IN THE HIGH COURT OF TANZANIA

AT SONGEA

DC CRIMINAL APPEAL .....NO 11..... OF..... 2013

(Originating from SONGEA DISTRICT COURT CRIMINAL CASE NO. 14 OF 2012)

FRANK JOTHA.....APPELLANT

Versus

THE REPUBLIC.....RESPONDENT

Last Order: 14th August, 2013

Date of Judgment: 17th October, 2013

JUDGMENT

FIKIRINI, J:

The appellant Frank Jotha was faced with a charge of incest contrary to section 158 (1) (b) of the Penal Code Cap 16 R. E. 2002. The particulars of the offence was that on 1st January, 2012 at Litisha Village in Peramiho within the rural District of Songea in Ruvuma region the appellant willfully and unlawfully did have carnal knowledge with one Lucia Nyingo who is his

mother without consent. The appellant denied the charge and the prosecution summoned a total of five (5) witnesses.

Briefly this is what transpired as a prosecution case; that on the material day the appellant went to PW1 - Lucia Nyingo's place. PW1 is the appellant's biological mother. They had lunch and thereafter both went out for music. Later PW1 returned home to prepare dinner and went to bed. It was PW1's account that while asleep she felt someone was on her back. She could not identify the person by face but recognized his voice as that of the appellant. The appellant robbed and raped her. While all these was taking place, PW2 - Lornardo Jotha who is PW1's son and the appellant's sibling entered the room. It was PW2's testimony that he found PW1 lying down and the appellant on top of her. Upon inquiring the appellant threatened to kill him.

PW2 went to fetch PW3-James Jotha who is his brother. By the time PW3 arrived at the scene the appellant was gone and PW1 was by herself in the room. PW1 told them that the appellant had raped her. The appellant was later arrested by PW3 and his friends and taken to the Village office. Meanwhile, PW1 was taken to Peramiho police station where she was

issued with a PF3. This piece of evidence was corroborated by PW5 – Dr. Bertha Komba who confirmed attending to PW1 in her evidence. She as well filled the PF3. Another witness was PW4 - E 442 D/Cpl Omary who drew the sketch map of the scene of the crime. He also testified on the source of light which was used in identifying the appellant. From him the court was told that the light could spread to the whole house through the doors and open spaces on the roof.

In his sworn defence evidence the appellant denied to have committed the alleged offence. He raised the defence of alibi which was supported by both DW2-Mathias Haule and DW3-Paulo Jotha who claim to be in the appellant's company at the material time. Besides, DW1 explained existence of bad blood between him and PW1 and that even after he was arrested he raised that with PW1. DW3 confirmed DW1's version of the story that there was bad blood between PW1 and the appellant.

Based on the above briefly stated evidence the appellant was convicted and sentenced to twenty (20) years imprisonment, the punishment which was to be confirmed by the High Court. Aggrieved by the decision the appellant appealed to this court having a total of four (4) grounds of

appeal. Close look at the grounds, it was clear they were all challenging the prosecution as to whether they had been able to prove their case beyond all reasonable doubt. At the hearing the appellant had not so much to say, being a lay person left it to the court to decide.

The respondent through Mr. Mwamwenda - Senior State Attorney supported the appeal on the following grounds: first, that the evidence adduced in court attested rape and not incest. In that regard he cited the case of **Maneno Katuma V. R (2012) Criminal Appeal No. 1 of 2012 CAT (unreported).** Second, that the charge was defective, the defect which could not have been cured. Instead of charging on one count of incest there were supposed to be two counts that of rape followed by that of incest. Third, that the identification of the appellant was doubtful. Fourth, that the trial magistrate applied section 127 of the TEA, Cap 6 R.E. 2002 without stating which specific subsection was being referred to since the provision has about seven (7) subsections. Fifth, that the trial court did not consider the appellant's defence of alibi which was supported by DW3 - Paulo Jotha and DW2- Mathias Haule. Also the trial court failed to consider the explanation regarding existence of bad blood between PW1 and DW1

and the concern raised of PW1 having tendency of fabricating issues, the concern which was as well supported by DW2, that indeed their mother had that habit. According to Mr. Mwamwenda this was an irregularity and to strengthen his point he cited the case of **Hussein Iddi & Another V. R (1986) TLR 166,** where consideration of the defence case was emphasized as a "must" meaning no choice.

Mr. Mwamwenda as well dwelt on suggestion for retrial but retreated and submitted that such a move could cause injustice to the appellant as the new trial would give the prosecution chance of mending up their case. For the above reasons the respondent supported the appeal.

My perusal of the trial court record, the judgment, grounds of appeal and the respondent's submission which is in support of the appeal, has left me with little work to do. That I joined hands with both the appellant and the respondent that truly this appeal is meritorious. **First**, as rightly pointed out by Mr. Mwamwenda the charge was defective. The appellant stood charged for incest contrary to section 158 (1) (b) of the Penal Code but the evidence led in court was entirely that of rape. Usually in such situation it is advisable for the person to be charged with two counts; that of rape

contrary to section 130 (1) & (2) (a) and then incest contrary to section 158 (1) (b) of the Penal Code and not as it is in this case where by incest was the only charge preferred while evidence produced was in support of the offence he was not charged with. The omission as it has been stated time without number is fatal. See: **Maneno Katuma** (supra)

Following in the footsteps of the Court of Appeal decision in the above cited case, I agree that charging the appellant with incest and yet convict him of rape based on evidence produced in court was incorrect.

Second, the case before the trial court was purely based on identification. From the evidence on record, PW1-Lucia Nyingo alleged to have identified the appellant from his voice, the appellant being her son. The court had to satisfy itself before convicting the appellant that the identification made was sufficient. Otherwise there was a danger of a mistaken identity bearing in mind it was at night. In the case of **Omari Hassan Kipara V. R Criminal Appeal No. 80 of 2012 CAT Dodoma (unreported),** the court concluded that:

"identification must be based on the source of light. Therefore even if a brother or a neighbor, light must be involved."

In the present appeal likewise, though a son, a person well known to PW1, yet since it was at night, light was the only reliable source to be used in properly identifying him. Some people are capable of imitating voices. PW1 had more than one son, so unless the appellant voice was distinct from the rest of her sons. Otherwise, the possibility of mistaken identity could not be ruled out in such situation. See: **Paulo Makaranga V. R Criminal Appeal No. 26 of 2006 CAT Mwanza (unreported)**

PW4 - E442 D/Corporal Omary in his testimony gave a description on the source of light at scene which could have been used to identify the appellant even though PW1 did not testify on that. But again even if, she were to claim she identified the appellant relying on the light in the said house or room, the court would still have to satisfy itself that alleged light was sufficient to properly identify the appellant. According to PW1 the light was of the bulb on the verandah. However, the court was not told the strength of the bulb in terms of watts and voltage, the area it covered, if there were objects such as a wall, where was the so called light being generated from and so forth. From the record the light came into the room through the door, roof and window. But the court was not told through the

door or windows when they were open or not. If it was through the cracks then the court ought to have been told how big were those cracks and so forth. It was also evident that the light catered for four other rooms. Chances that there was sufficient light to properly identify the assailant were in this case slim. Of course, PW1 in her evidence did not claim to have identified the appellant except for his voice, and the fact that she felt someone was on her back. PW1 could as well not state as to when the assailant went, if it was in dead of the night and if she was fast asleep. Likewise, she did not state to the court if she at all heard the assailant going in.

Besides, PW1's evidence it was only PW2- Lornardo Jotha who identified the appellant. It was his unsworn evidence that when he got home from video watching and he found the house door open and upon entering he saw PW1 lying down and the appellant was on top of her. PW2 inquired from PW1 as to what was going on, only to be threatened by the appellant that he would also be killed. Assuming this is the same house with the same source of light discussed above. The chances that PW2 had better vision are less likely. In addition, I am trying to imagine the situation PW2

was in. In my view he must have been in a very pathetic situation. He must as well be frightened in finding his mother in such situation. Under such circumstances it is hard for one to concentrate or notice things properly and with certainty. This, however, does not discard the fact that PW2 knew the appellant well, being his brother. Yet, inspite of this fact I am still not convinced with the evidence the way it is and the identification made relying on light which was coming the verandah. The appellant was in my view not properly identified. The trial court reliance on this kind of evidence was thus unsafe.

Third, trial court in its decision applied section 127 of the TEA, Cap 6 R.E 2002 without citing the actual subsection since the provision has more than one subsection. This provision relates generally to who may testify. The trial magistrate I believe brought it into application in relation to PW2 who was a child. Nonetheless, the record did not specify as to why was the provision brought into play and which specific subsection was relevant. The provision as it is, is wide therefore could not have assisted without specifically stating the purpose for which it was applied. Though this did not affect the decision but thought it should be highlighted.

Fourth, the trial court did not consider the defence case of alibi and that of DW2 which was in support of the appellant. As stated in the case of **Hussein** (supra), defence case must be considered. The word used was "must" meaning it was mandatory to do so. Failure by the trial court not to observe that was an omission which was fatal. In furthering my position, I as well looked at the case of **Mkulima Mbagala V. R., Criminal Appeal No. 267 of 2006, CAT (unreported),** where the court stated:

"For a judgment of any court of justice to be held to be a reasoned one, in our respectful opinion, it ought to contain an objective evaluation of the entire evidence before it. This involves a proper consideration of the evidence for the defence which is balanced against that of the prosecution in order to find out which case among the two is more cogent. In short, such evaluation should be a conscious process of analyzing the entire evidence dispassionately in order to form an informed opinion as to its quality before a formal conclusion is arrived at."

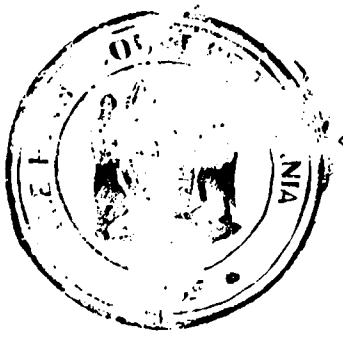
Had the trial court followed the above stated position, I am certain it would had arrived at a different decision since the appellant's defence of "alibi" and that of his witness would have been considered. Similarly, had PW1's evidence been examined properly, the likelihood of her evidence to be discredited would have been greater. But this was only if the defence case

was weighed against that of the prosecution. Unfortunately that was not the case.

In this appeal retrial which would have been the way forward was considered but the thought was discouraged by the respondent. It was their position that taking such move might give room to the prosecution to mend its case and in so doing cause injustice to the appellant. Looking at this case in general, I do share the respondent's position that retrial might cause injustice to the appellant and therefore ruled it out. See. **Hassan Kingama V. R (2000) TLR 200.**

All the above considered I thus conclude this appeal is meritorious and therefore allow it. The conviction is quashed and the sentence set aside. The appellant be released from prison forthwith unless he is lawfully held. It is so ordered.

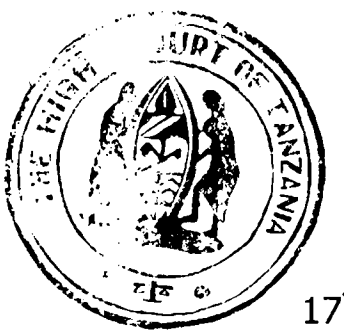
Judgment Delivered this 16th day of October, 2013 in the presence of Frank Jotha the appellant and Ms. Amina Mawoko - State Attorney for the respondent.



P.S.FIKIRINI

JUDGE

Right of Appeal Explained.



P.S.FIKIRINI

JUDGE

17th OCTOBER, 2013