IN THE HIGH COURT OF TANZANIA

AT DAR ES SALAAM

CRIMINAL APPEAL NO. 131 OF 2005

HAMZA NYAKIAGE ..... APPELLANT

VERSUS

REPUBLIC ..... RESPONDENT

Date of last order : 14/8/2006

Date of Judgment : 25/9/2005

JUDGMENT

MLAY, J.

The Appellant was convicted of Attempted Rape and was sentenced to 30 years imprisonment. Being aggrieved by the conviction and sentence, he has appealed to this court on seven grounds which can be stated as follows:

1. *The trial magistrate erred in law and in fact in grounding the conviction on the wrong principle of BURDEB OF PROOF.*

2. *The trial magistrate erred in law and fact not to have conducted a voice dire PW3 MUSSA MANYWELE a by of 9 years of age.*
3. *That the trial magistrate erred in law and fact by putting weight on the uncorroborated evidence of the prosecution witnesses whose credibility was questionable.*
4. *That the trial magistrate erred in law and fact in grounding conviction on grounds that the accused was drunk and could not remember anything while in fact the appellant was not given the opportunity to defend himself.*
5. *The trial magistrate erred in grounding the conviction on suspicious evidence of family members who were relatives of the victim.*
6. *The trial magistrate did not carry out his judicial duties diligently.*
7. *The trial before the trial magistrate was a nullity because it was in contravention of the provisions of Act No. 21 of 1969.*

At the hearing of the appeal the appellant adopted the contents of his memorandum of appeal which contained arguments and authorities in support of the grounds. Ms. Matiku State Attorney supported the conviction.

The prosecutoirn's case was based on the evidence of 4 witnesses. PW 1 P.C. ISSA testified that he received the report of the attempted rape and formally arrested the Appellant at the office of the village Executive Officer. PW1 told the court that upon questioning the appellant, he told PW1 that he did not know what happened on the previous right as he was totally drunk.

PW2 RAJAB MBWANA told the court that on 9/1/05 at 21.00 hours he was at home eating supper while the children HABIBA SUFIANI and TATU MUSSA were outside. PW2 said he heard the voice of someone threatening the children who were outside and then he saw SUFIANI come to him and informed him that there was one man chasing them away. PW1 decided to go outside and he was surprised to see HABIBA a girl aged 5 years sleeping while naked and he saw the Appellant who had taken off his trousers lying on the child. PW2 asked the appellant " **who are you and what you doing here?** (wewe ni nani na unafanya nini hapa?) PW1 said the appellant neither said anything or stood up and PW2 decided to use force to remove the appellant and the appellant stood up and took his trousers and wanted to fight with PW2. PW2 then called for help and his sister- in- law PW3 came out and neighbours came and tied up the appellant and took him to Village Executive Officer.

PW3 was MUSSA MANYWELE a boy aged 9 and a pupil of Standard II. Having recorded his name, the trial magistrate merely

recorded: " (A BOY DON'T KNOW THE MEANING OF OATH)" and the witness proceeded to testify. PW3 told the court that he was outside with SUFIANI and HABIBA who was sleeping on a mat. He said one HAMZA (the appellant) came and threatened to kill them with a knife. PW3 and SUFIAN ran away and left HABIBA who was sleeping. PW 3 said he went outside again and saw HAMZA taking all the clothes off HABIBA, until she was naked and HAMZA (appellant) also took out his trousers. PW3 said HAMZA wanted to rape HABIBA and later Rajabu (PW2) came out and removed the accused who was on top of HABIBA. They shouted for help and many people came and the appellant was arrested.

PW4 RUKIA SUFIAN the mother of HABIBA gave evidence to the effect that on 9/1/2005 at 21.00 hrs while she was in the bath room she heard RAJABU (PW2) calling her saying HABIBA ANATAKA KUBAKWA". PW4 went out and saw Hamza (Appellant) fighting with Rajabu and she shouted for help and when she checked her daughter she saw she was naked. PW4 said many people case and the appellant was arrested.

On 11/3/05 at the close of the prosecution's case the record shows that the accused was addressed in terms of Section 231 of the Criminal Procedure Act and he stated:

" *Accused: I will give a sworn defence and call two witnesses .*"

The case was set for " defence" on 8/4/05 but on that date the record shows that the accused did not appear and an order for a warrant of arrest to issue against him, was made and the defence was set for hearing on 6/5/05. On that date the hearing was again adjourned as the appellant had not been brought from remand and the defence hearing was set to be on 3/6/05. The record of the proceedings of 3/6/05 are in part as follows:

> " *Pros the case is for defence.*
>
> *ACCUSED: I'm ready for defence and don't need any more to my witnesses.*
>
> ***DEFENCE CASE OPENS***
>
> *DW1 HANZA NYAKIAGE OF NYAMWAGE, 12 MALE 23 YRS OLD PEASANT, ISLAM AFFIRMED AND STATE AS FOLLOW:*
>
> *XD: Your honour on the day which alleged to me to commit the offence, I was totally drunk, and I don't remember anything.*
>
> *XXD PROS: NIL"*

In the judgment the trial Magistrate having reproduced and then summarised both the prosecution's evidence and of the defence, went on to state in the last paragraph of the judgment, as follows:

" *According to the prosecution evidence the accused was found naked as he was not found wearing his trousers as the victim (the child HABIBA) was found to be naked. PW2 as both then were naked in that way, in people had to believe that the accused was the process to rape the victim. According to the PANT DOWN RULE the accused was found in fully preparation of committing the offence of rape. However as PW2 appeared he prevented him to commit the offence but he committed the offence of attempted rape."*

In the 1st ground of appeal the appellant has complained that the trial magistrate applied the wrong principle regarding the burden of proof. Having gone though the record of the trial court, I have not been able to find any justification for this ground. The trial magistrate did not shift the burden of proof to the appellant but acted on what he believed to be the strength of the prosecution's evidence that the appellant was found naked with the VICTIM HABIBA who was also naked and considered the evidence of PW2 who intervened to remove the appellant from the VICTIM, therefore preventing the completion of the offence of rape and the trial magistrate was convinced the evidence supported the offence of attempted rape.

The question is whether the offence of attempted rape was proved. I will return to that issue later but as for the applying the wrong principle of burden of proof, the complaint has no basis.

In the 2nd ground the appellant has complained that the trial Magistrate did not conduct a vore dire on PW3 who was a child of tender years as he was a boy aged 9 years. The trial Magistrate did record that PW3 did not understand the nature of an oath but the record does not show how the trial magistrate reached that conclusion. I am therefore prepared to agree with the appellant that the trial Magistrate did not conduct vore dire on PW3 before taking his evidence. But then what is the effect of this? I do not agree with the appellant that the effect is to render the trial a nullity because apart from the evidence of PW3, there was the evidence of PW2 who found the appellant being naked and lying on Habiba the victim, who was also naked. The effect is to exclude the evidence of PW3 but as I observed, there was still the evidence of PW2 and PW4 on which the conviction could have been grounded.

The 3rd ground is that the trial magistrate erred to convict on the uncorroborated evidence of the prosecution witness whose credibility was questionable. The appellant did not establish the basis for questioning the credibility of the prosecution evidence. I do not find any material contradiction between the evidence of PW2 and PW4 and the fact that they were relatives of the victim, that alone

does not render their evidence to be unreliable. I find the 3rd ground to be without merit and is accordingly dismissed.

The 4th ground is totally without any merit. The record clearly shows that the appellant was given the opportunity to defend himself and to call witnesses. The record shows that at first the appellant chose to give evidence on oath and to call two witnesses but when the defence hearing took place on 7/6/2005, the appellant declined to call witnesses and defended himself by saying that on the material day he was totally drunk and did not remember anything. The trial Magistrate however, did not convict the appellant on his failure to remember anything but on the evidence of the prosecution as he assessed it. The appellant was given the chance to defend himself and he did use it but only that the defence did not dent the prosecution's case.

In the present case, the appellant had no advocate and was not denied the right to engage one. The appellant had not even asked for legal aid for that matter. For these reasons, I do not find that the last ground has any merit.

I will now return to part of the first ground of appeal on whether the prosecution proved the charge of Attempted Rape beyond reasonable doubt. The offence of attempted rape is a specific offence created by Section 132 of the Penal Code. It does

not therefore fall within the general law governing " Attempts" as laid down in Section 380 of the Penal Code.

Section 132 (1) of the Penal Code provides as follows:

> " *132 – (1) Any person who attempts to commit rape commits the offence of attempted rape, except for the cases specified in sub section (3) is liable to imprisonment for not less than thirty years with or without corporal president."*

What constitutes attempted rape can be found in sub section (2) of that Section which provides as follows:

> " *(2) A person attempts to commit rape if, with intent to procure prohibited sexual intercourse with any girl or women , 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 on woman, applying any act of intension over her for sexual purposes.*

(c) making any false representations to her for the purposes of obtaining her consent

(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, she would be involuntary carnally be known."

The circumstances in which the intention to commit rape have been specified are in an exclusive manner. In my view any circumstances not coming within those specified in paragraph (a) , (b) (c) or (d), cannot constitute an intention to commit rape. This is according to the principle of law that a penal statute has to be interpreted strictly.

In the present case the appellant was found with his " *pant down"* and the victim Habiba was naked with the appellant lying on her. The appellant was not threatening the girl and even if he was a **person of authority or influence**" by reason of age, he was not applying any act of intimidation over her for sexual purposes or making any false representation for the purpose of obtaining her consent. Cleary there was no evidence that the appellant

"**represented himself to be the husband"** of the girl. Sadly as it may be, the facts do not bring of the case against the appellant within the exclusive circumstances laid down in subsection (2) of section 132 to ground the offence of attempted rape. The situation may have been different if the general law of attempt under Section 380 was put in play, but as the offence of attempted rape is a specific offence containing specific ingredients, the general law of attempts does not apply.

Considering the ingredients of attempted rape as set out in subsection (2) of Section 132 of the Penal Code, the prosecution's evidence did not prove the offence of attempted rape as laid down in the said Section 132 (1) and (2). For this reason, the appeal is allowed and the conviction is quashed and the sentence is set aside. The appellant shall be released from custody with immediate effect, unless he is otherwise lawfully held.

J. I. Mlay

JUDGE

Delivered in the presence of MS Eveta Mushi State Attorney and the appellant this 15th day of September 2006.

J. I. Mlay

JUDGE

25/9/2006