**IN THE COURT OF APPEAL OF TANZANIA**

**AT MTWARA**

**(CORAM: MJASIRI, J.A., MMILLA, J.A. And MWAMBEGELE, J.A.)**

**CRIMINAL APPEAL NO 130 OF 2017**

**EDWIN THOBIAS PAUL ..... APPELLANT**

**VERSUS**

**REPUBLIC .....RESPONDENT**

**(Appeal from the decision of the High Court of Tanzania at Mtwara)**

**(Mzuna, J.)**

**dated 16th day of October, 2015**
**in**
**Criminal Appeal No. 40 of 2015**

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# JUDGMENT OF THE COURT

8th & 10th May, 2018

## MMILLA, J.A:.

The appellant, Edwin Thobias Paul, was charged before the District Court of Lindi at Lindi with the offence of attempted rape contrary to section 132 (1) and (2) of the Penal Code, Cap. 16 of the Revised Edition, 2002 (the Penal Code). He was alleged to have attempted to rape an 8 years old child. After a full trial, he was convicted and sentenced to a life imprisonment term. On appeal to the High Court of Tanzania, Mtwara Registry, his appeal was partly allowed in that though the conviction was

upheld, the sentence was altered and reduced to a term of 30 years' imprisonment.

Briefly stated, the facts of the case were that on 10.4.2014 at about 19: 00 hours, PW4 Zainab Adam Mpelembe, the mother of the victim child (PW1), sent her to a nearby shop to buy kerosene. On her way back home, PW1 met the appellant who called her to where he was. She obliged. Taking advantage of her obedience to the call he made, the appellant caught her, pulled her to a nearby bush, coupled with threats to kill her if she raised alarm, he stripped her naked and lowered his trouser to the level of his knees, ready to implement his weird plan. Luckily however, before he could accomplish his intention, PW2 Mohamed Chande Madari and PW3 Salum Nassoro intervened and rescued that child. The two good Samaritans apprehended the appellant and sent him to PW4. The matter was eventually reported to the police who subsequently charged him with that offence of attempted rape.

The appellant's defence was very brief. In essence, he admitted having been with PW1, but asked to be pardoned. Before us, the appellant appeared in person and fended for himself. His memorandum of appeal raised four grounds as follows:-

1. *That the prosecution side failed to prove the case against him beyond reasonable doubt;*
2. *That the High Court overlooked the provisions of certain laws;*
3. *That the appellant's defence that he was drunk was not considered; and*
4. *That the sentence of 30 years was very excessive.*

On the other hand, the respondent/Republic enjoyed the services of Ms Mwahija Ahmed, learned Senior State Attorney, assisted by Mr. Wilbroad Ndunguru, learned State Attorney.

At the commencement of hearing, the appellant prayed the Court to adopt the grounds of appeal he filed and opted for the Republic to begin. We accordingly invited the Republic to proceed.

Mr. Ndunguru is the one who marshaled the submission. He proposed to argue together the first and the second ground, and the rest separately. We endorsed the proposal.

Mr. Ndunguru stated at the start that they were opposing the appeal. Put it differently, they are supporting conviction and sentence.

Submitting in support of the first and second grounds, the learned State Attorney maintained that the prosecution side proved its case against the appellant beyond all reasonable doubt in that they established, through PW1,PW2 and PW3, that the appellant attempted to rape the said child, but that the intervention saved PW1. He elaborated that PW1 informed the trial court that on meeting the appellant, the latter called her, and that after complying, the appellant got hold of her and pulled her into the bush at which he removed all her clothes, thus leaving her naked. She did not raise an alarm because he threatened to kill her if she did. After being stripped naked, the appellant lowered his trouser to the level of the knees ready to execute the dreadful act he had premeditated.

On the other hand, PW2 and PW3 testified that they intervened on realizing that the appellant had taken the child to the bush, for which they sensed that he was up to something sinister. In other words, had they not intervened, definitely he could have executed his creepy intention of raping PW1. Mr. Ndunguru summed up that on the basis of the evidence of PW1, all the three essential ingredients of attempted rape were established, that is intention to procure illegal sexual intercourse, threat in order to execute that, and that only intervention prevented the appellant from implementing his plan. To secure his position, Mr. Ndunguru referred us to the case of

**Isdori Patrice v. Republic**, Criminal Appeal No. 224 of 2007, CAT (unreported).

Before he concluded on the point, Mr. Ndunguru informed us that in essence, the appellant did not contradict the evidence of those witnesses because he did not cross examine them, which implies that he found their evidence to be true. More important, he added, the appellant admitted commission of the offence in defence though he qualified that he was drunk and did not know what he was doing. Also, Mr. Ndunguru added, the appellant once again admitted in his mitigation where he said he was not going to repeat that act. For these reasons, the learned State Attorney urged the Court to dismiss the first and second grounds of appeal.

The third ground of appeal asserts that the appellant's defence of having been drunk was not considered. In this respect, Mr. Ndunguru brought to the attention of the Court that this ground had been raised in this Court for the first time because it was not raised in the High Court. He requested the Court to strike out that ground.

Even, Mr. Ndunguru went on to submit, where the Court would wish to consider it, the defence does not meet the criteria envisaged under section 14 (1) of the Penal Code. That section lays down the circumstances

under which intoxication may be relied upon as a defence. He added that the appellant herein did not tell the trial court the nature of his intoxication; also that he knew what he was doing because he begged for forgiveness. He urged the Court to find that defence baseless.

In the fourth ground of appeal, the appellant alleges that the sentence of 30 years' imprisonment which was imposed on him is manifestly excessive. On the point, Mr. Ndunguru has submitted that this ground too is not well grounded because having the first appellate court vacated the life sentence which was meted out on the appellant by the trial court, the substituted sentence of 30 years was the minimum possible in this kind of offence. Likewise, he asked the Court to dismiss this ground.

Over all, for reasons he assigned, Mr. Ndunguru urged the Court to find that the appeal lacks merit. He requested us to dismiss it in its entirety.

The appellant did not have anything useful to say, except to request the Court to mercifully consider the grounds of appeal he raised and allow the appeal.

We have carefully gone through the proceedings in both courts below, their respective judgments, and the oral submissions before us. Like

Mr. Ndunguru did, we seek to discuss the first and second grounds of appeal jointly.

Our starting point in this matter is section 132 (1) and (2) of the Penal Code. While subsection (1) defines what attempted rape is, subsection (2) lays down the ingredients of that offence. That section states that:-

> *"(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 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."***

[Emphasis is added].

See the case of **Isdori Patrice v. Republic** (supra) in which it was it was stressed that:-

*"In a charge under section 132 (1) and (2), therefore, the factual circumstances which of necessity must be stated in the charge are those specified in paragraphs (a), (b), (c) and (d) of sub-section (2), in addition to the mentioned specific 'intent to procure prohibited sexual intercourse'."*

As already explained, PW1's testimony in the present case showed that after she responded to the appellant's call, the latter caught her and pulled her to the bush at which he stripped her naked and prepared himself to implement his intent, and that the appellant threatened to kill her if she dared to raise an alarm.

We agree with Mr. Ndunguru that the victim girl was by God's grace lucky because had PW2 and PW3 not intervened, the story would not have been the same. This is factually so because as will be recalled, PW2 and PW3 testified in common that on arrival at the scene of crime, they found the fear-seized girl naked, so also the appellant who had lowered his

trouser to the level of the knees. You can imagine what would have followed if they did not intercede! Given this situation, we think that the evidence of PW1, PW2 and PW3 established all the ingredients of the offence of attempted rape that the victim girl was *threatened;* that the *appellant had intended to have sexual intercourse with that child; and that had PW2 and PW3 not intervened, that child would have been carnally known.*

It is also crucial to point out that in fact, the appellant admitted commission of the offence and asked for forgiveness in the course of his testimony in defence, and also during mitigation. Similarly, he did not even cross examine any of the three crucial witnesses, that is PW1, PW2 and PW3. As this Court had the occasion to state in earlier cases, ordinarily failure to cross examine implies acceptance of the testimony of any such witness as representing the truth - See the cases of **Damian Ruhele v. Republic**, Criminal Appeal No. 501 of 2007, and **Nyerere Nyague v. Republic**, Criminal Appeal No. 67 of 2010 (both unreported). In the latter case**,** the Court stated that:-

> *"As a matter of principle, a party who fails to cross examine a witness on a certain matter is deemed to have accepted that matter and will*

*be estopped from asking the trial court to disbelieve what the witness said."*

For reasons we have assigned, we find and hold that the first and second grounds of appeal are devoid of merit. We accordingly dismiss them.

The third ground avers that the defence that he was drunk was not considered. As earlier on pointed out, Mr. Ndunguru brought to the attention of the Court that this ground is being raised in this Court for the first time because it was not raised in the High Court. Acting on that tip, we examined the grounds which were raised in the High Court appearing at page 26 of the Record of Appeal. We satisfied ourselves that indeed, that ground was not raised at that level, which means it is being raised here for the first time. The issue becomes whether it is proper for the Court to decide on a matter which was not raised and decided by the High Court on first appeal.

The Court had the instance of dealing with a problem such as this facing us here in the cases of **Juma Manjano v. The DPP**, Criminal Appeal No. 211 of 2009 and **Samwel Sawe v. Republic**, Criminal Appeal

No. 135 of 2004, CAT (both unreported). In the latter case, the Court stated that:-

> *"As a second appellate court, we cannot adjudicate on a matter which was not raised as a ground of appeal in the second appellate court. The record of appeal at pages 21 to 23, shows that this ground of appeal by the appellant was not among the appellant's ten grounds of appeal which he filed in the High Court. In the case of* ***Abdul Athuman v. R*** *[2004] TLR 151 the issue on whether the Court of Appeal may decide on a matter not raised in and decided by the High Court on first appeal was raised. The Court held that the Court of Appeal has no such jurisdiction. This ground of appeal is therefore, struck out."*

Indeed, that is the correct position of the law. For that reason, we are constrained to, and hereby strike out the third ground of appeal.

Remaining is the fourth ground which alleges that the sentence of 30 years' imprisonment which was imposed on him is manifestly excessive. We hurry to say that we agree with Mr. Ndunguru that having the first appellate court vacated the life sentence which was meted out on the appellant by the trial court, the substituted sentence of 30 years was the

minimum possible in this kind of offence. In the circumstances, the assertion that the sentence is manifestly excessive lacks merit and we dismiss it too.

Before penning off however, we have felt it imperative to pronounce ourselves that after carefully weighing the ingredients of the offence of attempted rape, particularly taking into consideration that something will have prevented the offender from implementing his plan, we think that the minimum sentence of 30 years' imprisonment is on the higher side. This is predominantly so when we take into account the fact that in all other offences of attempts, the sentences are fairly low. We have in mind offences like attempted murder which has no mandatory minimum sentence; attempted robbery which attracts a lower sentence than that of the offence of robbery; and several other such offences. It is astounding therefore, to find that the offence under consideration carries the same punishment like a fully-fledged offence of rape in respect of victims over 18 years. Influenced by this situation, we are suggesting that maybe it is time the law makers considered this point so that they can do something about this aspect with a view to reducing it.

Nevertheless, as things are for the time being, we think, for reasons advanced, this appeal lacks merit. We accordingly dismiss it in its entirety.

**DATED** at **MTWARA** this 9th day of May, 2018.

S. MJASIRI
**JUSTICE OF APPEAL**

B. M. MMILLA
**JUSTICE OF APPEAL**

J. C. M. MWAMBEGELE
**JUSTICE OF APPEAL**

I certify that this is a true copy of the original.

A. H. MSUMI
**DEPUTY REGISTRAR**
**COURT OF APPEAL**