IN THE HIGH COURT OF TANZANIA

AT IRINGA

DC. CRIMINAL APPEAL NO.55 OF 2016

(Originating from Iringa District Court in Criminal Case No. 72 of 2015)

ERICK PHILIPO MSEMWA.....APPELLANT

VERSUS

THE REPUBLIC.....RESPONDENT

JUDGEMENT

14th September 2016 – 7th October 2016

R. K. SAMEJI. J

In the District Court of Iringa, the appellant, Erick Philipo Msemwa was charged with three (3) counts of (i) incest by male contrary to section 158 (1) (a) of the Penal Code, [Cap. 16 R.E.2002], (ii) Unnatural offence contrary to section 154 (1) (a) & (2) of Penal Code, [Cap. 16 R.E.2002], as amended by section 185 of the Law of the Child Act No. 21 of 2009 reads together with section 119 (1) & (2) of the same Law of the Child Act and (iii) assault causing bodily harm contrary to section 241 of the Penal Code, [Cap. 16 R.E.2002]. After full trial, the trial court convicted the appellant for all three counts and sentenced him to serve thirty (30) years

imprisonment term in jail in respect with the 1st count, a sentence of life imprisonment in respect with the 2nd count and a sentence of five (5) years imprisonment in respect of the 3rd count. All sentences were to run concurrently.

Being aggrieved by the decision of the trial court the appellant lodged a Petition of Appeal with the following five (5) grounds, that:-

(a) the trial Magistrate erred in law and in fact by convicting the appellant basing on the evidence of the victim (PW1) in which voire dire test was not accordingly conducted;

(b) the trial Magistrate erred in law and in fact by convicting the appellant basing on the (PF3) of which its contents were not reviled before the Court;

(c) the trial Magistrate erred in law and in fact by convicting the appellant relying on the evidence of the victim which was not corroborated.

(d) the trial Magistrate erred in law and in fact by convicting the appellant without regarding his defense; and

(e) the charges against the appellant were not proved beyond reasonable doubt.

All the above grounds after being consolidated can essentially be said to challenge that charges against the appellant were not proved to the standard required by the law. That is beyond reasonable doubt.

The brief background of this case as reflected in the proceedings state that, PW1, seven (7) years old and a standard one student, is living with her grandmother, grandfather, his father and one Adili. That, on 19th February 2015, PW1 went to school and she never came back home. Her grandmother, grandfather and father tried to trace her but without success. However, PW7, the street Chairperson stated that, on 19th February 2015, one of his neighbor brought PW1 to his house informing him that PW1 do not want to go home, as she was frightened to meet her father. Then PW7 received her and allowed her to sleep in his house. PW7 observed the habits and conducts of PW1 and noted that she was living a

hardship life. The wife of PW7 also observed that PW1 had bruises through out her body. In the next day PW7, asked his wife to take PW1 to the gender desk where the auxiliary police was called and investigated on the matter and PW1 informed them that she was raped, unnaturally known and beaten by her father. PW1 was then taken to the social welfare office, Police and then hospital. The appellant was then arrested and the matter was brought before the trial court.

Before the trial court the prosecution side summoned eight (8) witnesses. PW1, Brenda Erick, the victim aged 7 years old, who testified after the *voire dire* test; PW2, Batister Raphael Mdogofu, the auxiliary police who investigated on the matter; PW3, Tula Jackson Ngudula, the caretaker of children in hardship situation at Huruma Center and the one who received PW1 at the Centre; PW4, Alice Kapinga, a Social Welfare Officer, who stayed and counseled PW1 at TARRWOC; PW5, a nurse and adviser who also interrogated PW1; PW6, the Doctor who testified to have examined PW1 and observed that she has some marks all over her body and bruises, her virgin was perforated and her anus has been penetrated by a blunt object and PW7, the Chairperson of Dodoma Road "D" Street at Mtwivila.

On the other side the appellant in his defence summoned seven (7) witnesses including himself. He denied the offences, in respects to the 1st and 2nd counts, but admitted to have beaten PW1. DW2, Elizabeth Shula and the grandmother of PW1 among others admitted during cross-examination that the appellant used to beat PW1. DW3, Phillip Msemwa the grandfather of PW1, recalled what transpired on 19th February 2015, on the missing of PW1 and that, he reported the incident to the police. He as well during cross examination admitted that the appellant is the one who beats his daughter and that is why PW1 is running away from home, but was not sure if the appellant also raped her. DW3 also stated that the appellant is a drunkard person. DW4, a form two student at Mtwivila Secondary school and a sister to PW1 also confirmed that appellant on regular basis beats PW1; DW5, Adriano Phillip Msemwa and a brother to the appellant who as well testified that appellant always beats PW1 and that the appellant is not fit to live with PW1. DW6, Kefa Philemon, a student at Mtwivila Secondary School testified that the appellant is always beating PW1 when teaching her and DW7, Laurensia Lugalala, who explained the appellant as a drunkard person.

The trial Magistrate after evaluation of the entire evidence adduced before him was convinced that the prosecution discharges its duty in proving all the three (3) counts against the appellant beyond reasonable doubts and consequently proceeded to convict and sentenced him as stated above.

At the hearing of this Appeal the appellant was represented by Mr. Mdegela, the learned Counsel while Ms. Edna Mwangulumba, the learned State Attorney represented the respondent, the Republic.

In his submission Mr. Mdegela while arguing for the 1st ground of the appeal contended that section 127 of the Evidence Act, [Cap.6 R.E.2002] provides for the issue of voire dire. Pursuant to that section it is mandatory for a victim of tender age when testifying to first go under a *voire dire test* and a Magistrate or Judge must indicate his/her findings if the said witness (*a child of tender age*) understands the duty of speaking the truth and the meaning of the oath. Mr. Mdegela referred the Court to page 15 of the trial court proceedings, and noted that, in the case at hand, the PW1 before giving her evidence, the trial Magistrate conducted the said voire dire test, but in his findings, the said Magistrate never stated as to whether the said PW1 understood the meaning of the oath and the duty of speaking the

truth. The *Voire Dire Test* was not conducted in accordance with provisions of section 127 of the Evidence Act, (supra). Mdegela stated further that, though at page 15 of the same proceedings the Magistrate promised to take the evidence of PW1 under the oath, but at page 16 of the same proceedings the evidence of PW1 was not taken under the oath. Therefore, such evidence was supposed to be corroborated for it to be considered by the court. Mr. Mdegela noted that, in the entire proceedings no any witnesses corroborated the evidence of PW1, so it was wrong for the trial court to convict and sentence the appellant.

Submitting on the 2nd ground of the appeal, Mr. Mdegella contended further that the contents of the PF3 were not read out before the trial court after its admission. He invited the court to see pages 31 and 32 of the trial court proceedings to verify the same. He also drew attention of this Court to the case of **Robson Mwanjisi & 3 Others v. Republic** [2003] TLR 218 in which the Court held that;

> *"Whenever it is intended to introduce any document in evidence it should first be declared for admission and be actually admitted before it can be read out".*

Based on **Mwanjisi's case**, Mr. Mdegela submitted that, the said PF3 after being admitted was supposed to be read out and explained, short of that, the said PF3 tendered before the trial court do not have an evidence value in law and is supposed to be expunged from the record of this case.

On the 3rd ground of the appeal, Mr. Mdegela informed the Court that, the evidence of PW1 was not corroborated and the trial Court convicted the appellant based on the evidence of PW1. That, at page 16 of the proceedings, PW1 denied to have been raped by the appellant, but only saying that she was being beaten by the appellant, the fact which was never disputed by the prosecution side. It is therefore true that PW1 was only beaten by the appellant.

Submitting on the 4th ground of the appeal, Mr. Mdegela argued that the evidence adduced by the appellant was not considered by the trial Court in its judgment. That, at page 12, 2nd paragraph of the said judgment, the trial court stated that, because the appellant was a drunkard person there is a high possibility of him being raping PW1 unknowingly. That, the evidence adduced by the defence side supported and

corroborated the evidence of the prosecution the thing which is not normal in criminal jurisprudence.

All in all, Mr. Mdegela submitted on the last ground of the appeal that the charges against the appellant were not proved beyond reasonable doubt and cited the case of **Matula v.Republic** (1995) TLR at page 3 where the court held that;

> *"It is the principle of law that, the prosecution must prove the case against the accused beyond reasonable doubt...What the accused has to do is to cast doubt on the prosecution case".*

Mr. Mdegela finally prayed the Court to grant the appeal and set the appellant free.

On the other side Ms. Mwangulumba strongly opposed the entire appeal and the submission advanced by Mr. Mdegela. She submitted on the first ground that the contention that the *voire dire* test was not properly conducted is unfounded since the same was properly conducted in accordance with section 127 of the Evidence Act, (supra). The intelligence of the child is measured through questions and that is what was done in

this case, see page 15 of the proceedings. She went on to submit that how to conduct the test is the style of the court and may differ from one court to another. The argument was supported by the unreported case of **Jefferson Samweli v. The Republic**, Criminal Appeal No. 105 of 2005 (sic). Unfortunately a copy of this authority was not supplied by Ms. Mwangulumba and as such, she denied the opportunity for this Court to verify the same.

On the 2nd limb of the appeal, Ms. Mwangulumba contended that the PF3 was properly tendered. The doctor, who testified, explained his findings, which were never disputed by the appellant. However, Ms. Mwangulumba admitted that on the record in the trial court proceedings it was not indicated that the PF3 was read over and explained to the appellant. According to the learned state attorney the omission does not render the document defective.

Submitting on the 3rd ground of the appeal, Ms. Mwangulumba argued that, the evidence of PW1 was well corroborated by the evidence of PW3 at page 19 of the trial court proceedings. That, even PW6 also corroborated the said evidence. That, even if the same was not corroborated still the evidence of the victim was enough to convict the

appellant, to this point, Ms. Mwangulumba drew attention of the Court to the case of **Omary Kijuu v. Republic**, Criminal Case No: 39 of 2005 at page 10 (sic). However, a copy of this authority was also not supplied to the court.

On the 4th ground of the appeal Ms. Mwangulumba argued that the trial Magistrate had considered and evaluated the evidence adduced by both parties. She referred the Court to page 12 of the trial Court's Judgment and indicated that, the trial court evaluated even the evidence of the witness of the defense side. Mwangulumba went on to submit on the last ground of the appeal that the prosecution side had proved the case against the appellant beyond reasonable doubts hence prayed the court to dismiss the appeal for lack of merit.

I have given a careful and anxious consideration to the records of the trial court and the submissions by both parties and I have remained with only one issue for my consideration, *whether the prosecution proved its case beyond any reasonable doubt.*

In deciding this appeal I am very much aware with the set principle that, this Court being the first appellate court, enjoys great liberty in re-

evaluating the evidence and the law. Further that, this Court can interfere with findings of facts by the lower court if the said court completely misapprehended the substance, nature and quality of the evidence, resulting in an unfair conviction. See for instance the case of **Yohana Dionizi and Shija Simon Versus The Republic,** Criminal Appeal No. 114 and 115 of 2009, Court of Appeal of Tanzania at Mwanza, (Unreported) and **Kisembo V. Uganda** [1999] 1 EA. In Kisembo's case the Court held that:-

> *"The Court of Appeal had the duty to properly scrutinize and evaluate the evidence of both the prosecution and the defence. It would be a misdirection to accept one version and then hold that because of that acceptance per se the other version is unsustainable."*

In the case at hand, it is on record that, the appellant was charged and convicted for three offences viz; *incest by male, unnatural offence and an assault causing bodily harm.*

With regard to the offence of incest by male as provided for under section 158 (1) (a) of the Penal Code, (supra), the same is committed

when any male person who has prohibited sexual intercourse with a female person, who is to his knowledge his granddaughter, daughter, sister or mother. It is clear that from both prosecution and defense evidence, the victim was the child of the appellant. For instance at page 48 of the typed proceedings, one Adriano Philipo Msemwa (DW5) a young brother of the appellant informed the court that the victim is a daughter of the appellant. Furthermore, testimonies of DW1 especially after being cross examined reveal that the victim was his child.

Moreover, according to section 154 (1) (a) & (2) of the Penal Code, (supra) as amended by section 185 of the Law of the Child Act, No. 21 of 2009, unnatural offence is committed when any person has carnal knowledge of any person against the order of nature. It has to be noted that the trial court conviction was heavily premised on the evidence adduced by the PW1, the victim who nakedly testified to have been raped in her vagina and unnaturally known by the appellant. That, the appellant used his penis to rape her. PW2 testified *inter alia* that when PW1 was sent to the hospital for examination it was observed that she was raped. That PW1 told them that she was *raped twice*. PW3 testified *inter alia* that she was told by PW1 that her father (the appellant) had raped her. PW4 also

testified *inter alia* to have been informed by PW1 that she was raped by her father who also threatened to kill her. The appellant raped her *several times*. PW5 also testified about the incident of rape since she was also informed by PW1 that the appellant raped her. PW6 a Medical doctor also testified to be the one who attended and medically examined PW1. That, he found PW1 with some marks (scars) all over her body and bruises. That, he also found her virgin was perforated and some bruises in her anus. That, some blunt object entered (penetrated) to her anus. To this effect a PF3 was tendered and admitted as exhibit. PW7, a street Chairperson also testified on how he came across with PW1 on 19th February 2015, but he did not testify anything on whether the victim was inflicted with the offence. PW8 informed the court that he saw PW1 with some bruises and she told him that those bruises were caused by beatings inflicted to her by the appellant. Based on these testimonies the trial court found the appellant guilty as charged.

It is clear from the above summary that almost all witnesses testified directly that the appellant used to beat PW1 on regular basis, however on the issue of incest by male and un-natural offence all of them testified to have been informed by PW1 herself that she was raped by her father

believing that by saying that PW1 was raped they have as well proved all the three offences incest by male, un-natural offence and assault causing bodily harm through rape was not one of the offences. Some of them stated to have been informed that the appellant raped PW1 twice and some on several times and no one including the PW1 herself stated clearly when and where the said offences were committed.

It is a canon of criminal justice in our jurisdiction and elsewhere that the duty is upon the prosecution to prove its case beyond any reasonable doubts. The burden never shifts to an accused to prove his innocence. See for instance the case of **Humfrey Swale & 7 others v. the Republic**, Criminal Appeal No. 188 of 2011, Court of Appeal of Tanzania at Iringa (unreported).

It has to be further noted that, when the offences were committed the victim, PW1 was seven (7) years old, hence a child of tender age who testified during the trial. It is settled law that before any trial court receives the evidence of a child witness, it must first conduct a *voire dire* examination.

The purpose of this examination is to satisfy the court on whether or not the intended child witness is competent to testify either on affirmation /oath or in terms of S.127 (2) of the Evidence Act, (supra). (see **Manenò Katuma v. the Republic,** Criminal Appeal No. 1 of 2c012, Court of Appeal of Tanzania at Iringa (unreported). I am however aware that there is recently amendment to section 127 of the Evidence Act, which was done through the *Written Laws (Miscellaneous Amendments) (No.2) Act No. 4 of 2016,* which provided that " *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*"

It has to be noted that this case was tried before the said amendments and I am therefore at one with Mr. Mdegela's submission that although the trial court conducted the *voire dire* test, but in its findings the trial Magistrate never clearly stated as to whether the said PW1 understood the meaning of the oath and the duty of speaking the truth. As such the conducted *voire dire test* was fatal and it is as if it was not conducted at all. In **Alfeo Valentino v. the Republic**, Criminal Appeal No.92 of 2006 Court of Appeal of Tanzania at Arusha (unreported) the Court reiterated its

position given in **Augustino Lyanga v the Republic,** Criminal Appeal No. 105 of 1991 and stated that;

> *"If we are to paraphrase the provisions of section 127 (2), a court may only receive evidence of a child of tender years who does not understand the nature of an oath if in the opinion of the court the child is possessed with sufficient intelligence and understands the duty of speaking the truth.* ***These requirements must be recorded in the proceedings****..." (Emphasis is mine).*

As ably submitted by Mr. Mdegela, in the case at hand, though the trial Magistrate conducted the *voire dire test*, did not record his findings properly and even after stating that PW1 will give her evidence under oath it was not indicated that she gave her testimony under oath. (See pages 15 and 16 of the trial court proceedings).

It follows therefore that if the court do not conduct the *voire dire test* then the testimony of such witness must be corroborated. This position was expounded in detail by a full bench in **Kimbute Otiniel v. the**

Republic, Criminal Appeal No.300 of 2011, Court of Appeal of Tanzania at Arusha (unreported), in which the Court among others remarked that:-

> "...***Where the court does not conduct a voire dire then the evidence of a child witness must be corroborated for the purposes of determining whether he or she is telling nothing but truth***. *That section 127 (7) is not intended to serve as an alternative legal basis for admitting or acting upon evidence, which would otherwise not be admissible under section 127(2). That subsection 7 is only intended to abolish, in all trials involving sexual offences, the requirement under the common law rule of practice that the evidence of a child witness, a victim of sexual offence or a sole witness, must, whether given by a sworn witness or an unsworn child witness in fully compliance with section 127(2), must be corroborated to sustain a conviction". (Emphasis added).*

Since there was no proper *voire dire test,* it was fundamental for the evidence adduced by PW1 to be corroborated by the remaining witnesses who however, none of them testified to have seen the appellant

committing the said offences (incest by male and un-natural offences). They only testified that the victim was raped and inflicted bodily without knowledge that rape was not part of the charged offence.

It has to be noted further that during trial PW6, a medical doctor who testified to have examined and seen the victim without virginity and her anus contained some bruises facilitated by a blunt object. He informed the court to have attended the victim and prepared a PF3. The said PF3 was tendered and admitted as exhibit by a trial court. Based on the admission of this PF3, Mr. Mdegela submitted that, the said PF3 after being admitted was supposed to be read out, short of that the PF3 lacks evidential value and is supposed to be expunged from the record. I have passed through the case of **Robinson Mwanjisi v. the Republic** (supra) as cited by Mr. Mdegela and find it distinguishable from the case at hand. In **Mwanjisi's case** a document was read over before being admitted by the Court while in the case at hand the document was admitted and not read at all. However, the trial court duly complied with section 240 of the Criminal Procedure Act, which is reproduced as follows:-

(a) 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;

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(b) *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; and*

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(c) ***When 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).*

Records of the trial court indicate at pages 31-33 of the proceedings that the doctor who had prepared a report (PF3)

summoned to appear before the trial court, testified and was cross-examined by the appellant. In the event the trial court could not have complied with this provisions, then this would be a ground to expunge the PF3 from the records.

However, after scrutinizing the PF3 I found it is lacking weight particularly on the count of unnatural offence. The report indicates the details of the alleged offence to be "**Assault and Rape**" it also states the nature of complaints to be "**child abuse**" and "**being beaten and abused.**" It is reported that the general physical /mental examination as follows; "**Bruises on back with scars (4x6cm), multiple, clean. Patient oriented.**" The report describe further the physical state of and any injuries to genitilia as follows; "**Normal genitilia, hymen not intact, no bruises, no discharge. DRE: Anus admitting index finger, sphincter not intact**" However, the report does not state the type of weapon or object used especially to inflict injuries to genitalia particularly to vagina and anus. I needless to say, the report is not exhaustive and direct to prove the count of unnatural offence. I have as well observed that, the testimony of PW6 to some extent do not comply and tally with what was stated in a PF3. For instance at page 32 of the trial court

proceedings PW6 stated *inter alia* that "...**under her anus has been some blunt thing entered to her**" the bolded sentence does not feature or even indicated in the said PF3.

From the above analysis, it is crystal clear that the evidence of PW1, which was relied by the trial court to convict the appellant particularly on the counts of incest by male and unnatural offences, was not watertight, and since it was not taken under oath was supposed to be corroborated. However, the evidence of PW2, PW3, PW4, PW5, PW6 and PW7 and PW8 also did not corroborate the evidence of PW1 to establish the offences of incest by male and unnatural offence.

Turning to the remaining count, *assault causing bodily harm,* the same is provided for under section 241 of the Penal Code, (supra), that *any person who commits an assault occasioning actual bodily harm is guilty of an offence.* As summarized above when analyzing evidences of all witnesses, it is enough to say that, testimonies of PW1, PW2, PW4, PW5, PW6, PW7, PW8 and that of DW1, DW2, DW3 DW4, DW5 and DW6 at least indicated PW1 was bodily harmed and the harm was caused by the appellant. For instance at page 16 of the typed proceeding PW1 testified *inter alia* that when she was living with her grandmother, grandfather and

her father, her father (the appellant) was beating her on the head and backbone by using a water pipe/conduit which resulted into her suffering and bruises all over her body. PW2 also informed the court at page 19 of the typed proceedings to have seen bruises on the body of PW1. PW5 also testified inter alia to have seen the said bruises on PW1's body. PW6 a medical doctor who treated the victim among other things at page 32 of the trial court proceedings also testified to have found the victim with some bruises on her body. The same has been as well proved by the PF3 which was received as an exhibit. PW7 also saw the bruises in the PW1's body per page 34 of the typed proceedings.

On the other side even DW1 (appellant) also admitted that he had beaten and punished PW1, (see page 40 of the proceedings). At page 43 of the proceedings, DW2, mother of the appellant informed the court that the appellant did not rape PW1 but confirmed that the he had beaten her and caused bruises (harm) on her body. DW3 father of the appellant testified also at page 44 of the trial court proceedings that the appellant did not rape PW1, but was the one who had beaten her. Furthermore, DW4 also testified that the appellant used to beat PW1 on several times and DW5 and DW6 also confirmed that the appellant is a always beating

PW1 and DW5 further stated that the appellant is not a fit person to live with PW1.

Based on the forgoing analysis, it is therefore settled in my mind that, the count of assault causing bodily harm was well proved beyond all reasonable doubt.

In the circumstances and for the foregoing reasons I have endeavored to provide, the appeal is partly allowed. I hereby quash and set aside the conviction and sentence against the appellant in respect of the 1st and 2nd counts of incest by male and unnatural offences, respectively. I therefore uphold the decision of the District Court in respect of the 3rd count of Assault Causing Bodily Harm. The appellant should continue to serve the sentence pronounced by the trial court thereto.

It is so ordered.

DATED at IRINGA this 7th day of October, 2016.

R. K. Sameji.
JUDGE
07/10/2016

Judgment delivered in Court Chambers in the presence of Ms. Magreth Mahundi, State Attorney for the Republic and Mr. Mdegela Counsel for the appellant.

A right of Appeal explained.

R. K. Sameji
JUDGE
07/10/2016

Certified as a true copy of the Original Judgment for the *(Dc) Criminal Appeal No. 55 of 2016.*

R. K. Sameji
JUDGE
07/10/2016