

TANZANIA / JUDGMENT

ezekia castor versus republic 2023

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IN THE HIGH COURT OF TANZANIA AT MBEYA CRIMINAL APPEAL NO. 146 OF 2023 (Originating from the District Court of Mbalari at Rujewa, in Criminal Case No. 201 of 2020) EZEKIA CASTORAPPELLANT VERSUS THE REPUBLIC.....
RESPONDENT

JUDGMENT

Date: 2 & 17 November 2023 SINDA, J.: The appellant Ezekia Castor was charged with the offence of rape contrary to sections 130 (1) (2) (e) and 131 (1) of the Penal Code (Cap 16 R.E

2022) (the Penal Code). At the conclusion of the trial, he was convicted of the offence of attempted rape contrary to section 132 (1) (2) (d) and

(3) of the Penal Code. The District Court of Mbalari at Rujewa (the Trial Court) sentenced him to thirty (30) years imprisonment. The particulars of the offence are that on 17 September 2020 at Manienga village within Mbarali District in Mbeya Region willfully and unlawfully did have sexual intercourse with XYZ a pupil at Manienga primary school aged 12 years old. 1 Against that decision, the appellant appeals on a number of grounds which can be consolidate into the following:

1. That; the trial court erred in law when convicted and sentenced the appellant without taking into account that if PW1 found the appellant outside and ordered her young sister to close the door.
 - (a) In how way the said rapist entered the said closed room?
 - (b) Why in their testimonies none of them testified if the said door of the room of PW1 and PW4 was broken by the said rapist?
 - (c) Which made PW1 to identified that the said culprit but remained silent to mentioned the name of the culprit PW4 who were together in the same room? Why PW4 was not seen the culprit.

2. That; the trial court erred in law when convicted and sentenced the appellant without evaluating deeply the evidence of PW1 and the heavy contradiction of the evidence PW3 who lied the trial court that she saw sperms inside the private part of PW1 whenever PW5 observed nothing this means the said case was fabricated only not otherwise.
3. That; the trial court erred in law when convicted and sentenced the appellant relying on the evidence of PW1 without regarding that PW1 was inside the dream of nightmare and wake up without knowing which occurred to her and was the reasons which made PW4 to observed nothing inside their room although was awoken by the alarm of PW1 eliest of such alarm. 2
4. That; the trial court erred in law when convicted and sentenced the appellant without regarding that neither PW1 nor PW4, PWW2 who proved the offence of attempted rape as per law.
5. That; the defense of the appellant was ignored by the court by adding an extraordinary matter which was not testified in the defense of the appellant during the delivering of his judgment. At the hearing of the appeal on 2 November 2023, the appellant appeared in person, unrepresented. The respondent was represented by Mr. Salmin Zuberi, learned State Attorney. The appellant requested the Court for Mr. Zuberi to read the grounds of appeal in the petition of appeal as presented in the Court. I permitted Mr. Salmin to read the grounds of appeal. In reply, Mr. Zuberi began by opposing the appeal. He supported the conviction and sentence on attempted rape and prayed for the court to dismiss the appeal on the following reasons. He submitted that the decision by the Trial Court on 30 November 2020 to convict and sentence the appellant for attempted rape was based on the evidence provided before the Trial Court during. The proceedings are correct because they followed the provisions of section 301 of the Criminal Procedure Act Cap 20 R.E 2022 (the CPA). He submitted that section 301 of the CPA provides that where a person is charged with an offence, he may be convicted of having attempted to commit that offence although he was not charged with the attempt. 3 Submitting on the first ground of appeal, he stated that the appellant is trying to convince the Court that the door was locked. This is based on facts and not law. The appellant in that house was invited to stay at the house as stated on page 8 by PW2 and by PW3 on page 11 of the typed proceedings of the Trial Court (the Proceedings). This means the appellant was staying at the house as he was invited to stay and there was no need for him to break the door. The appellant failed to ask any questions in relation to this. Failure to cross examine a witness on a material evidence amount to acceptance of it. This is provided in the cases Bakari Abdallah Masoud vs The Republic, Criminal Appeal No. 126 of 2017, cited in Karim Seif aka Islam vs. The Republic Criminal Appeal No. 161 of 2017 and Nyerere Nyabue vs Republic Criminal Appeal No. 67 of 2010 all reported on Tanzlii. He argued that the appellant said PW4 did not see the appellant. On page twelve (12) of the Proceedings PW4 promised to say the truth. PW4 was a person under a tender age but promised to say the truth. PW4 being below the age of 14 years it is clear by common sense that she might not have been able to see the appellant or was asleep. The appellant did not

cross examine PW4 on what PW\$ said before the trial Court. As such we rely on the cases we have mentioned above. He prayed the Court to dismiss the first ground. Mr. Zuberi responded to grounds number two and three together. He stated that these grounds are based on rape and not attempted rape. He contended that the witnesses aimed to prove the offence of rape but the 4 appellant did not object to the evidence given by PW2 and PW3. Then the Trial Court realized that the offence of rape was not proved beyond reasonable doubt and convicted the appellant on attempted rape on circumstantial evidence. In the case of John Mabula vs The Republic, Criminal Appeal No. 18 of 2004, Tanzlii. The Court of Appeal held in page 6 that in a case depending entirely on circumstantial evidence before an accused person can be convicted. The court must find that the inculpatory facts are in consistence with the innocence of accused person and incapable of explanation upon any other reasonable hypothesis than that of guilt. And it is necessary before drawing the inference of guilty from circumstantial evidence there are no other coexisting circumstances could weaken or destroy the inference. Indeed, this principle is well illustrated in the case of Ilanda Kisongo vs Republic, 1960 E.A 708 at page 782, it follows therefore that for circumstantial evidence to hold it must conform to three tests namely:

1. The circumstances from which an inference of guilty is sought to be drawn, must be cogently and firmly established.
2. Those circumstances should be of a definite tendency and unerringly pointing towards the guilty of the accused; and
3. The circumstances taken cumulatively should form a chain so, complete that there is no escape from the conclusion that within all human probability, the crime was committed by the accused and no one else. To cement on what he has stated above, Mr. Zuberi argued that in the typed proceedings of the Trial Court it shows that he was an invited guest 5 in that house. When PW2 and PW3 evidence was given, it shows that the appellant was shown a place to sleep different from the room the victim was sleeping with her sibling. The proceedings shows that the appellant left his room and went to sleep in the room with the victim and her sibling. He was asked why he was in this room while he was shown another room to sleep. He responded to PW2 that he decided to sleep in the children room so that he should not disturb anyone and wanted to wake up early. Also, the evidence shows that when the victim called her parents, the appellant was asked to go back to sleep in the room he was assigned. But in the morning, he was not there. This shows that he had a guilt mind that's why he left the house. We pray the court to dismiss this ground of appeal. In responding to the fourth ground, Mr. Zuberi submitted that the Trial Court reached the decision not to convict him on rape because the evidence did not prove the offence of rape. PW1, PW2, PW3 and PW4 were giving evidence on rape. That is why basing on circumstantial evidence the Trial Court convicted him of attempted rape. He referred to cases mentioned when responding to grounds number two and three on circumstantial evidence. He prayed for the Court to dismiss the appeal. Submitting to the fifth ground that the appellant defense was ignored by the Trial Court by adding extraneous matters in the judgement. Mr. Zuberi stated

that in the Trial Court typed proceedings on page seventeen

- (17) shows that on 20 November 2020 the appellant was given a chance to defend himself. He stated that he was given a chance to sleep at the 6 house when the event happened. He did not object to the offence of rape. He only said that he did not sleep in the children room. The Trial Court did not consider his defense because it could not change anything. Mr. Zuberi further submitted that also it is a common practice when a court deliver its judgement it must contain a number of things as required by law i.e, facts of the case, legal issues, the law and analysis or determination of legal issues, court findings, the ratio decidendi, the verdict and conclusion depending on the case. The Trial Court is not bound to deal with the issues raised by the prosecution. He prayed for the Court to dismiss the appeal. In rejoinder by the appellant insisted that he did not commit the offence. He prayed this Court finds him not guilty and releases him. I have considered the instant appeal, the grounds in support thereof, the submissions of both sides, the record of this appeal and the law. I will start with the fourth ground of appeal that the Trial Court erred in law when convicted the appellant without regarding that PW1, PW2, PW3 and PW4 did not prove the offence of attempted rape. The learned state attorney submitted that the Trial Court reached the decision not to convict the appellant on rape because the evidence did not prove the offence of rape. PW1, PW2, PW3 and PW4 were giving evidence on rape. That is why basing on circumstantial evidence the Trial Court convicted the appellant of attempted rape. 7 Whereas the general provision creating the offence of attempted rape is provided under section 132 of the Penal Code 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 elss 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 him self 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) Where a person commits the offence of attempted rape by virtue of manifesting his intention in the manner specified in subsection (2)(c) or (d), he shall be liable to imprisonment for life and in any case for imprisonment of not less than ten years 8

- (4) Where the offence of attempted rape is committed by a person who is of the age below eighteen years, he shall (a) where a first time offender, be sentenced to corporal punishment of five strokes;
- (b) where a second time offender, be sentenced to a term of six months; (c) where a third time offender or habitual offender, be sentenced to twelve months.” A quick look at page 6 and 7 of the judgement of the Trial Court, reveals that the Trial Court did not find the appellant guilty for the charged offence of rape contrary to section 130 (1) (2) (e) and 131 (3) of the Penal Code but guilty of the offence of attempted rape contrary to section 132 (1) (2) (d) and 3 of the Penal Code and convicted the appellant to thirty (30) years imprisonment. Section 132 (1) (2) (d) provides that: "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 elss 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);
- (b); (c).....; 9
- (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. The evidence on record does not prove beyond reasonable doubt the charge of attempted rape under section 132 (1) (2) (d) as substituted by the Trial Court. The substituted charge does not disclose the intent, which is to procure prohibited sexual intercourse and the element of representing himself as the husband of the girl or woman are essential for courts to uphold the charge and convict the appellant. In the Proceedings there is no evidence or proof that the victim was married. Further, the evidence does not show that the appellant attempted to represent himself as the husband of the victim so that he could procure sexual intercourse. Sections 110(1) and (2) and 112 of Evidence Act Cap. 6 R.E 2022 (the TEA) states that, he who alleges must prove and the burden of so proving lies on him. See also the cases of Abdul Karim Haji vs. Raymond Nchimbi Alois and Another, Civil Appeal No. 99 of 2004, Nathaniel Alphonse Mapunda and Benjamin Mapunda vs. Republic [2006] TLR 395 and Zombo Rashid vs. Republic, Criminal Appeal No. 7 of 2012 (CAT-unreported). Evidence must therefore be led by the prosecution in proving that, the offence was actually committed and so committed by the accused person. 10 It is also trite law that, in all criminal matters the standard of proof is that of beyond reasonable doubt as provided under section 3(2)(a) of the TEA, as conviction cannot be grounded on mere suspicion. The standard was considered in the case of Nathaniel Alphonse Mapunda and Another (supra), when the Court observed thus:

- i) “As is well known, in a criminal trial the burden of proof always lies on the prosecution. Indeed, in the case of Mohamed Said vs. Republic this court reiterated the principle by stating that in a murder charge the burden of proof is always on the prosecution, and the proof has to be beyond reasonable doubt. ii) Where circumstantial evidence is relied on, the principle has always been that facts which an inference of guilt is drawn must be proved beyond reasonable doubt. iii) In criminal charge, suspicion alone, however grave it may be it is not enough to sustain a conviction, all the more so, in a serious charge of murder.” From the above cited authorities it is evident to this Court that, evidence must be led by the prosecution towards proving that, it is the accused and accused person only who is responsible for commission of an offence as per the charge laid at his door since suspicion alone however grave it may be is not enough to sustain conviction in such a serious charge of attempted rape. 11 The court has power to convict parties of attempting in case the actual offence was not proven but attempt was proven. In this offence of attempted rape, that the appellant attempted to represent himself as the husband of the victim so that he could procure sexual intercourse is mandatory in proving the attempt. From the prosecution evidence adduced in the Trial Court, the victim woke up to the accused lying on top of her, but the ingredients of rape were not established. In accordance with the evidence tendered by PW5 there was neither bruises nor sperm remains found in the vagina of the victim. This indicated that there was no penetration. The fact that the appellant was found sleeping in the kitchen next to the room the children slept although he was asked to sleep in the parents’ quotas is not enough to convict the appellant for attempted rape. It is clear the conviction was based on circumstantial evidence and suspicion. The prosecution evidence was not watertight to convict the appellant for attempted rape. In the absence of these basic attributes of the offence of attempted rape, any conviction will be prejudicial to the appellant because from the beginning he did not know what offence he was pleading to and could not be in a position to effectively put up an appropriate defence to such a charge. For the reasons I have stated I am satisfied that based on the fourth ground of appeal the appellant should not have been convicted of attempted rape under section 132 (1) (2) (d) of the Penal Code. 12 As such, I do not wish to determine the rest of the grounds as they all fall short at juncture. Accordingly, I allow the appeal, quash the conviction and set aside the sentence imposed upon him. I order that the appellant be released forthwith unless lawfully detained in connection with another matter. The right of appeal was explained. DATED at MBEYA on this 17 day of November 2023. A. A. SINDA JUDGE The Judgment is delivered on this 17 day of November 2023 in the presence of the appellant, who appeared in person, and Ms. Lyimo, counsel for the respondent. A. A. SINDA JUDGE 13

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