IN THE COURT OF APPEAL OF TANZANIA
AT TANGA

(CORAM: MBAROUK, J.A., MWARIJA, J.A., And MWANGESI, J.A.)

CRIMINAL APPEAL NO. 328 OF 2016

MATHIAS ROBERT.....APPELLANT

VERSUS

THE REPUBLIC.....RESPONDENT

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

(Khamisi, J.)

dated 7th day of June, 2016
in
(HC) Criminal Appeal No. 7 of 2015

JUDGMENT OF THE COURT

24th & 27th April, 2018

MBAROUK, J.A.:

The appellant, first appeared before the District Court of Muheza at Muheza to answer a charge of incest by male c/s 158(1) (a) of the Penal Code, Cap. 16 R.E. 2002. It was alleged that, the appellant, on diverse days between March 2005 and April, 2009, had carnal knowledge with one Beatrice Mathias, who was his daughter. The trial District Court found him guilty as charged, convicted and sentenced him to serve thirty (30) years

imprisonment. His appeal to the High Court was dismissed. Still protesting his innocence, he has lodged this second appeal.

The brief uncontroverted facts which led to the conviction and sentence of the appellant mainly came from the evidence of Beatrice Mathias (PW1) - the victim which was subsequently corroborated by the evidence of (PW4) the brother of PW1. PW1 testified that, the appellant and her mother had separated and she remained staying with her father. One day when she was in standard III sometimes in 2002 his father had carnal knowledge with her in the forest and since then it was usual to have sexual intercourse with the appellant as they were going to the bush near the house and did it whenever the appellant demanded.

In 2005, she conceived as a result of the affairs with his father and gave birth to a baby boy on the 25th November 2005. She further testified that, despite giving birth to her first child, the appellant continued to demand sex until 2009 when she disclosed the incident to her paternal uncle.

The evidence of PW4 was to the effect that, the appellant was his father and that he was sexually harassing his sister

(PW1). PW4 further testified that sometimes the appellant used to take her to his room and slept with her overnight. PW4 said, he used to peep through the door shatters and saw the appellant lying on his sister's chest.

In his defence, the appellant denied having committed the offence he was convicted of. He contended that the charge against him was a mere fabrication and the intention is to take his properties.

In this appeal, the appellant appeared in person, unrepresented and fended for himself. The respondent/Republic was represented by Ms Rebecca Msalangi, learned State Attorney.

The appellant raised five (5) grounds of appeal in his memorandum of appeal which may be summarized as follows:-

1. That, the trial court erred in law by relying on the evidence of DNA reports.
2. He was convicted on insufficient evidence of the prosecution witnesses.

3. That, the allegation raised by PW1 that the appellant had sex with her several times and conceived three times, but she did not report to anyone.
4. Failure to determine why the appellant was not taken to court as was arrested on 6/04/2009 and arraigned in court on 2/09/2010.
5. The prosecution failure to prove their case beyond reasonable doubt.

During the hearing, the appellant exercised his option by letting the learned State Attorney to make her submissions first while he saved his right of reply thereafter.

The learned State Attorney supported both the conviction and sentence imposed on the appellant, in other words he did not support the appeal. She prayed to start by arguing grounds number two and five together, ground number one and lastly, ground number three and four together.

In her reaction to the second and fifth grounds of appeal as to the complaint that the prosecution has failed to prove their case beyond reasonable doubt, the learned State Attorney submitted that, what was required here was evidence to prove the charge under section 158 (1) (a) of the Penal Code which was duly done. She pointed out that, there was no controversy that PW1 was the appellant's biological daughter and that proof came from the appellant himself who did not dispute that fact. The next ingredient of the offence was whether the appellant raped PW1. Ms Msalangi, pointed out that, the evidence of PW1 was direct evidence to prove the guilty of the appellant and added that 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. She submitted that in terms of section 127 (7) of the Evidence Act Cap. 6 of the Revised Edition, 2002, PW1's evidence was properly relied upon. She relied on the case of **Renald John Shirima versus Republic,** Criminal Appeal No 280 of 2007 (unreported).

Ms Msalangi stated that the testimonies of the prosecution witnesses corroborated each other in that, PW1 was raped by the appellant and specifically the evidence of PW4. Therefore, she urged us to dismiss the second and fifth grounds of appeal as they are devoid of merit.

On the first ground of appeal, the learned State Attorney submitted on the appellant's complaint that the courts below erred by relying on the evidence of DNA report, she disputed that complaint on the basis that the conviction of the appellant was relied by the trial court on the evidence of the PW1 (the victim), which was corroborated by other prosecution witnesses and not the DNA report.

On grounds three and four of appeal, the learned State Attorney submitted that, these grounds are quite new and since they were not raised and decided by the first appellate court, this Court has no jurisdiction to determine them. He referred us to the case of **George Maili Kemboge versus Republic,** Criminal Appeal No 327 of 2013 (unreported).

Supporting the conviction and sentence, Ms. Rebecca urged us to dismiss the appeal, because the charge against the appellant was proved beyond reasonable doubt.

In his rejoinder submission, the appellant reiterated that the evidence of PW1 was contradictory, therefore 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 therefore prayed for the Court to allow his appeal.

Before we 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 principles 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, the

cases of **Salum Mhando vs. Republic** [1993] T.L.R. 170 and **Patrick Abel vs. Republic**, Criminal Appeal No. 55 of 2014 (unreported).

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

We have carefully scrutinized the evidence on record. PW1 was unequivocal that between 2002 and 2009, the appellant, who is her biological father, was regularly having sexual intercourse with her, and that the habit persisted for years. In early 2005, she realized that she was pregnant and gave birth to a baby boy. This was the gist of her evidence which was corroborated by the evidence of PW4.

However, in view of the fact that her evidence was consistent, truthful, credible and strong, we agree with the learned State Attorney that the two courts below correctly held, relying on section 127 (7) of the Evidence Act and the case of **Selemani Makumba v. Republic** [2006] T.L.R 379 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."

See also the cases of **Mkumbo Hamisi v. Republic,** Criminal Appeal No 24 of 2007**,** and **Anyelwisye Mwakapake and another v. Republic,** Criminal Appeal No. 227 of 2011, (both unreported).

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

On the first ground of appeal, we agree with the submissions made by the learned State Attorney that the issue of DNA report was properly resolved by the first appellate court and it was not that evidence which proved the conviction of the appellant as he was convicted basing on the evidence of PW1

(the victim) which was corroborated by the evidence of PW4. We therefore find this ground lacking merits.

Grounds three and four having been raised for the first time in this second appeal, we find that they are not legally before us for determination and therefore lack merit. This was on the basis of the settled legal position demonstrated by this Court in the case of **Sadick Marwa Kisase versus Republic**, Criminal Appeal No 83 of 2012, (unreported) where this Court stated:-

> *"The Court has repeatedly held that matters not raised in the first appeal court cannot be raised in a second appellate court."*

See also the case of **Richard Mgaya @ Sikubali Mgaya versus Republic**, Criminal Appeal No 335 of 2008 (unreported).

Therefore, we hasten to say that there is no better direct evidence which could have been adduced by the prosecution to establish the offence which the appellant was convicted of other than the evidence of PW1, the victim.

From the foregoing, we find that appellant's defence did not raise any reasonable doubt on the credibility and reliability of

PW1's and PW4's evidence which by itself, sustain the appellant's conviction. Accordingly, we hold that the appellant was properly convicted and sentenced.

In the event, and for reasons given, we find this appeal without merit and dismiss it in its entirety.

DATED at **TANGA** this 25th day of April, 2018.

M. S. MBAROUK
JUSTICE OF APPEAL

A. G. MWARIJA
JUSTICE OF APPEAL

S. S. MWANGESI
JUSTICE OF APPEAL

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

E.Y. MKWIZU
DEPUTY REGISTRAR
COURT OF APPEAL