IN THE COURT OF APPEAL OF TANZANIA
AT IRINGA

(CORAM: MJASIRI, J.A., JUMA, J.A., And MUGASHA, J.A.)

CRIMINAL APPEAL NO. 318 OF 2015

LAWAMA S/O DEDU .....APPELLANT

VERSUS

THE REPUBLIC .....RESPONDENT

(Appeal from the decision of the High Court of Tanzania at Iringa)

(Kihwelo, J.)

Dated the 10th day of June, 2015
in
DC Criminal Appeal No. 02 of 2015

JUDGMENT OF THE COURT

29th day of July & 1st day of August, 2016

JUMA, J.A.:

To all intents and purposes, the main question of law in this second appeal boils down to our determination of the question whether, a male person in Tanzania who has sexual intercourse with a female person he knows to be his niece, commits an

offence of "Incest by Males" under section 158 (1) of the Penal Code, **Cap. 16**.

The appellant LAWAMA s/o DEDU was in the District Court of Iringa Criminal Case No. 30 of 2014 charged with the offence of Incest by Males contrary to section 158 (1) (a) of **Cap. 16**. The particulars of the offence were that on the 7th February 2014, at Igangidungu village within Iringa Region, he had carnal knowledge with one LESI d/o KISAGISE, a fourteen year old girl who to his knowledge was his niece.

Briefly, the prosecution's case against the appellant was built around the evidence of the complainant Lesi d/o Kisagise (PW4), and five other prosecution witnesses. The complainant testified how on that material day, she decided to take a day off from her employment as a house girl in order to visit her aunt. She was at her aunt's place around 7 p.m. in the evening when the appellant, who happens to be her uncle, showed up. He invited her to his residence on the explanation that his wife (who she referred to as her aunt), wanted to meet her.

The complainant decided to walk together with the appellant, to his house. As they were passing through a patch of forest; the appellant

forcefully pulled her deep away from the pathway into the forest. He removed her underpants and then proceeded to have sexual intercourse with oblivious of her cries for help, calling out the appellant wife's name. Once he was done, he forced her to follow him into a house whose owner the complainant did not know.

Meanwhile the commotion the appellant and the complainant caused attracted attention of other villagers. Fedinanta d/o Kisuka (PW1) was walking home when she heard voices from the direction of the forest. It was a voice in distress, calling out for help. While wondering what was happening in the forest, PW1 was joined by Ester d/o Msige (PW2). They together tried to figure out the source of cries for help. A few moments later they saw two people ahead walking from the forest into a nearby house belonging to one Congesta d/o Msiga. PW1 and PW2 followed up to that house. Standing at the door, they could still hear cries of a woman inside the house complaining that she is dying, and needed help. PW1 and PW2 thought that they needed to shout alarm to draw the attention of other villagers. As more people responded to the alarm the complainant identified herself and came outside leaving the appellant inside the house.

The appellant was arrested and handed over to Ifunda Police Station. The complainant was taken to the village dispensary for medical examination and treatment. In his defence, the appellant denied the offence.

On the 7th August 2014, the learned trial magistrate (A.P. Scout-RM) found the appellant guilty of Incest by Males contrary to section 158 (1) of Cap. 16 convicted him and sentenced him to thirty (30) years imprisonment.

Being aggrieved by his conviction and resulting sentence, the appellant lodged an appeal (DC Criminal Appeal No. 2 of 2015) in the High Court at Iringa, faulting the cautioned statement for having been obtained under coercion. He contended that the case was not proved against him beyond reasonable doubt.

The appeal did not turn to his favour. In dismissing the appeal, Kihwelo, J. stated that he believed the credibility of the evidence of the complainant (PW4), Fedinanta d/o Kisuka (PW1), Ester d/o Msige (PW2), Lale s/o Dedu (PW3) and that of John s/o Caspal Nziku (PW5).

In his second appeal to this Court, the appellant filed his memorandum of appeal on 15th April, 2016 setting out seven grounds of appeal for our determination.

When the appeal was called on for hearing on 29th July, 2016, the appellant who represented himself preferred the learned State Attorney to respond to his grounds of appeal first and he would react thereafter. Before submitting on the grounds raised by the appellant, Ms. Kasana Maziku, learned State Attorney representing the respondent Republic, first sought the leave of the Court to withdraw the Notice of Preliminary Objection which was filed on 26th July, 2016. We accordingly marked the notice as withdrawn.

Before the learned State Attorney could submit on the grounds of appeal, we asked her whether the appellant was correctly charged and convicted for the offence of Incest by Males under section 158(1) (a). We pointed out that the niece, with whom the appellant was accused of having had sexual intercourse with, is neither the appellant's grand-daughter, or daughter, or sister nor his mother who are specified under section 158 (1) (a) for purpose of prohibited sexual intercourse. The provision of section

158 (1) (a) of Cap 16 under which the appellant was charged and convicted states:

> *158.-(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;* [Emphasis added].

After taking another look at the above provision in light of the particulars of the offence and the evidence on record; Ms Maziku conceded that the appellant was wrongly charged because the sexual intercourse for which the appellant was accused for was with respect to his niece. The learned State Attorney submitted that this offence does not cover nieces, but envisages sexual intercourse with the offender's granddaughter, or his daughter, or his sister or his mother. She submitted that the particulars of the offence and the evidence on record are more consistent with the offence of rape but not of incest by males.

Because the appellant was wrongly charged under inapplicable section, the learned State Attorney asserted, the entire proceedings including the conviction and sentence before the trial court and subsequently before the first appellate court were a nullity. She urged us to order a fresh trial.

When he was given the chance to submit on the issue of law regarding the propriety of charge which led to his conviction, the appellant had little to say except agree with what the learned State Attorney has submitted on.

On our part, we agree with the learned State Attorney that the appellant was wrongly charged with the offence of incest by males where sexual intercourse subject of the charge sheet involved his niece, who is not envisaged under the charging section 158 (1) (a) of Cap 16. The language used in section 158 (1) (a) are plain and unambiguous enough to exclude nieces. The Full Bench of the Court in **Chiriko Haruna David vs. Kangi Alphaxard Lugora, The Returning Officer for Mwibara Constituency and the Attorney General**, Civil Appeal No. 36 of 2012 (unreported) stated the following iconic directive:

"We wish to observe here by way of emphasis, even if it is at the expense of repeating ourselves, that one of the cardinal rules of construction is that courts should give a piece of legislation its plain meaning."

Since section 158 (1) (a) has specifically mentioned prohibited sexual intercourse is one where the female is the offender's granddaughter, daughter, sister or mother, puts paid to any suggestion that a niece can be implied into the provision. It is plausible to restate that if the Legislature had intended to accommodate nieces into section 158 (1) of Cap 16, it would have done so.

An interesting legal paradox emerges in Tanzania when provisions of section 158 (1) (a) of Cap 16 is subjected to an imaginary scenario where an adult man and his niece consent to a sexual intercourse. Sexual intercourse between consenting adult man and his niece is very abominable and is opposed by the common morality. But this sexual intercourse cannot sustain a charge of Incest by Males, nor can the consenting adult niece be charged with an offence of Incest by Females under section 160 of Cap 16 which prohibits sexual activities if the man is

her grandfather, or father, or brother or son. The relevant section 160 provides:

> *160. Any female person of or above the age of eighteen years who with consent* ***permits her grandfather, father, brother or son to have carnal knowledge of her (knowing him to be her grandfather, father, brother or son as the case may be) commits the offence of incest*** *and is liable to imprisonment for life or for imprisonment of not less than thirty years and shall, in addition, be ordered to pay compensation of an amount determined by the court to the victim in respect of whom the offence was committed:*
>
> *Provided that if the male person is below the age of ten years, to imprisonment of not less than thirty years.* [Emphasis added].

It seems to us that Kenya realized the above gap in the Penal Code and changed the law. The legislative changes which were made in the Kenyan provisions governing the offence of incest by males in 2006, provides a clear example of legislative intent to include nieces in the group of females with whom male persons are prohibited to have sexual

intercourse with. Before the enactment of Sexual Offences Act, 2006 (**Act No.3 of 2006 of Kenya**), section 166 of the Penal Code of Kenya **(Cap. 63 of the Laws of Kenya)** the provision creating the offence of Incest by Males was in *pari materia* with section 158 (1) (a) of the Penal Code of Tanzania. Before it was repealed, section 166 (1) of **Cap. 63 of the Laws of Kenya** stated:

> *"**166 (1).** - Any male person who has carnal knowledge of a female person who is to his knowledge his **granddaughter**, **sister** or **mother** is guilty of a felony and is liable to imprisonment for five years;*
>
> *Provided that, if it is alleged in the information or charge and proved that the female person is under the age of thirteen (13) years, the offender shall be liable to imprisonment for life.* [Emphasis added].

Legislative intent expressed through section 20 (1) of **Act No.3 of 2006 of Kenya** broadened the number of females covered by "prohibited sexual intercourse" with their relatives for purposes of the offence of Incest by Males:

"Any male person who commits an indecent act or an act which causes penetration with a female person who is to his knowledge his ***daughter****,* ***granddaughter****,* ***sister****,* ***mother****,* ***niece****,* ***aunt*** *or* ***grandmother*** *is guilty of an offence termed as incest and is liable to imprisonment for a term of not less than ten years.*

Provided that, if it is alleged in the information or charge and proved that the female person is under the age of eighteen years, the accused person shall be liable to imprisonment for life, and it shall be immaterial that the act which causes penetration or the indecent act was obtained with the consent of the female person." [Emphasis added]

A further paradox in the laws of Tanzania becomes apparent when categories of males and females who are in the group of prohibited sexual intercourse under the Penal Code; is compared with prohibited relationships for purpose of marriage under the Law of Marriage Act **(Cap. 29)**. For instance, the relationships that are prohibited for purposes of marriages under section 14 of **Cap 29** are not only broader than the prohibited sexual relationships under section 158 (1) of the Penal Code, they are very broad. This is clear from our reading of section 14 of the Law

of **Cap 29** in its outlining of the following prohibited marriage relationships:

> *"14 (1) No person shall marry his or her* ***grandparent, parent, child*** *or* ***grandchild, sister*** *or* ***brother, great-aunt*** *or* ***great-uncle, aunt*** *or* ***uncle, niece*** *or* ***nephew,*** *as the case may be.*
>
> *(2) No person shall marry the* ***grandparent or parent, child or grandchild of his or her spouse or former spouse.***
>
> *(3) No person shall marry the* ***former spouse of his or her grandparent or parent, child or grandchild.***
>
> *(4) No person shall marry* ***a person whom he or she has adopted or by whom he or she was adopted.***
>
> *(5) For the purposes of this section, relationship of the half-blood shall be as much an impediment as relationship of the full blood and it shall be immaterial whether a person was born legitimate or illegitimate.*
>
> *(6) For the purposes of this section grandparent, grandchild, great-grand-child, great-uncle and great-aunt include, as the case may be, grandparent, grandchild great-uncle and great-aunt of any degree whatsoever.*

(7) Persons who are, by this section, forbidden to marry shall be said to be within the prohibited relationships.

Suffice to say, the Penal Code provisions punishing incest by males or by females need to be harmonised with the provisions outlining the prohibited marriage relationships in the Law of Marriage Act.

Having found that the appellant was wrongly charged with an offence of incest by males c/s 158 (1) (a) of Cap 16 instead of the offence of rape, the subsequent proceedings before the trial and the first appellate courts were a nullity. In the exercise of the Court's powers of revision under section 4 (2) of the Appellate Jurisdiction Act, Cap. 141, the proceedings before the trial District Court of Iringa in Criminal Case No. 30 of 2014 together with the resulting conviction are hereby quashed and set aside.

Similarly, the subsequent proceedings in the High Court in DC Criminal Appeal No. 2 of 2015 which led to the Judgment of the first appellate court are hereby nullified, quashed and set aside.

Accordingly, because the matter before us centres on the allegation of rape of a child involving close relatives, the best interests of justice will

be served if a new trial is ordered. We order a new trial be commenced on a proper charge as may be determined by the Director of Public Prosecutions. It is so ordered.

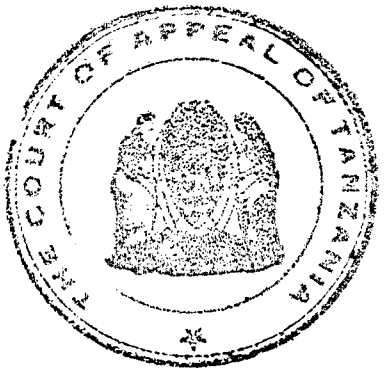
DATED at **IRINGA** this 1st day of August, 2016.

S. MJASIRI
JUSTICE OF APPEAL

I.H. JUMA
JUSTICE OF APPEAL

S.E.A.MUGASHA
JUSTICE OF APPEAL

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



B.R.NYAKI
DEPUTY REGISTRAR
COURT OF APPEAL