IN THE COURT OF APPEAL OF TANZANIA

AT TABORA

(CORAM: LILA, J.A., KITUSI, J.A. And MGEYEKWA, J.A.)

CRIMINAL APPEAL NO. 298 OF 2020

SIMON MALEMBEKA ..... APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

[Appeal from the Judgment of the Resident Magistrate's Court of Tabora at Tabora (Extended Jurisdiction)]

(Nyaki -SRM (Ext Juri.)

Dated the 9th day of June, 2020

in

Criminal Appeal No. 2 f 2020

JUDGMENT OF THE COURT

20th September, & 3rd October, 2023

MGEYEKWA, J.A.

The appellant, Simon Malembeka stood trial at the District Court of Nzega at Nzega with incest by males contrary to sections 158 (1) (a) and (2) of the Penal Code. The particulars of the offence and the evidence is that on diverse dates between the year 2018 and 25th day of June, 2019 at

Mwambaha Village within Nzega District in Tabora Region did have prohibited sexual intercourse with a girl aged 14 years whom to his knowledge was his own daughter and a Standard V scholar at Mwambaha Primary School. To conceal the victim's identity, we shall henceforth refer to the girl as 'PW1' as she so testified before the trial court.

The appellant (DW1) pleaded not guilty to the charge and the case went to full trial in which the prosecution called four (4) witnesses. At the close of the prosecution's case, the court found that the appellant had a case to answer and put him on his defense. The appellant was the only witness for the defence.

The prosecution evidence was to the effect that, in 2018, the victim (PW1) was living with the appellant, her biological father, who had a tendency of going to her daughter's room and rape her. According to PW1, her father started to rape her from the year 2018. At first, she refused but her father threatened her with a knife, she had no other choice, she surrendered herself to her father. DW1 continued to rape PW1 and forbid her to tell anyone about his vicious behaviour. His brutal behaviour towards her daughter ended on 25th June, 2019, when PW1 had to take the bull by the

horns by reporting the matter to her teacher one Roy and Daud Mwakanusya (PW4), her Head Teacher. Consequently, the matter was reported to the police. Edda Edwin Kaijage, the Village Executive Officer (PW2) was informed that the appellant was arrested for allegations of having sexual intercourse with his daughter. On the following day, PW2 accompanied the victim to the Hospital for a medical examination. Some more evidence of the encounter came from PW3 who testified to the effect that in May, 2019, he was informed that the appellant is living with her daughter (PW1) as his lover. He interrogated PW1 who told him what had befallen her and she was ready to cooperate in arresting the appellant. They searched the appellant and finally, he was arrested.

The evidence of PW1 was supported by Josephine Joseph, a Clinical Officer (PW4) who examined the victim at Nzega District Hospital on 25th June, 2019 and found that she was not a virgin. PW4 supported her evidence with the victim's PF3 which was admitted in evidence as exhibit P1.

In his defence evidence, the appellant did not foresee that the truth would be out. When he was given an opportunity to defend himself, he refused to testify and left the matter to the court to decide. By a judgment

delivered on 29th January, 2020, the trial court found that the case against the appellant was proved beyond reasonable doubt. It thus convicted and sentenced him to thirty years imprisonment. His appeal to the High Court was transferred to the Resident Magistrate's Court of Tabora to be heard by Nyaki -SRM with Extended Jurisdiction (SRM -Ext. Jur). The appeal was not successful hence this second appeal before this Court.

The appeal is predicated on four grounds of complaint which may be paraphrased as **one**, PW1, used the phrase "sexual intercourse" during cross examination which was an afterthought. She failed to establish the ingredients of the offence under section 158 (1) of the Penal Code; **two**, the age of PW1 was not established, the citations of her age which put her on oath, PF3, and charge sheet are not evidence; **three**, the trial court did not explain to the appellant the meaning of adverse inference, thus, he was not addressed in terms of section 231(1) of the CPA and **four**, the prosecution case was not proved beyond reasonable doubt.

In the light of the above grounds, the appellant who appeared in person, unrepresented prayed that the appeal be allowed, the conviction quashed and the sentence set aside.

On the adversary side, Ms. Lwila expressed her stance at the very outset that she did not support the appeal. She submitted on each ground of appeal seriatim. On the first ground, the learned State Attorney disagreed with the appellant's complaints. She argued that in her testimony, PW1 used phrases such as, "my father raped me" and during cross examination, she used a similar phrase "sexual intercourse", which meant that her father (appellant) raped her.

Concerning the second ground, admittedly, Ms. Lwila asserted that the citation of the complainant's age in the charge sheet and before taking oath cannot prove the age of the victim. However, she believed that the clinical officer (PW4) who examined the victim proved that PW1 was 15 years old. Relying on the case of **Mathayo Laurence Molle v. The Republic**, Criminal Appeal No. 53 of 2020, she was positive that the evidence of PW4 sufficed to prove the age of the victim.

On ground three, the learned State Attorney was brief, she defended the trial court's decision as sound and well reasoned. She clarified that before the hearing of the defence case, the trial court addressed the appellant in terms of section 231 of the Criminal Procedure Cap.20 (the CPA), but the

appellant elected to exercise his right to remain silent, hence the trial court drew an adverse inference against the appellant. She asserted that it was not a legal requirement for the trial court to explain the meaning of adverse inference to the appellant. She added that the appellant was addressed in terms of section 231(1) of the CPA, thus, he was not in any way prejudiced for the prosecution's failure to explain to him the meaning of adverse inference.

On the last ground, the learned State Attorney was brief, she asserted that the prosecution witnesses, in particular PW1's evidence proved the prosecution case against the appellant to the hilt.

In his brief rejoinder, the appellant concluded that the whole case was a frame-up against him and prayed that the appeal be allowed.

We have considered the grounds of appeal and submissions from both parties, and in dealing with the points of contention, we shall determine the grounds of appeal, in the same manner as indicated by Ms. Lwila, save the second ground which we will address last for reasons which will unfold in the course of this judgment.

However, before doing so, it is crucial to state that, it is an established practice of the Court when sitting to hear a second appeal to avoid upsetting concurrent findings of facts by the trial and first appellate courts if there were no mis-directions or non-directions on evidence. Where there are mis-directions or non-directions on the evidence, the Court is entitled to interfere and look at the evidence with a view of making its own findings. See **Wankuru Mwita v. The Republic.**, Criminal Appeal No. 219 of 2012 (unreported).

The appellant's complaint under the first ground is to the effect that PW1 failed to establish the ingredients of the offence of incest by males. Our starting point in respect of this ground will be sections 158 (1), (2) and (3) of the Penal Code which establish the offence of incest by males. These provisions states that: -

> ***"158.-(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." [Emphasis added]

Going by the above provisions, it is plain clear that, the victim testified in court and she persuaded the trial court to believe that the ingredients of the said offence were well established. PW1's testimony connoted sexual intercourse in prohibited relationships which meant that penetration was involved. In PW1's testimony we observed some phrases which meant that his biological father penetrating his penis into her vagina. Those phrases are; "my father told me *nimuachie kuma*" but she refused, "we did so many times" to mention a few.

The Court had an occasion to exemplify the victim's expressions in rape cases. In the case of **Mathayo Laurence** (supra), where the Court cited the case of **Hassan Kamuya v. The Repiblic**, Criminal Appeal No. 277 of 2016 [2018] TZCA 259 (25 July 2018)TanzLII, in which it was confronted with a similar situation and the Court observed as establishing penetration phrases like "[he] removed my underwear and started intercourse me", "sexual intercourse" or "have sex", "[he] undressed me and started to have sex with me", "*kanifanyia tabia mbaya*", "*alinifanya matusi*" or "he put his dude in my vagina" or "did sex me by force", "this accused raped me without my consent", "while this accused was sexing me I alarmed".

Moreover, we have considered the circumstances of the case at hand, where the appellant is the victm's biological father, in which culture restrictions, cultural upbringing, norms and religious beliefs, it is not easy for a child to utter such kind of direct words in front of the people. Thus, the allegation put forward by the appellant that PW1 mentioned "sexual intercourse" during cross examination is an afterthought is unfounded. Consequently, we cannot fault the factual findings of the two lower courts on this aspect.

We now turn to consider the complaint in ground three of the memorandum of appeal to the effect that it was improper for the trial court to draw an adverse inference after the appellant had refused to give evidence after being addressed in terms of section 231 (1) of the CPA. For the proper determination of this ground we have found section 231(3) of the CPA to be compellingly relevant. It reads that: -

> *"231(3) Where the accused person, after he has been informed in terms of subsection (1),* ***elects to remain silent, the court shall be entitled to draw an adverse inference against him and the court as well as the prosecution shall be permitted to comment on the failure by the accused person to give evidence."***

In its interpretation of this provision, the Court has deduced that in a situation where the accused (appellant) decides to remain silent, the trial court has a duty to invite the prosecution to comment. The record of the appeal at page 25 shows that the trial court addressed the appellant in terms of section 231 of the CPA and the appellant replied: "I do not wish to give any testimony. I leave it to the court to decide". In rejecting the appellant's

argument on compulsion, the SRM -Ext. Jur reasoned that the trial court was not duty bound to explain the consequence or effect of choosing to remain silent. We do not agree with her findings. In our decision in **G.9963 Raphael Paul @ Makongojo v. The Republic,** Criminal Appeal No. 250 of 2017, [2021] TZCA 541; (30 September 2021), we observed that: -

> *"In a surprising twist of events the appellant **elected to exercise his right to remain silent** and in terms of section 231(3) of the Criminal Procedure Act, Cap 20 R.E 2002 (now R.E 2019) ("the CPA") the trial Court drew an adverse inference against the appellant and therefore it invited the prosecution to comment on the **failure by the appellant to give evidence**. Consequently, the learned State Attorney made a final submission and argued that on the strength of the evidence presented by the prosecution and in particular the evidence of PW1 which was corroborated by other prosecution's witnesses and documentary exhibits the case against the appellant was proved to the hilt. Thus, in the upshot, the trial Court was satisfied that the prosecution accusations were proved beyond reasonable doubt, whereupon the appellant was*

convicted and sentenced to thirty years imprisonment." [Emphasis added]

In terms of the above decision, we find that it was fatai for the trial court to draw an adverse inference without inviting the prosecution to comment on the failure by the appellant to give evidence. The question is whether the omission has prejudiced the appellant. We hold that, despite the mishap, the appellant was not prejudiced. As intimated above, the appellant was well informed by the trial court about his rights to defend himself, to cross examine and call witnesses in terms of section 231 (1) of the CPA. Therefore, we conclude that failure to explain the meaning of adverse inference to the appellant did not deny him the right to give evidence.

Next for our consideration is the fourth ground, whether the prosecution case was proved beyond reasonable doubt against the appellant. At the outset, we hold that, the evidence is loud and clear that the appellant did have prohibited sexual intercourse with PW1. The trial court acted on the evidence of the four prosecution witnesses, in particular the evidence of PW1 which, we found to be credible.

The last ground for our consideration is ground two which is related to the victim's age at the material date. Before we embark to determine this ground of appeal, we wish to make it clear from the beginning that the age of the complainant in sexual offences cases is relevant for two purposes. Firstly, in statutory rape cases, it is meant to prove that the complainant was below eighteen (18) years. Secondly, it establishes the age of the complainant for purposes of sentencing. Therefore, in the circumstances of the case at hand, the prosecution was duty bound to establish the age of the victim in order for the court to be sure that it imposes an appropriate sentence on the appellant.

In determining whether the victim's age was proved, from the outset, we hold that the SRM -Ext. Jur was in error to adopt the facts revealed during the conduct of *voire dire* test to determine the victim's age. As a result, the SRM -Ext. Jur confirmed the sentence of thirty (30) years imprisonment.

It is patently clear that proof of age of the victim was wanting. We fault the SRM -Ext. Jur findings since in the record of appeal, neither the complainant nor any of the witnesses testified on the aspect of the victim's age. More so, they did not tender a birth certificate to support the facts

stated in the charge sheet regarding the age of the victim. Ms. Lwila in her submission was firm that the medical practitioner proved the age of the victim. We hold a different view from the learned State Attorney; first, there is no any evidence or documentary evidence on the record of appeal to prove the victim's age since the PF3 at page 11 of the record of appeal was expunged from the record because its contents were not read out in court. Second, the record of appeal at page 14 shows that the clinical officer approximated the age of the victim when he simply said, the victim was between 12 to 14 years which implies that he was not certain of her age.

We are alive to the decisions of **Issaya Renatus v. The Republic**, Criminal Appeal No. 542 of 2015 and **July Joseph v. The Republic**, Criminal Appeal No. 226 of 2021 (both unreported) whereby the Court maintained that, the age of the victim may be proved either by the victim, relative, parent, medical practitioner, or birth certificate on which we do agree. However, it is noteworthy that, the age may be determined through medical examination where a Doctor is instructed to examine a girl for that purpose. Therefore, it is clear that in the instant case, the victim's age was not medically assessed or proved.

Having reviewed the above finding and reasoning, we hold that, the appellant benefits from the doubts on the age of the victim warranting imposition of a lesser sentence of twenty (20) years imprisonment under section 158 (1) (b) of the Penal Code. For clarity, the said section provides that:-

> *"**158**.-(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."*

In the circumstances, we dismiss the appeal against conviction and we invoke our revisional powers bestowed on the Court under section 4 (2) of

the Appellate Jurisdiction Act Cap. 141 to set aside the sentence imposed on the appellant and substitute it with one of twenty years in prison.

In the upshot, save for the adjusted sentence, the appeal stands dismissed.

Order accordingly.

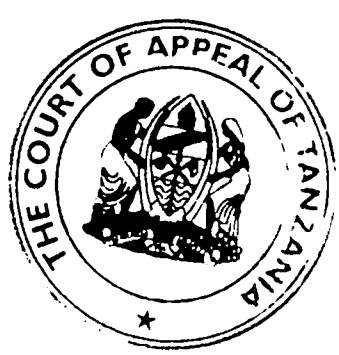
DATED at **TABORA** this 3rd day of October, 2023.

S. A. LILA
JUSTICE OF APPEAL

I. P.KITUSI
JUSTICE OF APPEAL

A. Z. MGEYEKWA
JUSTICE OF APPEAL

Judgment delivered this 3rd day of October, 2023 in the presence of the Appellant in person and Mr. Steven Mnzava, State Attorney for the Respondent/Republic, is hereby certified as a true copy of the original.



G. H. HERBERT
DEPUTY REGISTRAR
COURT OF APPEAL