGE

23.2.2024