**IN THE COURT OF APPEAL OF TANZANIA**
**AT IRINGA**

**(CORAM: MBAROUK, J.A., MMILLA,J.A., And MWARIJA, J.A., )**

**CRIMINAL APPEAL NO. 198 OF 2015**

**NARZIS LUAMBANO.....APPELLANT**

**VERSUS**

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

**(Appeal from the decision of the High Court of Tanzania at Songea)**

**(Kwariko, J.)**

**dated 30th day of March, 2015**
**in**
**DC. Criminal Appeal No. 6 of 2015**

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## JUDGMENT OF THE COURT

17th & 21st August, 2015

**MMILLA, J. A.:**

The appellant, Narzis Luambano was charged before the court of Resident Magistrate of Songea in Ruvuma Region with the offence of incest by male contrary to section 158 (1) (a) of the Penal Code Cap. 16 of the Revised Edition, 2002. He was found guilty, convicted and sentenced to thirty (30) years imprisonment. Aggrieved, he unsuccessfully appealed to the High Court of Tanzania at Songea, hence this second appeal to this Court.

The brief background facts of the case were not complicated. The appellant in this case is the biological father of the complainant, Hosana d/o

Luambano who testified as PW1. Before the occurrence of the charged offence they were living together in their family home at Mageuzi Mlilayoyo village together with other members of the family, including PW2 Selephine w/o Luambano, who was wife to the appellant and mother to PW1.

At the time the charged crime was alleged to have occurred between February and March, 2013, PW2 left her matrimonial home together with one of their children for Mtyangimbole village, leaving behind her husband and three of their children including PW1 who was then 15 years of age. It was alleged that the appellant utilized the opportunity of his wife's absence from home to lure PW1 to indulge in regular forced sexual intercourse, resulting into latter's pregnancy.

On being informed by PW1 in early May, 2013 that she was pregnant, the appellant is alleged to have asked an unnamed person to supply him with local herbal medicine which he instructed PW1 to drink in an endeauvor to procure abortion. PW1 consumed that medicine with the result that after three weeks, her stomach started aching, and found that she was bleeding thick blood. She informed the appellant who decided to call back home his wife from Mtyangimbole. It was after her mother's arrival that PW1 was taken to Songea Regional Hospital where she disclosed what happened to

her. They were advised to report the incident to police where again, she told them what happened. She was given a PF3 and returned to hospital. She was medically examined by PW3 Dr. Benedicto Ngaiza who discovered that the complainant had aborted, but that the abortion was incomplete and was infected as there were remains of "aborted zygote." He estimated that the pregnancy was two (2) months old.

With that background information, the appellant was arrested and sent to Songea Police Station at which he was interrogated. He denied commission of the alleged crime. On 27.5.2013, he was charged of that offence at the court of Resident Magistrate as afore said.

The appellant's defence comprised of a general denial that he did not commit the alleged crime. He called four (4) defence witnesses, namely Justus Luambano, his elder brother who testified as DW2, DW3 Hamad Mohamed Millinga, the then acting village chairman of Madaba Mageuzi, and DW4 Athumani Nyoni, who was the appellant's neighbour. While DW2 and DW3 testified in common that the appellant did not commit the said offence, DW4 told the trial court that he was not sure.

Before us, the appellant appeared in person and was undefended. He filed a memorandum of appeal which raised five "grounds," which however may conveniently be bridged into only two of them; **one** that, the two courts bellow improperly based his conviction on the contradictory evidence of PW1; and **two** that, the two lower courts erred in law and in fact in convicting him basing on the weak evidence of the prosecution witnesses.

On the other hand, the respondent Republic was represented by Mr. Shabani Mwegole, learned State Attorney. He readily informed the Court that he was supporting conviction and sentence.

At the commencement of hearing of the appeal, the appellant prayed to adopt his memorandum of appeal. He however, elected for the Republic to begin, signifying to say something thereafter if necessary.

Mr. Mwegole submitted generally on the two grounds indicated above. He contended in the first place that there was no controversy that PW1 was appellant's biological daughter. Also, he refuted the appellant's assertion that the evidence of PW1 was wrongly relied upon on account that she contradicted herself on the period of her pregnancy. While denying that PW1 ever said so, the learned State Attorney submitted that in essence the

complainant's evidence was that the appellant was raping her for months, adding that it was PW3 who said that PW1 was two (2) months' pregnant. He also stressed that both, the trial court and the first appellate court found PW1 to be truthful, thus a credible witness when she said her father was regularly having sex with her. He submitted that in terms of section 127 (7) of the Evidence Act Cap. 6 of the Revised Edition, 2002, her evidence was properly relied upon. He relied on the case of **Mkumbo Hamisi v. Republic**, Criminal Appeal No. 24 of 2007, CAT (unreported) which relied with approval on the case of **Selemani Makumba v. Republic** [2006] T.L.R. 379 in which it was commonly expressed that true evidence of rape has to come from the victim, which is what section 127(7) of the Evidence Act is all about. He therefore, urged the Court to dismiss this appeal.

In his rejoinder submission, the appellant reiterated that the evidence of PW1 was contradictory, therefore that it was wrongly relied upon by the trial court in founding his conviction, and that the first appellate court erroneously upheld that decision. He submitted in general that the prosecution did not prove their case against him beyond reasonable doubt. He prayed the Court to allow his appeal.

The appellant's conviction in the present case was founded on the evidence of PW1. Both courts bellow regarded her as a star witness, and were unanimous that she was a truthful and credible witness.

Before we may proceed with discussion however, we wish to reaffirm the principle that where there are concurrent findings of facts by the lower courts, an appellate court, in a second appeal, should not disturb them unless it is clearly shown that there has been a misapprehension of the evidence, a miscarriage of justice or violation of some principle of law, or there are obvious errors on the face of the record, or misdirections or non-directions on the evidence, or a misapprehension of the substance, nature and quality of the evidence, resulting in unfair conviction – See, among others, the cases of **Amratlal Damodar Maltazez and Another t/s Zanzibar Silk Store v. A. H. Jariwalla t/a Zanzibar Hotel** (1980) T.L.R. 31, **Salum Mhando v. Republic** [1993] T.L.R. 170 and **Patrick Abel v. Republic**, Criminal Appeal No. 55 of 2014, CAT (unreported).

We have carefully scrutinized the evidence on record. PW1 was unequivocal that between February and March, 2013, the appellant, who is her biological father, was regularly raping her, and that the habit persisted for months. In early May, 2013 she realized that she was pregnant. On being

informed of that status the appellant looked for, and asked an unnamed person to supply him with local herbal medicine which he instructed PW1 to drink in order to procure abortion, resulting in problems which later on forced PW2 into sending her to hospital. This was the gist of her evidence.

The appellant complained that PW1's evidence was contradictory in as much as she was not specific on the period of her pregnancy. With due respect to the appellant, we have not found any contradictions in the testimony of PW1. In fact, as properly submitted by Mr. Mwegole, she did not touch that aspect, what she said was that the appellant raped her for months, and that it was PW3, the doctor who medically examined her and tended the PF3 (exhibit P1) as evidence before the trial court, who said that the victim was two (2) months' pregnant. As such, the criticism on contradictions lacks merit. Thus, the prosecution evidence established beyond certainty that the appellant is the person who molested PW1 as was charged.

It is a fact that PW1's evidence that it was the appellant who raped her was not corroborated. However, in view of the fact that her evidence was consistent, truthful, credible and strong, we agree with Mr. Mwegole that the

two courts bellow correctly held, relying on section 127 (7) of the Evidence Act and the case of **Selemani Makumba v. Republic** (supra), 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 woman where consent is irrelevant, that there was penetration."*** [Emphasis added].

See also the cases of **Mkumbo Hamisi v. Republic, Ambrose Nombo @ Zungu v. Republic** (supra) and **Anyelwisye Mwakapake and another v. Republic,** Criminal Appeal No. 227 of 2011, CAT (unreported).

In view of the above, we find and hold that the prosecution evidence established beyond certainty that the appellant was the person who raped his daughter (PW1) as was charged, therefore that the two courts bellow were justified to reject the defence evidence which they found to be nothing but a conjecture.

Next is the issue whether the offence of incest by male was established. The starting point is section 158 (1) (a) under which the charge was premised. That section provides that:-

*"(1) Any male person who has prohibited sexual intercourse with a female person, who is to his knowledge his granddaughter, daughter, sister or mother, commits the offence of incest, and is liable on conviction–*

*(a) if the female is of the age of less than eighteen years, to imprisonment for a term of not less than thirty years."*

It can be deduced from the above that in a charge of incest by male, the prosecution must prove that the accused knew the female was his grandmother, daughter, sister or mother at the time of sexual intercourse. It presupposes however that, it is a defence if the accused honestly mistook about the identity of the woman with whom he had sexual intercourse.

In the present case, the prosecution established that PW1 was the biological daughter of the appellant. Evidence on this point came from PW1, and PW2, the biological mother of the latter, so also from the appellant himself who did not deny this fact. On page 7 of the court record, the appellant was express that Hosana (PW1) was his daughter. That means, he had sexual intercourse with the prosecutrix knowing that she was his daughter. Thus, the trial court properly found, and the first appellate court

correctly up held, the finding that the offence of incest was perfectly proven against the appellant.

That said and done, we find that the appeal is devoid of merit and we dismiss it in its entirety.

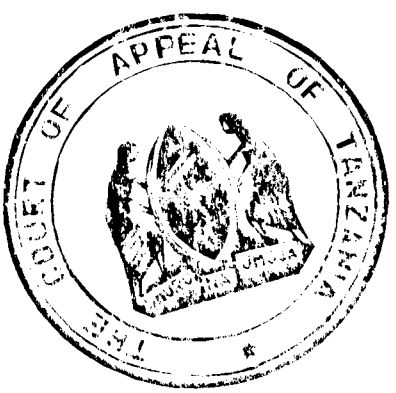
**DATED** at **IRINGA** this 20th day of August, 2015.

M. S. MBAROUK
**JUSTICE OF APPEAL**

B. K. MMILLA
**JUSTICE OF APPEAL**

A.G. MWARIJA
**JUSTICE OF APPEAL**

I certify that this is a true copy of the original.




E.F. FUSSI
**DEPUTY REGISTRAR**
**COURT OF APPEAL**