IN THE COURT OF APPEAL OF TANZANIA

AT DAR ES SALAAM

(CORAM: NDIKA, J.A., KITUSI, J.A., And MASHAKA, J.A.)

CRIMINAL APPEAL NO. 669 OF 2020

ABDALLAH ATHUMAN ..... APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

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

(Mgonya, J.)

dated the 9th day of November, 2020

in

Criminal Appeal No. 100 of 2020

.....

JUDGMENT OF THE COURT

13th & 23rd March, 2023

NDIKA, J.A.:

The appellant, Abdallah Athuman, was convicted by the District Court of Mvomero at Mvomero of incest and sentenced to thirty years' imprisonment. On appeal, the High Court of Tanzania at Dar es Salaam upheld the conviction and sentence. Still dissatisfied, he now appeals against the conviction and sentence.

At the trial, the prosecution relied on the testimonies adduced by five witnesses as well as four documentary exhibits to establish the

accusation that on 12th September, 2018, at Kichani area, Turiani Ward within the District of Mvomero in Morogoro Region, the appellant had prohibited sexual intercourse with a six-year-old girl who was to his knowledge his daughter. We will refer to the girl anonymously as "the complainant" or simply by her trial codename of "PW2".

Although it was not in dispute at the trial that the appellant is the biological father of the six-year-old complainant meaning that sexual union between them was prohibited, the contentious issue was whether the appellant had sexual intercourse with her as alleged.

The prosecution case was that in 2017 the complainant's mother (PW1) left the ménage at Turiani that she shared with the appellant in the aftermath of the dissolution of their marriage. She left behind their six children, who included the complainant, under the appellant's care. On 12th September, 2019, the complainant paid her a visit at her rented property. One Mrs. Chungulu, a neighbour, who was with her at the time, drew her attention to the manner the complainant was noticeably walking with difficulty. Upon quizzing her, the complainant revealed that the appellant forcibly had sexual intercourse with her. The two women examined her private parts and detected signs that she had, indeed, been

sexually molested. They immediately reported the matter to local officials and later to the Police. PW2 was taken to Bwagala Hospital (St. Francis Turiani) where she was admitted for two days.

According to the complainant, following her mother's relocation to the rented property, she used to share the same bedroom with the appellant and her younger brother. In the fateful night, the appellant woke up, stripped off her clothes, undressed himself and proceeded to have sexual intercourse with her. To quell her frantic cry for help, he threatened to kill her with a knife.

Dr. Samuel Joseph Nassar (PW5) examined the complainant at Bwagala Hospital (St. Francis Turiani) on 13th September, 2018. In his medical examination report (PF3 – Exhibit P4), he indicated that he observed *"bruises on her genitalia, foul smelling discharge yellowish in colour"* and *"no intact hymen seen."* The findings, according to him, were consistent with PW2's vagina having been penetrated by a blunt object.

H.6146 Police Constable Pius (PW3) tendered at the trial a cautioned statement dated 13th September, 2018 (Exhibit P2) attributed to the appellant by which he confessed to the crime. Furthermore, Juma Ally

Mbonde (PW4), a Resident Magistrate stationed at Mtibwa Primary Court, presented in evidence an extrajudicial statement of the appellant dated 28th September, 2018 (Exhibit P3) as further proof that the appellant confessed to the alleged crime.

Besides denying the accusation against him flat out, the appellant claimed that the charge was schemed by his divorced wife to take sole ownership and possession of the home they built together during their marriage.

The learned trial magistrate (Hon. A.H. Waziri – RM) took the view that the case mainly turned on two issues: one, whether the complainant had sexual intercourse; and two, whether it was the appellant who committed the sexual act on the complainant who was his biological daughter.

On the first issue, the learned trial magistrate believed and relied on the testimonies of PW1 and PW2 as corroborated by the medical evidence that the complainant was, certainly, sexually molested. As regards the other issue, the learned trial magistrate found, acting on the complainant's evidence as well as the appellant's confessions unveiled by the cautioned

and extrajudicial statements (Exhibits P2 and P3), that the appellant was the perpetrator of the crime. His defence that the charge was trumped up was rejected. Consequently, he was convicted of the charged offence and sentenced as indicated earlier.

On the first appeal, the High Court (Mgonya, J.) upheld the appellant's complaint that the cautioned statement (Exhibit P2) was unreliable due to having been recorded illegally after the expiry of the prescribed basic period for interviewing suspects in terms of section 50 of the Criminal Procedure Act ("the CPA"). As a result, the cautioned statement was discounted. Nonetheless, the learned appellate judge was satisfied that the charge was sufficiently proved upon the rest of the evidence on record.

In this appeal, the appellant faults the first appellate court's decision on seven grounds as follows: **one**, that the complainant's evidence was received contrary to section 127 (2) of the Evidence Act ("the Evidence Act"); **two**, that his defence was not duly considered; **three**, that the trial was irregularly conducted with the involvement of a social worker; **four**, that adverse inference ought to have been drawn against the prosecution for the failure to produce Mrs. Chungulu, a material witness; **five**, that the

requirement under section 130 (3) of the Evidence Act was not complied with; **six**, that the medical evidence adduced by PW5 and unveiled by PF3 (Exhibit P4) was unreliable due to PW5's failure to establish his medical credentials; and, **seven**, the offence was not proved beyond reasonable doubt.

At the hearing of the appeal, the appellant, who was self-represented, did not elaborate the grounds of appeal but urged us to allow the appeal. For the respondent, Mr. Laiton Mhesa, learned Principal State Attorney, who teamed up with Ms. Janeth Magoho, learned Senior State Attorney, and Ms. Kijja Elias Luzungana, learned State Attorney, stoutly resisted the appeal.

We find it logical to deal, at first, with the third, fourth, fifth and sixth grounds separately. Then, we will turn to the first ground of appeal and round off with the determination of the second and seventh grounds collectively.

Beginning with the third ground of appeal, it was the appellant's contention that a certain Ms. Peris, a social welfare officer, participated at the trial and that her name was recorded as part of the trial court's coram

contrary to the law. Indeed, it is true that the said social welfare officer attended the trial, but the grievance is plainly beside the point. We agree with Mr. Mhesa that her presence was necessary for her to monitor and safeguard the welfare of the complainant, who, having experienced a painful and traumatic occurrence, had to relive it by appearing at the trial to testify on it. It is certain that the officer did not appear or act as a member of the trial court and that she took no part in the trial proceedings beyond her watching brief. We are satisfied that the court, presided over by a Resident Magistrate, was properly constituted in terms of section 6 (1) (b) of the Magistrates' Courts Act to try the matter and render a decision thereon. Consequently, we find no merit in the ground under consideration.

The claim in the fourth ground that adverse inference ought to have been drawn against the prosecution for failure to produce Mrs. Chungulu who was a material witness is equally without any legal foundation. As rightly argued by Ms. Luzungana, the said Mrs. Chungulu did not witness the crime but that her evidence concerned the fact that she alerted PW1 to the worrying manner the complainant was walking. Even if she had testified at the trial, her evidence would not have added any critical

dimension to what PW1 had adduced. We agree with the learned State Attorney that in terms of section 143 of the Evidence Act there is no specific number of witnesses for proving a particular fact in issue and that what is critical for proving such fact is the quality of the evidence. The fourth ground of appeal fails.

The foregoing conclusion takes us to the fifth ground of appeal, which alleges that that the trial court received the testimony of PW1, the appellant's spouse, as a prosecution witness by breaching the mandatory procedure under section 130 (3) of the Evidence Act. The said witness, it was argued, testified against the appellant without having been informed in advance that although she was competent to take the witness stand for the prosecution, she was not compellable to do so. The issue before us is whether PW1 testified against the appellant contrary to the applicable procedure.

To be sure, subsections (1) to (3) of the aforesaid section govern the competence and compellability of spouses as prosecution witnesses against each other in a criminal trial. They provide as follows:

> *"**130.**-(1) Where a person charged with an offence is the husband or the wife of another person that other person shall*

be a competent but not a compellable witness on behalf of the prosecution, subject to the following provisions of this section.

(2) Any wife or husband, whether or not of a monogamous marriage, shall be a competent and compellable witness for the prosecution-

(a) in any case where the person charged is charged with an offence under Chapter XV of the Penal Code or under the Law of Marriage Act;

(b) in any case where the person charged is charged in respect of an act or omission affecting the person or property of the wife or husband, or any of the wives of a polygamous marriage of that person or the children of either or any of them.

(3) Where a person whom the court has reason to believe is the husband or wife or, in a polygamous marriage, one of the wives of a person charged with an offence is called as a witness for the prosecution the court shall, except in the cases specified in subsection (2), ensure that that person is made aware, before giving evidence, of the provisions of subsection (1) and the evidence of that person shall not be admissible unless the court has recorded in the proceedings that this subsection has been complied with."

Generally, section 130 (1) provides that a spouse is a competent but not compellable witness to give evidence on behalf of the prosecution against his or her spouse. Moreover, the evidence of such spouse would be inadmissible in terms of subsection (3) if it is received by the trial court without the spouse having been made aware of the provisions of subsection (1) for him or her to elect to testify against his or her spouse. However, the subsection (3) procedure does not apply in the cases specified in subsection (2). Pertinently, section 130 (2) (a) enacts, inter alia, that spouses would be competent and compellable where the other spouse is tried for any offence against morality created under Chapter XV of the Penal Code.

Ms. Luzungana argued that in the instant case PW1 was no longer the appellant's wife when she testified as it was in the evidence that their marriage was dissolved before the alleged crime occurred. We fully agree with her. In addition, we hold that even if the appellant's marriage to PW1 had been subsisting at the time the crime was committed, PW1 would still be a competent and compellable witness for the prosecution because the charged offence, laid under section 158 (1) (a) of the Penal Code, falls within the exempted offences under Chapter XV of the Penal Code. Thus,

the subsection (3) procedure was inapplicable. We thus dismiss the fifth ground of appeal.

The sixth ground of appeal assails the cogency and reliability of the medical evidence adduced by PW5 and unveiled by PF3 (Exhibit P4). It was contended that PW5 did not set forth his medical credentials as the foundation of his competence to give expert opinion on the alleged sexual act committed on the complainant. In rebuttal, Ms. Luzungana submitted that the medic fully explained his professional standing and designation, assuring the trial court that he was a competent expert witness.

Section 240 of the CPA governs the reception of medical evidence. It provides as follows:

> *"**240**.-(1) In any trial before a subordinate court, any document purporting to be a report signed by a medical witness upon any purely medical or surgical matter shall be receivable in evidence.*
>
> *(2) The court may presume that the signature to any such document is genuine and **that the person signing the same held the office or had the qualifications which he possessed to hold or to have when he signed it.***

(3) Where a report referred to in this section is received in evidence the court may if it thinks fit, and shall, if so requested by the accused or his advocate, summon and examine or make available for cross-examination the person who made the report; and the court shall inform the accused of his right to require the person who made the report to be summoned in accordance with the provisions of this subsection." [Emphasis added]

Significantly, subsection (2) above allows any subordinate court to presume that the signature to any document purporting to be a report signed by a medical witness upon any purely medical or surgical matter is genuine and that the person signing it held the office or had the qualifications which he professed to hold or to have when he signed it. It is certainly possible to rebut the presumption through a successful cross-examination of the medical witness on his credentials.

Having examined the record, we uphold Ms. Luzungana's submission that PW5 fully explained his medical credentials. He testified that he had been in active practice of his profession for thirty-five years and indicated in Exhibit P4 that at the material time he held the designation of Principal Assistant Medical Officer (PAMO). It is significant that he was not cross-examined on his qualifications, implying that no attempt was made to

rebut the presumption as to his competence. Ultimately, the sixth ground stands dismissed.

We now revert to the first ground of appeal. It was the appellant's contention that the complainant's evidence was received contrary to section 127 (2) of the Evidence Act, because the trial court rushed to extract her promise to speak the truth without asking her any preliminary questions.

For the respondent, Ms. Magoho countered that the procedure under section 127 (2) of the Evidence Act was fully complied with and that PW2 correctly promised to speak the truth before her testimony was received.

Section 127 (2) of the Evidence Act provides as follows:

> *"A child of tender age may give evidence without taking an oath or making an affirmation but shall, before giving evidence, promise to tell the truth to the court and not to tell any lies."*

The construction of the above provision has been a subject of discussion by the Court in numerous decisions. In **Issa Nambaluka v. Republic**, Criminal Appeal No. 272 of 2018 (unreported), we stated that the aforesaid provision permits a child of tender age, that is, a child whose

apparent age is not more than fourteen years, to give evidence on oath or affirmation or to testify without oath or affirmation but upon promising to tell the truth, not lies. Most importantly, we held thus:

> *"It is for this reason that in the case of* ***Godfrey Wilson v. Republic****, Criminal Appeal No. 168 of 2018 (unreported), we stated that, where a witness is a child of tender age, a trial court should at the foremost,* ***ask a few pertinent questions so as to determine whether or not the child witness understands the nature of oath. If he replies in the affirmative, then he or she can proceed to give evidence on oath or affirmation depending on the religion professed by such child witness****. If such child does not understand the nature of oath, he should, before giving evidence, be required to promise to tell the truth and not to tell lies."*[Emphasis added]

In the case at hand, it is common ground that the complainant, who stated to be six years old at the time she took the witness stand, was in the eyes of the law a child witness of tender years. Consequently, her evidence had to be given in compliance with the dictates of section 127 (2) of the Evidence Act. Although it is shown at page 15a of the record of

appeal that the trial magistrate did not ask any preliminary questions to determine if PW2 understood the nature of oath or affirmation for her to qualify to give evidence on oath or affirmation, she recorded her to have said, *"I [normally] speak the truth. I promised (sic) to speak the truth"* before she let her testify. Unquestionably, the trial court could not let her testify on oath or affirmation because it had not established whether she understood what an oath or affirmation meant. All the same, so long as the trial magistrate extracted the child witness' promise to speak the truth in compliance with the law, she rightly allowed her to give evidence on the strength of such promise. Consequently, the first ground of appeal fails.

Lastly, we finish off with grounds two and seven collectively. They raise the all-embracing question whether the charged offence was proven on the evidence on record beyond all reasonable doubt with the appellant's defence having been duly considered.

In determining the above question, we are mindful that due to the inherent nature of the offence of rape or any other sexual offence usually involving two persons only when it is committed, the testimony of the complainant is mostly essential and must be examined and judged carefully. Indeed, as we stated, for instance, in **Selemani Makumba v.**

Republic [2006] T.L.R. 379, the best proof of rape (or any other sexual offence) must come from the complainant. Consequently, the complainant's credibility becomes the most important consideration such that if his or her evidence is believable, persuasive, and consistent with human nature as well as the normal course of things, it can be acted upon as the sole basis of conviction – see section 127 (6) of the Evidence Act.

The crux of the offence of incest against the appellant, as laid under section 158 (1) (a) of the Penal Code, is a male person having prohibited sexual intercourse with a female person who is to his knowledge his daughter of the age of less than eighteen years.

As hinted earlier, it was undoubted that the appellant is the biological father of the complainant meaning that sexual liaison between them was prohibited. The contentious issue was whether the appellant had sexual intercourse with her as alleged.

We have carefully examined the evidence on record on the above issue. To begin with, we find, as did the courts below, that the complainant's detailed account of what happened during the fateful night is spontaneous, logical, and consistent. The lower courts believed her

evidence that the appellant woke up in the fateful night, stripped off her clothes, undressed himself and proceeded to have sexual intercourse with her while threatening to kill her with a knife should she raise an alarm. Apart from passing up the chance to cross-examine his daughter, the appellant did not suggest that she had any motive or reason to lie against him. Our jurisprudence instructs that failure to cross-examine a witness on a crucial aspect implies acceptance of the truthfulness of the testimony of the witness on the aspect concerned – see **Damian Ruhele v. Republic**, Criminal Appeal No. 501 of 2007; and **Nyerere Nyague v. Republic**, Criminal Appeal No. 67 of 2010 (both unreported). Indeed, in terms of section 127 (6) of the Evidence Act her evidence did not require any corroboration to sustain conviction against the appellant.

The foregoing apart, there are two further strands of incriminating evidence in the present case. The first strand consists of the testimony of the complainant's mother (PW1) as well as the medical evidence as adduced by PW5 and documented in Exhibit P4. Their observations were consistent with PW2's vagina having been penetrated by a blunt object. The second string features the extrajudicial statement (Exhibit P3) the appellant made in which he confessed so unreservedly to the alleged

offending. He told the Justice of the Peace (PW4) in detail that he had sex with the complainant in the fateful night after he came back home drunk.

As indicated earlier, the appellant in his defence blamed his tribulation on the grudges he had with his ex-wife, PW1, whom he claimed to have contrived the charge to acquire sole ownership and possession of the home they built during the subsistence of their marriage. As rightly argued by Mr. Mhesa, this defence was duly considered but rejected by the trial court but that the first appellate court did not consider it at all. Certainly, the first appellate court erred in not considering the defence because its duty sitting on the first appeal was to re-appraise the entire evidence on record and draw its own findings or inferences of fact. Nonetheless, we are satisfied that had the first appellate court considered the defence, it would have rejected it. In our view, the defence was not just a sham but an afterthought. Had it been truthful the appellant would have cross-examined PW1 on it, but he did not. Most crucially, the defence would naturally collapse when considered along with his confession as presented.

Overall, we find no substance in the second and seventh grounds of appeal as we are satisfied that the charge against the appellant was established beyond all reasonable doubt.

Before taking leave of the matter, we felt constrained to pronounce ourselves on the punishment of thirty years' imprisonment spelt out under section 158 (1) (a) of the Penal Code as the minimum penalty for incest committed on a female person below the age of eighteen years, which, of course, includes a female victim aged below ten years as is the case in the present case. Compared with the life imprisonment for unnatural offence under section 154 (2) of the Penal Code committed on a person below eighteen years or rape on a girl below ten years as stated under section 131 (3) of the Penal Code, the punishment under section 158 (1) (a) of the Penal Code is manifestly disproportionate as it punishes so leniently a person who commits incest on a female person of the age below ten years. In our view, commission of incest on a female person below the age of ten years would involve a serious breach of trust between the perpetrator of the crime and the victim. In the instant case, for example, instead of protecting her young, unsuspecting, and vulnerable daughter, the appellant took advantage of the filial relationship to molest her beyond

imagination. We see no reason why the same evil committed on a girl below the age of ten years would be punished differently under sections 131 (3) and 158 (1) (a) of the Penal Code. On this basis, we draw the attention of the legislature, as we did in **Edwin Thobias Paul v. Republic**, Criminal Appeal No. 130 of 2017 (unreported), to look at the matter with the view to reforming the law accordingly.

In the final analysis, we hold that the appeal is without substance and proceed to dismiss it in its entirety.

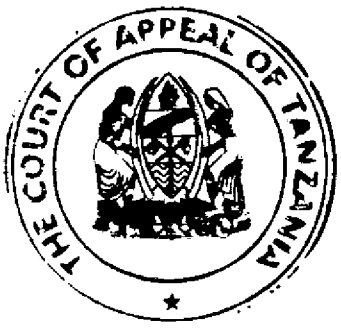
DATED at **DAR ES SALAAM** this 23rd day of March, 2023.

G. A. M. NDIKA
JUSTICE OF APPEAL

I. P. KITUSI
JUSTICE OF APPEAL

L. L. MASHAKA
JUSTICE OF APPEAL

The Judgment delivered this 23rd day of March, 2023 in the presence of Appellant in person vide video link from Ukonga Prison and Ms. Lilian Rwetabura Senior State Attorney via video link from National Prosecutions Service Office, for the Respondent is hereby certified as a true copy of the original.



R. W. CHAUNGU
DEPUTY REGISTRAR
COURT OF APPEAL