IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(IN THE DISTRICT REGISTRY OF ARUSHA)

AT ARUSHA

CRIMINAL APPEAL NO. 18 OF 2020

(Originating from Resident Magistrate's Court of Arusha Criminal Case No. 12/2018)

ALLY SHABANI NZIGE.....APPELLANT

VERSUS

THE D.P.P.....RESPONDENT

JUDGMENT OF THE COURT

06/05/2020 & 10/06/2020

GWAE, J.

This judgment is originating from the decision of the Resident Magistrate's Court of Arusha at Arusha (hereinafter referred to as "the trial court") vide Criminal Case No. 12 of 2018 delivered on 18th day of January 2018. In that criminal case, the appellant, Ally Shabani Nzige was charged with, tried and convicted of an offence termed "incest" contrary to section 158 (1) (a) of the Penal Code Cap 16 Revised Edition, 2002. He was eventually sentenced to a term of **thirty (30)** years imprisonment.

It was alleged by the prosecution side that, on the 12th May 2017 at Themi ya Simba Village, within Arumeru District and in Arusha Region, the accused now appellant did have prohibited carnal knowledge with his own daughter, aged eleven (11) years. The victim's name is hidden for privacy

and her dignity purposes and in lieu thereof, her real name is replaced by the name of SAM (victim-PW1).

It is perhaps important if facts of the case are briefly summarized, they are as follows; that, on the material date, at night hours and places aforementioned, the appellant and the victim (PW1) were at the appellant's residential house while the victim's mother was attending bereavement ceremony of her relative. The appellant called the victim at his room with pretense that, the victim would remove the thorn from his leg, the victim positively responded to her father's calls. The victim entered the room of her parents whereby the appellant forcibly removed the victim's clothes and forced her to lie on the bed. He finally inserted his penis into the victim's vagina.

Having ravished the victim, the appellant then asked the victim to go outside. The victim after incident opted to go to her neighbor known by name of Kazembe Salim Mbwana, ten cell leader (PW3) whom she found together with his wife. The victim was by then crying, she narrated the incident to the wife of Kazembe (PW3). Kazembe picked the victim together with his wife and went to the hamlet chairperson one Kaisi Salim Mbwana (PW2) whom PW3 requested to listen to the victim.

She similarly narrated what was done by her biological father to them (PW2, PW3, PW3's wife). That, PW2 and PW3 and one person called Khalid decided to take the child to her mother, Mwanahamis Issa (PW4) and then the matter was reported to police on the material date and appellant was subsequently arrested equally the victim was medically diagnosed by a medical practitioner, Rehema Goduin Lema (PW5).

On the other hand, it was the version of the appellant (DW1), during trial, that, he never committed the offence of incest to PW1 except that PW3 manufactured a case against him due to an accusation leveled against him (PW3) of adultery with his wife (PW4), the fact which, according to the appellant, was admitted by the victim's mother (PW4). The appellant through his 2nd wife, Adija Maulid (DW2) and Halima Issa (DW3) also raised a defence of an alibi in that from 20:00-22: 30 hrs the appellant was at her residential house (appellant's first wife residence).

Aggrieved with the trial court's conviction and sentence, the appellant appealed to this Court by filing a petition of appeal containing a total of five (5) grounds of appeal, namely;

1. That, the trial magistrate erred in law and fact by failing to comply with provisions of section 26 of the Written Laws (Miscellaneous Amendments) Act. 2 of 2016
2. That, the trial court erred in law and fact for relying on the evidence of PW3 who had conflict with the appellant
3. That, the trial magistrate erred in law and fact by basing his judgment on the weakness of defence side and not the strength of the prosecution
4. That, the trial magistrate erred in law and fact by holding that the prosecution had proved their case beyond reasonable doubt
5. That, failure by the prosecution to call material witness, the trial court ought to have drawn adverse inference against the prosecution

During hearing of this appeal before me, the appellant appeared in person, unrepresented whilst the D.P.P was represented by **Miss Adelaide Kasala,** the learned senior state attorney.

The appellant merely prayed for adoption of his grounds of appeal contained in the petition of appeal while Ms. Kasala strongly resisted this appeal. She attacked the 1st ground of appeal by stating that provisions of Section 26 of Act (No. 2) Act No. 4 of 2016 were complied with as the victim vividly promised to tell the truth.

In the second ground, the learned counsel for the D.P.P argued that, the appellant's assertion that, PW3 had conflicts with him is unfounded since, the record reveals that there were no misunderstandings between them adding that, the victim was however a credible witness.

As to the 3rd and 5th grounds of appeal, Miss Kasala submitted that the evidence adduced by five witnesses summoned by the prosecution together with PF3 is credible taking into account that it was sufficiently adduced that, the appellant was the victim's biological father. She went on arguing that evidence adduced by the medical practitioner (PW5) is also credible as the same was to the effect that the victim was walking with difficulties and her private part was penetrated.

She eventually opined that, the charge against the appellant was proved beyond reasonable and finally urged this court to entirely dismiss this appeal.

In his rejoinder, the appellant reiterated that, he plainly told the trial court that there was conflict that existed between him and PW3. He added that there was no material witness of the incidence adding that, on the

material date he was not at the house where the offence was allegedly committed since he was at the residential house of his senior wife whose residence is about 1 Km from that of junior wife. The appellant also sought adverse inference to be taken in his favour following the P4's failure to answer his questions during cross examination.

This is what in a very nutshell transpired during trial before the Court of Resident Magistrates and in this appeal stage. It is now noble duty to determine the appellant's grounds of appeal herein by closely assessing the evidence adduced before the trial court and oral submissions made by the parties in this court.

As regards the **1st ground**, I am quite alive of the trite law that, previously the law required courts to test the intelligence of a person who appears as a witness of tender age that is of not more than fourteen (14) by conducting voire dire test. This was pursuant to section 127 (2) of the Tanzania Evidence Act, Cap 6 Revised Edition, 2002 (See also judicial decisions in **Godi Kasenegala v. Republic,** Criminal Appeal No. 10 of 2008 (unreported), the Court of Appeal of Tanzania with an approval of a passage from a Kenyan case of **Kinyua v. R** (2002) 1 KLR 156. However with an enactment of Act No. 4 of 2016 (supra), where subsection (2) and (3) of section 127 of the Act were deleted, it provides 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 lies"

The above provision of the law was subsequently interpreted by the Court of Appeal in the case of **Godfrey Wilson v. Republic, C**riminal Appeal No. 168 of 2018 (Unreported) where it was **h**eld that;

> "To our understanding, the above cited provision as amended provides for two conditions. One, it allows the child of a tender age to give evidence without oath or affirmation. Two, before giving evidence, such child is mandatorily required to promise to tell the truth to the court and not to tell lies."

In emphasizing this position the Court of Appeal in another case of **Msiba Leonard Mchere Kumwaga v. Republic,** Criminal Appeal No. 550 of 2015 (unreported**)** observed and I quote;

> "....Before dealing with the matter before us, we have deemed it crucial to point out that in 2016 section 127(2) was amended vide Written Laws Miscellaneous Amendment Act No.4 of 2016 (Amendment Act). Currently, a child of tender age may give evidence without taking oath or making affirmation provided he/she promises to tell the truth and not to tell lies"

In our instant criminal matter, it is clearly evident from the trial court proceedings that, the PW1 glaringly promised to speak or tell the trial court the truth before she started giving her testimony and the trial court recorded to that effect (see page of the typed proceedings). Hence this ground of appeal is found to have been misplaced, it is thus dismissed as correctly submitted by the learned counsel for the DPP.

Regarding the appellant's complaint **on ground no. 2**, the appellant is seriously questioning the reliability of the evidence adduced by the PW3. It is apparently clear as explained herein above that the appellant raised the issue of adultery during his defence but such question was never paused by him when cross examining PW3-Kazembe as depicted in the page 13 of the typed proceedings. More so the appellant is now found asserting that his wife (PW4) admitted to have committed adultery with PW3 but when I carefully look at the proceedings from page 13 to 14 of the typed proceedings nothing like the alleged admission of adultery by the victim's mother (PW4).

Ordinarily and in practice failure by the prosecutor or an accused person to cross-examine a witness on a vital matter may lead to an adverse inference be drawn against a party who fails to cross-examine such a witness. The appellant is plainly observed to have failed to cross examine PW3 on the adultery accusations nor did he examine his wife (PW4) during trial. Hence his evidence is a mere an afterthought. This legal position was judicially stressed in **Nyerere Nyague v. Republic**, Criminal Appeal No. 67 of 2010 (Unreported) where the Court of Appeal held;

> "As a matter of principle, a party who fails to cross-examine a witness on a certain matter is deemed to have accepted that matter and will be estopped from asking the trial court to disbelieve what the witness said".

I have further ascertained reason (s) for the victim to tell lies against her own father and found none. The evidence adduced by the victim is

credible and the same is supported by that of PW3 and PW2, if truly as lamented by the appellant that there were misunderstandings between PW3 or and PW4 and him or arrangement or plan to incriminate the appellant, I think PW4 would go to the PW3's residence together with the victim and not the victim alone. It should be borne that, it is sufficiently proved to the effect that, PW4 was found in the funeral ceremony by the PW2, PW3, victim and another person called Khalid after the victim had fully narrated the incident to PW3, PW3's wife as well as to PW2.

As to the **fifth ground**, I am straight away unable to apprehend the appellant's complaint that, the prosecution failed to summon their material witness (es). I am saying so simply because according to the victim the incident occurred while the appellant was with his daughter only. Hence according to the evidence so adduced before the trial court no witness who is alleged to have physically witnessed the occurrence. The witness who can be said to have initially been narrated the incident is the PW3's wife who had not turned up for testimonial purposes however her evidence would not be different from that of her husband (PW3). While I am sound that failure to summon material witness may render prosecution evidence being questioned or doubted however the prosecution is not bound to call any witness as was judicially demonstrated in **Republic v. Rugisha Kashinde and Sida Jibuge** (1991) TLR 178 it was stated that:

> "The prosecution had the discretion to call or not to call someone as a witness. Where it did not call a **vital reliable person** without a **satisfactory explanation**, the court could

presume that the person's evidence would have been unfavourable to the prosecution (emphasis supplied".

In our present matter, the PW3's wife was not material witness since she was just told by the victim of the happening while together with the PW3 and then PW2. Moreover it was the victim who immediately and subsequently reported the matter to the PW3 and then to PW2, the hamlet chairperson. It follows that, there was no other independent witness who witnessed the incidence except the victim who, to my established view, had credibly testified before the trial court that she was carnally known by her biological father (DW1) and her testimony has not been shakened in anyhow.

In the **3rd and 4th** ground, on the complained weakness on the prosecution evidence. It is trite law that in criminal cases, a burden of proof is always on the prosecution side and the standard required is the "'proof' beyond reasonable double". Hence an accused cannot be convicted merely on his defence weakness. This legal position was rightly stressed by the Court of Appeal of Tanzania when dealing with an appeal before it, in the case of **Nkanga Daudi VS. Republic,** Criminal Appeal No.316 of 2013 had this to say:

> "It is the principle of law that the burden of proof in criminal cases rest squarely on the shoulders of the prosecution side unless the law otherwise directs and that the accused has no duty of proving his innocence "

In our instant case, particularly by looking at the judgment of the trial court and evidence on record, I find the evidence of the victim (PW1) is highly credible and sufficiently corroborated by that of doctor (PW5) and those to whom (**PW2,& PW3** including her mother-PW4) she immediately and unfearfully furnished this sad occurrence against her biological father (DW1).

However I have discovered an anomaly in the admission of PF3 (PE1) by the trial court as it is depicted that the trial court did not cause the PF3 to be read over to the court after its admission (See page 16 of the typed proceedings) so that its contents would be known not only to the appellant but also by the court. This error is capable of vitiating the weight of the PE1 and therefore capable of justifying this court to expunge it from the record. I would wish to subscribe my holding in this aspect in **Ntobangi Kelya and another v. the Republic**, Criminal Appeal No. 234 of 2015 found at https://tanzlii. Org/tz. Judgment PDF, where the Court of Appeal observed that and I quote;

> "It was wrong for the trial court to receive the cautioned statement as evidence without ordering the same be read over

In our present case, the PE1 was never read over by PW5 or caused to be read over. Thus the same is subject to being expunged as I hereby do. Nevertheless, this piece of expert evidence is salvaged by oral evidence adduced by the medical practitioner (PW5) who increasingly testified that the victim went to her office while walking with difficulties and that she

clearly narrated the incident to her (PW5) that, she was carnally known by her father.

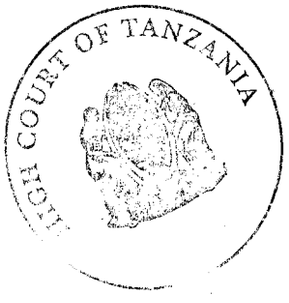
Before concluding, I find it worthy to note that, the defence of alibi raised by the appellant through his witnesses, to my considered opinion, does not carry weight for reason that, he could commit incest and shortly thereafter he could be able to quickly go to the residence of his first wife (DW2) and vice versa due to reason, that, the appellant himself told the court that the distance from the residence of his junior wife to the residential house of his senior wife is about one (1) Kilometer. Hence the appellant would either come from the house of senior wife and go to that of junior and commit the offence and turn back and vice versa without any notice by any person.

For the foregoing reasons, this appeal must fail, consequently the appellant's appeal is entirely dismissed. The trial court's conviction and the sentence against the appellant are accordingly upheld.

Order accordingly

M. R. GWAE
JUDGE
10/06/2020

Right of appeal fully explained



M. R. GWAE
JUDGE
10/06/2020