IN THE COURT OF APPEAL OF TANZANIA
AT DAR ES SALAAM

(CORAM: LILA, J.A, MWANGESI, J.A And SEHEL, J.A.)

CRIMINAL APPEAL NO. 57 OF 2018

ATHANAS NGOMAI ..... APPELANT

VERSUS

THE REPUBLIC ..... RESPONDENT

(Appeal from the decision of the High Court of Tanzania at Dar es Salaam)

(Kitusi, J.)

dated the 16th day of November, 2017.
In
Criminal Appeal No. 242 of 2016
.....

JUDGMENT OF THE COURT

29th & 22nd April, 2020

LILA, J.A.:

In the District Court of Ilala the appellant was charged with the offence of incest by males contrary to section 158(1)(a) of the Penal Code, Cap. 16 R.E 2002 (the Penal Code). After a full trial, he was convicted as charged and consequently sentenced to life imprisonment. He was also ordered to pay TZs. 2,000,000/= as compensation to the victim. It was alleged by the prosecution that on diverse dates between 2008 and 1/11/2014 at Mbondole area within Ilala District in Dar es Salaam Region he had carnal knowledge of his

own daughter, who, for the sake of hiding her identity, we shall be referring to as the victim or PW1 in the course of this judgment. Aggrieved, he appealed to the High Court against both conviction and the sentence imposed on him. His conviction was sustained. The imprisonment sentence was found to be illegal and was reduced to thirty (30) years imprisonment. Still protesting his innocence, he appealed to this Court against both conviction and sentence.

In order to appreciate the facts giving rise to the present appeal, we find it appropriate to give, albeit briefly, the background of the case. It was a common ground that the appellant is the father of the victim (PW1) and they first lived at Dodoma where the appellant divorced the victim's mother. The appellant, the victim and her brother one Baraka Athanas Ngomai later on shifted to Dar es Salaam and lived at Mbagala. The trio later shifted to Mbondole area within Ilala District where the appellant lived with another woman one Tumaini Swolakabeja (PW2). It was the victim's evidence that on diverse dates between 2008 and 21/01/2014 at Mbondole area within Ilala district her father (the appellant) did have carnal knowledge of her which habit the appellant started when they were residing at Mbagala. At that time the victim was in Standard III. According to the

victim, at Mbagala they lived in a house which had only a sitting room and a bed room. The sleeping arrangement was that during the night the victim was sleeping with the appellant and her brother was sleeping in the sitting room. When they moved to Mbondole they lived with a step mother (PW2) who dealt with making and selling "vitumbua". PW2 used to leave home at around 04.00hrs to her business and the appellant seized that opportunity to have sexual intercourse of the victim as well as against the order of nature at the sitting room where she used to sleep. In all those occasions the appellant warned her not to tell anybody lest he would kill her. Afraid of being impregnated by his father and hence terminated from school, she broke the news to PW2 on 27/1/2014. Flabbergasted, PW2 took the victim to the police station where they were issued with a PF3 and went to Amana Hospital for Medical examination. Magreth Ibado (PW5), a clinical doctor, examined the victim and observed that she had no bruises but her hymen was perforated as his fingers easily penetrated into the vagina which signified that the victim had sexual intercourse several times. She tendered a PF3 which was admitted as exhibit P1. That culminated into the appellant's arrest and later being charged.

In his sworn defence, the appellant, apart from admitting the victim being his daughter and living with the victim's stepmother flatly disassociated himself with the commission of the offence. He attributed the accusations with his refusal to heed to PW2's advise to sell his house which resulted into a misunderstanding for the year 2012 and 2013. He claimed that the case was thus a frame up by PW2.

In his well-reasoned judgment, the trial magistrate found the defence case was unable to shake the prosecution case which he was convinced that it had proved the charge against the appellant. He was satisfied that the appellant was the victim's father and applying the best evidence rule in sexual offences enunciated by the Court in the case of **Selemani Makumba vs Republic**, Criminal Appeal No. 94 of 1999 (unreported) he was also satisfied that the victim's evidence sufficiently established that the appellant had carnal knowledge of her at Mbagala and later at Mbondole. In addition, he was satisfied that the victim proved that there was penetration of her father's male organ into her female organ which evidence was supported by PW5 who medically examined her and found that, although there were no bruises, the hymen was perforated. In

respect of the absence of bruises, the learned trial magistrate relied on the case of **Daniel Nguru and Others vs Republic**, Criminal Appeal No.178 of 2004 (unreported) where the Court held that penetration is not proved by presence of semen on the body of the prosecutrix or bruises on her vaginal region and he held that despite absence of bruises PW1 proved that there was penetration. In that accord, he found that the defence evidence failed to raise any reasonable doubt on the prosecution case. He, accordingly convicted the appellant and sentenced him as hinted above.

The appellant felt aggrieved. He fronted five (5) grounds of appeal before the High Court. Nevertheless, upon being satisfied that the case against the appellant was proved, his conviction was sustained. The High Court concurred with the trial court that the best evidence in sexual offences comes from the prosecutrix and that PW1 and PW2 whose evidence was not doubted by the trial magistrate were credible witnesses. The cases of **Diha Matofali vs Republic**, Criminal Appeal No. 245 of 2015 and **Goodluck Kyando vs Republic**, Criminal Appeal No.118 of 2003 (both unreported) were cited to augment those findings. On the appellant's claim that the case was a concoction by PW2, citing the decision in the case of

Kwiga Masa vs Samwel Mtubatwa [1989] TLR 103 (HC), the learned judge found the claim an afterthought on account of his failure to cross-examine PW2 on the matter when she testified. Finally, the learned judge was satisfied that the conviction was well founded. As for the sentence, he found it illegal and reduced it to thirty (30) years imprisonment.

Still aggrieved, the appellant knocked the Court's door armed with a memorandum of appeal comprised of nine grounds of appeal seeking to impugn the High Court decision which can be paraphrased thus:-

1. That the learned first appellate Judge had erred in the law by failure to observe that the charge was defective for failure to reflect the allegation by PW1 that the appellant had carnal knowledge of her against the order of nature and subsequently raped the victim.
2. The prosecution evidence did not point at the appellant as the guilty one.
3. That the contradiction on the age of the victim between the charge, PW1 and PW2 was not resolved.

4. That sexual intercourse to a S.T.D III girl when she was eleven years old could not be proved without injuries, cut wound or damage on her private part.
5. That the charge was defective for not showing that the offence was committed at Mbondole and Mbagala.
6. That the first appellate court and the trial court disregarded the fact that the investigation was not completed within time hence the appellant was remanded in custody for an aggregate of six days without any certificate in compliance with requirement of the provision of the law.
7. That the first appellate Judge erred in law by not assessing the credibility of PW.1 PW.2 PW.3 and PW.5 before he relied on their evidence as a basis of conviction against the appellant.
8. That the first appellate court did fail to realize that the whole evidence adduced was purely concocted and was aimed implicating the innocent person (the appellant) with the offence charged.

9. That the offence against the appellant was not proved to the hilt.

At the hearing of the appeal which was conducted through video conference the appellant appeared in person whereas the republic Respondent had the services of Ms Esther Martin who was assisted by Ms Nancy Mushumbuzi, both learned State Attorneys.

When he was accorded an opportunity to elaborate his grounds of appeal, the appellant simply adopted them together with the written submission in support of the appeal he filed on 2/4/2019 and urged the Court to allow the appeal and set him free.

In his written submission, the appellant contended that the age of the victim was not proved and there was variance between the age stated in the charge and the prosecution evidence. That, while PW1 said she was born on 26/8/1998 hence she was 16 years old, PW2 did not prove the victim's age and PW3 said the victim was 13 years old.

Closely related to the above ground of appeal and although not raised as a ground of appeal, the appellant also submitted that the

evidence of the victim was illegally received as no *voire dire* test was conducted to establish if she understood the nature of an oath.

The complaint that the medical report (PF3) was irregularly admitted as exhibit P3 since it was tendered by the public prosecutor who was not a witness, cropped up as another new ground in the written submission.

The appellant also complained that according to the evidence by PW2, the appellant and victim were not in good terms hence they seized the opportunity to fix him with the offence he was charged.

On her part, Ms Martin strongly resisted the appeal and supported the High Court decision in its entirety.

In respect of ground one (1) of appeal, Ms Martin submitted that the charge was proper and the prosecution cannot be faulted for their choice to charge the appellant with the offence of incest by males only without including the offence of having carnal knowledge against the order of nature although both offences were committed. She prayed that ground to be dismissed.

Regarding ground three (3) of appeal, the learned State Attorney contended that no any contradiction existed respecting the

evidence of age of the victim. She argued that PW1 said she was born on 26/8/1998 and, on 25/8/2014, when she testified she was fifteen (15) years. As for PW2 who testified on 8/9/2014 she said the victim was sixteen (16) years old and PW3 who testified on 28/10/2016 said the victim was 13 years old. She contended that by arithmetical calculations all the witnesses were right save for PW3, a policeman, who, in accordance with the Court's decision in the case of **Issaya Renatus vs Republic**, Criminal Appeal No. 542 of 2015 (unreported), is not a person who could prove the victim's age. She insisted that only PW1 and PW2 were, in the present case, the ones who could prove the age of the victim. The evidence by PW3 should be ignored, she argued. She added that as the appellant was 15 years old, conduct of *voire dire* examination was not necessary.

Arguing against ground four (4) of appeal, the learned State Attorney discounted it that absence of injuries in the vaginal region of the victim did not matter on account of the victim's evidence that the appellant started to have carnal knowledge of her since she was eleven years hence she got used of it. Else, she argued, perforation of the victim's hymen as was found by PW5 proved being penetrated.

The learned State Attorney agreed with the appellant that the offence was committed both at Mbagala and Mbondole. She, however, contended that the prosecution decided to charge the appellant with what he did at the later place. They had that discretion hence they cannot be faulted. She accordingly urged us to dismiss that ground of appeal.

The learned State Attorney attacked ground six (6) of appeal and urged it be dismissed on the ground that, although it was not clear, there was no law that was violated by the investigation taking a long time and the appellant staying in prison for over six days.

Grounds Two (2), seven (7) and nine (9) were argued jointly by the learned State Attorney. Elaborating, she argued that PW1 explained in detail how the appellant, her blood father, had carnal knowledge of her at Mbagala and Mbondole which evidence was supported by PW2 to whom the victim first disclosed the said information and later cemented by PW5 who examined her and found her virginity destroyed. She concluded that the evidence by PW1, PW2 and PW5 who were believed by both courts below proved the charge against the appellant beyond doubt. And, she argued, the defence evidence could not create doubt on the prosecution evidence

since the appellant did not cross-examine PW2 on the contention that she framed up the case so as to allow her sell his house. In all, she beseeched the Court to uphold the concurrent findings of the courts below and dismiss the appeal in its entirety.

We have given due consideration to the appellant's grounds of appeal and the written submission in their support. We have, with equal weight, considered the arguments by the learned State Attorney in opposition to the appeal.

In determining the appeal we propose to address the grounds of appeal in this sequence. We shall first deal with ground 6 which is about the time the appellant spent in prison, grounds 1 and 5 which fault the charge to be defective, grounds three (3) which touches on the contradictions in the evidence proving the age of the victim and grounds 2, 4, 7, 8 and 9 jointly which concern whether the prosecution proved the charge against the appellant beyond reasonable doubt.

In the sixth ground of appeal, the appellant complains over the delayed investigation and having stayed in prison over six days without any certificate of any specified officer. Unfortunate though,

the complaint went unelaborated in the appellant's written submission. We could not comprehend the substance of that complaint and, to avoid engaging ourselves in speculations, we agree with the learned State Attorney that there is no law that bars investigation taking more than six days and the accused person to stay in prison during that period provided that the stay is justifiable. This ground is baseless and is dismissed.

In grounds 1 and 5, the appellant's attack is directed to the charge that was put at his door. In the first limb, the complaint is that it does not reflect the offence of unnatural offence as revealed by the victim's evidence. Like ground 6, this ground was not elaborated in the filed written submission. Read closely, the appellant seems to suggest that he expected to be charged with both the offence of incest by males and unnatural offence. Conversely, the learned State Attorney was of the view that the prosecution exercised its discretion to choose which offence to charge and they cannot be faulted for that.

The procedure of making of a complaint is governed by the provisions of sections 128 of the Criminal Procedure Act, Cap. 20 R. E. 2002 (the CPA). The main stay in that provision is that a charge is

framed according to the complaint presented to either the magistrate or the police. We are not aware of any statutory law which expressly or implicitly requires the prosecution to prefer a certain charge. The rationale behind it is that at the end of the trial the prosecution have to make sure that the evidence they have meets the cardinal principle in our criminal jurisprudence which imperatively obliges the prosecution to prove the case beyond reasonable doubt. That said, the preference on which offence to be charged is based on whether they have reasonable and probable cause to believe that such an offence has been committed and this is dependent upon the evidence collected. It is in that sense that the charge to be preferred is the exclusive prerogative of the prosecution. We think the same reasoning apply regarding the second limb of that ground of appeal that the charge reflected the offence committed at Mbondole only leaving aside that committed at Mbagala. Since the offence charged was committed in two different places the prosecution had discretion to charge the one they preferred most and which they were certain of being able to prove. Further, for a charge to be proper it must comply with the requirements provided under section 132 of the CPA. That section provides:-

132. Every charge or information shall contain, and shall be sufficient if it contains, a statement of the specific offence or offences with which the accused person is charged, together with such particulars as may be necessary for giving reasonable information as to the nature of the offence charged.

The import of the above quoted provision was lucidly explained in the case of **Mussa Mwaikunda v R [2006] TLR 387** where the Court stated, inter alia, that:-

> *"The principle has always been that an accused person must know the nature of the case facing him. This can be achieved if a charge discloses the essential element of an offence."*

In another case of **Isidori Patrice v Republic,** Criminal Appeal No. 224 of 2007 (unreported), the Court stated:-

> *"It is a mandatory statutory requirement that every charge in a subordinate court shall contain not only a statement of the specific offence with which the accused is charged but*

such particulars as may be necessary for giving reasonable information as to the nature of the offence charged. It is now trite law that the particulars of the charge shall disclose the essential elements or ingredients of the offence. This requirement hinges on the basic rules of criminal law and evidence to the effect that the prosecution has to prove that the accused committed the ***actus reus*** *of the offence with the necessary* ***mens rea****. Accordingly, the particulars, in order to give the accused a fair trial in enabling him to prepare his defence, must allege the essential facts of the offence and any intent specifically required by law."*

Since, in the present case, the charge complied with the above mandatory requirements of the law, we are at one with the learned State Attorney that these grounds of appeal are without merit.

We now turn to consider ground 3 of appeal. We entirely agree with the learned State Attorney that substantially no serious contradiction on the age of the victim existed. As rightly argued by Ms Martin, the victim told the trial court that she was born on 26/8/1998 and she testified on 25/8/2014. A simple calculation would

show that she was just a day to attain the age of 16. She was therefore right to tell the trial court that she was 15 years old on the day she testified. On her part, PW2, the victim's step mother who testified on 8/9/2014 said the victim was 16 years old. Truly, on that day, the victim was just 14 days after attaining the age of 16. She was around 16 years old. In terms of the Court's decision in the case of **Issaya Renatus vs Republic** (supra) which was rightly cited by the learned State Attorney, age of the victim would precisely be given by either the victim herself or PW2 who lived and knew well the victim. The age mentioned by PW3, the investigator and an outsider who was just informed, can not detract us from the true age given by the victim and PW2. In essence, therefore there existed no material and serious contradiction on the age given by PW1 and PW2. It was sufficiently proved that the victim was 15 years old when the charge was preferred against the appellant and, as rightly submitted by the learned State Attorney, *voire dire* examination under section 127(2) (5) of the Evidence Act, Cap. 6 (the EA) was therefore unnecessary as she was above fourteen (14) years hence was not of tender age.

The appellant also seemed to suggest that the victim's age could only be proved by production of a document, preferably a birth certificate. This assertion is definitely without legal basis. In the case of **Issaya Renatus vs Republic** (supra), when considering the need for the age of a victim of statutory rape to be established, the court explained how the age of a victim can be proved where it categorically stated that:-

> *"We are keenly conscious of the fact that the victim must be under the age of eighteen. That being so, it is most desirable that the evidence as to proof of age be given by* ***the victim, relative, parent****, medical practitioner or, where available,* ***by the production of a birth certificate****...."* (Emphasis added)

So, on the principle set out above, production of a birth certificate is not the only means of proving age, but, to say the least, possible only when the same is available. This observation takes cognizance of the fact that not all people have been availed with the same. Moreover, the wrong impression that proof of a fact by production of a document (documentary evidence) supersedes oral and direct evidence on a fact was disbanded by the Court in the case

of **Edward Nzabuga vs Republic**, Criminal Appeal No. 136 of 2008 (unreported) in which the Court quoted with approval the observation of the High Court Judge in that case when it went for first appeal, which went thus:-

> *"The issue here is whether only medical evidence is acceptable or admissible in proving penetration or physical injuries to the vagina or body of the victim respectively.*
>
> *I'm afraid that courts of law have been gripped with some sort of phobia to expert opinions in particular medical evidence which they hold to be superior to the opinions or evidence of ordinary people, some of whom have got experience on what they are talking about. It smacks of academic arrogance to doubt the evidence of a woman, an adult, like the sixty two year old PW1 Nahemi Sanga in the case at hand when she say that the appellant's penis penetrated into her vagina, simply because a medical report, of a doctor who was not only present at the scene and did not experience the thrust of the penis of the rapist, but depending only on the presence of spermatozoa and bruises in the vagina of the victim to reach his opinion. An expert's opinion is admissible to*

furnish the court with scientific information which is likely to be outside the experience and knowledge of a judge or jury. If on the proven facts a judge or jury can form their own conclusions without help, then the opinion of an expert is unnecessary."

We also subscribe ourselves to that observation and maintain that to be a valid and proper position of the law. The above observation provides an answer that even though the PF3 is subject to be expunged, as we hereby do, for being wrongly tendered by the public prosecutor who was not a witness, PW5's account of what she saw when she examined the victim still remain and sufficiently proved that the victim was penetrated.

The appellant's remaining grounds 2, 4, 7, 8 and 9, as indicated above, challenge both courts below for finding that the charge was proved against the appellant beyond doubt. In essence, all these grounds revolve around the appellant's total denial of committing the offence, disputing the victim being penetrated without either bruises or total destruction of her vaginal region and reliability of the victim, PW2, PW3 and PW5.

In resolving the above grounds of appeal we wish to start with credibility of the victim. it is now settled law that all witnesses are entitled to credence unless there are good reasons for not doing so, (see **Goodluck Kyando vs Republic** [2006] TLR 363). As to how credibility can be determined the court pronounced itself in the case of **Yasin Ramadhani Chang'a vs Republic** [1999] T.L.R. 489 and **Shabani Daud vs Republic**, Criminal Appeal No. 28 of 2001 (unreported) both quoted in **Nyakuboga Boniface vs Republic**, Criminal Appeal No. 434 of 2017 (unreported), that:-

> *"a witness's credibility basing on demeanor is exclusively measured by the trial court."*

The Court further stated that:-

> *"Apart from demeanor.... The credibility of a witness can also be determined in other two ways that is,* ***one by assessing*** *the coherence of the testimony of the witness, and* ***two****, when the testimony of the witness is considered in relation to the evidence of other witnesses."*

[see also **Edward Nzabuga vs R**epublic, (supra)]

It is noteworthy that both courts below believed the victim to be a witness of truth. As summarized above, the victim told the trial court

that the appellant used to have carnal knowledge of her first at Mbagala and then at Mbondole whereat, fed up of that habit and worried to be pregnant, decided to report the matter to PW2. She clearly stated that, we quote her:-

> *"...He was taking his penis and entered in my vagina while closing my mouth. he said if I will tell anybody, he will kill me, he entered part of it. When he entered at first time I felt pain but thereafter I didn't feel pains.*
>
> *When he entered I saw and feel it whitish materials inside my vagina. He started to rape me when I was in Std III in 2008. He raped me several times. Last day he raped me in 2014.*
>
> *He raped me at first in 2008 when we were at Mbagala. We were residing in the house with one bed room and one sitting room. I was with my brother one Baraka Athanas Ngomai. He is 19 years old. During the night my father was sleeping with me. My brother told my father to sleep with him since they were men but my father refused and told my brother to sleep in the sitting room..."*

The evidence that was led by the victim clearly indicated that she was penetrated by her father, the appellant. She was not only clear and detailed on what befell her but was also very consistent. That evidence alone tells it all how she was being carnally known by the appellant. Both courts below also believed the testimony by PW2 to whom the victim first reported the incident and PW5 who medically examined the victim. Similarly they did not doubt the testimony by PW3, the investigator. The record shows vividly that their evidence was considered and none was doubted. Like both courts below, we see no reason to disbelieve them. They were, therefore, truthful witnesses. That being the case the trial court rightly applied the best evidence rule in sexual offences to convict the appellant as was propounded in the case of **Selemani Makumba vs. Republic,** (supra) where the court held 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]

So much for that ground of complaint. Suffice it to say, on the evidence, the complaint that the courts below relied on the unreliable testimony of PW1, PW2 and PW5 is not meritorious and is dismissed.

Absence of evidence of there being bruises or destruction of the victim's female organ formed a crucial issue in the appellant's written submission. This should not detain us much. There was ample evidence by the victim that she was penetrated by the appellant. She, at first, felt pains but later on got used to it hence did not feel pains. That evidence proved penetration. In terms of section 130(4)(a) of the Penal Code, penetration however slight is sufficient penetration. Existence of bruises is not necessary for proving penetration as was once said, had that been the natural consequences of being penetrated, women might have opted for total abstinence. It is in appreciation of that fact that the Court in case of **Daniel Nguru and Another vs Republic** (supra) observed that:-

> *"Penetration is not proved by presence of semen on the body of the prosecutrix or bruises on her vaginal region."*

We think, the appellant's doubt as to how the victim, aged eleven years and of STD III, could withstand being penetrated without damage to her genital parts was well answered by the victim that she earlier on experienced pains but later got used of that practice. No better words would explain the situation she found herself in. This complaint lacks merit.

Lastly, having found that the victim, PW1 and PW5 were truthful witnesses coupled with the undisputed fact that the appellant was the victim's father, we see no reason to depart from the concurrent findings of both courts below that the appellant ravished his own daughter. His assertion that the appellant's wife (PW2) was all out to ensure the appellant sells his house or disappears to enable her sell the house came out during defence. No such questions were put to PW2 by way of cross-examination when she testified. That was, as was rightly held by the learned judge who rightly cited the case of **Kwiga Masa vs Samwel Mtubatwa** (supra), an afterthought. In that case the Court stated that where a witness version during examination in-chief is not challenged by way of cross-examination, the same is taken to be true. The appellant's defence that the case is a concocted one is therefore highly implausible. The

prosecution evidence stood unshaken. The complaints raised by the appellant are baseless and are hereby dismissed. The appellant's conviction was therefore well founded and the sentence, as altered by the High Court, was proper.

In the final analysis, this appeal is without any merit. It is hereby dismissed in its entirety.

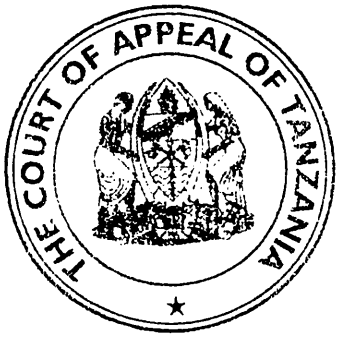
DATED at **DAR ES SALAAM** this 20th day of May, 2020

S. A. LILA
JUSTICE OF APPEAL

S. S. MWANGESI
JUSTICE OF APPEAL

B. M. A. SEHEL
JUSTICE OF APPEAL

The Judgment delivered this 22th day of May 2020, in the Presence of the Appellant in person and Ms. Mwanaamina Kombakono State Attorney for the Respondent is hereby certified as a true copy of the original.



G. H. HERBERT
DEPUTY REGISTRAR
COURT OF APPEAL