IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(IN THE DISTRICT REGISTRY OF DAR ES SALAAM)

AT DAR ES SALAAM

CRIMINAL APPEAL NO 75 OF 2021

(Appeal from the decision of the District Court of Ilala at Ilala in Criminal Case No.529 of 2018 delivered on 22 .12.2020 by Hon. Kanje, A. RM)

BETWEEN

FADHILI AFIDHI @ JOFU.....APPELLANT

VERSUS

REPUBLIC .....RESPONDENT

JUDGMENT

MRUMA J,

In the District Court of Ilala at Ilala, the appellant Fadhil Afidhi@ Jofu was charged with the offence of Rape contrary to sections 130 and 131(1), and Unnatural Offence contrary to section 154(1) (a) both of the Penal Code Cap 16 R.E 2012. Upon full trial he was found guilty as charged and was convicted and sentenced to 30 years imprisonment on each count. The sentences were ordered to run concurrently.

The material facts leading to the Appellant's arrest as obtained from the record of the trial court. The record shows that that on 17th July, 2019 PW1 Mohammed Abdallah testified before C.A. Kiyoja RM and told the court that on 12th September, 2018, at around 12.00 noon PW1, Mohammed Abdallah received a phone call from his sister Salima Simon telling him that the victim (PW2) had not been seen at home and that Allen and Anastazia had seen her entering in the house of Geofrey. PW1 went back home and saw PW2 standing outside Geofray's house. He took her back home and interrogated her. PW2 told him that she was at Geofray's house making love both naturally and against order of nature after she was threatened with a knife. From there PW1 went to the accused home and narrated the story to him. The accused denied to have been with PW2 and he insulted PW1. PW1 decided to report the matter to Tabata Shule Police Station where he was given a PF3.

Following the transfer of Kiyoja RM to another working station, the matter was re-assigned to honourable Luvinga RM and it appears PW1 testified afresh. He gave his testimony before Luvinga RM on 26. 11.2019. This time he changed the story and told the court that on 12th September, 2018 at around 14.00 hours he received a phone call from Salima telling him that Hilda (the victim) had entered in the room of Fadhili @ Geofrey and he was requested to come back home. When he

arrived at Geofrey's (Hafidh's) place he found Hilda outside the door of Geofrey's room. He took her back home and asked her where she was. Hilda told him that she was from Hafidhi's room and that Hafidhi had forced her to enter his bed room where he raped and sodomized her while holding a knife. It is further evidence of PW1 that he went to Hafidhi's and asked him what did he do to Hilda but Hafidhi insulted him that he is a fucked man. At around 19:00 hrs he went to Tabata Shule Police station to report the incident, but he didn't succeed on that day because there were few police officers. He was requested to go again on the following day. According to PW1 he went to report the incident on 15.9.2018 and he was given a Police Form No.3 then he went to Tabata Shule Hospital for medical check-up of the victim. At the hospital Eveline Wilson Zangwi, a clinical officer (PW3) conducted an examination and found that the victim was raped and sodomized.

PW2 (the victim) a 16 years girl testified that between September 2017 and September 2018 after she had finished standard seven, she went back home at Tabata Chang'ombe where she was living with her sister and brother Mohamed Abdallah (PW1). She told the court that during that period the accused wanted to have love affairs with her but she refused. According to her after persistent approach by the Appellant she agreed to go to the accused place where the Appellant continued to

convince her to have sexual intercourse with him. She said that while in the room of Appellant he pushed her on his sitting coach, then he undressed her khanga, skirt and her underwear and he took his penis and inserted into her vagina after undressed himself. It was futher testimony of PW2 the Appellant turned her back and took his penis and inserted into her anus. She told the court that blood came out from her vagina. After the act the Appellant chased her and warned her not to tell her sister.

PW2 testified further that in September 2018, the Appellant called her to dress his hair but she refused. However, she later on went to the Appellant's room where she found the accused with his friend one Isaac. After sometimes later Isaac left and she remained with the Appellant It is her evidence that the Appellant requested her to have sexual intercourse but she refused. Upon her refusal the Appellant pushed her into his bed. She screamed to no avail. The Appellant undressed her underwear and skirt then he inserted his penis into her vagina and the he turned her back and inserted it on her anus and he threatening her not to tell anybody. When she was getting out she met her brother (PW1) who asked her what was going on. She didn't tell him anything but when he insisted she told her that Appellant had forced her to have sexual intercourse with him. She said that on the next day PW1 went to

police station to report the incident and on 15.9,2018 she was summoned to Tabata police station. She was given a Police Form no.3 and advised go to a hospital for medical examination. After the examination she was told that she had suffered injuries on her private parts.

Eveline Wilson Zagwi who introduced herself as a clinical officer testified as PW3, testified that on 15.9.2018 at around 11:00 hrs while at her duty station she received a girl with his father. They had a Police Form No. 3 (PF3) they wanted medical examination to see whether she was raped. She said that she took girl's history and requested for some laboratory tests such as HIV test, syphilis test and urine test. The result showed that the girl was free from any infection. She conducted physical examination in her vagina and anus. She had no physical injuries and pains in her vagina but she had no hymen. PW3 found some white discharges that were coming out and the anus was open and had old injuries or bruises. It was the evidence of PW3 that she guessed that something soft could have caused those bruises and opening. That she issued anti-pains and antibiotic medicines.

In his defence, the Appellant denied committing the alleged offences. He said that one tuesday when he was at his home, he wanted to put super black in his hair then he called his friend Isaac and he put

the super black on his hair. Thereafter they entered inside his room and were listening to his recorded song. While there the door opened and PW2 popped in. She told them that that she had come to watch video. The Appellant did not bother because his friend Isaac was there, after a while Isaac left and PW2 was inside and then after the video end PW2 also left. After that PW1 (the victim's brother) came in and started to insult him.

In its Judgment the District Court found that there was evidence that the accused raped and had carnally known the victim. The trial court held that there was evidence of penetration into the victim's vagina. On top of that the victim was carnally known against order of nature. The Court proceeded to find the Appellant guilty and convictedhim forthwith.

The Appellant was aggrieved, and has appealed to this court on the following grounds:

1. That the learned trial magistrate grossly erred in law and fact in holding that the victim's age had been proved yet the prosecution failed to either tender any birth certificate or hospital chit and that citation of age in the charge sheet or victim's age before giving evidence.

2. That, the learned trial magistrate grossly erred in both law and fact in convicting the Appellant based on PW1 and PW2's evidence yet she had no chance to see and assess their credibility and demeanor while testifying in court as their evidence was heard and recorded by her predecessor.
3. That, the learned trial magistrate grossly erred in both law and fact by convicting the Appellant based on PW3 (Doctor) evidence yet in her evidence she didn't state the method used in examining the victim but findings were based on assumption as stated in her evidence rather than facts.
4. That, without prejudicing the above ground of appeal the learned trial magistrate erred in convicting the appellant based on incredible and unreliable evidence of PW2 who had lied to her brother and to the court as we would expect her to have accompanied her brother and to the police to report the said incident and be examined before given a PF3 form.
5. That the learned trial magistrate erred in both law and fact in convicting the Appellant based on PW1 testimony despite him having shown that he was a lier when he was called to testify for the second time as he had given a totally

different statement from the one, he had given at first instant, hence it was open that he could have induced his sister to fix the appellant for reason better known to him.

6. That the trial magistrate erred in law and fact by convicting the appellant based on unreliable Exhibit P1 tendered by PW3.
7. That the learned trial magistrate erred in holding that the prosecution had proven both count as required by law.
8. That, the learned trial magistrate grossly erred in failing to believe the appellant's side of story who had shown to be clean and transparent as he had nothing to hide hence failed to note that the prosecution case was a concocted one aimed to destroy the Appellant future and career.

On those grounds he had prayed this court allow the appeal, quash the conviction, set aside the sentence and set him free.

The appeal was conducted by way of written submission. The Appellant appeared in person and unrepresented while the Respondent/Republic enjoyed the services of Nasoro Katunga learned Senior State Attorney.

The learned State Attorney supported both conviction and sentence. He submitted that the Appellant battled issues of age,

credibility, demeanour of witnesses and contradiction of evidence made by PW1 which complaints are unfounded.

Submitting on the issue of age of the victim, the Appellant submitted that the prosecution failed to prove the age of the victim. He said that PW1 testified that victim was 15 years while PW2 the victim herself told the court that she was 16 years old.

Submitting in response to the Appellant submissions the learned State Attorney contended that at page 18 of the proceedings PW1 stated that the victim's age was 16 years and that was repeated by PW2 herself when she stated at page 11 that her age was 16 years old. On page 9 of the judgment trial Magistrate held that during the time of commission of crime the age of victim was 15 years old. To fortify his argument, he cited the case of **Andrea Francis Vs. R CAT, Criminal Appeal No. 173 of 2014 (Unreported).** He also referred this court to the case of **Zacharia Edward Vs. R, CA NO. 131 of 2020, CA** at Mwanza, which cited with approval the case of **George Claud Kasandra V DPP, CA NO.376 of 2017 CAT** at Mbeya where it was held that the age of victim can be proved by the victim herself, parent, near relative, medical doctor or birth certificate. It was the submission of the learned counsel that in the present case the Appellant did not dispute the age of the victim as he did not cross examine PW2 regarding the same. Accordingly

it was his submission that the age of the victim was proved since the victim stated clearly in her statement that she was 16 years old.

I have gone through the records of trial court in deed the charge sheet indicated that the victim is of age of 15 years old, PW1 stated that victim is of 15 years old while the victim on her testimony she stated that she is 16 years old. The evidence of the victim must have reference to the time she was testifying which is almost a year after the commission of the alleged offence. I therefore see this ground of appeal to have no merits.

Regarding to third ground of appeal that the evidence of PW3 (Doctor) was unreliable as the Doctor did not state the method used in examining the victim. The learned State Attorney submitted that there is no law that require the Medical Doctor to state the method used during examination. According to him the fact that the medical personnel examined PW2 was sufficient even if he did not explain what method she used because PF3 does not require PW3 to give details of what method was used in examining the victim. On this point I beg to differ with the Learned State Attorney. It should be noted that the Appellant was facing the charge of rape and unnatural offence or simply sodomy under section 130 (1), (2) (e) and section 154(1) (a) both of the Penal

Code. For easy reference I reproduce the said provision. Section 130 provides as follows:-

(1) *It is an offence for a male person to rape a girl or a woman.*

(2) A male person commits the offence of rape if he has sexual intercourse with a girl or a woman under circumstances falling under any of the following descriptions

(e) with or without her consent when she is under eighteen years of age, unless the woman is his wife who is fifteen or more years of age and is not separated from the man

And Section 154.-(1) provides:

Any person who-

(a) has carnal knowledge of any person against the order of nature;

For offence of rape the prosecution is required to prove penetration. In this case the only witness who came to testify about penetration was PW3 the Medical Doctor who stated that;

> "I guess that, something soft could cause those bruises and opening".

Here the medical doctor did a guess work. The record shows that the victim was presented before the Doctor for medical examination three days after the incident that means there was nothing that pointed the appellant to have committed such offence. The victim didn't say anything regarding penetration. The prosecution was

required to prove beyond reasonable doubt that there was penetration and the accused was one who did that offence. The facts of the case as read out during the Preliminary Hearing conducted on 21st February, 2019 testimony of PW1 before honourable Kiyoja RM received on 17th July, 2019 and his testimony before Luvinga RM recorded on 26th November 2019 leaves a lot to be desired. In the preliminary hearing conducted on 21st February, 2019 the accused name was stated as Fadhil AFIDHI @ JOKU who was 20 years old. In his evidence before Kiyoja RM, PW1 testified against a person he referred to as Geofrey and that he was informed about the incident by his sister Salima Simon who called him on phone at around 12:00 hours on 11th September 2018. When he testified before Luvunga RM, he mentioned the accused as Fadhil Geofrey and sometimes he referred him as Hafidhi and he told the court that he received a phone call from Salima on 12th September 2018 at around 14:00 hours. These contradictions were not cleared by the prosecution. I am alive of the position of law as it was stated in the case of **Selemani Makumba V Republic, Criminal Appeal No. 94 of 1999** (unreported) where the Court of Appeal held that: -

"True evidence of rape has to come from the victim, if an adult, that there was penetration and no consent and in case of any other women where consent is irrelevant that there was penetration."

But where there is material contradiction on the prosecution's evidence regarding the occurrence of the incident itself, and where there is suspicion that there is likelihood that the story was cooked, the evidence of the victim must be approached with utmost care as child witnesses are easily coached. For instance in the case at hand evidence on record shows that the victim testified to have been raped and sodomized between September 2017 and September 2018 the charge sheet shows that the offence was committed on 12.9.2018, and there is nothing on evidence which gave explanation of these contradictions. In my view in a situation like this where the exact date(s) of commission of the alleged offence is not clear, where the medical expert didn't give details of how he/she arrived on the conclusion he arrived at and the victim say nothing to prove penetration, then the guilt of the appellant was not proved beyond reasonable doubt. This suffices to dispose this Appeal.

Since the prosecution failed to prove its case beyond reasonable doubt, the Appellant is entitled to benefit from the doubt found in prosecution's case. This court accordingly allow the appeal, quashes the

conviction and set aside the sentence. The Appellant should be set free unless otherwise lawfully held.

Order accordingly,

A.R. Mruma,

Judge,

6/9/2022.

Dated at Dar Es Salaam this 6th day of September 2022