IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

IN THE DISTRICT REGISRTY OF ARUSHA

AT ARUSHA

CRMINAL APPEAL NO. 21 OF 2021

(C/F CRIMINAL CASE NO. 23 OF 2014 IN THE DISTRICT COURT OF MBULU AT MBULU)

AZIZI S/O MUSTAPHA.....APPELLANT

VERSUS

THE REPUBLIC.....RESPONDENT

JUDGMENT

16/06/2021 & 27/08/2021

GWAE, J

The historical background of this appeal can be traced back in the year 2014, where the appellant before the District Court of Mbulu stood charged of an offence of defilement of an idiot or imbecile contrary to section 137 of the Penal Code Cap 16 R.E 2002. The particulars of the offence were such that on the 26th day of March 2014 at Gwandumehi Daudi village within Mbulu District the appellant had sexual intercourse with one a person whose name shall be referred to as "CL-or victim" knowingly the same to be an idiot or imbecile.

The trial court, after the conclusion of trial, was satisfied that the charge against the appellant was proved beyond reasonable doubt. The appellant was on 25th September 2014 convicted and sentenced to seven **(7)** years imprisonment, the sentence which was to be confirmed by the High Court.

On confirmation of the sentence, the High Court Judge properly exercised her revisional powers under section 30 (1) of the Magistrates' Court Act Cap 11 R. E. 2002 and reversed the sentence to a statutory sentence of fourteen **(14)** years as provided for under section 132 of the Penal Code.

Dissatisfied with both conviction and sentence the appellant successfully filed his appeal which was determined by Hon. Aziza. E. Temu-SRM with Extended Jurisdiction. The conviction and sentence were quashed and set aside on reasons that; **firstly**, one, no reasons that were given on the change of Magistrate and secondly, that, there was non-compliance of section 234 of the Criminal Procedure Act Cap 20 R. E 2002 after the charge was substituted and plea was taken again. Basing on these irregularities the RM's court with extended jurisdiction made an order for immediate retrial of the matter before another Magistrate.

On 19/11/2019 retrial of the matter commenced, and after hearing of both parties, the trial Magistrate was of the view that the prosecution had proved its case at the required standard as per criminal justice. Consequently, the appellant was accordingly convicted and sentenced to fourteen (14) years imprisonment

without corporal punishment and compensation on the 18th day of December 2020 by the trial court.

Still aggrieved, the appellant has come to this court with his appeal. The appellant filed 8 grounds of appeal and 4 additional grounds. In his grounds of appeal the appellant is mainly challenging the evidence for the prosecution upon which his conviction was based, claiming that the same was not proved beyond reasonable doubt. The summary of his complaints is as follows;

1. That, his defence of alibi was not considered,
2. That, the offence to which he was charged with is defilement while he was convicted with having carnal knowledge with the victim.
3. That, there was no direct witness from the prosecution who witnessed the incident,
4. That, the exhibits PE II and PE I were not read over in court after they were admitted,
5. That, the victim was not present in court and no evidence that the court assessed the said victim,
6. That, the court failed to consider the fact that the appellant never knew that, the victim was an idiot and
7. That, the trial court failed to consider the time spent by the appellant in the first conviction.

The evidence that was led to the guilt of the appellant by the trial court was that on the 26/03/2014 at around 21:00 hrs PW1 one Goodluck Hamnaay, a lessee at Banga Bayo's house while on his way back home he heard a voice of a

person crying coming from the room of the appellant who at that time was his fellow tenant at the house of Banga Bayo. It was PW1 who called the Land lord, PW2, knocked the door of the appellant and after sometimes the door was opened by the appellant. At that time PW2 was holding a torch to which he pointed it towards the appellant's room where they saw the victim kneeling down beside the accused's bed with blood and feces on the floor and the whole room was stinking. PW2 asked the appellant as to what was happening and the appellant replied that *"nilikuwa nimezidiwa"*. The accused was in a white vest and a red short. Thereafter the victim's mother, PW3 was called and when she arrived, she saw the appellant and the victim. The victim was seen bleeding through her vagina and at that time the appellant ran away.

PW3 took the victim back home and on the following day, she went to the Police station where she was issued with a PF3 and went to Mbulu Hospital where the victim was hospitalized for four days. The PF3 was admitted and marked as PE1. The victim was further examined by, a medical doctor at Mbulu District Hospital who testified as PW5, PW5's findings were that the victim was mentally unbalanced and was unable to speak.

In his defence, the appellant alleged that on the material date he was not at Daudi Village as he was at Moringa Village pruning trees which belonged to Gwandumehi village's chairman. He further alleged that he was not arrested at the

scene of the crime and that none of the prosecution witnesses saw him committing the offence he is charged with. The appellant argued that this is a cooked case as he owed PW2 money and the victim is PW2's young sister, therefore he claimed that this is a family case.

When the appeal was called on for the hearing, the appellant appeared in person. The respondent Republic was represented by M. Ahmed Hatibu, learned State Attorney. In his submission the appellant prayed for the adoption of the grounds of appeal together with the additional grounds.

Mr. Hatibu on the other hand opposed the appeal and submitted as follows; firstly, the complaint that the defence of alibi was not considered is not founded by the judgment appealed, secondly, the appellant's complaint that the victim was not promptly sent to the hospital is baseless as the incident occurred on 26/03/2014 while the victim was sent to the hospital on the next day that is on 27/03/2014. Thirdly, that, the appellant was found with the victim at his residential house however he managed to escape but was arrested on the same day. Fourthly, that, the victim was an idiot the fact which was established by PW5, a medical doctor and there is ample evidence to that effect which raises no doubt.

Nevertheless, Mr. Hatibu conceded to the additional grounds of appeal number 1 and 4 which are to the effect that exhibits PEI and PE II were admitted but the same were not read over to the court. He supported that the same be

expunged from record, however he insisted that the oral evidence of PW5 still proves that the victim was an idiot. Mr. Hatibu also conceded that the trial court did not consider the period the appellant has served when he was initially convicted.

After traversing the evidence on record and the submissions by the appellant and the learned State Attorney, I wish to begin with ground **number one** as appearing in the additional list of the grounds of appeal.

As conceded by the learned State Attorney, indeed, the records are so clear that exhibits PI and P2 after they were admitted by the trial court the same were not read out in court. The necessity for documents which have been admitted by the trial court to be read out to an accused in order to know the documents of the documents so admitted has been stressed in a number of cases including the decision of the Court of Appeal in the case of **Robert P. Mayunga & another vs. The Republic,** Criminal Appeal No. 514 of 2016 (Unreported) where it was stressed that any document after its admission must be read out to the appellant so that the appellant may be aware of the contents and can properly exercise his right to cross examine the witness effectively. As suggested by Mr. Hatibu, PEI and PEII are hereby expunged from the records.

Having expunged from the records exhibits P1 and P2, the question that follows is whether the remaining evidence from records suffices to prove the

prosecution case beyond reasonable doubt. The offence to which the appellant is charged with an offence of defilement of an idiot or imbecile contrary to section 137 of the Penal Code, the section reads as follow;

> "S. 137 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, is guilty of an offence and is liable to imprisonment for fourteen years, with or without corporal punishment."

From the above quoted section, this court is of the firm view that, in proving this offence two elements must be proved by the prosecution, one; that there was unlawful sexual intercourse and second; that at the time of commission of the said offence the offender knew that the victim was an imbecile or idiot.

In proving that there was unlawful sexual intercourse the appellant alleged that none of the prosecution witnesses had testified to have witnessed the commission of the crime while the prosecution evidence relied much on exhibit P1 which is a PF3 together with the testimony of PW4, the medical doctor. Exhibit PI in this case is however of no use as the same has already been expunged never the less the question that this court asks itself is whether exhibit PI alone proved that there was unlawful sexual intercourse. I am of the considered view that

medical evidence does not alone prove that there was unlawful sexual intercourse where there are other pieces of evidence indicating that the said offence was committed (See the case of **Lazaro Kalonga vs. The Republic,** Criminal Appeal No. 348 of 2008 (Unreported-CAT). The evidence of PW4, a medical doctor is to the effect that after examination of the victim he discovered that there were injuries and bruises in her vagina which were caused by a blunt object and she was still bleeding. This piece of evidence is supported by that of PW1 PW2 and PW3 who testified to have found the victim in the appellant's room kneeling down besides the appellant's bed with feces/dung and blood around the room and the victim was also found bleeding, the fact that had not been disputed by the appellant neither during cross examination of the prosecution witnesses nor during his defence.

The appellant in ground **6 of his petition** of appeal complained that he was charged with an offence of defilement while he was charged with the offence of having carnal knowledge to the victim, perhaps this is a misconception by the appellant, basically, the blame which I shall not put on him since he is a lay man and unrepresented. The offence of defilement as defined in section 137 of the Penal Code is self-explanatory that the offence involves unlawful sexual intercourse therefore the question of the appellant having carnal knowledge with the victim is direct proportional to the offence to which he was charged.

On the second element as to whether the appellant knew that the victim was an idiot or imbecile, again in this element, the medical evidence is of no use as the same was expunged, never the less there is still evidence from the prosecution witnesses which suggests that the appellant knew that the victim was an idiot or ought to have knowledge of that fact. PW1 and PW2 testified that the victim is a well-known in their village to be mentally unbalanced, PW 3 the victim's guardian testified that the victim was born disabled and that she cannot even speak.

This fact is supported by the evidence of PW5, a medical doctor who after examination of the victim discovered that the victim suffered from schizophrenia (mentally unbalanced) and she was unable to speak. More so, at paragraph 16 of the typed proceedings of the trial court it is evident that the respondent's counsel prayed for the court to take judicial notice of the status of the victim who was present in court chambers to be mentally unbalanced and could not speak. From the evidence above it is with no doubt that the victim at the time of the commission of the offence was an idiot.

The appellant in one of his additional grounds of appeal denied to have known that the victim was an idiot. I find this piece of evidence unfounded basing on the facts given above, the appellant cannot escape from knowing that the victim was an idiot as it has already been established by the prosecution witnesses that

the victim had mentally unbalanced and she is unable to speak, if the victim could not speak as amply adduced, how did she find herself in the appellant's room without the appellant noticing that, the victim was an idiot. The appellant is basically trying to run from his own shadow.

Another complaint by the appellant is on his defence of alibi which he claimed that it was not considered by the trial court. This allegation is baseless as the trial court Magistrate in composing his judgment at page 3, 4 and 5 considered the defence of alibi as raised by the appellant. In his findings the trial Magistrate was of the view that the defence was not properly raised pursuant to section 194 (4) and (5) of the Criminal Procedure Act, however the trial Magistrate went on stating that even if he was to consider such a defence the same did not raise any doubt in the prosecution evidence.

On the **last complaint that the trial Magistrate's failure to consider** the time the appellant had served from the previous illegal conviction, the fact which was conceded by the learned State Attorney. Under the circumstances, this court is justified to interfere with the trial court's sentence. It my considered view the period served by the appellant as a prisoner though illegal, must be taken into account when a magistrate a judge retries a case and reconvicts an accused person. My holding is guided by the jurisprudence of the Court of Appeal of Tanzania in the case of **Mokiri Mwita @ Gesine v. Republic,** Criminal

Appeal No. 182 of 2015 (unreported CAT), where this court sitting at Mwanza convicted the appellant of the offence of manslaughter c/s 195 of the Penal Code (supra) but it was observed that, the accused person was not asked to either admit or deny the facts of the case, it was stated;

> "We order the case to be remitted to the High Court for retrial before another Judge. We further order the retrial be expedited and **if thereafter the appellant is convicted, the term he has already served in prison should be taken into consideration** (emphasis supplied)".

Also, in **Amani Ramadhani Mgonja v. Republic**, Criminal Appeal No. 219 of 2007 (unreported-CAT)

In our present appeal, the appellant was vividly and initially sentenced to 7 years jail on the 25th September 2014. Though the imposed sentence was illegal yet the appellant served it before it set aside followed by an order for retrial which is the subject of this appeal whose judgment was delivered on 18/12/2020. Simple calculation shows that the appellant has already served about **seven (7)** years since 2014 to date, the period served by the appellant that ought to be taken into consideration by the trial court which conducted re-trial of the case at the time of passing the sentence.

Given the reasons stated above, this court upholds the trial court's decision in that the prosecution case was proved beyond reasonable doubt. The appeal is

therefore dismissed save for the time already served by the appellant which was not considered by the trial court. Accordingly, the service of the imposed sentence of 14 years jail **shall start** retrospectively that is from **25th September 2014** when he was illegally convicted and sentenced by the trial court instead of **18th December 2020**.

It is so ordered.

M. R. GWAE
JUDGE
27/08/2021

Court: Right of appeal to the Court of Appeal of Tanzania fully explained

M. R. GWAE
JUDGE
27/08/2021