THE JUDICIARY OF TANZANIA

IN THE HIGH COURT OF UNITED REPUBLIC OF TANZANIA AT SHINYANGA

CRIMINAL APPEAL 202404302000011467

(Appeal arising from Criminal Case No. 90 of 2020, Bariadi District Court)

NJILE AMOS ..... APPELLANT

VERSUS

REPUBLIC ..... RESPONDENT

JUDGMENT

22nd & 31st May 2024

F.H. Mahimbali, J

The appellant was charged and convicted at the trial court of Bariadi District Court with one offence of attempted rape contrary to section 132(1)(2) (a) of the Penal Code Cap 16 R.E 2022. It was alleged by the prosecution that on the 4th day of July 2020 at Idoselo Forest, Mwanampala Ward, within Itiima District in Simiyu Region, with intent to procure prohibited sexual intercourse, did attempt to rape one girl aged 11 years old. On that conviction, the appellant was accordingly sentenced to life imprisonment.

Undaunted with both conviction and sentence, the appellant has preferred this appeal armed with three grounds of appeal which digestively

all boil into one main ground that the prosecution's case was not established beyond reasonable doubt to mount conviction as done.

During the hearing of the appeal, the appellant was unrepresented, thus just prayed that his grounds of appeal be adopted to form part of his appeal submission. The respondent on the other hand who supported the appeal, was represented by Mr. Kadata learned state attorney

In supporting the appeal, firstly Mr. Kadata averred that the offence in which the appellant was charged with, was not established as per law. The appellant was charged with attempted rape contrary to section 132(1) (2) (a) of the Penal Code. As per this offence, the prosecution was supposed to establish amongst others that there was use of force or threat to procure the said rape. According to the evidence by PW1 who is the victim of the said offence, had not established whether prior to the said act, there was actual use of threat. Legally, it was important to establish the ingredients of threat (see **Abubakar Msafiri V. Republic**, Criminal Appeal 378 of 2017, CAT at Mbeya where the CAT emphasized that threat is one of the crucial elements in establishing the intention of the attempted rape.

Secondly, Mr. Kadata submitted that the cautioned statement after being admitted, was not read over in court, thus prejudiced the appellant from knowing the contents of the alleged cautioned statement for his proper defense (see the case of **Ahmad Salum Hassan @ Chinga V. Rep,** Criminal Appeal No. 386 of 2021, CAT at). The only available remedy is to expunge the said exhibit from court record.

Moreover, during the preliminary hearing, the said cautioned statement was not listed as one amongst the documents to be relied upon during trial, added Mr. Kadata in his submission. The appellant was however not given notice of additional evidence. Thus, all this denied the appellant from preparing well his defense.

Furthermore, the PF3 which was admitted as exhibit P.2, the same was equally not read over its contents after its admission. Therefore, this exhibit as well is supposed to be expunged from court record, emphasized Mr. Kadata.

For all this, he concluded that the case at the trial court, was not established beyond reasonable doubt thus, the appellant's conviction was vitiated.

I have carefully gone through the trial court's records and the submissions in support of the appeal by the parties. The vital question is one, whether the appeal is meritorious.

It is a trite law that, prosecution bears the burden to establish and prove the offence beyond reasonable doubt. Section 3 (2)(a) of the Evidence Act. Likewise, section 110 of The Evidence Act, also provides in a clear manner as quoted hereunder:

> *"Whoever desires any court to give judgement as to any legal right or liability dependent on the existence of facts which he asserts, must prove that those facts exist. (2) When a person is bound to prove the existence of any fact, it is said that the burden of proof lies on that person."*

These sections received breath by the Court of Appeal in the case of **Anthony Kinanila Enock Anthony Vs. R,** Criminal Appeal No. 83 Of 2021 when it held:

> *"As to the standard of proof which we shall also have the opportunity to consider in the instant case, the prosecution has the duty to prove ail the ingredients of the offence beyond reasonable doubt and here, one should not waste time trying to*

invent a new wheel as that is exactly what was stated by the House of Lords in England way back in 1935 in ***Wooimington Vs. DPP*** *[1935] AC 462 from where our present general principles of criminal law and procedure emanate"*

Now, in the case at hand Mr. Kadata correctly argued that the prosecution was supposed to establish amongst others that there was use of force or threat to procure the said rape. According to the evidence by PW1 who is the victim of the said offence, had not established whether prior to the said act, there was actual use of threat. Thus, for this it was important to establish the ingredient of threat (see **Abubakar Msafiri V. Republic**, Criminal Appeal 378 of 2017, CAT at Mbeya where the CAT emphasized that threat is one of the crucial elements in establishing the intention of the attempted rape.

The term "threatening" is not defined in the Penal Code. So it must have been used in its ordinary grammatical meaning. The Concise Oxford Dictionary (5th ed p. 1350) defines the word "threat" as

"Declaration of intention to punish or hurt (law) such menace of bodily hurt or injury to reputation or property as may restrain a person's freedom of action..."

And in BLACK'S LAW DICTIONARY, 6™ ed. P.1030; that term is defined as:-

> *"A communicated intent to inflict physical or other harm on any person or property. A declaration of intention to injure another or his property by some unlawful act..."*

From these definitions, it is clear that the word "threatening" in Section 132(2)(l)(a) of the Penal Code must mean a manifestation to inflict bodily or other harm on the person or property of another (See **Katibu Kanga V. Rep**, Criminal Appeal No. 290 of 2018, CAT at Arusha, at page 11). In the current case, it is hardly established that there was such use of actual threat to procure the said prohibited rape.

Mr. Kadata further discredited the prosecution's case at the trial court for being poorly prosecuted as some of the important exhibits were not procedurally dealt with after their admission. Reference was made to the PF3 (exhibit P2) and the Cautioned statement which was also not listed as one of the prosecution's intended exhibits (PE1), it was admitted without compliance to the notice of adducing additional evidence. As they were wrongly dealt with, they are subject to be expunged as I hereby do.

The manner the testimonies of PW1 and PW2 were recorded, didn't comply to the rule of giving evidence under oath (see section 198 of the CPA). Though PW1 was of tender age, yet was supposed to comply with

the provisions of section 127(2) of the TEA. PW2 was an adult, yet testified without taking an oath. This contravened section 198 of the CPA.

In a total consideration of all these pregnant errors on the prosecution's case, the same cumulatively have weakened its case. Thus, it is my finding that the appellant's appeal has been brought with sufficient cause. The same is hereby allowed.

In the final result, the appellant's conviction and sentence are set aside. Accordingly, I hereby order the immediate release of the appellant from prison custody unless held there for some other lawful cause.

DATED at SHINYANGA this 31st day of May 2024.

F.H. MAHIMBALI

JUDGE