**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA**

**IN DISTRICT REGISTRY OF ARUSHA**

**AT ARUSHA**

**DC. CRIMINAL APPEAL NO. 147 OF 2017**

*(Originating from Criminal Case No. 80 of 2016 in the District Court of Babati at Babati)*

**JUMA YUSUPH @ MURASA @MODU.....APPELLANT**

**VERSUS**

**REPUBLIC .....RESPONDENT**

**JUDGMENT**

**DR. M. OPIYO, J.**

The appellant herein was arraigned before the Babati District Court of the offence of defilement of imbecile contrary to section 137 of the Penal Code, Cap 16 R.E. 2002. After full trial, he was convicted and sentenced to 14 years imprisonment. He was not satisfied with the decision and preferred appeal to this court on the following grounds.

1. That the learned Trial Magistrate erred in law by relying on the uncorroborated evidence of PW1, PW2 and PW3 who were from the same family, and that their evidence ought to have been accorded less weight.

2. That, the learned Magistrate erred in law and fact in not considering the appellant defence at the trial.

3. That the learned Trial Magistrate erred in law and in fact by admitted PF3 in the Court without any medical proof that the victim is imbecile (insane)

4. That the learned Trial Magistrate erred in law to sentence him to imprisonment unfairly.

5. That, the Trial Magistrate erred in law and in fact by ignoring the basic procedure of law on the reception of the evidence of person of a tender age as it is required under Section 127 of the law of the Evidence Act (Cap 6 R.E. 2002) Voire dire test, i.e. PW1 and PW2.

6. That the Trial Magistrate erred in law and in fact by convicting and sentencing the appellant basing on the evidence of the witness who testified in the mental illness of the Victim without providing a certificate from a professional Doctor in proof.

The brief facts of the case is that on 31st day of August, 2016 at Mafuta village within Babati District in Manyara Region the appellant did have sexual intercourse with one Fatuma Swelehe knowing she is an imbecile. That on the fateful date the appellant went at victims home and found her with four children including PW1 and PW2. He ordered them to get out and barred them from listening to the adult conversations. When the children went out, he undressed the victim and did have carnal knowledge with her while the children were looking through the window, and some openings at the wall of the house. Others looked through the door which remained open. Seeing the awful scene, PW1 raised alarm and called Mwanvita who met the accused coming from the victim's home. She found the victim naked with sperms in her vagina. She then called victim's

mother who was out on union business. She came and took her imbecile daughter to the police for PF 3 and later to the Hospital for Medical Examination, where it was proved that the having Motile spermatozoa and bruises proving penetration.

Bringing his appeal home accused who was not represented. He submitted generally that the trial magistrate never considered his evidence at all and that only prosecution case was examined.He further submitted that there is no proof of the status of alleged victim's state of mind if indeed she is an imbecile. Also that the evidence of PW2, (being a child of tender age), was taken without conducting *voire dire* test as shown page 16 of the typed proceedings.

Ms. Kassala, learned state Attorney supported the appeal by the applicant based on the same grounds. On the issue of *voire dire* test she stated that in accordance to section127 of the Evidence Act, Cap 6 R.E 2002, in taking the evidence of a person of tender age *voire dire* test must be conducted to find out if the witness possess sufficient intelligence, but in this case, PW1 and PW2 (pg. 14 and pg.18 of the proceedings) were children but *voire dire* test was not at all conducted as required by Law in taking their evidence. She argued that although in terms of Section 388 (1) of the CPA when a finding or sentence is found in presence of error or omission the order or retrial can be mad, but in this case she is not praying for order of re-trial because there was another flaw in the prosecution case that does not accommodate such prayer.For that, she submitted that although it was alleged that the victim was imbecile but no proof was brought to that effect

or she being brought for the court to satisfy itself of the fact of her condition that she was indeed imbecile.

After considering the submission of both parties above, I made the following findings.Appellant was charged with the offence of defilement of imbecile contrary to section 137 of the Penal Code. The section states that;

> *"Any person who, knowing a woman to be an idiot or imbecile, has or attempts to have unlawful sexual intercourse with her 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, commits an offence and is liable to imprisonment for fourteen years, with or without corporal punishment."*

From the wording of the above section, the ingredients of the offence of defilement of imbecile include the woman being imbecile and knowledge of the accused of the condition of the woman in question. From that I readily agree with the appellant and learned state attorney that in proving such offence against the accused, it was necessary to adduce evidence proving the mental condition of the victim. The proof was even more necessary as the victim was not born imbecile, but it is the condition that was developed at a later stage. From the testimony of victims own mother at pages 19-20 of the proceedings, it was evident that the victim's (her daughter) mental problems started in 2011. It continued until she was chased away by her

husband landing her back to her house where she met the tragedy.Apart from stating that that her daughter is imbecile no proof was brought in court to itssatisfaction on that fact. It is trite law that in a criminal case, the standard of proof has to be beyond all reasonable doubt**(see Bigara Kiguru V. Republic, Crim Appeal No 153/2011 CA Mwanza (Unreported).** However in the circumstances of this he implausibility in the prosecution case have created serious doubts on the guilt of the appellant. Thus, it remains that the issue was not proved to the required standard, required, beyond reasonable doubt.The benefits of those doubts ought to have been given to the appellant.

In the circumstances, I am subdued to allow the appeal. The conviction by the District Court of Babatiis hereby quashed and the sentence set aside. I order that appellant be released from custody forthwith unless otherwise lawfully held.

**(SGD)**

**DR. M. OPIYO,**

**JUDGE**

**6/4/2018**

I hereby certify this to be a true copy of the original.


**D. J. MSOFFE,**

**Ag. DEPUTY REGISTRAR**

**ARUSHA**