IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

MOSHI SUB - REGISTRY

AT MOSHI

CRIMINAL APPEAL NO. 39 OF 2023

(Appeal from the decision of District Court of Moshi at Moshi Dated 06th May 2022 in Criminal Case No.218 of 2021)

DAIMA PETER LEKANAE @ JUAKALI.....APPELLANT

VERSUS

THE REPUBLIC.....RESPONDENT

JUDGMENT

27th February 2024 & 12th March 2024.

A.P. KILIMI, J.:

The appellant hereinabove was convicted by the District Court of Moshi at Moshi for the offence of Defilement of Imbecile contrary to section 137 of the Penal Code Cap 16 RE 2019 and sentenced to serve 14 years in prison. Being aggrieved by the said conviction and sentence the appellant preferred this appeal by marshalling the following grounds;

1. That, the trial Magistrate grossly erred in both law and fact in convicting the appellant basing on contradictory evidence from PW1, PW2 and PW5.

2. That, the learned trial Magistrate court grossly erred both in law and fact when convicted the appellant on a highly suspicious proceedings as there is nowhere indicating where and how the trial court got the full name of the victim of the alleged offence (PW4). Taking into the account that, the victim failed to respond the questions posed to her.

3. That, the learned trial Court Magistrate grossly erred both in law and fact in shifting the burden of proof of the appellant by requiring him to prove his defence of alibi.

4. That, the learned trial Magistrate court erred both in law and fact in convicting and sentencing the appellant despite the charge sheet been not proved beyond reasonable doubt against the appellant and to the required standard by the law.

Briefly the facts that led to the appellant conviction as discerned from the trial Court records are to the effect that; On 29th May 2021 during the evening hours Monica Bryson (PW1) the grandmother of the victim (PW4) went to church leaving her grandchildren including the victim with their grandfather Bryson Mustapha (PW2). The victim was disabled and could not do anything by herself. Upon her return no one was at home. She started calling the victim's name where the victim replied that she was at Ndemerei's house, the house where the appellant resides alone. PW1 who joined PW2 in search for the victim went where the voice was coming and

discovered that the victim was inside that house and the door was closed. PW1 after seeing that, she left her husband (PW2) and went to call the village chairman one Shaban Athuman (PW5). Upon her return the appellant opened the door and fled away. Few minutes later the victim (PW4) also followed coming out from the same room while holding her underwear and a skintight. The Chairman (PW5) then asked the women who were gathered around the crime scene including the victim grandmother (PW1) to inspect the victim to see if she was raped, upon inspection they discovered that she had sperms on her private parts. As it was already a night, PW5 advices them to continue with other procedures including going to a police station and hospital on the next day. The next day the victim was sent to the police station given PF3 and went for medical examination where she was found to be sexually assaulted.

In his defence the appellant refuted committing the crime and stated that on that day and date which he didn't recall, he was at his farm with one Jose irrigating his farm, where one Jamali Hamadi called Jose asking if the appellant was with him and Jose confirmed that he was with him. It was until the next day in the morning where he went back to his farm the village chairman come with one Jamali and informed him that they were

searching for him and he was needed at the meeting. In the meeting he found the victims grandmother (PW1) and the wife of one Jamali and other relatives who questioned him about the incidence that happened the previous day to which he replied that he was not the one who committed the said offence.

After a full trial the appellant who pleaded not guilty to the charge, was found guilty, convicted and sentence as stated above.

When this appeal came before me for hearing, the appellant appeared in person, whereas the Republic was represented by Mr. Frank Daudi Wambura, Learned State Attorney.

Submitting in support of his grounds of appeal, the appellant submitted that at a trial Court PW1 and PW2 testified that the victim (PW4) could not talk as she was not mentally sound. The appellant submitted further he wonders where and how the trial Court got the victim's name who could not even talk as she could not respond to any of the questions that were posed to her. The appellant was of the opinion that, there was another person informing the trial Court on the matters that were supposed to be said and testified by the victim herself. The appellant

further submitted that no expert evidence submitted to prove that the victim was mentally abnormal, because the trial magistrate and the prosecutors were not medical expertise to conclude that the victim was imbecile hence it was improbable for the trial court to disregard taking the evidence of the victim who was the key witness for the reasons that she failed to answer question that were posed to her.

The appellant stated further that in cases like this, the best evidence usually comes from the victim and that the trial court could do any means to obtain the evidence from the victim herself unless it was proven by the medical expert that she was incapable in testifying. The appellant then prayed for her appeal to be allowed and her sentence and conviction of the trial court be set aside.

In reply to the grounds of appeal Mr. Wambura learned State Attorney responding to the first ground of appeal contended that such ground was baseless as the evidence adduced by PW1, PW2 and PW5 at the typed trial Court proceeding at page 7 ,9, and 14 shows those witnesses saw the appellant and the victim coming from the appellant room while holding her underwear and upon the appellant seeing PW1 he

pushed PW5 and ran away. The counsel submitted that there were no contradiction as those witnesses testified what they saw directly with their own eyes.

In regard to a second ground of appeal on highly suspicious proceedings, Mr. Wambura submitted that such ground lacked merits as the name of the victim was stated by her parents at a police station and in Court under oath. Further the learned state Attorney stated that Court did not use the victim's evidence as they saw her condition and her inability to answer questions that were posed to her.

As to a third ground of appeal, the learned Counsel submitted that at the trial Court the appellant herein did not inform the trial Court if he was going to rely on the defence of *alibi.* The counsel referred to section 194 of the Criminal Procedure Act Cap 20 RE 2022 on how the law stated clearly on notification to court and other part in case the accused wishes to rely on such defence. To emphasise his point the learned counsel referred the decision of **Oswald Godfrey Musa vs. Republic** Criminal Appeal No.137/2019 (HC) where at page 8,9 and 10 emphasis was that a defence of *alibi* ought to be produced before the hearing or before the prosecution

decides to close its case. Mr. Wambura further cited the decision in **Kubezya John vs. Republic** Criminal Appeal No. 488/2015 CAT at Tabora where emphases were to issue a prior notice to the other part so that he may be informed that the accused will rely on defence of *alibi*.

In regard to the fourth ground, Mr. Wambura argued that the case was proved beyond all reasonable doubts as all the elements of the offence as charged under section 137 of the Penal Code were proved. The learned State Attorney explained that a PF3 exhibit P1 proved a recent penetration to the victim as the victim was not a virgin. The counsel went on replying that as to the second element as to idiotic nature and imbecilic of the victim it was also proved by the parents of the victim while the third element was also proved as the appellant himself knew the condition of the victim as the victim and the appellant were neighbours.

The counsel further submitted that as it was held in the case of **Seleman Makumba vs. Republic** that in sexual offences the best evidence comes from the victim herself, considering the circumstances of this case that the victim was mute, insane/idiot and not able to talk as it was testified by her parent that she was in that condition since she was

born, and even when she was brought before the court of law she could not testify. Penetration being one of the most important elements in rape cases, the counsel submitted that the same was proved through a PF3 that was tendered by the PW6.The counsel then invited me to the decision of **Hassan Bakari@Mama Jicho,** Criminal Appeal No 103/2012 CAT and section 130(4) of the Penal Code.

In rejoinder, the appellant briefly stated that he was given this case because there was a dispute over a farm that they wanted from him, a farm which he inherited from his grandfather.

Before I dwell into the merit of this appeal, I have noted that the appellant despite having raised four grounds in her memorandum of appeal she only submitted on one ground which is ground number two and others remained unargued.

However, I have considered the grounds raised, both aimed to contest that the prosecution case at the trial was not proved beyond reasonable doubt. Therefore, it is my intuition the issue for determination which cut across the above, is whether the prosecution at the trial court

proved a case beyond reasonable doubts, and upon answering this issue will determine whether this appeal has merit or not.

Starting with the contradiction which was raised in the first ground, that the trial magistrate erred in law and facts by convicting the appellant basing on contradictory evidence from PW1, PW2 and PW5 and as explained above, as I said above in this ground the appellant did submit nothing. On the other hand, the Learned State Attorney Mr. Wambura in reply to the first ground submitted that there were no any contradictions as the evidence adduced by PW1, PW2 and PW5 both testified that they saw with their eyes the victim coming from the appellant room while holding her underpants and that when the appellant saw PW1 he pushed PW2 and ran away.

I my view of the alleged contradiction, briefly it centres that, PW1 testified that after coming back from calling the village chairman it was the appellant who firstly come out from his room and few minutes later the victim (PW4) followed holding her underwear while PW2 testimony was that the appellant firstly came out and upon seeing PW1 he fled away by running then the victim followed coming from the appellant room. Further

the noted difference in testimony is on PW5 testimony who testified to be the hamlet leader and that he was informed through a phone by PW2 that it was the appellant who defiled the victim while the testimony of the PW1 was that she was the one who went to call the village chairman and not the hamlet leader.

The question which comes from the above, is whether the contradictions stated were so material as to go to the root of the matter and thus affect the prosecution case? I have scanned through the discrepancies complained as reproduced above. I am of the view that the same does not go to the root of the case as it is evident PW1 and PW2 saw the appellant at the crime scene despite their indifference in narrating who saw first. This is because witnesses' testimonies cannot be similar from words to words as some may be affected due to lapse of time and recalling of events which in my considered view are minor as the above noted indifference in testimony does not go to the root of the case to dismantle the entire prosecution case. I stand guided by the decision in **Dickson Elia Nsamba Shapwata vs. Republic**, Criminal Appeal No 92 of 2007, Court of Appeal Tanzania at Mbeya (Unreported) held that;

"In evaluating discrepancies, contradictions or omission, it is undesirable for a Court to pick alit sentences and consider them in isolation from the rest of the statements. The Court has to decide whether the discrepancies or contradictions are only minor or whether they go to the root of the matter"

Therefore, it is only when the contradictions go to the root of the case is when can affect the prosecution, if not stand to be ignored. However, I must say at this juncture, I retain in respect to what they saw as witnesses' weather was credible for the purpose of identification of the appellant or not will be discussed at later stage in this judgment. In that regard I am settled that there was no contradiction which affect what the two eye witnesses saw substantively at the scene of crime as highlighted above. Thus, I find this ground no merit and hence suffers entire dismissal.

In respect to the second ground, the appellant is alleging that the trial court convicted him on highly suspicious proceedings and here he has pinpoint that his name was not evidenced as a culprit and the victim failed to respond questions posed to her. As I said above this ground will be dealt

collectively with other two grounds, since both are of the same nature which are answered by issues raised above.

In respect to mental condition of the victim, it is a trite law the trial court in dealing with a witness of such status, must satisfy the circumstances state in the provisions of Section 127(6) of the Evidence Act Cap. 6 R.E.2022, that is whether was capable of understanding the questions put to her and give rational answers and therefore competent to testify and put the finding on record. (See **Fadhili Makanga vs. Republic** [2020] TZCA 270 (TANZLII).

According to page 13 of the typed record of the trial proceeding, I find relevant in view of the above to reproduce as hereunder;

> *"**Date** 30/8/2021*
> *Coram R.G. Olambo, RM*
> *Pros: Sabitina, State Attorney*
> *Accused: Present*
> *B/C Oisso*
>
> ***State Attorney:** For hearing we have two witnesses today, and one of them is the victim who is an imbecile.*
>
> ***Court:** PW4 ANITHA DEODATI (the victim) seen: We have tried to communicate with her, but she cannot respond to the question we posed to her. In that aspect it is my finding that the witness will not be able to testify.*

Sgd. R.G. OLAMBO, RM
30/8/ 2021"

In my view of the above, the learned trial Magistrate was correct on the test as per requirement of the law stated above. Thus, means no evidence of sexual intercourse from the victim. Now, the next point to be determined by this court is whether there is other evidence which proves that the offence charged was committed by the appellant.

According to the judgment of the trial court seems to rely on the evidence of PW1, PW2, PW3 PW5 and PW6 that proved penetration of the appellant to the victim. For purpose of reference hereunder is what the trial court observed at page 6 and 7 of the typed judgment;

> *"PW1 and PW3 further alleged that the accused person came out first, and thereafter managed to run, whereas PW4 followed next while holding her under pant and skin tight. During that time the neighbours were also there, including PW5 who advised PW1 to inspect PW4 if she was indeed raped. The evidence further reveals that* ***PWI did such inspection together with another woman and it was their observations that PW4 was carnally known since she had sperms on her private parts.*** *Relying on such*

observations, PW5 advised PWI and PW2 to report the incidence at the police, and since it was already night, they reported at the police on the next date, ... PW6 also testified that, after being ***handled with the PF3*** *at the hospital, the results indicated that PW4 was indeed raped.*

..... this version of story is similar with that of PW6 who appeared as an investigator. PW6 also testified that, ***after being handled with the PF3 at the hospital, the results indicated that PW4 was indeed raped****. He therefore gathered all the evidence and forwarded the case file to the AG's office. Supporting his evidence PW6* ***tendered Exhibit P1, which clearly indicates that after examination PW4 was observed to have partially perforated hymen meaning that there is a proof of penetration in PW4's vagina."***

[Emphasis is mine]

Nonetheless, at the same page the trial court proceeded to conclude that the evidence which supports that there was unlawful sexual intercourse towards PW4 is that of PW1, PW2, and PW5 who appeared as eye witnesses.

From the above, I am persuaded to evaluate the evidence of the above witnesses to see whether the offence was proved at the trial court. According to the evidence of PW1, PW2, and PW5 there is no dispute no one found the appellant is in *fragment delicto* or saw the real sexual intercourse with the victim, the mere fact that PW1 examine the victim and saw sperms in my view without being corroborated cannot prove whether the appellant did sexual intercourse with the victim, I am saying so by reasoning from prove of kindred offence of rape, which the law says prove of rape is not proved by sperms although can be proved by DNA taken from it. (See **Julius Kandonga vs. Republic** [2019] TZCA 398 (TANZLII).

In regard of the above reasoning, I am settled the existence of sperms is immaterial to prove that the appellant did sexual intercourse with the victim.

Be that as it may, it is the position of law that a sexual offence may be proved by any other evidence than medical evidence, especially if carnal knowledge is not in dispute (see **Issa Hamis Li Kamila vs. Republic.** Criminal Appeal No. 125 of 2005, and **Prosper Mnjoera Kisa vs. Republic** Criminal Appeal No. 73 of 2003 and **Hamis Shabani @ Hamis**

(Ustadhi) vs. Republic, Criminal Appeal No. 259 of 2010 (both unreported). In **Hamis Shabani @ Hamis** (supra) the Court observed:

> *"... there is no legal requirement that in offences of this kind, sophisticated scientific evidence' to link the appellant and the offence is required. It is not the requirement, for example, that the assailant's spermatozoa, red and white blood (or even DNA) should be examined to prove that he is the one who committed the offence. If there is other, independent evidence to implicate the accused with the offence and the court is satisfied to the required standard (that of proof beyond reasonable doubt), that in our view, is sufficient and conclusive."*

In the present matter, since appellant disputed the commission of the offence, I now proceed to look whether the evidence of witnesses alleged to be eye witnesses were corroborated.

Concluding the judgment as quoted above, the learned trial Magistrate seems to rely on the above eye witnesses and added that were corroborated by the evidence of PW6 an investigator of this matter who

tendered a PF3 (exhibit P1) which shows that the hymen was partially perforated thus proved the victim was penetrated.

I have scanned the trial record, in my view the said PF3 was admitted contrary to the requirement of the law, and for the purpose of clarity I reproduce the proceeding in such respect which is found at paragraph 23 of the typed proceeding;

> ***"PW6;*** *....I can identify the said PF3 through the name of the victim. Police's official stamp, the name of the Doctor who filled it and the hospital stamp. (Document shown to PW6). This is the PF 3 I was referring to. I pray that the same be admitted as an exhibit.*
> ***Accused:*** *I have no objection.*
> ***Court:*** *PF3 admitted and marked as exhibit Pl." (PW6 read and explained "exhibit Pl" loudly)."*

In view of the above excerpt from the trial court, I am daring to say the section 240 (3) was not complied with. The said section provides as follows:

> *"When a report referred to in this section is received in evidence* ***the court may, if it thinks fit, and shall, if so, requested by***

> ***the accused*** *or his advocate, summon and examine or made available for cross-examination the person who made the report;* ***and the court shall inform the accused of his right to require*** *the person who made the report to be summoned in accordance with the provisions of this section. "*
>
> [Emphasis added]

Therefore, from the above, the court has interpreted this provision that once the medical report is received in evidence, it is necessary for the trial court to inform the accused person of his right stipulated in section 240 (3) of CPA so as to cross examine the author of such medical report. Failure to comply with the provision leads a report not to be acted upon, hence discounted. Several decisions of the Court have reached to that conclusion. (See for instance the case of **Kashana Buyoka vs. Republic,** Criminal Appeal No. 176 of 2004, **Sultan s/o Mohamed vs. Republic,** Criminal Appeal No. 176 of 2003 and **Alfa Valentino vs. Republic,** Criminal Appeal No. 92 of 2006 (all unreported) and **Kayoka Charles vs. Republic** [2010] TZCA 145 (TANZLII) (to mention a few).

In the instant matter, PF3 (Exhibit PI) was admitted in court despite was not objected by the appellant, however, since the one who tendered it is PW6 (a Police Investigator) and since the appellant himself was not proved to be a medical expert or a person acquainted with medical personnel, obvious is presumed to be a layperson on what was written in the said PF3, in the circumstances in my view this was a fit case to summon the maker of the said PF3. I think admitting it without informing his right was contrary to the intention of legislature of the requirement of calling an expert on the said medical field to enable the victim understood the exhibit and how the said medical examination was conducted. In my opinion the trial court was against the position of the law which provides that, accused person can only be convicted on the strength of the prosecution case and not on the basis of the weakness of his defence.

In the above analysis, I am settled that the procedure adopted by the trial court offended section 240 (3) of the Cap. 20. For that reason, I find the evidence found in the PF3 cannot be sound due to the said irregularity, and thus I hereby discounted it. Now, having discounted the PF3 which could have corroborated witnesses as said above, the next question I have asked myself is whether there is another piece of evidence which proves

that appellant did sexual intercourse with the victim. I have scanned the entire record of the trial court, in my view, I am settled that there is none.

Without prejudice of the above, I am mindful an offence charged against the appellant at the trial was Defilement of Imbecile contrary to Section 137 of the Penal Code, Cap.16. The section states that;

> *"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 or 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."*

From the wording of the above section, it is very clear the above offence to be committed is not necessary to prove mere penetration, but even it may be proved by attempt to have unlawful sexual intercourse. I think the prosecution in alternative could have also established and prove the offence of attempted sexual intercourse, the offence charged against

the appellant as highlighted above does not fall in circumstances amounting to rape, thus as said above, prove of the offence did not need even the PF3 to establish the offence charged. Unlike attempted rape which is statutory defined and how may be proved under section 132 of the Penal Code, this offence in this matter charged against the appellant does not contain a definition in it, therefore courts have to resort to section 380 of the Penal Code which defines the crime of attempt. Section 380 defines attempt as follows: -

> *"When a person, intending to commit an offence, begins to put his intention into execution by means adapted to its fulfilment, and manifests his intention by some overt act, but does not fulfil his intention to such extent as to commit the offence, he is deemed to attempt to commit the offence."*

I have considered the prosecution evidence at the trials and submission in in this court by the Republic State Attorneys, with respect, in my view they were endeavouring to prove only sexual intercourse if existed and forgotten other requirements of proving this offence as per above provisions, this has led even the trial court to succumb on the same

direction and concluded that unlawful sexual intercourse was committed as stated at page 8 paragraph 2 of the typed proceeding, which in my determination as above was not proved.

Nevertheless, I have scanned the evidence adduced at the trial, I am satisfied the first limb provided in this law of attempt to have unlawful sexual intercourse with the victim by the appellant also was not proved beyond reasonable doubt, and this is because of the following reasons; first the time for witnesses saw the appellant is uncertain, despite the charge itself does not explicitly state at what time the offence was committed, witnesses testimonies also varies, PW1 said it was evening, PW2 said it was night and PW5 who attended immediately the scene was said it was night.

And second, the facts that it is not clear whether it was a day or night, and the fact that neither evidence of identification or recognition during day time nor evidence of identification or recognition during unfavourable condition were tendered by the prosecution. In my view of the said circumstances which is not settled, I think there was a need to have all possibilities of mistaken identity cleared before evidence on

identification or recognition is acted upon, nonetheless, even if the above witnesses recognized the appellant whom they knew before, still that could have been evidenced by them on how they recognised him and the same be recorded by the trial court in order to show elimination of all mistakes in recognition which is often. (See **Issa s/o Mgava @ Shuka vs. Republic,** Criminal Appeal No. 37 of 2005 CAT and **Philipo Rukaiza @ Kitchwechembogo vs. Republic**, Criminal Appeal No. 215 of 1994 CAT (Both unreported). In **Philipo Rukaiza @ Kitchwechembogo** (supra) the Court observed as follows; -

> *"The evidence in every case where visual identification is what is relied on must be subjected to careful scrutiny, due regard being paid to all the prevailing conditions to see if, in all the circumstances, there was really sure opportunity and convincing ability to identify the person correctly and every reasonable possibility of error has been dispelled. There could be a mistake in the identification notwithstanding the honest belief of an otherwise truthful identifying witness".*

In principle therein above, I am of the considered opinion the prosecution left doubts in proving whether is the appellant who came from

the alleged room wherein also the victim came from. Thus, I am settled no any circumstantial evidence proved in respect to the offence of attempt to have unlawful sexual intercourse with the victim.

In the premises, I hereby find the prosecution did not prove its case beyond reasonable doubt. The appellant's conviction is therefore insecure. I accordingly allow the appeal. Consequently, I quash the conviction, and set aside the sentence imposed by the trial court. I thus, order appellant immediate be released from prison, unless he is otherwise lawfully held.

It is so ordered.

DATED at **MOSHI** this day of 12th March, 2024

A. P. KILIMI

JUDGE

Court: - Judgment delivered today on 12th day of March, 2024 in the presence of the Appellant in person and Mr. Frenk Daudi Wambura Learned State Attorney for the Republic.

Sgd: A. P. KILIMI

JUDGE

12/03/2024

Court: - Right of Appeal duly explained.

Sgd: A. P. KILIMI

JUDGE

12/03/2024