IN THE COURT OF APPEAL OF TANZANIA
AT MWANZA

(CORAM: MSOFFE, J.A., BWANA, J.A., And MJASIRI, J.A.)

CRIMINAL APPEAL NO. 501 OF 2007

DAMIAN RUHELE ..... APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

(Appeal from the decision of the High Court of Tanzania at Bukoba)

(Lyimo, J.)

dated the 20th day of November, 2007
in
Criminal Appeal No. 38 of 2006

JUDGMENT OF THE COURT

1 & 2 March 2012

MSOFFE, J.A:

DAMIAN RUHELE is appealing from the decision of the High Court (Lyimo, J.) in which the conviction entered against the appellant for attempted rape and the sentence of thirty years imprisonment meted by the trial District Court of Karagwe were affirmed. He appeared in person. On behalf of the respondent Republic Mr. Pius Hilla, learned State Attorney, resisted the appeal.

PW1 Mariantonia told the trial court that on 23/3/2002 at about 12.00 hours she was working in her shamba. The appellant came in and after greeting her he held her, pinned her to the ground, undressed her, and in the meantime he undressed himself. She raised an alarm after which PW2 Deogratius Mibamoko responded and came to her rescue. On arrival he saw the appellant lying on top of PW1. He observed that both PW1 and the appellant were naked at the time. Realizing that PW2 had arrived at the scene in response to the alarm the appellant in desperation and frustration retorted the following words to PW1:- "Chukua lakini utakapokufa kitaoza".

In his defence the appellant asserted that there were grudges between him and the husband of PW1. He tried to show that as early as 11/3/2002 PW1 was prepared to testify against him. In essence his defence was that the prosecution case against him was a frame up in view of the past grudges between him and the prosecution witnesses.

The appellant preferred four grounds of appeal. **One,** the charge was defective for failure to disclose the essential elements of the offence of attempted rape. **Two,** there was variance of dates between the charge and the evidence on the date the offence was said to have been committed. **Three,** the introduction in evidence of the PF3 offended the provisions of Section 240 (3) of the Criminal Procedure Act (CAP 20 R.E. 2002) (the Act). **Four,** the totality of the evidence did not establish the offence of attempted rape.

The offence of attempted rape is defined under the provisions of Section 132 (2) of the Penal Code as amended by Section 8 of the Sexual Offences Special Provisions Act No. 4 of 1998. The sub-section states:-

> (2) A person attempts to commit rape if, with 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 to her for the purposes of obtaining her consent;

(d) representing himself as a 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 supplied.)

For our purposes in this case, paragraphs (b), (c) and (d) of the above sub-section do not apply. Paragraph (a) is the appropriate provision in the matter before us. The catchword under paragraph (a) is "threatening". So, in a charge of attempted rape the evidence must show that the perpetrator of the crime in issue threatened the victim for sexual purposes. We are supported in this view by this

Court's decision in **Mussa Mwaikunda v Republic,** Criminal Appeal No. 174 of 2006 (unreported).

As for the complaint in the first ground of appeal Mr. Hilla readily conceded that the charge did not disclose the elements of the offence. He was quick to point out, however, that this did not occasion a failure of justice because the evidence on record established the offence in question. With respect, we agree with him. It is true that in her evidence PW1 stated how he was threatened by the appellant. As stated above, threatening is an essential element in an offence of this nature. She stated:-

> .... He (the accused) came close to me and said "Leo utanipa kuma yako". He got hold of me and laid me down.

It is evident here that the appellant threatened PW1 before he laid on her. This case is distinguishable from **Mwaikunda** (supra) because in that case the evidence did not disclose anything on threatening. So, the failure to disclose the important ingredient of

the offence in the charge sheet was not fatal because it was curable under Section 388 (1) of the Act; and, after all, the appellant was not prejudiced in any way because he knew the nature of the case against him.

The complaint in the second ground has merit in the sense that it is true that the charge sheet reflected that the date of incident was 23/4/2002 whereas in the evidence of PW1 it was stated that the incident took place on 23/3/2002. However, as correctly submitted by Mr. Hilla, this was probably a slip of the pen. At any rate, the variance in dates was curable under Section 234 (3) of the Act which reads:-

> (3) Variance between the charge and the evidence adduced in support of it with respect to the time at which the alleged offence was committed is not material and the charge need not be amended for such variance if it is proved that the proceedings were in fact instituted within the time, if any, limited by law for the institution thereof.

The complaint in the third ground need not detain us. It is true that there was a PF3 which was tendered in evidence at the trial. But it is also true that both the trial magistrate and the judge on first appeal did not use it in convicting and upholding the conviction, respectively. At any rate, the appellant did not canvass the point in his first appeal to the High Court.

In a sense the complaint in the last ground of appeal is closely related to the first ground. As shown above, it is not true that the essential elements of the offence were not disclosed in the evidence. In fact, as Mr. Hilla pointed out, quite correctly in our view, it defeats reason that the appellant did not cross-examine PW1 on the offence in issue. The tenor, essence and cornerstone of his evidence was that he did not commit the offence, without more. Yet the evidence of PW1 was exactly to the opposite. Inspite of this, when PW1 testified he did not cross-examine her on this damning evidence against him. We are aware that there is a useful guidance in law that a person should not cross-examine if he/she cannot contradict. But it is also trite law that failure to cross-examine a witness on an

witness's evidence – See this Court's decision in **Cyprian Athanas Kibogoyo v Republic,** Criminal Appeal No. 88 of 1992 (unreported).

For reasons stated, this appeal has no merit. We hereby dismiss it.

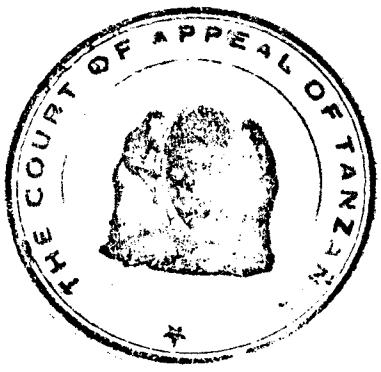
DATED at **MWANZA** this 1st day of March, 2012.

J.H. MSOFFE
JUSTICE OF APPEAL

S.J. BWANA
JUSTICE OF APPEAL

S. MJASIRI
JUSTICE OF APPEAL

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



(J.S. MGETTA)
DEPUTY REGISTRAR