

TANZANIA / JUDGMENT

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THE UNITED REPUBLIC OF TANZANIA JUDICIARY IN THE HIGH COURT OF TANZANIA MBEYA
SUB - REGISTRY AT MBEYA CRIMINAL APPEAL NO 18629 OF 2024 (Originating from District
Court of Chunya at Chunya in Criminal Case No. 8267/2024) SIMON SAI
HOMA.....APPELLANT VERSUS THE
REPUBLIC.....RESPONDENT

JUDGMENT

Date: 17 October 2024 & 12 December 2024 SINDA, J.: The appellant was charged with the offence of attempted rape c/s 132 (1) and (2) of the Penal Code, Cap 16 R.E 2022 (the Penal Code). The District Court of Chunya (the Trial Court) convicted and sentenced him to serve 30 years imprisonment. The particulars of the offence are that on 17 March 2024 at Mapogoro village within Chunya District and Mbeya Region, the appellant attempted to have carnal knowledge of one XYZ (PW1 or the Victim). The appellant was allegedly arrested by good Samaritans at the crime scene. He was 1 then taken to Mapogoro village and later to Chunya police station. On 27 March 2024 the appellant was arraigned before the Trial Court. After full trial, he was found guilty of the said offence. Dissatisfied with the decision, the appellant appeals on a number of grounds as hereunder provided:

1. THAT – the trial court erred in law and fact to convict and sentence the appellant the by depriving to record the appellant questions put to PW1 and PW3 during cross – examination.
2. THAT – the trial court erred in law when convicted and sentenced the appellant without assessing deeply the credibility of the evidence of Pw1 that was invaded by the rapist while on the road and herself advised the rapist to accompanied with her to the bush in order the said rapist to execute the evil offence.
 - (a) Why she didn't ran away or raised an alarm to the pass by person passing to the said road?
 - (b) In her testimony no any were Pw1 testified if the said rapist was armed with dangerous weapon in order to threats her to do as he like which convinced her to consented to accompanied 2 by the said rapist? How many distance from the road to the bush?

3. THAT – the trial court erred in law when convicted and sentenced the appellant without taking into account that if it was true the appellant was put off all his clothes trying to rape the victim (PW1) why the said clothes were not collected by DANIEL or PW2 to prove the same? or tendered at the court to support their evidence?
4. THAT – the trial court erred in law when convicted and sentenced the appellant without evaluating deeply the evidence of PW1, PW2 and PW3 which lacks merits as none of the leaders mentioned by PW1 and PW2 called to prove the same.
5. THAT – the offence of attempted rape was not proved as per law and the appellant's defence was ignored by the trial court. Hearing of the appeal was by way of oral submissions. The appellant appeared in person, unrepresented. The respondent was represented by Mr. Rajabu Msemo, learned State Attorney. The appellant opted for the respondent to reply to the grounds of appeal first, and he would rejoin in case such need arose. 3 On the first ground of appeal, the learned state attorney argued that at page five and ten of the Trial Court's proceedings (the Proceedings), the appellant did not ask any questions during cross examination. Therefore, he cannot say that the court did not record his questions to PW1 and PW3. He cited the case of Paul Dioniz vs The Republic, Criminal Appeal No. 171 of 2018 to support his argument. Addressing the second ground, it was Mr. Msemo's submission that the Victim stated that the appellant asked her to choose between being raped or killed. That, the words were uttered while the appellant was strangling the Victim. Therefore, she could not run. The learned state attorney added that the evidence of PW1 is corroborated by the evidence of PW2 who stated that she heard noises from the bush. That, when PW2 arrived at the crime scene, she found the appellant on top of the Victim and arrested him. He added that when the appellant was asked to cross examine the victim he did not do so. The counsel was of the view that failure to cross examine means he agreed with what was stated. On the third ground, Mr. Msemo submitted that the clothes of the appellant were not required to prove the offence of attempted rape because he was caught red handed at the scene of crime. 4 With regard to the fourth ground, the counsel referred to section 143 of the Evidence Act, Cap 6, R.E 2022 (the Evidence Act), which provides that no exact number of witnesses is required to prove an offence. That, the court will look at the strength of the evidence provided before it to determine a case. Mr. Msemo argued that the evidence of PW1 and PW2 was sufficient. That, PW1 clearly explained how the incident occurred. PW2 explained how she caught the appellant red handed while he was about to commit the offence. As for the fifth ground, the learned state attorney submitted that the appellant was convicted for attempted rape which was proved by the evidence of PW1 and PW2. He added that the appellant's defence was considered at page four of the Trial Court's judgment (the Judgment). In his short rejoinder, the appellant submitted shortly that at the Trial Court he was not given a chance to cross examine the prosecution witnesses, to wit PW1, PW2 and PW3. I have considered the submissions by both sides and the records of the Trial Court. The most pertinent issue of determination is: whether the appellant attempted to rape the Victim (PW1). 5 As I begin my deliberation, I will first address the second ground of appeal. As such, I wish to reproduce Section 127 (6) of the Evidence Act, that reads: "127 (6)

Notwithstanding the preceding provisions of this section, where in criminal proceedings involving sexual offence the only independent evidence is that of a child of tender age or of a victim of the sexual offence, the court shall receive the evidence, and may, after assessing the credibility of the evidence of the child of tender years or of as the case may be the victim of sexual offence on its own merits, notwithstanding that such evidence is not corroborated, proceed to convict, if for reasons to be recorded in the proceedings, the court is satisfied that the child of tender age or the victim of the sexual offence is telling nothing but the truth.” The above provision should be read together with the case of Meedrage Mohamed Naheka vs Republic, Criminal Appeal No. 391 of 2022. The Court of Appeal had this to say: “As for the ingredient of penetration, PW1 (the victim) had given a true and reliable oral account, which is the best evidence required by law for proving sexual offence cases. See- Selemani Makumba v. R,

[2006] T.L.R. 379. Since, the appellant was caught almost red handed. However, we are also mindful of the legal principle which poses an exception to the rule in Seleman Mkumba (supra), that the rule cannot apply whole sale, ignoring credibility and reliability of the prosecution witnesses and the obtaining circumstances.” From the above, I find that the evidence of PW1 to be filled with doubts. During trial, she explained that the appellant wanted to rape her along the road. However, she was the one that suggested that the encounter should take place inside a bush. Apparently, where it would be harder to get help, unlike alongside the road where the appellant allegedly wanted to rape her in the first place. Also, the Proceedings does not show why PW1 did not raise an alarm as they were headed to the bush. There is also no mention of the appellant having any weapons on him at the scene of crime. PW1 being a physically fit adult woman, there was just so much she could have done. The learned state attorney during his submission on this ground emphasized that, the appellant did not cross examine PW1 when given a chance. That, his failure to cross examine amounts to admission of what was stated by PW1. Concerning this argument, I will seek wisdom from the case of Michael John Kajela vs Republic, Criminal Appeal No. 487 of

2021. The case elucidated that: 7 “We understand that, one of the major reasons why the two courts below believed the evidence of PW1 without critically assessing its credibility is because of failure of the appellant to cross examine PW1. The trial court took it that such failure amounts to admission of the truthfulness of such evidence. We agree in the first place that, failure to cross examine a witness on material respect is tantamount to accepting the evidence to be true. That, however, does not mean that such evidence would be taken wholesomely without its credibility, probity and reliability being assessed in line with other evidence, including the defence evidence.” In relation to the above decision, it is my belief that even if the appellant did not cross examine PW1, but the credibility of the PW1’s evidence is very questionable especially to the fact that she did not raise an alarm. I therefore find the second ground of appeal with merit and therefore do not wish to discuss the remaining grounds. From the foregoing, the prosecution failed to prove their case beyond reasonable doubt. See: Paschal Yoya @ Maganga vs Republic, Criminal Appeal No.

248 of 2017. The appeal is hereby allowed. I proceed to quash the conviction, set aside the sentence and order the appellant's immediate release, unless he is otherwise held for a lawful cause. Right of appeal explained. 8 DATED at MBEYA on this 12 Day of December 2024. A. A. SINDA JUDGE 9

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Prepared on 12 October 2026 · Esheria