IN THE HIGH COURT OF TANZANIA

AT IRINGA

APPELLATE JURISDICTION

(Iringa Registry)

(DC) CRIMINAL APPEAL NO. 2 OF 2010

(Originating from Criminal Case No. 41 of 2002

of the District Court of Mufindi District

at Mafinga

Before: M. A. Moyo, R.M.)

AUJENI MNYENYELWA ..... APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

JUDGEMENT

UZIA, J.

The appellant was convicted as charged by the trial District Court of Mufindi of the offence of Defilement contrary to section 137 of the Penal Code. He was sentenced to Fourteen (14) years imprisonment. Convinced with his innocence he appealed to this Court.

Briefly stated, the facts relevant to this appeal are that on

the 10th day of February, 2002 at about 14 hours at Utosi Village within Mufindi District in Iringa Region, the appellant alleged to have carnal knowledge of one Sikitu Ngano (PW.1) while at the time of the commission of an offence he knew that PW.1 is an idiot who on the material time alleged to be 18 years old. That on that day PW.1 visited her uncle (appellant) at his household to ask for bodyline Oil and her aunt (appellant's wife) was not present in the said household. When PW.1 was there, the appellant took and dragged her to the bush where he forcefuly did carnal knowledge of PW.1. That she felt pain and on the second day informed the matter to one Wendeline Ngano (PW.2) who took PW.1 to the police station. Thereafter the accused was arrested, and PW.1 was taken to the hospital for medical examination.

PW.1 testified that despite of the ordeal she did not shout because she was afraid of the accused.

PW.2 among others testified that he is the uncle of both the victim (PW1) and the accused person/appellant and that PW1 is an orphan and of unsound mind. That he became aware of the

allegations after being informed by the victim that she has been raped by the appellant when she went to ask for the bodyline oil. That he managed to see blood stains on the victim's foot. He testified further to have reported the matter to the Village Executive Officer one Austen Mdede (PW.3) and sent a militiaman to arrest the appellant who at the material time left from his household to the deserted place (mahameni) where he was arrested on the 7th day. He stated that at the VEO office the accused was interrogated and admitted the crime and apologized for the same.

PW.3, the VEO of Utosi Sadani Village *inter alia* testified that on 13/2/2002, PW.2 came to his office and informed him about the act of an appellant against PW.1 thereafter; he accompanied with PW.2 to the victim/PW.1 and found her attacked with epilepsy hence unable to talk with them. He further testified that on 16/2/2002 the appellant were arrested and brought to him and upon inquiries the appellant denied the allegation. When the appellant informed and threaten to be taken to police he admitted the same.

PW.4 one C.239 SSGT Dastan Matonya testified to have recorded caution statement. He informed the accused his rights including the rights of presence of his relative and the appellant chose one Mdede to witness the exercise. That, the appellant was not forced to make a statement at all.

In the light of the above evidence the trial court held an accused person/appellant liable and convicted him of an offence.

In this appeal the appellant was unrepresented, and Mr. Riziki Matitu, the learned State Attorney, represented the respondent, the Republic.

The appellant who is a lay person, in his memorandum of appeal submitted almost six grounds of appeal to challenge the verdict. This court has summarized them as hereunder;

1. That the trial court erred in law and fact when convicted an appellant for the offence of defilement of an idiot while the prosecutor failed to prove the offence to the standard required by the law.

2. That the trial court erred in law and fact to convict an appellant by relying on the evidence of age of the victim/complainant in the absence of Doctor's opinion.

3. That the trial magistrate erred in law and fact to believe that the appellant consented to commit the offence.

4. That the trial court erred in law and facts to convict an appellant by relying on evidence of the victim/complainant in the absence of PF3.

5. That the trial court erred in law and facts to convict an appellant by relying on the evidence of the person of unsound mind.

6. That the trial court erred in law and fact by admitting the evidence as tendered by victim/complainant without corroboration.

In his first ground of appeal, the appellant denied to have committed the offence as alleged by the prosecution and that the trial court erred in law and fact to convict him of the offence of

defilement of an Idiot. That, the prosecution side failed to prove the offence according to the standard required by the law.

On the part of the prosecution, Mr. Matitu, learned State Attorney countered the contention and supported the conviction. He submitted that the appellant is the one who defiled the idiot Sikitu Ngano. He stated that the offence to which an appellant charged with is defiling an idiot contrary to section 137 of the Penal Code, [Cap. 16 R.E 2002]. He stated the elements which constituted the offence per section 137 that any person who,

(1) Knowing a woman to be an idiot or imbecile;

(2) has or attempts to have unlawful sexual intercourse with her;

(3) in circumstances not amounting to rape, but which prove that the offender knew at the time of the commission of the offence that the woman was an idiot or imbecile.

Mr. Matitu further submitted that the prosecution proved the allegation beyond reasonable doubt since the victim/PW.1

was proved to be an idiot. He used the evidence testified by PW2 as contained under page 10 of the trial court's proceedings. And that that during an act the appellant was aware that the victim was imbecile. He once more pointed at page 32 of the proceedings to ascertain the contention.

He further submitted that the evidence as adduced by PW.4 who recorded the caution Statement of the appellant upon which the appellant voluntarily stated to have done the act and that during trial the appellant admitted the statement.

The learned state Attorney also contended that the prosecution proved the allegation beyond reasonable doubt that the victim /PW1 was an Idiot. He relied on the statement of PW2. as provided for at page 10 of the trial court's Proceedings.

I am prepared to expound the given six grounds of appeal together as they are closely intertwined and hinge on the question of whether the prosecution/Republic proved the case according to the standard required by the law.

It is the requirement of the law that whoever desires any

court to give Judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist. In criminal cases where the accused pleads the general issue "not guilty" the prosecution is obliged to prove every fact or circumstances stated in the charge which is necessary and constitute the offence charged with. The standard or requirement of the law in proving an offence in criminal case is as provided for under Section 3(2) (a) of the Law of Evidence Act, [Cap.6 R.E 2002] which *inter alia* state that;

> *"A fact is said to be proved when in criminal matters, except where any statute or other law provides otherwise, the court is satisfied by the prosecution beyond reasonable doubt that the fact exists ;"*

In proving commission of an offence of defilement the case of *Kibale v. Uganda [1999] 1. EA 148* is of great assistance. It was held that;

> *"In order to prove the commission of the offence of defilement,* ***three facts had to be established:*** *firstly, that there had been penetration of the female*

sex organ by the male sex organ, secondly, that the female was below the age of 18 years, and thirdly, that it was a male person who had engaged in the sexual intercourse. In cases of a sexual nature, the court had to warn itself of the danger of acting on the uncorroborated testimony of a complainant but having done so, it could convict in the absence of corroboration if it was satisfied that the complainant's evidence was truthful."

The same standard was maintained by the Supreme Court of Uganda at Mengo in the case of *Mugoya v. Uganda [1999] 1. EA 202* whereby it was held that;

"In cases involving sexual offences, there was a need for corroboration of both the evidence proving that sexual penetration of the complainant took place and the complainant's evidence implicating the accused in the commission of the offence."

Penetration is among the cardinal ingredients of defilement per Kibale's case (supra). It is stated to have been

committed if it is proved that there is penetration in the vagina. It must be proved that the said penetration is of penis. Rapture of seamen, sperm or blood stain is immaterial to ascertain the act. As a matter of practice, where there is no direct evidence to prove the allegation, the report prepared by the Professional Medical Experts suffices and it is on the basis of that report, when one may rightly allege that there was penetration or not. Also where medical examination is conducted it is mandatory for a report to be submitted to the court. Furthermore, during hearing, an accused must be given an opportunity for cross examining a Medical Expert (doctor) who conducted such medical examination. Section 240 (3) of the Criminal Procedure Act, [Cap. 33 R.E.2002] provides for medical witnesses. *Inter alia* it provides thus;

> *"When a report referred to in this section is received in evidence the court may if it thinks fit, and shall, if so requested by the accused or his advocate, summon and examine or make available for cross-examination the person who made the report; and the court shall inform the accused of his right to require the person*

who made the report to be summoned in accordance with the provisions of this subsection".

This position of the law was also emphasized by Ramadhani, C.J., in the case of *Arabi Abdu Hassan V. Republic, Court of Appeal of Tanzania at Mtwara,Criminal Appeal No.187 of 2005 (Unreported).* He stated thus;

"We may as well point out that this is the third instance in this session we find that that provision has been violated. The transgression has been committed elsewhere, too, for example in Shabani Ally v.R, Criminal Appeal No. 50 of 2001; Prosper Mnjoera Kisa v.R., Criminal Appeal No. 426 of 2006, all three are unreported decisions of this Court. We think that it is high time we direct all Judges-in-Charge to instruct Magistrates to observe that law".

When I was visiting records of the trial court I found that the complainant /PW1 had taken to the police station and thereafter to the hospital. Unfortunately, nothing in the record which indicates what transpired when the complainant brought to

the hospital. It is my expectation that since the victim was sent to the hospital, it was necessary to avail her with a Medical Report and the prosecution would use the same to prove the allegation. In the case of *Chila and another v. Republic [1967] EA 722,* among others the Supreme Court of Uganda stated that;

> *"Here, the prosecution case, in the form of the complainant's testimony, was corroborated by the medical evidence, and proved beyond reasonable doubt that the complainant had had sexual intercourse with a man on 16 July 1993. With regard to the complainant's age, there was ample evidence justifying the trial Judge's finding that the complainant was under 18 years of age at the material time and there were no grounds for faulting her in this regard."*

Also the question of Idiot-proof of PW.1 was supposed to be supported by the Medical report. I disagree with the standard used by the prosecution and trial court to prove the same since it is based on the narration of PW.2 only. I think this alone can not exhaustively prove the idiotic nature of the complainant/PW1.

The learned State Attorney further submitted that the caution statement of the appellant as recorded to the police station and which was not objected by the appellant during trial corroborated the circumstantial evidence hence proved the allegation beyond reasonable doubt. He supported the contention by citing an authority of *Pascal Kitigwa v. Republic (1994) TLR 65 (CA)* in which among others the court held that,

> *"Corroborative evidence may be circumstantial and may well come from the words or conduct of the accused and, in this case, the appellant independently corroborated the evidence of the co-accused;"*

I am in all fours with Mr. Matitu on the above contention because at page 18 of the typed proceedings which conducted by the trial Court on 7/1/2004 among other things indicates when the caution statement read before the appellant and when he was asked by the Court of whether he has objection against the same, he did not object it. This draws a rebuttable inference that he confessed.

However, I am of firm opinion that failure by the prosecution

to produce the medical evidence during the trial for ascertaining the allegation at large impoverished the prosecution's case.

I further find that the evidence adduced by the three witnesses of the Republic was not watertight and did not prove the case beyond reasonable doubts. None of them managed to witness the incident on the material time. For example, PW.2 testified on what he was informed by the complainant; PW.3 testified the mater as he was informed by PW.2. It is undisputable fact that their evidence was based on hearsay. In the case of *Kigecha Njunga v. Republic (1965) E.A. 773* the Court was rejected a piece of evidence which was based on hearsay evidence. Also in the case of *Kinyatti v. Republic [1976-1985] 1 EA 234 it* was *inter alia* stated that;

> " *Hearsay or indirect evidence is an assertion of a person other than the witness testifying, offered as evidence of the truth of that asserted rather than as evidence of the fact that the assertion was made. It is not original evidence. The rule against hearsay is that a statement other than one made by a person while giving oral evidence in the*

proceedings is inadmissible as evidence of any fact stated."

In order to ascertain the allegation and prove the case, independent evidence was required to corroborate the allegation made by the complainant/PW1. Failure to do so brings doubt on the prosecution side and undoubtedly, benefits the appellant. In the case of *R. v. Charles Kisengedo [1967] HCD. n. 204* the accused was convicted of rape under provision of the Penal Code. The complainant, a school girl aged 15, gave the only evidence implicating the accused, the Court held that ;

> *"In sexual cases independent corroboration of the complainant's story, implicating the accused, will be required notwithstanding the trial court's warning itself of the danger of convicting without it" Conviction quashed."*

For these reasons I have no hesitation in coming to the conclusion that the evidence before the court was wholly insufficient to warrant the conviction of the appellant and admittedly, the prosecution failed to prove the case according to

the standard required by the law. The guilt of the appellant was not proved beyond reasonable doubt. He was entitled to the benefit of doubt.

Appeal allowed and Conviction is hereby quashed and set aside. The appellant is to be released forthwith from prison unless he is otherwise lawfully held.

L. M. K. UZIA

JUDGE

29/09/2010

Right of appeal explained.

L. M. K. UZIA

JUDGE

29/09/2010

Date: 10/11/2010

Coram: L.M.K. Uzia, Judge

For Appellant: Present

For Respondent: Present