

**IN THE HIGH COURT OF DAR-ES-SALAAM**

**[DAR-ES-SALAAM DISTRICT REGISTRY]**

**AT DAR-ES-SALAAM**

**CRIMINAL APPEAL NO. 116 OF 2022**

**MOHAMED ALLY.....APPLICANT**

**VERSUS**

**THE REPUBLIC.....RESPONDENT**

*(Appeal from the decision of the District Court of Kibaha at Kibaha, F.L. KOBONA, RM in Criminal Case No. 25 of 2021)*

**JUDGMENT**

*Date of Order: 04/10/2022*

*Date of Judgment: 31/10/2022*

**BADE, J**

The Appellant herein above appealed before this Court against the decision of Kibaha District Court in Criminal Case No. 25 of 2021, he was charged with the offence of rape contrary to sections 130 (1) and (2) (e) and section 131 (1) of the Penal Code, Cap 16 R.E. 2002 respectively and upon conviction he was sentenced to serve 30 years' imprisonment.

The highlight of the fact of case is that, on the 04<sup>th</sup> of March, 2021, at Mihande- Mlandizi area within Kibaha District in the coast region. The appellant then accused person did have sexual intercourse with one LB

whose age is 13 years old, the Appellant pleaded not guilty against the said charge.

The facts of the case can be briefly summarized that the victim of the offence, her sister and brother in law who is a husband to the sister lived together up until the commissioning of the alleged offence, which is pegged on 4<sup>th</sup> March 2021. It is on record that on the fateful day at night but unspecified time, the sister left for the shops and left behind her husband and the victim with her own children. According to her testimony, she was hardly gone half an hour, and upon her return, she found the victim of the offence crying, and as she asked what was the matter, she did not respond. She alleges that the appellant went to where she was sleeping and started to touch her private parts while threatening her that she will kill her if she screams. He removed her clothes as well as his own, and inserted his penis (he describes it as the thing he uses to urinate) in her vagina (her part that she uses to urinate). The next day she went to school but had to come back home as she found herself bleeding. At this point she narrated what happened to her the previous night, and was then taken to the Mlandizi police and eventually the hospital.

Meanwhile, it's the appellant's defence when he was ruled with a case to answer, that he was away during the alleged time, busy handing over properties away from home. He tendered exhibits, which were said to not show the particular days if they matched the dates where the allegations are centred.

The Appellant's petition of appeal consists of a total of 7 grounds of appeal which are as follows;

1. That, the learned trial Magistrate erred in law and fact by convicting and sentencing the appellant while the case against him was not proved by the prosecution side at the required standard of proof in criminal cases which is beyond reasonable doubts.
2. That, the learned trial Magistrate extremely erred both in law and in fact by convicting and sentencing the appellant by relying on the victim's evidence in absence of any strong corroborating evidence from eye witness (direct evidence).
3. That, the learned trial Magistrate grossly erred in law and fact by not considering the key element of rape.
4. That, trial Magistrate grossly erred in law and fact by completely ignoring the defense of alibi that was raised by the Appellant.

5. That, trial Magistrate erred in law and fact by basing his decision on the PF3 which did not directly implicate and prove the charge of rape against the appellant as the examination was conducted on the second day after the alleged offence of rape.
6. That, the trial Magistrate erred in law and facts for the failure to ascertain the credibility of the victim evidence and testimony.
7. That, the trial Magistrate failed to take into account the time and the circumstances the victim has explained the incidence of rape.

Looking at the grounds of appeal, the issue for consideration before this court is whether the Prosecution has proved the alleged offence of rape charged against the appellant beyond reasonable doubt.

The appellant's case in essence is that the prosecution has failed to prove its case beyond reasonable doubt with evidence that is incredible, insufficient, uncorroborated and contradictory, on one hand, and failed to consider the appellant's defense on the other, and that the appellant was not around during the alleged commission of the offence.

The Appellant alleges that the said trial court's judgment has failed in its consideration to look at the evidence and scrutinize the same to satisfy itself

if it is without doubts and uncertainties. In substantiating his arguments, the appellant picked on the Doctor's report P2, that this report shows that PW5 did not find any bruises in the said victim's vagina but also the said victim herself told the Doctor that she was in her menstrual cycle. The Doctor observed the same after he made the examination, as he stated that he examined the victim of the offence, who is 13 years old on the 6<sup>th</sup> March 2021 and he found no bruises on her vagina, she had no hymen, there were no sperms, she was not pregnant, and she found no problem at her anus. He also observed that the alleged victim was in her menstrual cycle as per pp 10 – 12 of the typed proceedings for the PW1 testimony; and p 32 of the proceedings for the PW5 testimony.

In reply to the said grounds of appeal, the Counsel for the Respondent argues that the fact that the victim of the offence who is 13 years old after being examined by PW5 she was not found with hymen, hence that evidence corroborates the victim's evidence. So what stops the trail to the accused person that he is the one that had carnal knowledge of the victim and raped her and no one else. The learned counsel urges that, since the victim has testified on how the appellant undressed her and inserted her penis, the said

where she said she was bleeding because of her menstrual cycle; pg 28, and pp10-12 of the typed proceedings. Further, the said evidence which is termed as corroborative by the respondent's counsel, that is P2 which is the PF3 report as tendered by PW5 after examining the said victim, shows that PW1's vagina had no bruises, nor did it had the hymen; and there were no sperms found. In any case, these are doubts that have to be resolved in the Appellant's favour because it is for the prosecution to prove its case, not for the accused to prove his innocence. That there are lots of doubts in the prosecution evidence since the results of the contents of exhibit P2 have not been disputed by the Respondent hence they negate the substance of the prosecution evidence, and such doubts qualify to being reasonable doubts. The evidence to say the least is rather contradictory than corroborative. The evidence for instance on when exactly the incident happened is itself contradictory and question the credibility of the witnesses, with the father of the victim saying it was on 4<sup>th</sup> March, and later on while being cross examined saying it was 5<sup>th</sup> March see typed proceedings on PP 13-15. In **Yohana Dioniz and Another vs Republic, Criminal Appeal No. 114 of 2009** (unreported), the Court has emphasized that:

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*"This is a second appeal. At this stage the Court of Appeal would be very slow to disturb concurrent findings of fact made by the lower courts, unless there are clear considerations or misapprehensions on the nature and quality of evidence, especially if those findings are based on the credibility of witnesses."*

The trial court in the course of the hearing, should have made inferences negative or otherwise on the testimony of the victim of the offence as she was contradicting herself between the fact that her bleeding was due to the fact she was raped by the accused, or is it because she was bleeding due to her menstrual cycle. In the case of **Yasin Ramadhani Chang'a v. Republic** [1999] TLR 489, the Court made a general observation that:

*"Demeanor is exclusively for the trial court. However, demeanor is important in a situation where from the totality of the evidence adduced, an inference or inferences, can be made which would appear to contradict the spoken words."*

I must agree with the Appellant here that there are doubts that rips the very root of the matter, and that is not to say the mode through which the victim identified the accused does not meet the required standard of law, which



means the prosecution has failed its duty to prove their case at the required standard.

With regards to the failure of the court to consider an Accused's defense of Alibi as the 4<sup>th</sup> ground of appeal, it is my considered view that, defense of alibi is acceptable but subject to the condition that the one intending to rely on it must give a prior notice in court to that effect, there is nowhere an accused proves to have complied with that condition, I subscribe to the Respondent's learned counsel view that since an Accused did not inform the trial court before the hearing on his reliance on the defense of alibi, it is legally required condition that has to be met before the hearing of the matter. **Section 194** of the Criminal Procedure Act, cap 20[ R:E 2022] provides thus:

*"194, (1) - N/A*

*(2) -N/A*

*(3) -N/A*

*(4) Where an accused person intends to rely upon an alibi in his defense, he shall give to the court and the prosecution notice of his intention to rely on such defense before the hearing of the case.*

*(5) Where an accused person does not give notice of his intention to rely on the defense of alibi before the hearing of the case, he shall furnish the prosecution with the particulars of the alibi at any time before the case for the prosecution is closed.*

*(6) If the accused raises a defense of alibi without having first furnished the prosecution pursuant to this section, the court may in its discretion, accord no weight of any kind to the defense."*

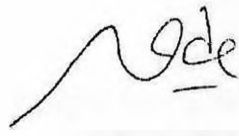

In line with the above position, the fourth ground of appeal fails as the Appellant failed to comply with the said conditions.

I now turn to the 7<sup>th</sup> ground of appeal, since both parties have not argued upon this ground, I found it illogical to deliberate on it. The danger of digging onto it is like the act of raising issues which have not been brought by the parties or pleaded in court. In my considered view this ground of appeal seem to be ambiguous, as it is not clear if the appellant is referring to the fact that the victim of the offence did not report the incident at the earliest opportunity it happened, or that it was not clearly adduced how the victim identified the accused. It is this court's finding that this is as good as there is no 7<sup>th</sup> ground of appeal. And thus it is of no effect either way.

In the upshot, this appeal is hereby allowed with the effect that the conviction and sentence are quashed and the Appellant is set at liberty; unless he is held for other lawful cause.

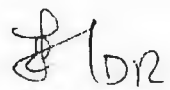
It is so ordered accordingly.

**DATED at DAR ES SALAAM on the 31<sup>st</sup> October 2022.**

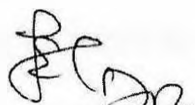
  
  
**A.Z. BADE,**  
**JUDGE**  
**31/10/2022**

COURT: Judgment is delivered by Hon. Nyembele, DR in the presence of Appellant in person, and Ms. Laura Kimario, Senior State Attorney for the Respondent this 01<sup>st</sup><sup>th</sup> day of November 2022.

Right of appeal is explained.

  
01/11/2022

Signed

  
01/11/22