IN THE COURT OF APPEAL OF TANZANIA
AT ARUSHA

(CORAM: NDIKA, J.A., LEVIRA, J.A., And MWAMPASHI, J.A.)

CRIMINAL APPEAL NO. 558 OF 2017

JOSEPHAT JOSEPH ..... APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

(Appeal from the judgment of the High Court of Tanzania at Arusha)

(Opiyo, J.)

dated the 15th day of September, 2017
in
Criminal Appeal No. 46 of 2017

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JUDGMENT OF THE COURT

23rd & 26th November, 2021

NDIKA, J.A.:

The appellant, Josephat Joseph, is dissatisfied by the judgment of the High Court of Tanzania at Arusha (Opiyo, J.) dated 15th September, 2017 affirming his conviction and sentence of thirty years imprisonment for the offence of incest by males contrary to section 158 (1) (a) of the Penal Code, Cap. 16 R.E. 2002 (now R.E. 2019). He now appeals against the said judgment.

It was alleged at the trial before the Resident Magistrate's Court of Manyara at Babati that the appellant, between 30th May and 3rd June, 2016 at Gawal village within Babati District in Manyara Region, had prohibited

sexual intercourse with [name withheld], a girl aged sixteen years, who was, to his knowledge, his daughter. We have withheld the name of the victim to safeguard and protect her privacy and modesty, hence we shall refer to her later in this judgment as "the victim" or simply as PW1.

The prosecution case, based on the testimonies of PW1 and five other witnesses fielded by the prosecution, tended to show that the victim was a sixteen-year-old biological daughter of the appellant. She lived with her parents in their home at Gawal village within Babati District along with her six younger siblings. In the early hours of 29th May, 2016, a quarrel erupted between her parents culminating in her mother (PW3) storming out of the home. It was established later on that PW3 returned to her ancestral home at Dareda in Manyara Region.

After learning that his wife had not returned home, the appellant called out the victim in the evening of 30th May, 2016 around 21:00 hours and took her to his adjoining farm where he asked her to strip naked and lie on the ground as he demanded to see her private parts. Shocked by that turn of events, the victim resisted her father's demonic overtures. The appellant, however, overcame his daughter's resistance by holding her neck and forcing her to the ground as he undressed her. There and then, he wasted no time as inserted his male organ into her vagina while the

victim was crying in agony. When he was through, he walked back home along with his daughter claiming that he was still unfulfilled and that he wanted more sex. At that time, the victim's younger siblings were already in bed. After some hours that night, the appellant pressed the victim for more sex, asking her to come to his bedroom. The tale as to what followed that night as told by PW1, as shown at page 14 of the record of appeal, was so graphic and poignant. It is as follows:

> *"He started beating me and told me that if I won't agree he will continue beating me. I felt pain thus I [went] to his room. He asked me to take off my clothes. He told me to sleep on my stomach and said that this time is by the back (akasema zamu hii ni kwa nyuma). He did then insert his penis to my vagina from the back. I told him that I was feeling pain. He asked me to turn and sleep on my back (akasema lala kwa mgongo). I turned and he did again insert his penis into my vagina. Then it was almost morning and I told him that I was supposed to go to school as I had exams. He agreed to let me go."*

In the evening of 1st June, 2016 around 21:00 hours, the appellant again forced the victim to go with him to the farm. Despite her resistance on the reason that she was sick, the appellant beat her up, stripped her

naked and forcibly inserted his penis into her vagina. After he was done, they both walked back home and slept in separate rooms. In the morning, the appellant called her, urging her not to spill the beans about what was going on between them.

There were two further occasions on which the appellant forced the victim to have sexual intercourse with him. According to PW1, the first of the occasions was, yet again, at the farm around 20:00 hours in the evening on 2nd June, 2016 while the next encounter was in the appellant's bedroom around 04:00 hours in the following morning.

It turned out that PW1's younger brother then aged 14 years, who testified as PW2, had all along suspected that his father was raping his sister because of their suspicious nocturnal movements in the house and to the farm as well as the beatings she suffered for no apparent reason. Thus, when PW1 went to visit her mother (PW3) at Dareda on 3rd June, 2016 along with PW2 and her other younger brother, PW2 pressed his elder sister (the victim) on the following day to tell PW3 as to why the appellant beat her occasionally and why both of them used to go out at night. At that point, PW1 unveiled all the details of her predicament to PW3. The distressing revelation was shared immediately with several family members including the victim's maternal grandmother (PW4). Both

PW3 and PW4 examined the victim's vagina, which they found to be bruised with a tear to the anus. Subsequently, a complaint was lodged at Babati Police Station and the victim was taken to Mrara Government Hospital in Babati for treatment after being issued with a medical examination request form (PF.3).

PW6 Emmanuel Benedict Bado, a Clinician at Mrara Hospital, told the trial court that he examined the victim's vagina on 8th June, 2016 and found it bruised and that it revealed surviving sperms. His findings as documented in the PF.3 (Exhibit P.1) were consistent with the victim having had repeated sexual intercourse. On being cross-examined by the appellant, PW6 adduced that spermatozoa cannot survive in a vagina longer than twenty-four hours.

There was further evidence from Police Officer WP.3104 Detective Corporal Asia (PW5). She narrated about various aspects of the investigations into the matter, notably the fact that the appellant was arrested on 10th June, 2016.

In his defence, the appellant flatly denied having had any sexual intercourse with PW1 but acknowledged to have quarreled with PW3 who then left their matrimonial home for Dareda. In cross-examination, he

admitted that the victim was his daughter aged sixteen years old and that she was the eldest of his seven children with PW3.

In its well-reasoned and conscientious judgment, the trial court (Hon. D.C. Kamuzora – Senior Resident Magistrate, as she then was) found the charged offence proven beyond reasonable doubt and proceeded to convict and sentence the appellant as hinted earlier. On appeal, the High Court dismissed all eight grounds of appeal the appellant had cited and concluded that the appeal lacked merit.

By his self-crafted memorandum of appeal dated 29th June, 2018, the appellant raised seven grounds of appeal, which crystallise into the following complaints: **one**, that the evidence on record was not properly evaluated by the courts below and that the charged offence was not proven beyond reasonable doubt. **Two**, that there was a variance between the charge sheet and the evidence on record. **Three**, that the trial court's judgment does not contain all elements of a proper judgment. **Finally**, that the appellant's defence was not considered.

At the hearing of the appeal before us, the appellant, who was self-represented, adopted his grounds of appeal and urged us to allow his

appeal. For the respondent, Mr. Diaz Makule and Ms. Riziki Mahanyu, learned State Attorneys, strongly resisted the appeal.

It is germane to state at the outset that this being a second appeal, we are mandated, under section 6 (7) of the Appellate Jurisdiction Act, Cap. 141 RE 2019 to deal with matters of law only but not matters of fact. However, in consonance with our leading decision in the **Director of Public Prosecutions v. Jaffari Mfaume Kawawa** [1981] TLR 149 and a litany of decisions that followed, the Court can intervene where the courts below misapprehended the evidence, where there were misdirections or non-directions on the evidence or where there was a miscarriage of justice or a violation of some principle of law or practice – see also **D.R. Pandya v. R.** [1957] E.A. 336.

We begin with the first ground of appeal. As hinted earlier, the appellant contends in this ground that the evidence on record was not properly evaluated by the courts below and that the charged offence was not proven beyond reasonable doubt.

In rebuttal, Mr. Makule reviewed the evidence on record, contending that the victim gave a particularly detailed and compelling account on how the appellant forcibly had sexual intercourse with her on five occasions

while he knew that she was his daughter. That the victim's evidence drew support from PW2's testimony who observed suspicious nightly movements by the appellant and the victim in and outside their home. He added that the victim's mother and grandmother (PW3 and PW4 respectively), who examined the victim after the revelation of her predicament to PW3, confirmed that her vagina was bruised and ruptured. Further confirmation came from the medical witness (PW6) who examined the victim on 8th June, 2016. Citing the case of **Selemani Makumba v. Republic** [2006] T.L.R. 379 for the proposition that true evidence of rape or any other sexual offence must come from the victim, Mr. Makule submitted that PW1's evidence was, on its own, credible and weighty.

In a brief rejoinder, the appellant argued that the case against him was trumped up by his estranged wife.

At this point, we wish to remark that we are alert that in view of the inherent nature of sexual offences where only two persons are usually involved, the testimony of the victim is of paramount importance and that it must be scrutinized cautiously. Accordingly, the credibility of the victim becomes the single most important issue. If the testimony of the complainant is credible, cogent and consistent with human nature as well

as the normal course of things, the accused may be convicted exclusively on that evidence.

It is evident from the evidence on record that the prosecution case hinged on the victim's testimony as well as the corroborating evidence proffered by PW2, PW3, PW4 and PW6. We have reviewed this body of evidence in the light of the concurrent findings of the courts below. It is clear to us that the said courts gave full credence to the victim's testimony, which is a graphic narrative of her sordid and painful ordeal at the hands of the appellant, her father. Both courts took the view that her evidence was clear, candid, spontaneous and reliable. They took into account the fact that the victim had no reason to lie against her father and that her testimony was uncontroverted in cross-examination. Both courts rightly directed themselves to the primordial consideration that true evidence of a sexual offence must come from the victim in consonance with the dictates of section 127 (7) of the EA (now section 127 (6) following amendment of section 127 by section 26 of the Written Laws (Miscellaneous Amendments) (No. 2) Act, No. 4 of 2016) – see also **Selemani Makumba** (*supra*). Earlier in our judgment we excerpted a part of the victim's testimony, which we find to be so compelling and weighty.

We also agree with Mr. Makule that PW1's evidence was corroborated by PW2's testimony who observed suspicious nocturnal movements by the appellant and the victim in and outside their home. Actually, it is on record that the victim's predicament came to light after PW2 had pressed PW1 to disclose to their mother (PW3) as to what was going on between her and the appellant. The learned State Counsel is also right that the victim's narrative was further validated by the testimonies of PW3, PW4 and PW5 whose findings were consistent with the victim having had sexual intercourse repeatedly. On this basis, we hold without demur that the concurrent finding by the courts below that the appellant had prohibited sexual intercourse with the victim while being aware that she is his daughter is clearly unassailable. The first ground of appeal fails.

The appellant's contention in the second ground that there was a material variance between the charge sheet and the evidence on record as regards the time within which the charged offence was committed is evidently beside the point. We are in agreement with Mr. Makule that the accusation in the charge sheet that the appellant had a prohibited sexual intercourse with the victim between *"30th May and 3rd June, 2016 at Gawal village"* corresponded so neatly with the victim's testimony, at pages 14 through 16 of the record of appeal, that the appellant forcibly had sexual

intercourse with her on five occasions between the evening of 30th May, 2016 at 21:00 hours and early morning on 3rd June, 2016 at 04:00 hours. It is noticeable that the first appellate court considered the same issue and came to a similar conclusion in its judgment as shown at page 71 of the record of appeal. In our view, any of the five occasions on which sexual intercourse occurred could constitute the offence as charged.

We recall that in his rejoinder, the appellant extended his alleged variance by taking issue with PW6's evidence that he found surviving spermatozoa in the victim's vagina when he examined her on 8th June, 2016 while it was in evidence that the victim had left his home (where the offence was supposedly committed) with her two brothers five days earlier, that is, on 3rd June, 2016. Since by PW6's own acknowledgement in cross-examination that spermatozoa would only survive in a vagina for twenty-four hours only, the appellant contended that the victim must have had sex with an unknown person one day before she was examined while she was at her maternal grandparents' home.

In our considered view, we need not answer the question whether the victim must have had sex with another person one day or so before her medical examination based upon PW6's suggestion that spermatozoa in a vagina would only survive for twenty-four hours. As a medical witness,

PW6's evidence was mainly relevant in determining whether the victim had sexual intercourse. He was not expected to testify as to when the victim had sexual intercourse for the first time. We think that his finding that the victim had repeated sexual intercourse sufficiently advanced the prosecution case as opposed to detracting from it. Accordingly, we find no substance in the second ground of appeal, which we hereby dismiss.

In the third ground of appeal, the appellant contended, without any elaboration, that the trial court's judgment fell short of the statutory threshold and that it should not have been upheld on the first appeal. For the respondent, Mr. Makule countered that claim, submitting that the trial court's judgment met the requirement stipulated by section 312 (1) of the Criminal Procedure Act, Cap. 20 R.E. 2002 (now R.E. 2019) ("the CPA").

Section 312 (1) of the CPA stipulates the contents of a judgment in criminal trial as follows:

> *"**312**.-(1) Every judgment under the provisions of section 311 shall, except as otherwise expressly provided by this Act, be written by or reduced to writing under the personal direction and superintendence of the presiding judge or magistrate in the language of the court and **shall contain the point or points for***

determination, the decision thereon and the reasons for the decision, *and shall be dated and signed by the presiding officer as of the date on which it is pronounced in open court."* [Emphasis added]

The above provisions require expressly that every judgment under section 311 of the CPA must, among others, contain the point or points for determination, the decision thereon and the reasons for the decision. The Court in **Hamisi Rajabu Dibagula v. Republic** [2004] TLR 181, at 196, referred to its earlier decision in **Lutter Symphorian Nelson v. The Hon. Attorney General and Ibrahim Said Msabaha** [2000] TLR 419 on what a judgment should contain:

> *"A judgment must convey some indication that the judge or magistrate has applied his mind to the evidence on the record. Though it may be reduced to a minimum, it must show that no material portion of the evidence laid before the court has been ignored. In* ***Amirali Ismail v Regina****, 1 T.L.R. 370, Abernethy, J., made some observations on the requirements of judgment. He said:*
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> *'A good judgment is clear, systematic and straightforward.* ***Every judgment should state the facts of the case, establishing each fact***

> ***by reference to the particular evidence by which it is supported; and it should give sufficiently and plainly the reasons which justify the finding.*** *It should state sufficient particulars to enable a Court of Appeal to know what facts are found and how.'"*[Emphasis added]

The Court concluded in **Dibagula** (*supra*), citing **Wily John v. R.,** (1956) 23 E.A.C.A. 509, that failure to comply with the relevant statutory provisions as to the preparation of a judgment would be fatal to a conviction where there is insufficient material on the record to enable the appellate court to consider the appeal on its merits. See also **Ramadhan s/o Aito v. Republic**, Criminal Appeal No. 361 of 2019 (unreported); and **Stanslaus Rugaba Kasusura and the Attorney General v. Phares Kabuye** [1982] TLR 338 on the duty of a trial magistrate or judge to evaluate the evidence of each of the witnesses, assess their credibility and make a finding on each of the contested facts in issue.

Having reviewed the impugned judgment of the trial court in the light of the above authorities, we agree with Mr. Makule's submission that the said judgment is fully compliant with the statutory prescription under section 312 (1) of the CPA. It is apparent on its face that it contains a succinct summary of the evidence on record, the points for determination,

the findings of fact based on the evidence and the reasons for each finding. It shows a meticulous appraisal of the evidence of each of the witnesses as well as an assessment of their credibility. Based on that appraisal, a finding was duly made on each of the contested facts culminating in the appellant being found guilty and convicted of the charged offence. On that basis, we find no merit in the third ground of appeal.

Whether the appellant's defence was not considered is the final question we have to deal with.

We are alert that the appellant's defence was essentially one of general denial. Mr. Makule referred to the trial court's judgment, at pages 45 through 47 of the record of appeal, arguing that the said court duly considered the said defence and rejected it. Although he conceded that the first appellate court only had a cursory glance at the defence, he urged us, on the authority of **Athuman Musa v. Republic**, Criminal Appeal No. 4 of 2020 (unreported), to step into the shoes of that court and re-appraise the defence evidence.

Rejoining, the appellant blamed his travails on PW3 whom he referred to as his estranged wife. He said that she trumped up the charge against him as an act of revenge.

With respect, we are persuaded by Mr. Makule that the trial court duly considered the appellant's defence but rejected it as it preferred the prosecution version principally made by PW1 in her testimony which it found credible and reliable. Certainly, we had expected the High Court as the first appellate court to re-appraise the entire body of evidence on record including the defence but, as rightly submitted by Mr. Makule, the said court hurriedly concluded in its judgment, at page 71 of the record of appeal, that *"the defendant failed to raise doubts on the prosecution evidence"* without scrutinizing the defence along with the rest of the evidence. Be that as it may, we agree with Mr. Makule that, as held in **Athuman Musa** (*supra*), this Court can do what ought to have been done by the High Court on the first appeal.

Having reflected on the appellant's defence in the light of the entire evidence on record, we are of the settled mind that the said defence was rightly rejected by the trial court. Apart from such defence of general denial being essentially self-serving and very weak, in the circumstances of this case, it did not displace the prosecution case mainly based on the evidence of the victim, which, as explained earlier, the trial court found to be credible and uncontroverted. Neither at the trial nor before the High Court or this Court did the appellant suggest why PW1, his own daughter,

would have lied against him. His belated claim that his estranged wife fabricated the case against him is plainly an afterthought mainly because he did not cross-examine her on it. We would, therefore, dismiss the fourth ground of appeal.

In the upshot, we hold that the appeal is unmerited. We dismiss it in its entirety.

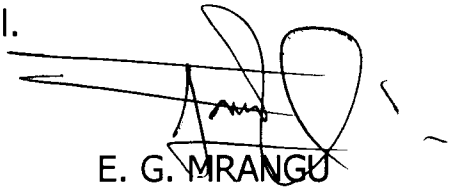
DATED at **ARUSHA** this 25th day of November, 2021.

G. A. M. NDIKA
JUSTICE OF APPEAL

M. C. LEVIRA
JUSTICE OF APPEAL

A. M. MWAMPASHI
JUSTICE OF APPEAL

The Judgment delivered this 26th day of November, 2021 in the presence of the Appellant in person, Ms. Tarsila Gervas and Ms. Grace Madekenya, learned State Attorneys for the Respondent/Republic is hereby certified as true copy of the original.



E. G. MRANGU
DEPUTY REGISTRAR
COURT OF APPEAL