

IN THE HIGH COURT OF TANZANIA

IN THE DISTRICT REGISTRY

AT DAR ES SALAAM

CRIMINAL APPEAL No. 134OF 2020

*(Arising from the Judgment of the District Court of Mvomero at Morogor
Criminal Case No. 04 of 2018)*

IBRAHIM ELIAS.....APPELLANT

Versus

THE REPUBLIC.....RESPONDENT

JUDGMENT

24th August, – 26th October2020

J. A. DE-MELLO, J;

The lower **Trial Court at Mvomero District** heard, convicted and, sentenced the Appellant, with an **incest** offence contrary to **section 158 (1) (a) Cap. 16 RE 2002**. He is serving a thirty years (30) jail term.

He is dissatisfied and, now on appeal with the following **six (6)** grounds.

- 1. That, the learned trial Magistrate erred in law and fact by convicting the appellant in a case that was conducted with the influence of social welfare officer who appeared in coram only when the victim testified and didn't appear on other days.**

- 2. That, the learned trial Magistrate erred in law and fact by convicting the appellant based on unauthenticated oral evidence of PW1 as it was recorded contrary to mandatory provisions of section 210 (3) Cap. 20 RE 2002.**
- 3. That, the learned trial Magistrate erred in law and fact by convicting the appellant based on incredible and unreliable oral evidence of the victim (PW1) without considering the victim was induced by PW2 to set up her father as;**
 - (a) The appellant denied to grant leave to the victim to join her mother who was separated and living away to her.**
 - (b) The appellant denied the victim an opportunity to proceed with schooling for poor reasons of keeping up / raising her siblings (two young brothers born from different mothers who is deceased)**
- 4. That, the learned trial Magistrate erred in law and fact by convicting the appellant without considering that there is contradictions in oral evidence of PW1 and PW2 that were to be resolved in favour of the appellant regarding;**
 - (a) When PW2 became aware of the evil conduct of the appellant as on 18.9.2019 or after staying for a week with the victim.**
 - (b) What made the victim weak and sorrow on 18.9.2019 as due to being raped or being in a state of trying to commit suicide.**

5. That, the learned trial Magistrate erred in law and fact to convict the appellant believing on incredible oral evidence of PW2 that the victim was badly treated by her biological father while in fact the victim tried to commit suicide to force her father allow her to go and join her biological mother who was living separate with them.

6. That, the learned trail Magistrate erred in law and fact by convicting the appellant while the case was not proved beyond reasonable doubt.

On the **24th of August 2020**, in the presence of both parties, the Appellant who earlier own had indicated to be represented, took his case as he attempted to expound on all the six grounds of appeal. Briefly, he found it improper for the social welfare officer to be in Court. He challenged the evidence that, **PW1** his daughter gave, finding it highly unreliable and incredible, full of lies. The two, that is the mother **PW2** and, **PW1** contradicted themselves as to what actually lead **PW1** to attempt suicide. The whole evidence by prosecution was wanting for not meeting the standards for proof without leaving any shadow of doubt, he observed.

Monica Ndakidemi opposing the appeal, combined **grounds 1, & 3**, submitting the **2nd** alone, joining the **5th** and, **6th** together. It was her opinion and, as evidenced from proceedings in **page 13** as to how the victim narrated the whole scenario, how her own father abused her in absence of the mother who left the matrimonial home. Almost all neighbors, local government leaders knew how traumatized the girl was, she stated. True, the social welfare appeared when the victim was adducing her evidence,

considering it to be her duty in defending children's right and, which did not have any adverse reference to the appellant. With regard to contravention of **section 210 (3)** Counsel found it inadequate for failure of the appellant explaining how this was violated much as his rights were clearly explained and open. The case of **Flano Alphonse Mashudy vs. Republic Criminal App. No. 366 of 2018** to fortify the contention. However and, if otherwise, Counsel was of the view that, failure to do so if at all does not vitiate proceedings and, rights of the accused. The contradiction alleged was drawn from which fluid was drunk by the victim in her attempt to commit suicide which did not render the fact that, suicide was attempted. In light of all the above **Counsel Ndakidemi** is of a firm view that, proof beyond doubt was established by the prosecution, leading the Trial Magistrate to arrive as he did. Counsel prayed for considering the swearing by the victim as unsworn evidence following swearing as an adult and, not a child. The case of **Rajabu Juma Mwera vs. Republic Criminal Appeal No. 125 of 2017** was cited in support of this. Let it be expunged, she prayed.

In his rejoinder the Appellant found the allegations out of hate, fabricated and pure speculation orchestrated by a stray wife. It is a cruelty of high level, he believes, being left with two (2) toddlers who **PW1** was of great help in taking care of.

It is an incest offence that this Court has to take caution it being quite a serious and, sensitive matter. In the case of **Minani Evarist vs. Republic, Criminal Appeal No. 124 of 2007** amongst other things it was observed;

“It is generally accepted that in determining cases a Court has to look at the peculiar facts of the case. In other words, each case has to be decided on the basis of its own facts. This is important because the facts may not necessarily be the same as the other”.

Above it all, Courts have embraced and cherished the underlying principle in rape cases that the victim themselves are the **‘best witness’**. The case of **Selemani Mkumba vs. Republic, Criminal Appeal No. 94 of 1999 (Unreported)** cannot be over emphasized. In the case of **Tumaini Mtayomba vs. Republic, Criminal Appeal No. 217 of 2012 (CAT) at Mwanza, Kimaro J.A** on rather almost similar facts ranging from **‘age, a student, manner and modality of hijacking disappearance and put under key lock, threats and several forceful sex for two days** did disregard all the grounds of appeal from **a ‘defective charge, voire dire requirements, violation of section 192 of Cap. 20, Non Compliance of section 240 (3), failure to indicated specific date on which the offence was committed, failure to summon the police investigator, and insufficient evidence on the part of the Prosecution,** as the Court categorically observed that, none of all these did occasion any miscarriage justice to water down the credible and reliable evidence from the victim herself. Taking into account the incest offence, it is **section 158 (1) (9)** reads;

“Any male person who has committed sexual intercourse with a female person, who is to his knowledge his granddaughter, sister or mother commits an offence of incest, and is liable on conviction

if the female is of the age less than eighteen years, to imprisonment for a term not less than thirty years”.

To this end, I am fully convinced, certain and satisfied with the findings of the lower Trial Court, as I uphold the conviction and, sentence passed. PW1the victim had in her evidence and without hesitation narrated how abused she was by his own father and corroborated by **PW2** her mother.

I therefore dismiss the Appeal in its entirety as I leave open the Right to Appeal.

I so order.



J. A. De-Mello

JUDGE

26/10/2020