

TANZANIA / JUDGMENT

64

COURT
TANZLIIDECIDED
20 August 2024

Source: media.tanzlii.org · Research copy typeset by Esheria. Not court-issued or certified.

THE UNITED REPUBLIC OF TANZANIA JUDICIARY IN THE HIGH COURT OF TANZANIA MBEYA
SUB - REGISTRY AT MBEYA CRIMINAL APPEAL NO. 17078 OF 2024 (Originating from the District
court of Rungwe at Tukuyu in Criminal Case No. 150 of 2017) OMARY
MWANG'OMBE.....APPELLANT VERSUS THE
REPUBLIC.....RESPONDENT

JUDGMENT

Date: 20 August 2024 & 12 September 2024 SINDA, J.: The appellant at the District Court of Rungwe at Tukuyu (the Trial Court) was charged with the offence of attempted rape contrary to section 132

- (1) and (3) of the Penal Code, Cap. 16 R.E 2002 (the Penal Code) and sentenced to thirty (30) years imprisonment. The particulars of offence are that the appellant on 4 November 2017 about 18:00hrs at Busoma village within Rungwe District in Mbeya Region, 1 did attempt to have carnal knowledge with XYZ (the Victim or PW3) a child of seven (7) years old. It was the prosecution evidence that on the material day, the Victim while playing with other children's, she was taken by the appellant. He went with the Victim to his house. Then, the appellant attempted to rape the Victim but the mission was not completed because while in the process of trying to rape the Victim, the Victim father called her outside the appellant house. The appellant was caught by the father of the Victim (PW1) and was taken to the police and then to court. The appellant denied committing the offence. He alleged that the case was fabricated against him by PW1 because he once caught him committing adultery with his wife (now deceased). At the end of hearing, the Trial Court found that the prosecution proved the case to the required standard. The appellant was convicted and sentenced to serve 30 years imprisonment. The appellant challenges his conviction and the corresponding sentence on eight grounds of appeal as follows:
1. The trial magistrate erred in law and fact by convicting and sentencing the appellant while the case was not proved beyond the reasonable doubt. 2
 2. The trial magistrate erred in law and fact when convicting appellant relying on evidence of prosecution especially PW1 who was not credible witness.

3. The trial magistrate erred in law and fact when convicted the appellant by merely believing on exhibit P1 while it was a photocopy.
4. The trial magistrate erred in law and fact when she convicted the appellant by merely believing evidence of PW1, PW2 and PW3 without care because both have interest with case against the appellant.
5. That the trial magistrate erred in law and fact when convicting appellant relying on evidence of PW1 and PW2 without taking into consideration that no any leader called to prove evidence PW1 And PW2 while the matter was reported even to WEO.
6. The trial magistrate erred in law and fact by convicting appellant relying on evidence of PW3 a child of tender age contrary to the requirement under section 127 (2) of The Law of Evidence Act R.E 2022 (TEA)
7. That the trial magistrate erred in law and fact relying on evidence of PW4 (police officer) who tendered in court exhibit PW2 (cautioned statement).
8. The appellant defence was not considered. 3 At the hearing the appellant appeared in personal unrepresented. The respondent was represented by Ms. Upendo Lyimo, learned State Attorney. The appellant requested the Court to consider his grounds in the petition of appeal as presented in the Court. He opted for Ms. Lyimo to reply to them first so he could rejoin in case such need arose. In relation to the first ground of appeal, Ms. Lyimo submitted that the appellant was convicted for attempted rape under section 132 (1) and (3) of the Penal Code. She added that section 380 of the Penal Code, explains the meaning of attempt to mean a person tries to commit an offence but doesn't go through it. Ms. Lyimo argued that the ingredients of attempted rape were identified by PW3 at page 8 on the third paragraphs of the typed proceedings of the Trial Court (the Proceedings) that the Victim slept in her back and the appellant took out his penis and pressed it into the Victim private part. That, when the Victim tried to shout but the appellant blocked his mouth. The evidence was corroborated by the doctor (PW4), who stated that she found the private parts of the Victim with bruises though her hymen was intact. That, the blunt object was trying to penetrate the Victim private parts unsuccessful. 4 Ms. Lyimo argued that in the offence of rape the testimony of the victim is enough to convict the appellant. She referred to section 127 (6) of the TEA and the case of Selemani Makumba vs R TLR. It was her opinion that the offence was proved beyond reasonable doubt as the testimonies was not cross examined by the appellant. She referred to the case of Mawazo Anyagwile Mwaikwaja vs. DPP, Criminal Appeal No. 455 of 2017 (CAT at Mbeya) which referred to the case of Damian Ruhele vs. R Criminal Appeal No. 501 of 2007 (unreported) and the case of Nyerere Nyegue vs. Republic, Criminal Appeal No. 67 of 2010 (unreported) to support her argument. Regarding the second ground of appeal, Ms. Lyimo contended that the ground is baseless because the charge sheet shows the offence was attempted rape and not rape. She further argued that the Victim at page 8 paragraph 3 of the Proceedings explained how the appellant tried to rape her but he was unsuccessful. The testimony was collaborated by PW4 who found out there are bruises

but the hymen was still there. She added that PW1 was not an eye witness and he did not say that the Victim was raped. She stated that PW1 is a credible witness. She referred to the case of Goodluck Kyando vs. R TLR (2006). 5 On the third ground of appeal in relation to the age of the Victim, Ms. Lyimo submitted that it was stated in various court decision that the age of the victim can be confirmed by a parent. She referred to the case of Isaya Renatus vs. R, Criminal Appeal No. 542 of 2015 (CAT at Tabora). She argued that at page 3 paragraph 2 of the Proceedings, PW1 explained that he did not remember the exact date but the Victim was born in October 2010. She further argued that at page 2 of the Proceedings, in the memorandum of the undisputed facts, the appellant didn't object the age of the Victim. Also, when the charge sheet was read to the appellant it stated that the age of the victim that she was 7 years old. She added that at page 3 of the Proceedings it shows that the birth certificate which was submitted was a photocopy without giving reasons and the appellant didn't object the age of the victim. Turning to the fourth ground of appeal, it was the respondent view that relatives are not restricted to give testimony in court. Ms. Lyimo referred to the case of Amini Ismail vs. R, Criminal Appeal No. 178 of 2015 (CAT at Tabora) where the CAT referred to the case of Mustapha Ramadhani Kihyo vs. R (2006) TLR 324. She submitted that the appellant said that the relatives had interests in the case but did not give reasons for the 6 court to discredit the witnesses. Also, he did not object to their testimony in court. She further submitted on the fifth ground of appeal that section 143 of TEA stated that the responsibility to call witness to prove the case is on the prosecution. It was Ms. Lyimo opinion that the prosecution called enough witnesses to prove the case against the appellant. She stated that for the offence of attempted rape can be proved by the victim alone without being collaborated. At page 4 paragraph 5 of the judgment, the Trial Court relied on the testimony of the Victim and that the ingredients of attempted rape were met. With regards the sixth ground of appeal, that the court relied on the evidence of a child of a tender age without following the proper procedures. Ms. Lyimo submitted that the appellant does not object that voire dire was done. At page 7 paragraph 3 of the Proceeding shows that the child promised to say the truth. Section 127 (2) of TEA states that a child can give his evidence without an oath but has to promise to say the truth. The law and procedure were followed as at page 7 of the Proceedings, the Victim promised to say the truth. Arguing on the seventh ground of appeal, Ms. Lyimo claimed that at page seven of the judgement, the court relied on the evidence of PW1, PW3 7 and the defense of the appellant and it was proved that the appellant committed the offence of attempted rape. Therefore, it is not true that the Trial Court relied only on the cautioned statement submitted by PW4. Regarding the eighth ground of appeal that the appellant defense was not considered. Ms. Lyimo, submitted that at page 7 paragraph 3 of the judgement, the Trial Court stated that the case was proved beyond reasonable doubt. She added in his defense, the appellant couldn't explain why he was found with the Victim in his room. In rejoinder, the appellant insisted his defense in the Trial Court that the case was fabricated against him. I have gone through the court records, grounds of appeal and submission made by the parties. I find the appeal can be disposed under one issue whether the offence of attempted rape was proved by the prosecution to the required standard. Going through the court records I find that there was

variance between the charge and the evidence presented by the prosecution to prove their case. For ease of reference, I reproduce the charge sheet as follows; 8 CHARGESHEET PARTICULARS OF THE PERSON CHARGED NAME: OMARY S/O MWANG'OMBE TRIBE: KYUSA AGE: 40 OCC: PEASANT RELG: CHRISIAN RESD: BUSONA-VILLAGE STATEMENT OF THE OFFENCE: Attempt rape c/s 132 (1) and (3) of the Penal Code Cap. 16 of the laws R.E 2002. STATMENT OF OFFENCE: Attempt rape C/S 132 (1) and (3) of the Penal Code Cap 16 Vol. 1 of the Laws R.E 2002. PARTICULARS OF OFFENCE: That OMARY S/O MWANG'OMBE charged on 4th day of November 2017 at about 18: 00hrs at BUSOMA village within Rungwe District in Mbeya Region, did attempt to have carnal knowledge to DIANA D/O USWEGE DICKSON a child of 7 years old. The offence of attempted rape is provided for under section 132 (1) of Penal Code that: "132. -(1) Any person who attempts to commit rape commits the offence of attempted rape...." 9 It is also a position of the law that in criminal trials involving sexual offences that the evidence of the victim, if found credible, is the best evidence and capable of mounting conviction even in the absence of corroboration the case. See Seleman Makumba vs Republic [2006] TLR 379, Aman Ally @ Joka vs. Republic (Criminal Appeal 353 of

- 2019) [2021] TZCA 170 (Tanzlii) and; Mussa Sebastiani vs. Republic (Criminal Appeal 406 of 2018) [2021] TZCA 119 (Tanzlii). In this case the evidence of the Victim or PW3 appeared at page 8 of the Proceedings. The Victim stated that the appellant took out his penis and pressed it into her private part and she felt pain. Section 130 (4) (a) of Penal Code provides that: "For purposes of proving the offence of rape penetration however slight is sufficient to constitute the sexual intercourse to prove the offence. " In line with the above authority, I find that the evidence presented by PW3 which is expected to be the best evidence in this case proved the offence of rape and not the offence of attempted raped which the appellant was charged with. It is trite law that, in any criminal case the prosecution must lead evidence disclosing the offence charged. This was stated in the case of Godfrey Simon and Another vs. the Republic, 10 Criminal Appeal No. 296 of 2018 (CAT) at Arusha, in which it was emphasized that: "Where there is a variation of the charges and the evidence about the place where the alleged offence (Armed Robbery occurred) the charge must be amended forthwith, and if no amendment is effected the charge will remain unproved and the accused person shall be entitled to acquittal as a matter of right short of that a failure of justice will occur." In this case there was variation in the ingredient of the offence which the appellant was charged with. The appellant was charged with the offence of attempted rape while the evidence presented by the Victim proved the ingredient of rape the offence which appellant was not charged with. Unfortunately, even the evidence of the doctor which ought to corroborate the evidence of PW3 still proved ingredient of rape that after examination she found victim labia minora on the left side was bruised. As per section 130 (4) (a) of Penal Code it constitutes rape. In that regard I find that the offence of attempted rape which the appellant was charged with remained unproved. 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. 11 Right to appeal explained. DATED at MBEYA on this 12 day of September 2024. A.
A. SINDA JUDGE 12

Source & reproduction note

Judgment wording, source notices and original paragraph numbers are retained. Esheria supplies the layout and this PDF's page numbers; these are not the source pagination. This is a research copy, not an official or certified court document. Check quotations, citations and publication restrictions against the original source before relying on it.

ORIGINAL SOURCE	https://media.tanzlii.org/media/judgment/316706/ source_file/98e074b84939f887/64._OMARY_MWANGOMBE_v_R_-_JUDGMENT.pdf
CASE PAGE	https://chat.esheria.ai/case-law/tanzania/omary-mwangombe-v-the-republic-attemptedrape- tanzlii-2024

Prepared on 14 October 2026 · Esheria