IN THE HIGH COURT OF THE UNITED REPUBLIC TANZANIA
TANGA DISTRICT REGISTRY
AT TANGA

CRIMINAL APPELLATE JURISDICTION

DC CRIMINAL APPEAL NO. 61 OF 2022

(Originating from the District Court of KOROGWE
CRIMINAL Case No. 46 of 2021)

SALIMU MOHAMED RAMADHANI---------- APPELLANT

VERSUS

REPUBLIC----------RESPONDENT

JUDGEMENT

Mansoor, J :
Date of Judgement- 22ND MARCH 2023

The appellant appeared before the District Court of Korogwe at Korogwe charged with rape c/s 130(1) (and 2) (c) (e) of the Penal Code [CAP 16 R.E 2019]. The section reads:

> (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:

c) With her consent when the consent has been obtained at a time when she was of unsound mind.....unless proved that there was prior consent between the two.

(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 him.

The particulars are that, on 22nd day of November 2021 at Kwasunga Village within the District of Korogwe in Tanga Region, the appellant did have carnal knowledge of one Victim ZS (Not actual name to hide her identity), a girl of 14 years old. The appellant was charged under Section 130 (2) (c) since the girl was of unsound mind, but with her consent, and he was charged under Section 130 (2) since the girl was under the age of Eighteen.

The appellant entered a plea of not guilty therefore, a trial was conducted. The prosecution/respondent availed a total of six witnesses and one exhibit (P1) which is a PF3 of the Victim. The appellant defended himself, and the appellant's mother gave the evidence as DW2.

In a nutshell these are the brief facts of the case.

On records it appears that the appellant is the neighbour of the victim (PW1). The victim lives with her grandmother Asha Hussein who testified as PW1. PW1 said she was informed by PW3, who is also a child of six years, the records did not show if PW3 lives with the appellant or the victim or a relative of the appellant or the respondent, or if he was just a boy from the neighbourhood. SM3 told SM1 that the victim is with the appellant in the appellant's house having sex. PW1 said she reported to the Village Executive Officer and, the Chairman, they all went to the appellant's house, they saw the victim coming out of the house, and the appellant was found in his room. The Village Executive Officer inspected the girl, she had

some dirty stuff coming out of her vagina, they took her to Police Station at Makuyuni, then to Mombo Police, they were given a PF3, and the victim was taken to the Hospital.

On the same day, a medical Doctor (PW7) conducted a medical check-up. The result did not reveal that she was raped but she was not a virgin, but she had fungus in her vagina. For ease of reference I shall reproduce what was written in PF3.

> "Both examined normal with no hymen intact and found she has been involved in sex many times. There is whitish discharge from the vagina smelling in nature. The child examined and found she has been involved in sexual actions even before due to genital examination."

The PF3 was admitted in court as **Exhibit P1**.

The Doctor was examined as PW7, he said and I quote:

> "Tulimpokea XZ na kumfanyia uchunguzi ila kwa muda huo hatukuweza kuona kama amebakwa ila ilionyesha kuwa alikuwa akijihusisha na ngono.....pia tuligundua kuwa binti huyu ana maambukizo ya fangasi au bakteria hakukutwa na ukimwi kaswende wala mimba....."

Another interesting piece of evidence is the evidence of the Village Executive Officer who testified as PW4, she said she has asked the victim if the appellant has raped her but the victim said the appellant sucked her nipples and she felt good, the victim did not tell the village leader that she was raped or she had sexual intercourse with the appellant.

The prosecution also claims that there was an eye witness who is also a child, he testified as PW3, he was 6 years old and he promised to tell the truth. He said he saw Salim and the victim wanabakana, but he did not say where and at what

time. He only said he saw them having sex. His testimony was very short and there were no details of where and at what time he saw the two having sex, he did not even say if he entered the room of the appellant and saw them having sex or maybe he only peeped from the window or maybe he just guessed since the two were together in the house of the appellant.

The appellant fended that he never raped the victim. He lives with his parents and therefore he could not have the victim in his house when her mother was also at the house. DW2 was the appellant's mother who said that the appellant was not at home at the time the alleged rape had happened.

The trial magistrate having satisfied herself that the prosecution has proved the charge beyond reasonable doubt, she convicted the appellant and sentenced him to serve the minimum sentence of 30 years in prison.

Dissatisfied with the conviction and sentence, the appellant has appealed to this court by levelling a total of four grounds of appeal of which I reproduce hereunder:

1. That the evidence of PW1 and PW2 lacked essential elements of proving the offence of Rape.

2. That the learned trial failed to notice that the medical evidence of PW7 did not corroborate the offence of Rape.

3. That the learned trial magistrate erred in law for acting upon weak, unreliable and contradictory evidence of the prosecution witnesses.

4. That the case against the appellant was not proved beyond reasonable doubt.

The Appellant, therefore, humbly prays before this Honourable court to allow the appeal, quash the conviction, set aside the sentence, and set him at liberty.

I shall begin with Ground No 2; the appellant submitted that the doctor's evidence (PW7) never supported the charge. That when the test was done the victim was found to be the habitual and she had much sexual intercourse before the date of the alleged incident, and there was no proof that on the date of the incident the girl was raped. The prosecution in the reply submission said the law does not require the presence of certain things to prove rape. They argue that section 130 (4) (a) of the Penal Code Cap 16 R: E 2022, one of the sexual element for proving sexual intercourse is penetration, however slight, and that the evidence of the medical Doctor (PW7) clearly show that the victim did have sexual intercourse, that the hymen was not intact and that she has been engaging in sexual intercourse, and the testimony of the Doctor supported the case for the prosecution. I reproduced herein above the contents of PF3 which was admitted as Exhibit P1, and the testimony of the Medical Doctor who testified as PW7.

The offence at hand is a statutory rape and the punishment is provided for under section 131(1) of the Code.

> ***131.-(1) Any person who commits rape is, except in the cases provided for in the renumbered subsection (2), liable to be punished with imprisonment for life, and in any case for imprisonment of not less than thirty years with corporal punishment, and with a fine, and shall in addition be ordered to pay compensation of an amount determined by the court, to the person in respect of whom the offence was committed for the injuries caused to such person.***

(Underline is mine for emphasis)

Having a look at the nature of the punishment, it is obvious that the offence is a grave and a serious one. Its minimum sentence is 30 years imprisonment and therefore needs a

thorough and a serious investigation and straightforward evidence. For there to be an offence of Rape there must be penetration, and the penetration needs to be proved that it was the appellant who penetrated the victim. Analysing the evidence of the Medical Doctor (PW7), there was no proof that the appellant subjected the victim (PW-2) to sexual intercourse by inserting his male organ into her private parts (vagina) and since she was less than 14 years" old at that point of time, said acts constituting the offence of rape defined in Section 130 (1) and (2) (e) and Section 131 (1) of the Penal Code, Cap 16 R: E 2002. The evidence of the doctor did not assist the prosecution case as the doctor noted that the girl's hymen was not intact and she has been having sex many times before the date of the incident and on the date of the incident there was no proof that the girl was penetrated. Again, the Doctor noted smelly whitish discharge from the girl's vagina, and he concluded that the girl had fungal or bacterial infection, but he did not say if the girl was infected by the appellant. Again there was no proof of penetration, as

the doctor did not say if the white smelly discharge found in the girls vagina were sperms, and if they were sperms, whether they were the sperms of the appellant. There is doubt created by the Doctors testimony and the Doctors Report that there is a possibility that the girl had sex with some other person before the date of the incident, and so the DNA test was inevitable in this case to determine whether the white smelly discharge found in the girl's vagina were sperms, and if they were, whether the sperms comes from the appellant. The PF3 contradicted the entire prosecution case. This defect has shaken in a great deal the case for the prosecution as first there was no proof of any sexual assault to the girl done by the appellant, no proof of penetration either on the anus or a vagina confirmed by the medical report. I am satisfied that the discrepancy affected the merits of the case and this justifies the interference of the Magistrate findings of conviction.

I am aware, as was stated in **Seleman Maumba V. Republic [2006] TLR 379,** that in sexual intercourse, good evidence comes from the victim. However, I find no other evidence available to sustain a conviction. As already discussed herein above the evidence of the victim (PW2) has also suffered a fatal blow for being uncertain and incredible. However the testimony of the victim who is insane needs serious corroboration and a PF3 would have been a good piece of evidence to support the testimony of the victim, but on the contrary the PF3 weakened the prosecution case and did not support at all the victim's version. In the case of **Julius John Shaban vs. Republic, Criminal Appeal No. 53 of 2010**, in which the Court of Appeal held that "*it is true that PF3 would have supported the commission of the offence but rape is not proved only by medical evidence alone, some other evidence may prove it.*" In this case, the closest evidence which was used by the Trial Magistrate to corroborate the victim's version and to convict the appellant is

the medical evidence, and the evidence did not support the evidence of the prosecution.

Again, on merits, the evidence of the grandmother of the victim is not reliable and trustworthy. She did not say that she found the accused/appellant doing the act; she said she found the appellant in his room at his house, the house the appellant residing with his parents and as testified by the appellant's mother, on the date of the incident she was home, and her son, the appellant herein was never at the house. Since the time of the incident has not been shown, and since the grandmother did not say whether the accused was apprehended on the spot, and whether or not the appellant was alone in the house, the prosecution side could not discredit the evidence of the appellant and his mother. PW1/SM1 testifies that she found the victim outside the house of the appellant standing with her clothes on. She also did not say if the girl was undressed. She only says she was told by PW3 that the girl was raped; there was nothing to corroborate

her evidence. She also did not say if the girl's vagina was penetrated when the girl was inspected by the Village Executive Officer. When asked by the Village Executive Officer the girl said the appellant touched her nipples and she enjoyed it, it be noted that the girl is insane and could not be in a position to understand what was being asked. PW1, and the rests of the prosecution witnesses (except PW3) were not the eyewitnesses, they did not see the girl being sexually abused. Therefore, their evidence is unreliable. The victim also pointed a vagina when she was examined, but being an insane, her evidence was wrongly recorded by the trial magistrate. An insane cannot give evidence unless the court is satisfied that the mental disease has not impaired the witness's ability to understand questions or give rational answers to the specific questions, the evidential weight of an insane person is very shaky and low unless the Magistrate was satisfied that she was able to understand the questions and give the rational answers. The victim appears to not be able to give rational answers as testified by PW4, the Village

Executive Officer, the girl was asked if she loves the appellant , she said yes, and she also said she would not want the appellant to be taken to jail. She was asked if she wanted the appellant to marry her, the girl said yes. Obviously, the mental health of the victim impaired her ability to understand the proceedings. The proceedings before the Trial Court does not show that the Magistrate took any steps to satisfy herself before taking the evidence of an insane victim that her mental state did not impair her ability to understand the proceedings. Although the best evidence in sexual offences if the evidence of the victim, the victim in this case being an insane person, her evidence was to be taken under the cautions given under section 127 of the Evidence Act, and he evidence needed corroboration, which I found none in the proceedings.

The Investigating Officer committed several mistakes. He did not even draw the sketch map of the scene of crime to make the court clear of the spot of the commission of the crime. There is no reliable evidence to show that the appellant had

committed the offence in his house or his bedroom. The learned trial Magistrate erred in shifting the burden on the accused contrary to the principle of burden of proof in criminal prosecution, which burden is 100 percept on the prosecution, and the standard of proof is very high that of beyond reasonable doubt. Even if the evidence is taken on its face value, it does not disclose that the accused /appellant have committed the crime. There is no proper evidence to show that the actus Reus was committed, thus the accused cannot be convicted on the offence charged.

Thus, based on the above discussions, the appeal is allowed, and the conviction and sentence passed by the District . This defect has shaken in a great deal the case for the prosecution as first there was no proof of any sexual assault to the girl, no proof of penetration either on the anus or a vagina and again, the charge and the disposition of the victim contradicted each other, while the girl pointed at her vagina when examined , the charge sheet shows that the girl was penetrated on her

anus. I am satisfied that the contradiction affected the merits of the case and this justifies the interference of the Magistrate findings of conviction. Magistrate of Korogwe in Criminal Case No. 46 of 2021 is quashed and set aside. The appellant SALIM MOHAMED RAMADHANI is ordered to be released from imprisonment forthwith, unless otherwise held for any other lawful cause.

DATED AND DELIVERED IN TANGA THIS 22ND MARCH 2023

L. MANSOOR

JUDGE

22ND MARCH 2023