IN THE COURT OF APPEAL OF TANZANIA
AT DAR ES SALAAM

(CORAM: MWARIJA, J.A., SEHEL, J.A. And MASHAKA, J.A.)

CRIMINAL APPEAL NO. 484 OF 2021

SAID MOHAMED..... APPELLANT

VERSUS

REPUBLIC..... RESPONDENT

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

(Kakolaki, J.)

dated the 20th day of August, 2021
in
DC. Criminal Appeal No. 73 of 2021

JUDGMENT OF THE COURT

26th September & 23rd November, 2022.

SEHEL, J.A.:

Like any other rural women, the victim in the present appeal whom for preservation of her dignity, we shall not disclose her name but shall be referred to by her initials "EE" or PW2, woke up very early in the morning of 6th November, 2019 to prepare for the day by lighting fire in the kitchen. At the time she woke up, his brother, Said Mohamed, the appellant was already at her home. PW2 recalled that the appellant arrived at her house

at around 01:00 hours and called her from outside telling her that he was hiding from the people who were chasing him.

While in the kitchen, the appellant called again and asked for fire. As she was busy in the kitchen, PW2 asked the appellant to look for a piece of iron sheet from where he was and come collect the fire. The appellant responded that he could not find one. She therefore decided to go outside to assist him. As she approached the door but before she stepped out, the appellant grabbed and threatened her with a knife on her neck. He dragged her to a nearby bush, pushed her down, removed his and her clothes and forcefully raped her. After having satisfied himself, he left her there helplessly. She collected herself and went back home. The following morning, she reported the incident to the hamlet chairman, one Ramadhani Salum Amri (PW3).

On receipt of the report, PW3 ordered Juma Raffi Mohamed (PW6), a member of community policing to arrest the appellant. Upon his arrest and being questioned, the appellant confessed before PW3 and PW6 to have committed the offence and asked for forgiveness. The matter was reported to Kwala police station where the victim was issued with a PF3 and taken to Kwala Dispensary for medical examination. She was attended by Dr.

Mustapher Abdallah (PW1) who found bruises on her inner part wall of labia majora with presence of blood and spermatozoa. His findings were recorded in the PF3 which was admitted in court as exhibit P1. Two saws were also collected from the scene of crime by Detective Corporal Shedrack. According to the exhibit keeper, one E. 7776 Corporal Ramadhani on 19th November, 2019 he received two saws for safe custody and tendered in court as exhibits P3 and P2, respectively.

The appellant was arraigned before the District Court of Kibaha District at Kibaha with the offence of incest by males contrary to sections 158 (1) (b) and 159 of the Penal Code, Cap. 16 R.E. 2002 (now R.E. 2022) (the Penal Code). It was alleged that on 6th November, 2019 at Msua area within Kibaha District in Coast Region, the appellant had sexual intercourse with PW2, a person who is to his knowledge his sister.

The appellant denied the charge and as a result, the case proceeded to a full trial. In that trial, the prosecution called a total of four witnesses whereas the appellant did not call any witness. He relied on his own evidence which he gave under oath.

In his sworn evidence, the appellant denied the allegation and claimed that his sister framed the case against him due to bad blood

relationship as he had advanced her TZS. 70,000.00 which she failed to repay.

At the conclusion of the trial, the learned trial Senior Resident Magistrate found the appellant guilty as charged. He was consequently convicted and sentenced to twenty years imprisonment.

Aggrieved by the decision of the trial court, the appellant appealed to the High Court against both the conviction and sentence but his appeal was dismissed for want of merit. Still aggrieved, he lodged in this Court a memorandum of appeal comprised of six (6) grounds, namely;

> *"1. That, the first appellate court erred in law and fact to sustain appellant's conviction based on evidence of recognition at night while the circumstances were not favourable and there was possibility of mistaken identity.*
> *2. That, the first appellate court erred in law and fact to uphold appellant's conviction based on prosecution evidence that was full of improbabilities and implausibilities that dented the evidence of the victim.*
> *3. That, the first appellate court erred in law and fact to uphold appellant's conviction without observing that the charge's particulars of offence and the evidence on record were at variance as regard to the name of the victim and the person who testified as PW2 were not one and the same person.*

scene of the crime and proceeded to respond to 3rd, 4th, 5th and 6th grounds of appeal, separately.

Being mindful that a charge is a foundation of any criminal case, we will start with the 3rd ground of appeal where the appellant complained that there was a variance between the evidence and the charge. The learned State Attorney submitted that the variance complained of concerned the name of the victim. She pointed out that the charge refers the name of the victim with two names, that is, her first and the middle name only (EE) and when the victim was in the witness box, she introduced herself by three names, that is, the first, middle and surname (EES). It was the learned State Attorney's submission that the complaint was baseless because throughout the trial there was no dispute on the name of the victim. She argued further that even if such infraction is noted, it would not absolve the appellant from the commission of the crime.

Indeed, the charge appearing at page 1 of the record of appeal referred the victim by two names, that is, EE whereas at page 21 of the record of appeal when the victim was in the witness box, she introduced herself by her three names, that is, EES. That apart, we agree with Ms. Bimbiga that throughout the trial, the name of the victim was not in

4. That, the first appellate court erred in law and fact to sustain appellant's conviction without giving deserving weight to the defence evidence of the appellant that raised reasonable doubts to the case.

5. That, the first appellate court erred in law and fact for failure to note that, if the victim named knives as offensive weapon, and at the scene they recovered saws, then it was possible that the victim failed to properly identify the appellant on that material night.

6. That, the first appellate court erred in law and fact to uphold appellant's conviction while the prosecution case was not proved beyond reasonable peradventures."

When the appeal was called on for hearing on 26th September, 2022, the appellant appeared in person, unrepresented whereas Mr. Emmanuel Maleko, learned Senior State Attorney and Ms. Sofa Bimbiga, learned State Attorney appeared for the respondent Republic. When the appellant was invited to address the Court, he adopted the grounds of appeal and opted for the learned State Attorney to reply to his grounds of appeal, with no more to add.

It was Ms. Bimbiga who made a reply submission on behalf of the respondent. She responded to the 1st and 2nd grounds of appeal together as they both raise with the issue of identification of the appellant at the

scene of the crime and proceeded to respond to 3rd, 4th, 5th and 6th grounds of appeal, separately.

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dispute. It is also on record that after she had testified and the appellant was given a chance to cross examine her, he did not challenge PW2's name. Besides, the victim was not a stranger to the appellant, she is her sister. We are satisfied that the appellant was familiar with the victim's name and that is why he did not cross examined her. Accordingly, we find this ground of appeal is without merit.

We now turn to the grounds raising evidential issues. This being a second appeal to this Court we shall then be mindful of the settled principle of law that, the Court rarely interferes with concurrent findings of fact by the courts below. We can only interfere where there are mis-directions or non-directions on the evidence, a miscarriage of justice or a violation of some principle of law or practice – see: **The Director of Public Prosecutions v. Jaffari Mfaume Kawawa** [1981] T.L.R. 149 and **Musa Mwaikunda v. The Republic** [2006] T.L.R. 387.

In the 1st, 2nd and 5th grounds of appeal, the appellant complained that the identification made during the night was not watertight. The learned State Attorney acknowledged that the incident took place at night. However, she was quick to submit that the appellant was properly identified by PW2. She pointed out that PW2 and the appellant are blood

relatives; they conversed before and after the incident; there was enough light coming from the moon which was bright enough to identify the appellant and the whole incident took about one hour. She argued that, given the circumstances explained by PW2, there was no room for mistaken identify. To fortified her submission, she referred us to the cases of **Masumbuko Zacharia @ Dogo Aslei and 2 Others v. The Republic**, Criminal Appeal No. 610 of 2020 that cited the case of **Anatory Nangu and Another v. The Republic**, Criminal Appeal No. 109 of 2006 (both unreported).

The learned State Attorney further acknowledged that the evidence of the victim was such that the appellant threatened her with a knife but during trial, what was tendered were two saws (exhibit P2 and P5 respectively), which were said to have been retrieved from the scene of crime. Nonetheless, she argued that such discrepancy did not go to the root of the case to dent the credibility of PW2 who properly identified the appellant. She further argued that the use of weapon is not one of the ingredients of the offence of incest by males.

On close re-evaluation of the evidence on record of appeal, we agreed with the learned State Attorney that the identification of the

appellant was watertight. Though the offence was committed at night, PW2 was able to tell the trial court as to how she managed to identify the appellant. At page 22 of the record of appeal, she told the trial court that she recognized the appellant because he was her blood relative, a fact admitted by the appellant himself during his defence that the victim was his sister. Further, the two conversed before and after the incident, as indicated earlier, immediately after the appellant arrived at his sister's home, he introduced himself. Besides, PW2 said that there was enough moonlight that night and the commission of the offence took some time. We are therefore satisfied that the surrounding circumstances that night were favourable and there was no possibility of mistaken identity. In the case of **Anatory Nangu and Another** (supra), cited by Ms. Bimbiga, there were almost similar identifying circumstances. In that appeal, the offence was committed at night but since the victim and the assailants knew each other and there was enough moonlight, the Court held:

> *"The conditions for identification in this case as gathered from the evidence were favourable. The complainant knew the appellants before, they were staying together in the same village and there was moonlight.... It took sometime before the offence was committed as the attack was preceded by a*

conversation. PW2 corroborated the evidence of PW1 on the identification of the first appellant. Under these circumstances, we agree that there was no room for mistaken identity."

We are not in agreement with his submission that since PW2 failed to describe his attire then the conditions for proper identification were not favourable. We hold this position because the appellant was not a total stranger to PW2. They were a brother and sister, they knew each other very well such that any further description, like his attire, body built, complexion, size or any peculiar feature, was unnecessary – see: **Fadhili Gumbo Malota and 3 Others v. The Republic**, Criminal Appeal No. 52 of 2003 (unreported). With such clear evidence on the identification of the appellant by PW2, the argument by the appellant, that PW2 did not properly identified him, because, in her evidence she said that she was threatened with a knife while two saws were retrieved from the scene and admitted in evidence, also crumbles. In any event, as rightly submitted by the learned State Attorney, threat either by the use of a weapon or not is not an ingredient of proving the offence of incest by males. For a charge of incest by males to be established, the prosecution must prove an act of sexual intercourse to a female person, who is to his knowledge his

grandmother, daughter, sister or mother. We thus find no merit on the 1st, 2nd and 5th grounds of appeal.

Responding to the 4th ground of appeal that the first appellate court failed to give deserving weight to the appellant's defence, Ms. Bimbiga briefly submitted and we entirely agree with her that the first appellate court rightly rejected the appellant's defence after it had weighed and found that the same did not shake the prosecution case. This is gathered from page 76 of the record of appeal where the first appellate court stated as follows:

> *"The appellant's defence was properly considered by the trial court before it was rejected for failure to shake the prosecution case. It was his defence that the case against him was fabricated by PW2 who owed him TZS. 70,000.00 as she failed to repay it. And that PW2 had odd relationship with his wife which fueled hatred against him to the extent that the same was known to the village suburb chairman (PW3). To the surprise when PW2 and PW3 were testifying the appellant never cross examined them on those facts to establish and prove his defence of fabrication of case basing on ill relationship between him and PW2. In rejecting his defence the trial court considered and reasoned that the*

appellant failed to cross examine PW2 and PW3 hence failure to discredit prosecution evidence, the finding which I find to be correct and justified in law."

On our part, we find no reason to fault the concurrent findings of the two lower courts. As pointed out earlier, the appellant did not cross examine any of the prosecution witnesses on his allegation that there was bad blood between himself and the sister and between the sister and his wife. We therefore take that such a defence of bad blood was an afterthought and it was rightly rejected by the two courts below. Accordingly, we dismiss the 4th ground of appeal.

Concerning the 6th ground of appeal that the offence of incest by males was not proved, the learned State Attorney argued that the evidence of PW2, corroborated by the evidence of PW1, PW3, and exhibit P1, proved the offence against the appellant beyond reasonable doubt.

Having gone through the record of appeal, we discern therefrom that the first appellate court concurred with the trial court that the appellant had prohibited sexual intercourse with PW2 while knowing that she is his sister, the relationship which is also admitted by the appellant in his defence evidence. It further concurred with the trial court that PW2

properly identified the appellant and we hold the same as stated herein. Accordingly, we, like the two courts below, are satisfied that the prosecution proved its case beyond reasonable doubt against the appellant.

At the end, for the reasons discussed, we dismiss this appeal.

DATED at **DAR ES SALAAM** this 22nd day of November, 2022.

A. G. MWARIJA
JUSTICE OF APPEAL

B. M. A. SEHEL
JUSTICE OF APPEAL

L. L. MASHAKA
JUSTICE OF APPEAL

The Judgment delivered this 23rd day of November, 2022 in the presence of the Appellant in person and Mr. Ramadhani Kalinga, Senior State Attorney for the Respondent/Republic, both appeared through Video Link from Ukonga Dar es Salaam, is hereby certified as a true copy of the original.

THE COURT OF APPEAL OF TANZANIA

J. E. FOVO
DEPUTY REGISTRAR
COURT OF APPEAL