IN THE COURT OF APPEAL OF TANZANIA
AT IRINGA

(CORAM: MUSSA, J.A., LILA, J.A., And WAMBALI, J.A)

CRIMINAL APPEAL NO.378 OF 2016

FESTO MGIMWA ..... APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

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

(Sameji, J.)

Dated the 10th June, 2016

In

DC. Criminal Appeal No. 53 of 2015

JUDGMENT OF THE COURT

3rd & 15th May , 2019

WAMBALI, J.A.:

The District Court of Iringa which sat at Iringa, convicted the appellant, Festo Mgimwa of the offence of incest by males contrary to section 158 (1) (a) of the Penal Code, Cap. 16 R.E. 2002 (the Code), which was preferred as the first count by the prosecution. He was accordingly sentenced to thirty (30) years imprisonment and ordered to pay a compensation of Tshs 500,000/= to the victim of the offence. He was however acquitted of the second count of assault causing actual

bodily harm contrary to section 241 of the Code. He unsuccessfully appealed to the High Court, hence this second appeal in which he still challenges both conviction and sentence.

It is noted that the appellant earlier on lodged his memorandum of appeal comprising nine (9) grounds of appeal. However, at the hearing, the learned Senior State Attorney for the respondent Republic argued them generally. But, going through the grounds thoroughly it came clear that essentially the main complaint is that the learned first appellate judge wrongly found that the prosecution proved the case beyond reasonable doubt because of the following reasons. First, that identification was not watertight. Second, that the trial court wrongly believed the evidence of family members, namely PW1 and PW2 while the same were not credible and against the law. Third, that the PF3 which contained the report of the doctor on the alleged penetration of the male organ into the victim's vagina was not read over after it was admitted as exhibit P1 contrary to the requirement of the law. Fourth, that the appellant's defence was not properly considered by the trial court.

The brief background of the prosecution case was that on 4th November, 2013 at Ilala area within the Municipality of Iringa in Iringa

Region, the appellant had carnal knowledge of the girl aged 13 years who is also his biological daughter. For the purpose of this judgment, as the victim was a child below eighteen years, we will refer to her with the prefix JFM or PW1 wherever necessary. The prosecution case was supported by three witnesses, including the victim who testified as PW1, Happy Festo Mgimwa (PW2) and Dr. Scollar Malangalila (PW3) who also tendered the PF3 which was admitted as exhibit P1. It is on record that PW3 examined PW1 and found that she had lost her hymen and had bruises on her private parts and some injury in her neck.

The appellant defended himself and denied any involvement in the commission of the offence of incest by males as he stated that he could not have done so to his own daughter. Nevertheless, at the end of the trial, the District Court was fully satisfied that the appellant could not exonerate himself from the commission of the offence, and thus it convicted and sentenced him as acknowledged above.

At the hearing of the appeal, the appellant appeared in person, unrepresented, whereas Mr. Abel Mwandalama learned Senior State Attorney appeared for the respondent Republic. We wish to remark, however, that before we commenced the hearing, Mr. Mwandalama

prayed, and we granted the requisite leave for him to withdraw the notice of preliminary objection on the competence of the appeal which was lodged by the respondent Republic earlier on. We accordingly marked it to have been withdrawn.

When he was required to submit in support of his grounds of appeal, the appellant urged us to allow Mr. Mwandalama to respond first to his grounds and he would rejoin if necessary.

On behalf of the respondent Republic, Mr. Mwandalama did not support the appellants' appeal as he was firm that the prosecution proved the case against the appellant beyond reasonable doubt.

However, the learned Senior State Attorney started his submission by conceding to the complaint of the appellant in respect of exhibit P1 (PF3) which its contents were not read over in court after it was admitted. He argued that the failure of trial court to follow the procedure laid down by several decisions of the Court disabled the appellant to understand and know what was stated in that medical report. To support his submission in respect of this point he referred the Court to its decision in **Lack Kilingani v. The Republic,** Criminal Appeal

No. 402 of 2015 (unreported). Following his concession, he urged us to expunge exhibit P1 from the record. Nevertheless, Mr. Mwandalama argued that even if exhibit P1 is expunged, still the evidence of PW1 conclusively proved that the appellant had sexual intercourse with her unlawfully and therefore, penetration which is an essential requirement as proof of commission of a sexual offence was fully established. In his view, the medical evidence is only intended to give an opinion on the incident, but the victim in sexual offence is always in a better position to prove that sexual intercourse occurred and that it is none other than the accused who committed the offence.

Mr. Mwandalama argued that in terms of section 127(7) of the Evidence Act, Cap 6 R.E. 2012, the trial court properly believed the testimony of PW1 and convicted the appellant. To bolster his argument on this point he referred us to the decision of this Court in **Shozi Andrew v. The Republic** [1987] TLR 68, and **John Mapunda v. The Republic,** Criminal Appeal No. 101 of 2013 (unreported).

Responding on the complaint that the appellant was not properly indentified, Mr. Mwandalama submitted that the appellant and PW1 knew each other well as family members and lived in the same house before

the incident. He argued further that the incident occurred while there was no darkness and it is the appellant who ordered PW1 to go home from the market and wash his clothes and later followed her to go to Ilala mountain. He contended further that even at the scene there was moonlight which enabled PW1 to identify properly the appellant who she knew well as her father. He emphasized that after the incident, PW1 went to inform her sister (PW2) that she was carnally known by his father. Mr. Mwandalama thus concluded that the testimony of PW1 cannot be doubted concerning identification and urged us to disregard the complaint of the appellant.

Finally, Mr. Mwandalama submitted that the defence of the appellant was sufficiently considered by the courts below and it was found that the same could not discredit the prosecution evidence. He thus considered the appellant's complaints as baseless. He concluded his submission by imploring us to dismiss the appeal in its entirety.

In rejoinder, the appellant was content that the case against him was framed up due to his dispute with his former wife, the mother of PW1, and his defence was not considered by the trial court. He insisted that he could not have involved in sexual intercourse with his daughter.

He did not agree with the submission of Mr. Mwandalama that his case was proved beyond reasonable doubt. In the end, he requested us to allow the appeal.

On our part, firstly, we entirely agree that the contents of exhibit P1 was not made known to the appellant as it was not read over as required. We therefore, expunge the same from the record as prayed by Mr. Mwandalama. We wish however, to implore trial courts to always adhere to what the Court stated in **Robinson Mwanjis and three Others v. The Republic** [2003] TLR 218, on the importance of reading over the contents of the document once it is cleared and admitted in evidence.

We now turn to consider the other complaints raised by the appellant to support the contention that the prosecution did not proved its case beyond reasonable doubt.

With regard to identification, we are of the considered view that the appellant was not only properly identified, but he was also recognized by PW1. We have closely scrutinized the record and found that PW1 gave a detailed account of how the appellant instructed her to go home from

the market and later followed her and ordered her to go towards Ilala road and followed her up to Ilala mountain where he ordered her to undress her skirt and after she refused he threatened her with a bush knife and injured her hand, kicked her, and after she fell down, he undressed her skirt and underpants, then he undressed his trouser and underpants and proceeded to insert his penis in her vagina. PW1 stated categorically that although she knew well the appellant as her father, while they were at home there was sufficient electricity lights and on the way to Ilala mountain he closely followed her. Indeed, at the scene of the crime there was moonlight which assisted her to recognize and identify the appellant properly. Moreover, we are aware of the fact that after the incident, PW1 went direct to her sister PW2 and informed her of the incident and mentioned his father as the perpetrator, before she was taken to the police and later to the hospital. Besides, her sister explained how she saw PW2 outside the house dragging her legs and crying while wearing soiled clothes. In the event, we are settled that in view of the fact that the appellant was well known to PW1 given their relation as daughter and father, and her detailed testimony on the incident and how she identified the appellant, we entertain no doubt that the evidence of

identification was water tight. We accordingly find the complaint on lack of proper identification unmerited.

Secondly, in view of the evidence in the record of appeal, we are satisfied that PW1 sufficiently proved that there was penetration on her vagina and it was none other than the appellant who had sexual intercourse with her. PW2 sufficiently proved the requirement of section 130(4)(a) of the Penal Code that penetration however slight is sufficient to constitute the sexual intercourse necessary to the offence. From what we have stated above, PW1 did not only identify the appellant at the scene but gave a detailed account of how the incident occurred. According to the record, the appellant did not dispute the fact that PW1 is her daughter.

In a charge of incest by males, the prosecution must prove that the accused knew the female as his grandmother, daughter, sister or mother at the time of sexual intercourse. In the present case, the prosecution sufficiently proved that the appellant had carnal knowledge of PW1 while knowing that she is her daughter. He has never stated in his defence that he mistook the identity of the victim with whom he had sexual intercourse to another girl or woman. In his defence, apart from denying

the involvement in the commission of the crime, he only alleged, that the charge was framed up due to the strained relation with PW1's mother, her former wife.

In the circumstances of this case where the best evidence of commission of sexual offence emanates from the victim, (See **Selemani Makumba v. The Republic,** [2006] TLR) 379), we are satisfied that the trial court and as confirmed by the first appellate court, properly found that PW1's evidence on penetration was water tight and properly convicted him as required by section 127 (7) of the Evidence Act, Cap 6 R.E. 2002, for there was no need of corroboration to her evidence. We are therefore, in agreement with the submission of Mr. Mwandalama that even after expunging exhibit P1, still the evidence of PW1 is sufficient to ground conviction of the appellant as found by the trial court and confirmed by the first appellate court. The credibility of PW1 in the circumstances of this case cannot be doubted. It is in this regard that in **Shozi Andrew** (Supra) the Court held that:

> *"In terms of section 127(7) of the Evidence Act, sworn testimony of a child of tender years does not need corroboration. It can be treated as any*

other sworn testimony and it could form basis of conviction."

In the event, we find the complaint meritless.

With regard to failure of the trial court to consider the appellant's defence, we agree that the trial court did not consider and decide on the defence of the appellant as required by law. However, we are satisfied that the first appellate court, properly evaluated the evidence of the prosecution against that of the defence of the appellant and come to a conclusion that the same had no basis. Indeed, this is not the first time the appellant has raised this complaint as he raised it before the first appellate court. We accordingly find that the complaint is baseless in view of the fact that the evidence of the prosecution outweighed the appellant's defence.

Lastly, we have no hesitation to state that both PW1 and PW2 who testified at the trial are the appellant's daughters and thus his family members. The submission of the appellant is that their evidence required corroboration. In support of his contention he referred us through the explanation of ground one of the memorandum of appeal, the case of

Jason Rwebangira v. The Republic [1975] TLR No. 26. Having gone through the record, we are satisfied, as we have observed before, that the evidence of PW1 which was strengthened by that of PW2 did not indicate that the witnesses teamed up to promote untruthful story on the incident. Certainly, it is not the law that the evidence of relatives or family members cannot be relied upon by the trial court to ground conviction of the accused. That evidence must be weighed as required by law. It is in this regard that, in **Paulo Tarayi v. The Republic**, Criminal appeal No. 216 of 1994 (unreported) the Court stated that:

> *"We wish to say at the outset that it is, of course, not the law that wherever relatives testify to any event they should not be believed unless there is also evidence of non-relative corroborating their story. While the possibility that relatives many choose to team up and untruthfully promote a certain version of events must be borne in mind, the evidence of each of them must be considered on merit, as should the totality of the story told by them ... that is not to say a conviction based on such evidence cannot hold unless there is supporting evidence by a non relative..."*

Yet, in Mustafa **Ramadhani Kihiyo v. The Republic** [2006] TLR 323, the Court emphasized that:

> *"The evidence of relatives is credible and there is no rule of practice or law which requires the evidence of relatives to be discredited, unless there is ground for doing so."*

See also **Republic v. Lulakombe Mikwalo and Kibege** (1936) EACA 43; **Hamis Angola v. Republic**, Criminal Appeal No. 442 of 2007 and **Deo Bazil Olomi v. Republic,** Criminal Appeal No. 245 of 2007 (both unreported).

In the present case, we are satisfied that the evidence of PW1 and PW2 cannot be discredited as there is no indication that they teamed up to promote an untruthful story. Their evidence did not require to be corroborated by that of non relatives. The trial Court therefore, rightly believed their evidence and convicted the appellant and imposed a deserving sentence for the offence. We accordingly find the complaint as unfounded.

Overall, we are satisfied, and we agree with Mr. Mwandalama that the prosecution case was proved beyond reasonable doubt. We thus

dismiss all the complaints of the appellant save for what we have stated with respect to exhibit P1 which we have expunged from the record. But, that stance does not weaken the prosecution case. In the final analysis, we dismiss the appeal. It is so ordered.

DATED at **IRINGA** this 15th day of May, 2019.

K. M. MUSSA
JUSTICE OF APPEAL

S. A. LILA
JUSTICE OF APPEAL

F. L. K. WAMBALI
JUSTICE OF APPEAL

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

A.H. MSUMI
DEPUTY REGISTRAR
COURT OF APPEAL