

**IN THE HIGH COURT OF TANZANIA**  
**(DAR ES SALAAM DISTRICT REGISTRY)**  
**AT DAR ES SALAAM**  
**CRIMINAL APPEAL NO. 158 OF 2018**

*(Arising from the District Court of Kilombero, Criminal Case No. 261 of 2016)*

**YUDA LINUS @KANIPELELE..... APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

**JUDGMENT**

*Date of last order: 16/10/2019*

*Date of Judgment: 31/12/2019*

**S.M. KULITA, J.**

This is an appeal from Kilombero District Court in the Criminal Case No. 261 of 2018. The accused YUDA LINUS @KANIPELELE (hereinafter to be referred as the appellant) was convicted and sentenced to serve fourteen years imprisonment for "defilement of idiot" contrary to section 137(1)(2)(e)(ii) and section 131(1) of the Penal Code [Cap 16 R.E. 2002].

Being aggrieved with the decision of the said court he appealed to this court against both conviction and sentence.

The background of this matter is that on the 2<sup>nd</sup> day of August 2016, at about 15:30 hours at Muungano village, Mlimba within the District of Kilombero in Morogoro Region the accused had carnal knowledge to one Judith Lyapanga a girl of 16 years old who is an idiot.

The appellant lodged his appeal comprising of five grounds challenging the decision of the aforementioned case as follows;

1. That the trial court erred in law and facts by convicting the appellant basing on wrong principle of the evaluation of evidence.
2. That the trial court erred in law and facts when the defense of Alibi was raised by the appellant that he was absent at the scene of crime but the court did not consider it.
3. That the trial court erred in law and facts when the prosecution failed to prove whether the victim girl was an imbecile or idiot without an evidence from the specialist doctor.
4. That the trial court erred in law and facts when convicted the appellant relying on the evidence of PW5 without conducting the identification parade as required by the law because the appellant claimed to be out of the scene.

5. That the trial court erred in law and facts for relying on the evidence of PW6 stated to have observed semen in the victim's female organ without proof whether there was penetration of the penis into the vagina as the availability of semen in the vagina is not the only ingredient to prove rape.

When this matter was called for hearing the appellant represented himself while the respondent enjoyed the service of the learned State Attorney Ms. Monica Ndakidemu.

In arguing his grounds of appeal which was done orally the appellant submitted that he was convicted and sentenced to serve the imprisonment of 14 years for defilement of imbecile by the District court of Kilombero at Ifakara on the 19/10/2017. He prayed for his grounds of appeal to be adopted as the submissions for his appeal. Lastly he prayed for the appeal to be allowed.

In reply with regard to ground one of appeal the learned State Attorney Ms. Monica Ndakidemu submitted that the evidence was clearly evaluated by the trial magistrate and the fact that the appellant was seen by PW5 leaving the scene of crime while his trouser is half dressed and the victim was found lying in the toilet, the appellant must be the one who had carnal

knowledge to the victim. She further stated that the appellant ran away and PW5 could not chase him because she was pregnant, instead she just shouted.

Ms. Ndakidemu also submitted that the records shows that after the incidence as stated by the Street Chairman that the appellant escaped, he was arrested after about one and a half months later. Also the appellant never stated where he had been nor did he bring any witness to prove that he was somewhere else on the material date.

Arguing on ground two of the appeal which relates to the defense of Alibi the State Attorney submitted that according to section 194(4)(5) and (6) of the Criminal Procedure Act [Cap 20 RE 2002], hereinafter to be referred as CPA, ***Alibi*** can stand as a defense ground when it is raised before the closure of the prosecution case whereby the accused has to state about a place where he had been so that the prosecution case can take trouble to investigate and challenge the same if found false. She said that raising it at the defense level it is not allowed.

Arguing on ground three of the appeal that there was no medical proof that the victim was idiot or imbecile, Ms. Ndakidemu submitted that the evidence shows that the victim was not of sound mind as testified by her father (PW1) and

PW5 who knows the victim as a neighbor. The Counsel further submitted that the Doctor (PW6) examined the victim and stated that she is imbecile.

Arguing on ground four of the appeal that there was no identification parade conducted to identify the assailant, the Counsel submitted that the ground has no legal weight due to the fact the PW5 was the eye witness knows the appellant by his name and his physical appearance as they live in the same village.

Arguing on ground five of the appeal that is proof of penetration Ms. Ndakidemu submitted that the Doctor (PW6) testified that he observed the presence of sperms in the victim's sexual organs. He also observed that the victim had pains when an instrument called "specular" was inserted into her sexual organ. The Counsel stated that all these prove that penetration was there.

In conclusion the State Attorney, Ms .Ndakidemu prayed for the appeal to be dismissed.

In the rejoinder the appellant submitted that he would not have done that act in the public toilet during the day time. If PW5 found him he could have raised the alarm and he could be arrested. He concluded by stating that he was not medically

examined so as to know if he actually had sexual intercourse with the victim.

From the submissions by both parties I see only two grounds which have merit for determination of this matter which are the ***defense of alibi*** and ***identification***.

To start with the ground which relates to the defense of Alibi raised by the appellant I had to go through Section 194(4)(5) and (6) of the CPA provides for the requirement of the defense of Alibi. The provision requires the accused/appellant to give a notice before the commencement of the prosecution case that he was going to rely on that mode of defense. As correctly submitted by the State Attorney that the appellant ought to inform the court before the commencement of the prosecution case that he was going to rely on the defense of alibi. From the evidence in record it is not indicated anywhere that the appellant gave such notice before the commencement of the prosecution case, raising it at any other stage renders it irrelevant.

The second ground is the one which relates to the identification of the assailant. The evidence in record shows that the appellant was seen by PW5 leaving the scene of crime (toilet)

while his trouser was half dressed and the victim was found lying in the toilet. It is also evident that having seen PW5 the appellant ran away. PW5 could not chase him because she was pregnant, so she just shouted. As rightly submitted by Ms. Ndakidemu the records show that the appellant escaped after the incident, he was arrested after about one and a half month later. Probably the appellant ran away knowing that PW5 identified him and he knew very well that he had committed the crime.

In the case of **HAMIS SAID BUTWE V. R, Criminal Appeal No. 489 of 2007, CAT at Mtwara (unreported)** the court held that it is trite law that for the court to rely on the evidence of visual identification the evidence must be water tight with no possibility of mistake of identity. In that regard since the appellant was clearly identified by PW5 who had arrived at the immediately after the occurrence of the offence and the fact that it was a day time meaning thereby it was lighteous enough to enable her (PW5) to identify the appellant, there was no doubt that the witness clearly identified the appellant. I therefore concur with the findings of the trial court that the

appellant was properly identified by PW5.

For the aforesaid reasons I am satisfied that the prosecution case at the trial court had proved its case against the accused person beyond all reasonable doubts. The conviction and sentence are therefore upheld. Appeal dismissed.



  
**S.M. KULITA**  
**JUDGE**  
**31/12/2019**