IN THE HIGH COURT OF TANZANIA

(MTWARA DISTRICT REGISTRY)

AT MTWARA

CRIMINAL APPEAL NO. 37 OF 2020

(Original Nanyumbu District Court Criminal Case No. 14 of 2018)

YASSIN ABDALLAH MPILI @ MAGOGO..... APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

JUDGMENT

2 August & 8 October, 2021

DYANSOBERA, J.:

The appellant was convicted by the District Court of Nanyumbu District of the offence of rape contrary to sections 130 (2) (e) and 131 (1) of the Penal Code. He was found to have raped one "LE" or simply "the victim" on the 5th day of February, 2019 at about 20.00 hours and was sentenced to thirty years imprisonment. He was aggrieved by that decision and has appealed.

Briefly, the evidence which led to the appellant's conviction and subsequent incarceration is the following. "LE", the victim in this case who was born in 2007, is both deaf, dumb. She is also mentally imbalanced. She lives with her father one Samwel John Milanzi (PW 4) at Ngalinje Village. On 5th day of February, 2019 at around 18:00 hrs PW 4 went out leaving the victim behind with her grandmother. At 2000 hrs, Felister Fundi (PW 1), a neighbour, heard the victim crying from the bush. With a torch, she went to the crime scene and found the appellant having sexual intercourse with the victim; the victim was lying down and had no skirt while the appellant was on top of her. On arrival at the scene of the crime, the appellant threatened PW 1 telling her, "we toka ntakuuwa". PW1 who alone at that time retreated and went to inform PW 4 that the appellant was having sexual intercourse with his daughter. Both PW 1 and PW 4 went to the crime scene but could not found the appellant and the victim around, only the victim's skirt. Hadija Mohamed (PW2), while at home, heard a person vomiting at a deserted house of the late Ankose. She went there and, with the aid of a torch, saw the victim under a mango tree near that abandoned house. The victim had

neither pants nor skirt but a top. The victim who was lying down rose up and grasped PW 2. Since the victim had no habit of walking naked, PW 2 was astounded to find her in such state. She then handed the victim to her grandmother. Samson Francis Mrope (PW 3) participated in tracing both the victim and the appellant. Mayasa Ahmad Membe, the Mwambani Village Executive Officer (PW 6) informed the police who found the appellant sleeping in the deserted house. The appellant was found and arrested in the deserted house of the late Ankose and was taken to the police station by the police. The victim was dirty, had blood stains in her mouth and had semen.

G. 5089 DC Mark (PW 5) went to the crime scene and drew the sketch map (exhibit P 1).

The victim was medically examined by Jackson Kasuga (PW 7), a medical officer stationed at Mangaka District Hospital. According to PW 7, the victim could not speak as she had, 'ulemavu'. He found that the victim's vagina had bruises and semen mixed with blood. He established that the victim was penetrated with a blunt object. PW 7 then filled in the PF 3 (exhibit P 2).

In his defence the appellant made a total denial on his involvement in the commission of the offence. He told the trial court that only one witness testified to have seen him raping the victim but other witnesses testified on the hearsay evidence. The appellant challenged the evidence of PW7 arguing that the medical examination was conducted on the victim on 6.2.2019, a day after the event is alleged to have occurred. He said that it was too long a time for a person to be able to see the blood in the vagina. The appellant wondered why his statement was not tendered in court. He also challenged the evidence of other prosecution witnesses.

In impugning the trial court's decision, the appellant has fronted four grounds of appeal as follows:-

1. That the trial magistrate grossly erred in law and fact by convicting and sentencing the appellant by merely believing the evidence of PW1 a victim who was child of 13 years old regard that the evidence was taken while the voire dire test was not conducted as required by the under section 127(2) of TEA Cap 6 R.E.2002.
2. That the trial magistrate erred in law and fact by entering a defective conviction in his judgment because he only cited the section of the act concerned with the offence and failed to

specify the offence of which I was charged with and hence failed to comply with section 235 and 312(2) of the CPA [Cap 20 R.E.2002].

3. That my lord the trial magistrate grossly erred in law and fact when convicted the appellant by believing that the victim PW1 13 years old and that she was in form one (1) without taking into consideration that there was no birth certificate which tendered in court as an exhibit. Apart from that there was no any teacher from the said secondary school who appeared before the trial court as a witness in order to prove the same.
4. I do not pen off without saying that the prosecution side failed to prove the offence beyond reasonable doubt hence I pray the court to allow my appeal quash out the conviction set aside the sentence and set me free from the prison.

At the hearing of this appeal, the appellant entered appearance personally and without legal representation whereas Mr. Wilbroad Ndunguru, learned Senior State Attorney opposed the appeal on behalf of the respondent Republic.

The appellant's main complaint was that the victim did not give evidence to prove what had happened to her. He argued that Felister Fundi who is alleged to have seen the incident did not inform anybody.

Supporting the conviction and sentence, learned Senior State Attorney submitted that the case against the appellant was proved beyond reasonable doubt. He explained that the evidence of the victim, a child of 13 years old and that of PW4, her father was clear. He stressed that the victim is the lunatic who could not talk independently and argued that the evidence showed that the appellant had sexual intercourse with the victim. He clarified that PW 1 eyewitnesses the incident as after she heard at that night a hue cry, she went to the scene of the crime and saw the appellant knowing the victim carnally though the appellant threatened her. In further elaboration, Mr. Ndunguru submitted that penetration was proved by PW7 one Jackson Kassinga who medically examined the victim and filled in the PF 3. He pressed that despite the victim being handicapped, was lunatic and unable to talk, the available evidence sufficiently proved the case against the appellant beyond reasonable doubt and the appellant knew this condition prior and during this incident.

With regard to identification, the learned Senior State Attorney submitted that identification was impeccable as it is reflected at page

7 whereby PW1 clearly stated that she did not lie and there was no chance of mistaken identity. He maintained that since the victim was handicapped thus the first ground lacks merit.

In response of the second ground of appeal Mr. Ndunguru argued precisely and concisely that there is a misconception as in the impugn judgment at page 6 the trial court stated that it convicted the appellant and it went further by mentioning the sections.

Reacting to the third ground of appeal, the learned Senior State Attorney argued that did not reflect the evidence therefore it should be dismissed.

In the rejoinder, the appellant started by arguing that Felister Fundi testified that he saw himbut admitted that there was no light but identified him by noise. The appellant stressed that it was at 2030 hours and no witnesses were called to witness the incident. The appellant went further and argued that he did not see the victim either at the police station or even in court. In addition, the appellant submitted that he was told that she was schooling but the teacher was not called to testify.

Besides, the appellant argued that he was apprehended first and the incident occurred later. Furthermore, the appellant submitted that VEO testified that some children eye witnessed the incident but those children were not called in court to testify. He also, submitted that there was no light and the doctor was clear on the date and that was inconsistent with that mentioned earlier.

Finally, the appellant submitted that the victim's father clearly testified that the incident happened at 2000 hours and was apprehended at 2000 hours and was at the police station at 2000 hours. He further urged this court to make a finding that he did not commit the offence.

I have dispassionately gone through the record of the trial court, grounds of appeal and the submissions from both. There is no dispute that the appellant was charged with and convicted of rape contrary to sections 130 (2) (e) and 131 (1) of the Penal Code. Likewise, it is not disputed and Mr. Wilbroad Ndunguru agrees that the victim is a lunatic, deaf and dumb.

The main issue for determination is whether the appellant was properly charged and convicted.

The evidence is abundant that the victim of rape was an imbecile. PW 4, the victim's father was clear on this. The same applied to PW 2 and PW 3 who are the victim's neighbours. The Doctor who medically examined the victim did not mince words and testified that that the victim '*alikuwa na ulemavu*'. Although he did no specify which handicap the victim had, the totality of the evidence shows that she was a lunatic, deaf and dumb.

Having observed that, I now consider if an imbecile or idiot can be raped. I think the answer must be in the negative. The law is clear that an imbecile or idiot cannot be raped but defiled. This is clearly spelt out under section of the Penal Code, [Cap. 16 R.E. 2019] which provides that:-

> "**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, commits an offence and is liable to imprisonment for fourteen years, with or without corporal punishment."

Was the victim a woman as defined by the law? In my view, the answer must be in the positive. Although the charge sheet shows that the victim was twelve years old, she was, as far as this case is concerned, a woman. A woman is defined under section 129 A to mean:

> **"129A**. In this Chapter "woman" means any female person and, unless the context requires otherwise or it is otherwise expressly provided, irrespective of age."

With that definition, it is clear that the victim in this case was a woman, irrespective of her age.

Although the evidence supported the charge of defilement of idiot or imbecile, the particulars of the offence did not disclose the ingredients of such offence. For instance, it was not established that appellant knew that the woman was idiot or imbecile. In other words, the charge did not disclose the ingredients of the other offence. This means that the appellant cannot even be convicted with an alternative offence of defilement of imbecile or idiot.

As the appellant was charged under a wrong provisions of law, that is Sections 130 (2) (e) and 131 (1) of the Penal Code, and the particulars of the offence did not prove the commission of the

cognate offence, the conviction and attendant sentence cannot be allowed to stand.

In consequence, the appeal is allowed, conviction quashed and sentence set aside. The appellant is to be released from custody forthwith unless legally held for other causes.

It is so ordered.

W.P. Dyansobera

Judge

8.10.2021

This judgment is delivered under my hand and the seal of this Court this 8th day of October, 2021 in the presence of the appellant in person and Mr. Paul Kimweri, the learned Senior State Attorney for respondent.

Rights of appeal to the Court of Appeal explained.

W.P. Dyansobera

Judge