IN THE COURT OF APPEAL OF TANZANIA

AT MWANZA

(CORAM: MUGASHA, J. A., KENTE, J.A. And MASHAKA, J.A.:)

CRIMINAL APPEAL NO. 263 OF 2019

MASALU IPIRINGA ..... APPELLANT

VERSUS

THE REPUBLIC..... RESPONDENT

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

(Siyani, J.)

dated the 31st day of July, 2019

in

Criminal Appeal No. 19 of 2019

JUDGMENT OF THE COURT

4th & 11th July, 2023

MASHAKA, J.A.:

The appellant, Masalu Ipiringa aged 21 years, a young guy at his prime age was residing with his parents and sister among his seven siblings at Imweru village, Chato District in Geita Region. He was charged before the District Court of Chato in Criminal Case No. 362 of 2017 with; first count, rape contrary to section 130 (1) (2) (e) and 131 (1) of the Penal Code [Cap 16 R.E 2002]; second count, unlawful causing pregnancy to a primary school girl contrary to section 60A (3) of the Education Act No. 2 Cap 353 of the Laws of 2016 and incest by

males contrary to section 158 (1) (a) of the Penal Code [Cap 16 R.E 2002]. He was found guilty, convicted on all counts and sentenced to serve thirty (30) years' imprisonment. On appeal, the High Court quashed the conviction and sentence in respect of the 1st and 2nd counts and upheld the conviction and sentence in the third count. To protect her modesty, we shall hereinafter refer her to as "PW1" or the victim.

We find it obligatory to give a brief account which led to the appellant's conviction as follows: Tabu Katisho (PW2) and Kantius Madala (PW3) are the parents of the victim (PW1) and the appellant. PW3, the father of the duo had received information that his daughter PW1 was pregnant and decided to investigate it. On the fateful day of 03/11/2017 when he returned home, he found the appellant and PW1 having sexual intercourse in his house. PW3 called his neighbours to come and witness the incident, among them was Buyugu Malole (PW4) a resident of Imweru village. The appellant is said to have confessed to having sexual intercourse with his sister. In her evidence, PW1 stated that the appellant induced her to have sex as he was told by a traditional healer. PW3 and PW4 took them to the Village Executive Officer (the VEO) and later to the Buseresere police station. The appellant was interrogated by WP 3122 D/CPL Wokusima, a police

officer (PW6) and issued a PF3 to PW1 for medical examination. PW1 was taken to the Buseresere Health Centre and upon being examined by the doctor one Joram Nyanza (PW7) was found pregnant. PW7 tendered the PF 3 which was admitted in evidence as exhibit P2.

After a full trial, as earlier stated the trial court convicted the appellant on all counts and sentenced him to serve thirty years. Aggrieved, the appellant preferred his appeal to the High Court. The appeal was partly allowed. The High Court quashed the conviction and sentence on 1st and 2nd counts due to two reasons; one, that there was no sufficient evidence to support the 2nd count and two, that the appellant could not be charged with both rape and incest by male. It further upheld the conviction and sentence in respect of the 3rd count.

As stated above, the appellant was further aggrieved by the decision of the High Court hence this second appeal. In his memorandum of appeal, the appellant has raised six grounds paraphrased hereunder:

1. That the first appellate court erred in law and fact to uphold the conviction and sentence after the trial magistrate erred and contravened the

requirements of section 210(3) of the Criminal Procedure Act [Cap 20 R.E 2019], (the CPA).

2. That the appellate court erred in law on omission to inform the appellant his right to appeal which is fatal.
3. That the appellate court erred in law and fact to uphold the conviction and sentence of the appellant after the trial magistrate erred to convict and sentence him on the weakness of the defence.
4. That the appellate court erred in law and fact to uphold the conviction and sentence of the appellant after the trial court erred in the admission of exhibit PE2 (PF3) in evidence which was not read out before the court.
5. That the circumstantial evidence against the appellant did not irresistibly point to his guilt.
6. That the prosecution case against the appellant was not proved beyond reasonable doubt.

During hearing of the appeal, the appellant entered appearance in person and unrepresented while the respondent Republic enjoyed the

services of Ms. Lilian Erasto Meli, learned State Attorney and Mr. Deogratius Richard Rumanyika, learned State Attorney.

The appellant was called upon to submit on his appeal and he prayed to the Court to consider his memorandum of appeal which he has advanced six (6) grounds of appeal. He further emphasised that the PF3 was not read out after its admission in evidence and that PW3 was his step father while PW2 was his and PW1's mother. Prompted by the Court on whether ground two of appeal was relevant as he was before us arguing his appeal, upon reflection, he prayed to abandon ground two.

At the outset in reply, Ms. Meli opposed the appeal and urged the Court not to consider grounds 3 and 5 of appeal which were new grounds not raised before the first appellate court and not based on a point of law. In bolstering her arguments, she cited the case of **Elia Wami v. Republic**, Criminal Appeal No. 30 of 2008 (unreported). She proceeded to argue the remaining grounds 1, 4 and 6. On the issue of procedural irregularities covered under ground 1, Ms. Meli conceded that there was non-compliance with section 210 (3) of the CPA, because the trial magistrate had failed to comply with the mandatory requirements of the law. However, it was her contention that it was not a fatal

irregularity as it had not prejudiced the rights of the appellant. Also, the appellant had failed to show exactly what was not reflected in the evidence of the witnesses.

The second procedural irregularity in ground 4, Ms. Meli contended that it had no merit as the first appellate court had expunged exhibit P2 from the record as it was not read to the appellant before the trial court.

In respect to ground 6, the complaint is that the prosecution failed to prove the charge beyond reasonable doubt which Ms. Meli firmly maintained that the prosecution did prove the charge to the hilt that the appellant committed the offence. She argued that the appellant and PW1 were blood related; siblings. Further she submitted that the issue of being related or otherwise is factual and did not crop in the lower courts. On this, the learned State Attorney made emphasis on the uncontroverted evidence of PW1, PW2 and PW3 that PW1 and the appellant were the children of PW2 and PW3. She further contended that, the appellant was found by his father PW3 red handed indulging in sexual intercourse with PW1, whom he knew to be his sister. Moreover, it was her submission that, in the light of the settled position of the law, the evidence of PW1 is the best and credible on the occurrence of the fateful incident. That apart it was also submitted that, PW4 who was

called by PW3 witnessed the appellant having sexual intercourse with his sister PW1. She argued further that the defence evidence did not shake the credible evidence of the prosecution as the appellant had sought to be leniently punished which was in a way an admission of guilt which supported the prosecution case. Regarding the appellant's plea to have the sentence reduced, Ms, Meli pointed out that, the sentence meted on the appellant is the statutory minimum and it cannot be reduced. Thereafter, she urged us to hold that all grounds of appeal are devoid of merit warranting a dismissal of the appeal. The appellant reiterated his earlier submission and implored the Court to show leniency.

Before we embark on the determination of the grounds of appeal, we take note that grounds 1, 3, 4 and 5 are new as none of those grounds was raised at the first appellate court. Normally, this Court would not entertain and determine a new matter which was not dealt with by the first appellate court as we have declined such attempts in a number of cases, amongst others; **Jafari Mohamed v. Republic** Criminal Appeal No. 112 of 2006, **Hassan Bundala @ Swaga v. Republic** Criminal Appeal No. 416 of 2013; **Hussein Ramadhani v. Republic** Criminal Appeal No. 195 of 2015, **Abeid Mponzi v. Republic**, Criminal Appeal No. 476 of 2016 (all unreported). However,

we take note that grounds 1 and 4 involve matters of law, in which this Court has jurisdiction to entertain as we observed in **Elia Wami v. Republic** (supra): -

> *"A point of law (not facts) may be raised at an appellate level even if it was raised before the court(s) below, provided that the parties were given opportunity to address the court on the point. Since there is a complaint on the contravention of section 210 (3) of the Criminal Procedure Act, we cannot turn a blind eye. We think it is not proper, but also it is our duty, to consider, and investigate this complaint, now that both parties have addressed it".*

In the same vein, we maintain that grounds 1 and 4 are complaints based on points of law as addressed to us by the parties and we are obliged to consider and determine the respective complaints. At the outset, we respectfully agree with Ms. Meli that the appellant in this second appeal is required to confine his grounds of appeal to points of law alleged to have been wrongly decided by the first appellate court. The complaint in grounds 3 and 5 are based on facts which never featured before the first appellate court and thus, in terms of section 6 (7) of the Appellate Jurisdiction Act, which clothes the Court with

jurisdiction to determine appeals from the High Court, it is our considered view that we are not mandated to entertain the said new grounds as they do not involve matters of law. Therefore, grounds 3 and 5 are hereby struck out.

Reverting to ground 1 of appeal, the trial magistrate did not comply with section 210(3) of the CPA after recording the evidence of the prosecution witnesses as well as the appellant. Section 210 (3) of the CPA reads:

> *"The magistrate shall inform each witness that he is entitled to have his evidence read over to him and if a witness asks that his evidence be read over to him, the magistrate shall record any comments which the witness may make concerning his evidence."*

In the light of the cited provision and the record of appeal before us, it is glaring that the trial magistrate omitted to comply with the provisions of section 210(3) of the CPA after recording the evidence of the witnesses. The next question we ask ourselves, is whether the omission was prejudicial to the parties. As, no complaint was raised or registered be it by the prosecution or defence witnesses that their evidence was not correctly recorded and, in this regard, the authenticity

of the record of the trial and subject of the present appeal is completely not at stake. See: **Jumanne Shaban Mrondo v. Republic**, Criminal Appeal No. 282 of 2010 (unreported). Therefore, the complaint by the appellant has no basis and even if the appellant intends to impeach the court record, it is settled law in our jurisdiction that a court record is always presumed to accurately represent what actually transpired in court. See **Alex Ndendya v. The Republic,** Criminal Appeal No. 207 of 2018 (unreported). We thus find this ground unmerited and is dismissed.

With regards to ground 4 of appeal, that the contents of exhibit P2 were not read out before the trial court after its admission, this complaint has no basis. With respect, we agree with Ms. Meli that the first appellate court at page 55 of the record of appeal expunged exhibit P2, it being a product of an irregular procedure in its admission in evidence. This ground is misconceived and accordingly dismissed.

On ground 6, it is the complaint that the charge of incest was not proved to the hilt. Apart from the offence of incest by males being a creature of the provisions of section 158 of the Penal Code, the elements constituting the offence are prescribed therein. The section reads:

"(1) Any male person who has prohibited sexual intercourse with a female person, who is to his knowledge his granddaughter, daughter, sister or mother, commits the offence of incest, and is liable on conviction -

(a) if the female is of the age of less than eighteen years, to imprisonment for a term of not less than thirty years;

(b) if the female is of the age of eighteen years or more, to imprisonment for a term of not less than twenty years.

(2) It is immaterial that the sexual intercourse was had with the consent of the woman.

(3) A male person who attempts to commit an offence under this section is guilty of an offence".

As cited above, in such a charge of incest by males, the prosecution must prove that the accused knew the female as his grandmother, daughter, sister or mother at the time of sexual intercourse. See **Festo Mgimwa vs. Republic,** Criminal Appeal No. 378 of 2016 (unreported). In the instant appeal, it is undisputed that PW1 and appellant were respectively sister and brother; both biological children of PW2 and PW3.

The prosecution evidence proved that the appellant had sexual intercourse with PW1 while knowing that she was his sister. In her

evidence, PW1 stated that herself and the appellant lived together in the same house and had regular sexual intercourse for a long time with her brother. She recounted to have been induced and agreed to have sexual intercourse with the appellant who had told her to do the shameful act as that was per the directions of a traditional healer. The confirmation on the sexual intercourse is reflected in the victim's evidence at page 7 of the record of appeal that:

> *"On 03/11/201 my father [found] me committing sex during night hours and after that he called neighbours who found us committing sex and after that we were brought at the office of VEO and later at police station".*

When PW1 was cross examined by the appellant, she firmly and without hesitation stated that:

> *"We have been making sex together for long time".*

The proof that the appellant and the victim were related is as per the evidence of PW2 who testified that she had nine children, the appellant and the victim being son and daughter respectively and that they all resided in the same homestead. PW2 as well, expressed shock when she was called to witness the appellant having sex with his sister and upon being taken to the police and for medical examination, the

victim was found to be pregnant according to the evidence of the medical doctor, PW7. According to PW6, the investigation officer, she received both the appellant and PW1 who were taken to the police station by PW3 and PW2 on allegations of having sexual intercourse as confirmed by the victim who recorded a statement to the effect that on 03/11/2017 at night she was found having sexual intercourse with her brother and that she had never had sexual intercourse with another man.

After a thorough examination of the evidence on record, we entirely agree with Ms. Meli that the detailed and credible account by PW1 proved she had sexual intercourse with the appellant. This was corroborated by PW3 who caught the duo red handed having sexual intercourse. Moreover, there is also the evidence of PW2 and PW7 who examined PW1 and found that she was pregnant which is proof that there was penetration which was occasioned by sexual intercourse. The two courts below found the evidence of PW1 credible and we have no reason to doubt such a finding having considered the consistent and coherent account of PW1 on the occurrence of sexual intercourse with the appellant on a number of instances which is the victim's best evidence as we held in **Selemani Makumba v. Republic** [2006] T.L.R.

379. The credible account of PW1 is entitled to credence and it was not controverted or shaken by the appellant be it, during cross-examination or at the hearing of the defence evidence. Thus, we are satisfied that, all the ingredients of the offence of incest by males were proved and thus the charge was proved to the hilt against the appellant who had sexual intercourse with the victim knowing that she was his blood related sister. As such, like the two courts below, we find that with the strong and credible prosecution evidence which, with no flicker of doubt, proved beyond reasonable doubt that the appellant committed the offence.

On the propriety or otherwise of the punishment meted on the appellant, in his defence at the trial and before us, he pleaded for a lenient sentence which was opposed by the learned State Attorney on ground that the sentence is the prescribed statutory minimum. We agree with the learned State Attorney that the minimum sentence on the offence charged is prescribed. As such, since the victim was less than eighteen years, the jail term of thirty years is appropriate in terms of the provisions of section 158 (1) (a) of the Penal Code.

In view of what we have endeavored to demonstrate, we, on our part, as rightly submitted by Ms. Meli, are in agreement with the

concurrent findings of the lower courts that there was cogent evidence by the prosecution which established the offence of incest by a male to have been committed by the appellant. As stated earlier, he was properly convicted and sentenced according to section 158 (1) (a) of the Penal Code.

In the final analysis, we find the appeal devoid of merit and dismiss it in its entirety.

DATED at **MWANZA** this 11th day of July, 2023.

S. E. A. MUGASHA
JUSTICE OF APPEAL

P. M. KENTE
JUSTICE OF APPEAL

L. L. MASHAKA
JUSTICE OF APPEAL

This Judgment delivered this 11th day of July, 2023 in the presence of Appellant in person and Ms. Stella Minja, learned State Attorney for the respondent / Republic, is hereby certified as a true copy of the original.

THE COURT OF APPEAL OF TANZANIA

J. E. FOVO
DEPUTY REGISTRAR
COURT OF APPEAL