IN THE COURT OF APPEAL OF TANZANIA

AT ARUSHA

CRIMINAL APPEAL NO. 290 OF 2008

(CORAM: NSEKELA,J.A. MSOFFE, J.A. And MASSATI, J.A.)

KHATIBU KANGA ..... APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

(Appeal from the Decision of the High Court of Tanzania at Arusha)

(Chocha, J.)

dated the 30th day of July, 2008
in
Criminal Appeal No. 165 of 2006

JUDGMENT OF THE COURT

5th & 11th October, 2011

MASSATI, J.A.:

The appellant was charged with the offence of attempted rape contrary to **Section 132(1)** of the Penal Code, (Cap 16 R.E. 2002) as amended by the Sexual Offences (Special Provisions) Act No. 4 of 1998. The District Court of Monduli, convicted and sentenced him to 30 years imprisonment. His appeal to the High Court (Chocha, J.) was dismissed. He has now come to this Court in a second appeal.

The brief background of the case is this. Early in the morning of 14/9/2002, Sophia Andrew, (PW1) who was then 10, was at home, with her brother, Luize (PW3). Their parents were not around. The appellant came and inquired of their parents' whereabouts. On being rebuked by PW1, the appellant seized and took her to his house, which was nearby. At the house he forced her into the bedroom, where there was a mat on the floor. He then undressed himself and PW1, forced her down the mat and lay on top of her. At all the time, PW1 was resisting and shouting for assistance. PW2, who was PW1's uncle, heard the alarms and came rushing in, and managed to push the appellant off PW1. Due to the intervention, the appellant could not achieve what he intended to do. The girl then collected her underpants and fled. PW2 and other neighbours, arrested the appellant and took her to the police station where he was rearrested and charged with the offence. PW1 was taken to hospital for examination and she tendered the PF3 as Exh. PI.

At the hearing of the appeal, the appellant was unrepresented and fended for himself. Ms. Javelin Rugaihuruza, learned State Attorney, appeared for the respondent/Republic.

The appellant had filed three grounds of appeal and also presented written arguments thereon. The **first** was that, the lower courts convicted him on the basis of contradictory prosecution evidence. In his written argument, he submitted that there were contradictions between PW1 and PW2, on whether the appellant was forced off the victim by PW2, or he left her on his own accord. In the **second** ground of appeal, the complaint is that the lower courts did not properly assess the credibility and wrongly acted on the evidence of PW1, PW2 and PW3, who were all members of the same family. He argued that, since all the prosecution witnesses were from the same family, there was a real possibility of the evidence being couched and fabricated and therefore not reliable. In the **third** ground, the appellant submitted that the prosecution case was not proved beyond reasonable ground.

But Ms. Rugaihuruza, learned State Attorney, supported the conviction. She submitted; **first,** that there were no material contradictions in the evidence of the prosecution witnesses; **two,** that there was no law prohibiting the members of the same family from

testifying, and if credible, their evidence to found a conviction, and; **lastly,** considering the testimonies of PW1 and PW2, the prosecution case was proved beyond reasonable doubt. She therefore prayed for the dismissal of the appeal in its entirety.

When probed by the Bench on the propriety of the charge sheet and whether all the ingredients of the offence of attempted rape were proved, the learned State Attorney, conceded that, the proper provision under which the appellant should have been charged, was **Section 132(1)(2)(a)** of the Penal Code. She also conceded that according to the said provision, one of the ingredients of the offence was threatening; which should not only have been included in the particulars of the offence, but also proved. However she was of the view that these irregularities were curable under Section 388 of the Criminal Procedure Act, and evidence of threat could be found in the testimony of PW1, to the effect that she was bitten on her left cheek by the appellant.

With regard to the contradictions between the evidence of PW1 and PW2, which is in the appellant's first ground of appeal, the complaint is

that the witnesses differed on whether the appellant got off PW1 voluntarily or after being forced off by PW2. On this aspect PW1 said on p.12 of the record:-

> *"As my baba mdogo came, the accused was on top of my chest (Alikalia kifua). Though he was seated, he got hold of the accused and took him outside"*

PW2, on the other hand said on p. 14,

> *"I pushed accused out of the girl. As I removed him on top of the child PW1 accused dressed."*

Both witnesses were therefore, consistent that when PW2 came in the room, the appellant was on top of PW1, and PW2 had to forcefully remove him from there. We do not therefore see any contradictions there. This ground lacks merit and is accordingly dismissed.

The next complaint is that the conviction was based on the evidence of PW1, PW2 and PW3 who were all family members. It is true that PW1 and PW3 were sister and brother from the same family, and PW2 was their paternal uncle. But they are the ones who witnessed the incident. Their evidence was therefore relevant. Whether or not their evidence could

ground a conviction depended on their credibility, not whether or not or how they are related to each other. Like that from any other witness(es) such evidence was certainly admissible, and could be acted upon, if credible (See: **ESIO NYAMOLOELA AND 2 OTHERS V.R** Criminal Appeal No. 49 of 1995 (unreported) **JUMA CHOROKA V.R** Criminal Appeal No. 23 of 1999 (unreported). There is therefore nothing wrong in law, in accepting and relying on the evidence from family members, to ground a conviction, if it is found credible.

In this case, the trial court addressed itself on this issue and in its judgment, it found that PW1, PW2 and PW3's evidence was credible, and so rightly relied on their evidence. We find the second ground also devoid of substance.

The next and last ground of appeal has two aspects. The first is general, fielded by the appellant himself on whether the prosecution evidence proved the case beyond reasonable doubt. In arguing this ground, the appellant submitted that the prosecution case was highly improbable, and that the non-production of PW2,'s PF3; and the non-

calling of the investigator as a witness, provided cracks in the prosecution case. We do not agree. We think that this analysis by the appellant does not leave any doubts on the prosecution case. **Firstly,** the conviction was not based on the evidence of PW2 alone, or the fact that he was hit by the appellant and injured. The non-production of his PF3 could have affected the weight of his evidence if the issue was whether or not he was injured. But the issue before the trial court, was whether the witness saw and extricated the appellant from the victim. The PF3 was therefore irrelevant. **Secondly** in presenting its case, the prosecution is not obliged to call all the witnesses, if it is satisfied that the witnesses at hand were sufficient (See: **YOHANES MSIGWA V.R** (1990) TLR. 71, **R.v GOKALDAS KANJI KARIA AND ANOTHER** (1949) 16 EACA 116. So, it was not necessary for the prosecution to call the investigator to the witness stand in order to prove its case; neither did his absence affect the credibility of PW1, PW2 and PW3 on which the conviction was based. Lastly, we find nothing strange in the appellant's utterances (*"huyu ni saizi yangu".* (translated *"this girl is the right size for me")* when the appellant was reacting to a question by PW2 as to what he was doing with the girl, especially when such evidence came also from a 9 year old PW3, who corroborated that part of PW2's testimony. With all the elaboration put up by the appellant

in this ground of appeal we are not persuaded on this aspect of the ground. It is lacking in substance.

But there is this other aspect, which was raised by the Court, which is, whether, as framed, the charge sheet did disclose the offence of attempted rape; and also, whether, the evidence proved every ingredient of the offence. We understand that this matter was not dealt with by the lower courts, but as this Court said in **ELIAS KAMAGI V.R.** Criminal Appeal No. 118 of 1992 (unreported) that, as a Court of law and not of the parties:-

> *".... We are bound to take judicial notice of matters of law, particularly where such matters concern the innocence of a convicted person."*

(See: also 9532 ***CPL EDWARD MALIMA v. R*** *Criminal Appeal No. 15 of 1989* (unreported).

As shown above, the appellant was charged under **Section 132(1)** of the Penal Code. Ms. Rugaihuruza, learned State Attorney, conceded that the correct provision should have been **Section 132 (1)(2)(a)** which reads:-

1) Any person who attempts to commits rape, commits the offence of attempted rape, and except for the cases specified in subsection 3, is liable upon conviction to imprisonment for life, and in any case shall be liable to imprisonment for not less than thirty years with or without corporal punishment.

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 and woman for sexual purposes ....

(b) Not applicable

(c) Not applicable

(d) Not applicable

In **Mussa Mwaikunda v R** Criminal Appeal No. 174 of 2006 (unreported) this Court held that in an offence of attempted rape "threatening" was an important ingredient, and so, not only that this should be alleged in the charge sheet, but must also be adequately proved. It was further held in that case, that if the charge did not disclose the ingredient in the particulars, it was manifestly wrong and could not be cured under **Section 388** of the Criminal Procedure Act. So, with

unfeigned respect to the learned State Attorney, the omission of the ingredient of threatening in the charge sheet was not curable.

But even if the ingredient was not missing in the particulars of the charge sheet was there any evidence of threatening by the appellant. Ms. Rugaihuruza referred us to PW1's evidence that in the course of the struggle, the appellant bit her on her left cheek in order to subdue her.

The term *"threatening"* is not defined in the Penal Code. So it must have been used in its ordinary grammatical meaning. The Concise Oxford Dictionary (5th ed p. 1350) defines the word "threat" as

> *"Declaration of intention to punish or hurt (law) such menace of bodily hurt or injury to reputation or property as may restrain a person's freedom of action..."*

And in **BLACK'S LAW DICTIONARY,** 6TH ed. P.1030; that term is defined as:-

> *"A communicated intent to inflict physical or other harm on any person or property. A declaration of intention to injure another or his property by some unlawful act..."*

From these definitions we think that the word *"threatening"* in **Section 132(2)(1)(a)** of the Penal Code must mean a manifestation to inflict bodily or other harm on the person or property of another.

In the present case, the appellant manifested more than an intent to hurt or inflict bodily injury. We are satisfied that, by biting the victim on her cheek, which fact was not seriously disputed by the appellant, the appellant inflicted an actual bodily injury, and it was therefore more than a threat.

But since the charge of attempted rape was incurably defective, a conviction for that offence cannot be sustained. We are satisfied; however that on the evidence, the appellant was guilty of a lesser offence of sexual harassment contrary to **Section 138D** of the Penal Code.

In exercise of our powers of revision under **Section 4 (2)** of the Appellate Jurisdiction Act, we quash the conviction for attempted rape and set aside the sentence of 30 years imprisonment and substitute thereof a conviction for sexual harassment contrary to **Section 138D** of the Penal

Code. And since the penalty for this offence is imprisonment for not more than five years we substitute the sentence with the one of such term as to result into his immediate release from the prison.

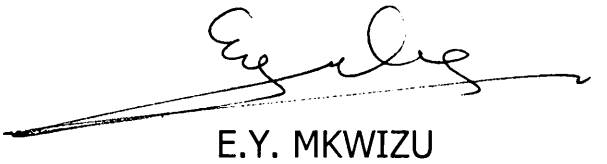
DATED at ARUSHA this 7th day of October, 2011.

H.R. NSEKELA
JUSTICE OF APPEAL

J. H. MSOFFE
JUSTICE OF APPEAL

S.A. MASSATI
JUSTICE OF APPEAL

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



E.Y. MKWIZU
DEPUTY REGISTRAR
COURT OF APPEAL