IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

ARUSHA DISTRICT REGISTRY

AT ARUSHA

CRIMINAL APPEAL NO. 48 OF 2020

(Originating from Hanang District Court in Criminal case No. 57 of 2019)

PASCHAL S/O JOSEPH @ AYO..... APPELLANT

VERSUS

THE D.P.P .....RESPONDENT

JUDGMENT

15/7/2021 & 17/9/2021

ROBERT, J:-

The appellant, **Paschal s/o Joseph @ Ayo**, is currently serving thirty years imprisonment having been convicted by the District Court of Hanang for the offence of attempted rape contrary to section 132 (1) of the Penal Code, Cap. 16 R.E 2002. The appellant filed this appeal challenging his conviction and sentence by the trial court.

The case against the appellant was to the effect that, on 22nd day of June, 2019 at Mogitu Village within Hanang District in Manyara Region he unlawfully attempted to have sexual intercourse with a female child aged three years old. It was alleged that, on the material date the

appellant arrived at the house of one Regina Mkai (PW1) at 20:00 HRS with his friend Bilali, later on Bilali left and the appellant was left alone playing with the victim. Later on, Matle Saktai (PW2) heard the victim crying and when she rushed to see what was happening, she found the appellant carrying the victim on his legs while they were both naked. She took the victim from the appellant and reported the matter to the ten-cell leader who eventually took the appellant to Katesh Police Station on 23/6/2019 where, after interrogation, he was arraigned before the Court to face his charges.

In his defence, the appellant denied to have committed the said offence. He stated that, on the material day he was drinking alcohol at Muna's house with his friend Bulali and other elders. Later on, after Bulali had left, Muna quarrelled with his wife who went to report to the ten cell leader and came back with the ten cell leader's wife. The ten cell leader's wife asked him to go and sleep at her place. On the next day after Muna had refused to go and pick him he was escorted by a motorcycle to Katesh Police station.

Based on the evidence adduced, the trial court found the appellant guilty as charged and sentenced him to thirty years imprisonment.

Aggrieved, the appellant preferred this appeal armed with the following grounds:-

1. *That, the learned trial Resident Magistrate grossly erred in law and fact in basing the appellant's guilt and conviction on assumption based on appellant defence rather than on the strength of the prosecution evidence.*
2. *That, the appellant was convicted on a very shacky and unsatisfactory evidence as the prosecution had failed to prove the charge beyond all reasonable doubts. The victim was not summoned to testify.*
3. *That, the learned trial Resident Magistrate erred in law and fact in convicting and sentencing the appellant while the Charge sheet was defective.*

When this appeal came up for hearing the appellant appeared in person without representation whereas the respondent (DPP) was represented by Ms. Mary Lucas, state attorney. The appeal was argued orally.

Starting with the third ground, the appellant submitted that the charge sheet did not indicate subsection (2) (a) of section 132 of the Penal Code and the particulars of the alleged offence did not indicate whether there was a threat before an attempt to commit the offence. Thus, based on the alleged shortcomings he maintained that the charge sheet was defective and prayed for this ground to be allowed. Counsel for the respondent conceded to the argument that the appellant was charged and

convicted on a defective charge. She maintained that the appellant was supposed to be charged under section 132 (1) and (2) of the Penal Code and not section 132 (1) only. Further to that, particulars of the alleged offence do not reflect the ingredients of the offence of attempted rape as provided for under section 132 of the Penal Code. She argued that the defects noted are not curable under section 388 of the Criminal Procedure Code, Cap R.E 2019 as defectiveness of the charge is regarded as having no charge before the court. She cited the case of **Richard Mvingwa vs Republic**, Criminal Appeal No. 11 of 2016 which referred the case of **Isdory Patrice vs Republic**, Criminal Appeal No. 224 of 2007 (unreported) to support her argument.

Having carefully read the charge against the cited section, it is apparent that both the statement and particulars of the charge misses essential ingredients of the offence of attempted rape. As rightly stated by the learned counsel for the respondent, failure of the prosecution to cite subsection (2) of section 132 of the Penal Code and/or giving particulars of how the accused person (appellant herein) manifested his intent to procure the alleged prohibited sexual intercourse which is the essential ingredient of the offence of attempted rape had the effect of not disclosing the nature of the case facing the accused person. Accordingly,

I find the charge filed against the accused person to be incurably defective.

Coming to the first ground, the appellant faulted the trial Court for basing its conviction on the weakness of the defence evidence rather than the strength of the prosecution evidence. The victim's age was not proved since the victim's mother failed to produce the clinic card, the doctor who performed the medical examination and the victim did not testify and the PF3 was tendered as exhibit as required under section 240 (3) of the CPA. Due to the failure of the prosecution to establish their case he prayed for this ground to be allowed too.

In response, Ms. Lucas agreed that, the prosecution failed to explain how the offence took place, they only submitted that the child was three years old and the victim was holding him while he was naked. According to section 132 there must be a threat and the circumstances which proved that if the offender was not stopped the offence of rape could have been occurred. She argued that, the prosecution did not call the wife of the ten cell leader who attended the scene of crime as a witness to corroborate their evidence. Thus, she prayed for the appeal to be allowed.

Considering the arguments made by both parties, I laboured to go through the impugned judgment to find out if the trial magistrate

examined the evidence of both parties based his decision on the evidence adduced by both parties. It is clear that, in its judgment the trial court assessed the evidence of both parties. The trial Court based its conviction on the evidence brought by PW1 and Pw2 that both the appellant and the victim were found naked. However, the trial magistrate did not consider if the evidence adduced proved the ingredients of the offence charged. To prove the offence of attempted rape under section 132 of the Penal Code, the prosecution ought to have established the actions or circumstances which manifests that the appellant had the intention to procure the prohibited sexual intercourse which, had he not been stopped, could have been committed.

In the case of **Leonard Mwanashoka vs The Republic,** Criminal Appeal No. 226 of 2014 (unreported), cited in **YASINI S/O MWAKAPALA versus The Republic,** Criminal Appeal No. 13 of 2012 it was held that:

> "*It is one thing to summarise the evidence for both sides separately and another thing to subject the entire evidence to an objective evaluation in order to separate the chaff from the grain. It is one thing to consider evidence and then disregard it after a proper*

scrutiny or evaluation and another thing not to consider the evidence at all in the evaluation or analysis."

Since the trial court did not consider the ingredients of the offence charged in its analysis of the prosecution evidence, this court finds and holds that the prosecution evidence did not establish the offence charged.

On the last ground, the appellant submitted that the prosecution failed to prove their case beyond reasonable doubt. Both the appellant and the respondent agreed that the charge was not proved to the standard required by law and prayed for this appeal to be allowed.

As clearly noted in the previous grounds, the prosecution's failure to prove the ingredients of the offence charged means the charge was not proved to the standard required by law.

On the basis of the reasons stated, I allow this appeal, quash the conviction and set aside the sentence of the trial Court. The appellant to be released forthwith from prison unless he is otherwise lawfully held.

It is so ordered.

K.N.ROBERT
JUDGE
17/9/2021