

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA**

**IN THE SUB-REGISTRY OF MWANZA**

**AT MWANZA**

**CRIMINAL APPEAL NO. 8 OF 2023**

*(Original Criminal Case No. 41 of 2022 of the District Court of Ilemela District at Ilemela)*

**JUMA KAKUYA ..... APPELLANT**

**VERSUS**

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

**JUDGMENT**

*22<sup>nd</sup> May & 18<sup>th</sup> July 2023*

**ITEMBA, J.**

The appellant herein, was charged with the offence of rape contrary to section 130 (1) (2) (e) of the Penal Code. It was alleged that on diverse dates of the year 2021 at Pasiansi Juu within Ilemela District in Mwanza region, he did rape YZ, a girl of 12 years old, herein a victim. Following a full trial, the appellant was convicted and sentenced to thirty years imprisonment. The appellant was definitely not pleased with the trial court's decision and he has filed this appeal with the following three grounds:

- 1. That, the learned trial Senior Resident Magistrate erred in convicting the Appellant on the basis of the evidence of Pw2 who had a medical condition affecting her ability to think and act properly.*

- 2. That, the learned trial Senior Resident Magistrate erred on relying on the PF3, exh. PE1 which was improperly admitted into evidence.*
- 3. That, since the Appellant's defense was not taken into consideration by the learned trial Senior Resident Magistrate the proceedings before her were vitiated.*

At the trial it was alleged that, the appellant was a barber and the victim used to go to his barber shop. That, the victim had health condition which stopped her from attending school. One day, the victim was with the appellant and he asked to have sex with her and she denied. The other day, he called her and took her in the bush and raped her. She did not mention it to anyone. The second time she was sent to the shop and the appellant called and raped her at the same bush. From there onwards the victim used to isolate herself, sleep more frequently and was scared to pass near the appellant's work place. The victims' mother (PW1) upon realizing the victim's change of behaviour, she questioned her and the victim mentioned to have been raped by two people, the appellant and another named Tolu. The matter was reported to the police and it was investigated by PW3. The victim was medically examined by PW4. She also took her mother and the police to the barber shop and identified the appellant who was later arrested and charged with offence. The appellant admitted to have known the victim as his customer but he disputed to have raped her. He also explained that he

had grudges with the victim's mother without clarifying of which type. He added that the victim had mental illness. The appellant brought one witness, a chairperson who stated that the victim has mental illness and the alleged scene is an open space, it is not easy for a person to be raped.

When the appeal was scheduled for hearing, the appellant was present and he was represented by Mr. Anton Nasimire learned counsel. The respondent was represented by Ms. Lilian Meli and Martha Mtiti learned state attorneys.

Submitting in support of the appeal, Mr. Nasimire argued the first 2 grounds jointly. He stated that the evidence relied by the trial magistrate was weak and unsatisfactory. That the court relied on PW2's evidence who is the victim but the evidence in record shows that PW2 was not mentally stable and it was therefore unsafe to rely on her evidence to convict the appellant.

He argued that, the contention that PW2 was not mentally stable is corroborated by PW1 her mother and DW2 who lives in the same street with PW2 and he categorically explained on PW2's mental illness and that she could not speak properly.

He added that PW2 mentioned 2 people who allegedly raped her namely Juma and Tolu. That, even PW3 an investigator, mentioned 2 people, the appellant and one Evarist and it is not entirely clear if Evarist is the same 'Tolu' who is mentioned by PW2. It is also not entirely clear why Evarist was not brought to court if he was mentioned by PW2.

The learned council contemplated that the victim alleged to have been raped twice by the appellant at page 8 and 9 of proceedings but she does not mention the relevant dates. At line 19 and 20 of page 8 of typed proceedings PW2 states that Juma used to rape me, but she does not state when, and she does not explain the details about being raped by the alleged "Tolu". Citing the case of **Godi Kasenegala v Republic Criminal Appeal no. 10/2008** Court of Appeal of Tanzania at Iringa, he stated that in rape cases the best evidence is that of victim and the rest of evidence is merely corroborative. In its totality, he argued that evidence of PW2 who is a victim is not satisfactory on its own to convict the appellant and even the corroborative evidence is equally deficient. He challenged the evidence of PW4, Dr. S. Makundi who examined PW2 stating that the PF3 which was produced as Exhibit P.1 had issues which raise doubts as to, if really PW2 was raped. He mentioned that no blood stain was noted and that the sexual

assault was done weeks prior to examination, the victim was stable clinically and there was no evidence of recent penetration. That if there was no sign of penetration, the evidence of a medical Doctor and the exhibit cannot adequately corroborate PW2.

As to the evidence of the investigator (PW3) he stated that PW3 received the file on 3.3.2022, although the charge shows the appellant raped the victim on diverse dates in 2021, 17/3/2022 is the date of the charge sheet. That, it is not known which are those dates and why the appellant was arrested all this late. It is indicative that mostly likely the appellant is framed.

He argued further that PW1, the victim's mother, did not witness the rape, in her own words at page 7 she states the PW2 did not inform her when exactly she was raped. However, PW1 states PW2 was raped on 8/12/2021 which is contradictory.

In respect of the 3<sup>rd</sup> ground, referring to page 6 of the judgement, he argued that the appellant's defence was not considered by the court. That, the court considered prosecution's evidence and believed it but the magistrate did not analyse the defence and she does not say why she rely more on prosecution's evidence than defence. There is nowhere showing that, the trial magistrate considering the defence and stating why she does

not believe it versus the prosecution. That, according to **Hussein Idd and another v Republic** (1996) TLR 166, when the defence is not considered, the proceedings are vitiated. He finally prayed for the conviction and sentence to be set aside.

In reply by Ms. Meli State Attorney opposed the appeal. Starting with the first 2 grounds, she argued that PW2 who was a victim showed that she was competent to testify and that there is no proof of mental incapability brought to court. She cited section 127 (1) (5) of The Evidence Act which states that every person shall be competent to testify and section 125(5) states a person of unsound mind is competent unless he is prevented by his condition from understanding the questions put to him and giving rational answers to them. She stated that even if the court will find the accused had mental condition she could still testify. She explained that the victim was direct and detailed on what happened to her at page 7 to 8 of typed proceedings. That, she also said they met and had sex twice, the evidence which proved penetration. She referred to page 7 of the proceedings where the victim said she is 12 years and the court questioned her and she promised to tell the truth. That, the victim did not give her testimony under oath but the court recorded that victim has sufficient knowledge to testify. The

learned state attorney cited the case of **Karim Seif @ Slim v Republic Criminal Appeal No. 161/2017**, Court of Appeal of Tanzania – Mbeya, which states credibility of witness is determined by several issues including coherence of testimony, apart from demeanor. She agreed on the principle that in rape cases the victim is the best witness as per **Selemani Makumba** [2006] TLR 379.

As regards the victim's delayed medical examination, she argued that it does not matter because the important fact is that the victim had no hymen. As for the date of incidence, she stated that PW2 told the court that she does not remember the date of rape that is why even the charge sheet states in diverse dates of 2021. She added that not knowing the dates do not negate the fact that PW2 was raped by appellant. On the mentioning of two different people as suspects, she pointed that identification of the appellant was not in dispute in this case, therefore, if there are other people mentioned "Tolu" that is not an issue. She maintained that PW2 mentioned the appellant as the perpetrator and even the testimony was against the appellant.

As to the scene of crime, she argued that PW2 said it was a narrow path (*uchochoro*) so, if PW2 said there were many people that's a possibility

but it is also possible that when PW2 was being raped, that specific day, people did not pass.

In the last ground; she submitted that if the defence was not considered, this being the 1<sup>st</sup> appellate court, it can step into the shoes of the trial court and analyse the said defence. She maintained that the evidence of PW1 and PW2 was still strong and unshaken.

In his rejoinder, Mr. Nasimire argued that, as per the victim's medical condition, the victim's mother said she is not schooling because of medical reasons therefore, there was no need of the Doctor to prove this and even DW2 at page 21 confirmed the same. He reiterated that PW2's evidence could not be relied in convicting the appellant. That, even if the victim promised to tell the truth but did she do so? He argued that, she didn't tell the truth if she says she was raped on 2 different occasions she mentions neither the date nor the year. Yet, she mentions to have been raped with Juma and Tolu and 'then Juma used to rape me'. It is not clear as to which statement should the court pick among the 3 contradicting statements. That, in view of these contradictions the appeal be decided in the appellant's favor.



In the last ground, he insisted that non consideration of defence vitiates proceedings and duty to assess the defence is of trial court not appellate court and non-consideration of defence is not curable.

Having considered the evidence, record of appeal and both parties' contentious arguments, the issue is whether the prosecution has established the offence of rape offence against the appellant. I must state that this appeal has really exercised my mind.

Section 130 (1) (2) (e) and (3) **of the Penal Code** establishes the offence of rape. It provides thus:

*130.-(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. (emphasis supplied).*

While composing the judgment, it appeared that, the issue of the victim's mental condition was relied by the appellant as one of the grounds of appeal. Considering that, the court moved the parties to consider if there

is evidence to prove that the victim had mental condition and if so to address on whether in respect of section 137 of the Penal Code, the appellant was properly charged with the offence of rape. Both parties issued a brief written submission on the aspect. Mr. Nasimire counsel for the appellant, was of the view that, if one has to believe the story of PW1, PW2 and DW2 then the victim was at the time of her alleged sexual assault, an imbecile which brings the case within the ambit of section 137 of the code. However, citing the case of **Aziz Mustapha v Republic** Criminal Appeal No. 21 of 2021, he insisted that as there was no solid evidence of unlawful sexual intercourse between the two, and that the appellant knew of the victim's status then even the offence under section 137 cannot be proved. The learned counsel finalized by stating that even if there was evidence to support the allegations against the appellant, there is variance of evidence between the charge and evidence and to him, the offence of defilement of idiots or imbecile, is not cognate to rape therefore, there is no evidence against the appellant, at all.

In the other side the Messrs George Ngemera and Ibrahim Salim learned state attorneys submitted that the issue of mental illness was only mentioned by the appellant during his defence. That, the victim's mother did not state anything about mental health, she said the victim is not going to

school due to medical reasons and medical reasons does not mean mental reasons. That, if needed, the appellant would have cross examined further on that aspect. The counsels added that, the victim's mental illness, if any, could have been observed by the trial court in accordance with section 127(5) of the Evidence Act but the proceedings are silent on that. They cited the case of **Nyakubonga Boniface v Republic** Criminal Appeal no. 434 of 2017 stating among others that, the trial court is in better position to assess the witness' demeanor.

To answer the issue whether the appellant was properly charged, the answer is in affirmative regardless of whether she was mentally fit or not. As for the reasons, I will let the words in **Fadhili Makanga V Republic** Criminal Appeal No. 458 Of 2017 speaks for themselves.

*'On whether the charge was defective or not, we are of the view since, the victim being under eighteen years of age, the charge preferred against the appellant under the circumstances was proper, since the said provision, that is section 130(l)(2)(e) and 131(1) of the Penal Code, specifically addresses raping a girl under the age of eighteen (18) years regardless of her mental status of the victim. The age of the victim was proved by the testimony of PW1, her mother. At the*

*same time we have failed to find any specific provision addressing raping a girl of unsound mind under the age of eighteen years. Section 130(2)(c) criminalizes raping a woman of unsound mind and section 137 of the CPA addresses defiling of idiots and imbeciles but do not specify the age factor.'*

Therefore, the appellant was properly charged.

Back to the grounds of appeal, I will respond to the three grounds jointly as in some way, they are interrelated. The 1<sup>st</sup> and 2<sup>nd</sup> grounds of appeal, basically challenges the competency of PW2 as a witness due to mental illness. There is evidence from the victim herself, her mother (PW1) that the victim is not schooling due to 'medical reasons'. Then, DW2 who is a street chairman states that 'the victim is having mental illness she cannot speak properly'. I would disagree with the appellant's counsel on the aspect that the appellant did not know of the victim status because at page 20 of the typed proceedings, in his defence, during cross examination he stated that;

*'I am familiar with the victim, she was my client, she used to come to my workplace at Pasiansi, she is having mental condition, when she came to my office (salon) she was accompany (sic) with the sister'*

I will agree with the learned state attorney that health condition may not necessarily mean mental condition. Further, I find that, sensibly, between the mother of the victim and the street chairperson, it is the mother who is in best position to tell the real condition of the victim. However, the defence has already raised a serious doubt, by questioning the mental condition of victim because the type of disability raised, may affect even the type of charge against the appellant. As mentioned above, if otherwise the appellant would have been charged with the offence of defilement of idiots or imbecile under section 137 of the Penal Code.

It was a duty of the prosecution to source from PW1, the victim's mother, as to why the victim was not going to school? What exactly was the kind of medical condition? Apart from PW1, even the medical doctor who testified, could have been led to clarify on the health situation of the victim. In the other side, the court itself could have probed the witnesses to explain more in relation to the victim's health status and this could have led to certainty as to the real victim's health status and possibly led the case into a different direction altogether. In its judgement, the trial court did not state anything regarding the appellant's line of defence from DW1 and DW2 that the victim was mentally incapacitated. This is also raised in the 3<sup>rd</sup> ground of

appeal. The prosecution has invited this court to step into the shoes of the trial court and assess the defence, and I agree that, this is the position of the law as stated in case of **Siza Patrice Vs. Republic** Criminal Appeal No. 19 of 2010. In this case, it was held *inter alia* that, *'....a first appeal is in the form of a re-hearing. As such, the first appellate court has a duty to re-evaluate the entire evidence in an objective manner and arrive at its own finding of fact if necessary.'*

I will therefore step into the shoes of the trial and do what it ought to have done. In respect of the defence raised, the appellant, as already mentioned above, DW1 mentioned that the victim had mental illness during cross examination. Then, DW2 at page 21 also states as follows:

*'I saw the victim, she is almost 11 years old, she is residing at my street, **the victim is having mental illness, she cannot speak properly**, I cannot prove it the victim mentioned the name of accused, I have doubt, I was not around when she was raped.....'*

It is trite law that the defence only need to raise a doubt and not to prove anything. See **Yusuph Nchira Vs. The Republic** Criminal Appeal No. 174 of 2007 (Unreported). Where the court stated that, *"The appellant had only to raise doubts and prosecution had to prove its case beyond reasonable*

*doubt. The appellant's story need not be believed. He had only to raise a reasonable doubt and not to prove anything."*

I think, based on this defence the prosecution would have gone further and detail as to what kind of a medical condition the victim had? Did it had a scientific term? Or was the victim still under examination to ascertain the status? Was it just a health condition or was it a mental condition? This evidence could be used to clear or otherwise the doubts raised by defence. In absence of such evidence there is a serious doubt which remains unresolved in respect of the competency of PW2 who is the victim and the weight of her evidence. Having found that PW2 is an unreliable witness considering a possibility that she had a mental condition and considering the well settled principle that the best evidence in a charge related to sexual offences comes from the victim, then taking into consideration the weakness of the remaining 3 prosecution witnesses, it is clear that the charges against the appellant were not proved to the standard required. I have considered the evidence available against the appellant and find that there are a lot of gaps in the prosecutions' case.

And, I find no other evidence left against the appellant. If rape cannot be proved even defilement of idiots cannot be proved.

In the end, the doubts in the prosecution evidence should benefit the appellant. Therefore, the appeal is allowed and the conviction of the appellant is quashed and sentence set aside. The appellant should be released from custody unless otherwise lawfully held.

Right to appeal explained.



**L. J. ITEMBA**  
**JUDGE**  
**18/7/2023**