IN THE HIGH COURT OF TANZANIA

IN THE DISTRICT REGISTRY OF SHINYANGA

AT SHINYANGA

CRIMINAL APPEAL NO.149 OF 2019

(Appeal arising from the judgement of the Resident Magistrate's Court of Shinyanga in criminal case No. 74/2017)

PETRO UPEPO..... APPELLANT

VERSUS

THE REPUBLIC..... RESPONDENT

JUDGEMENT

26/3/2020 & 03/04/2020

G. J. Mdemu,J.

In the Resident Magistrate Court of Shinyanga at Shinyanga,the Appellant was charged with two counts, to wit, incest by males contrary to the provisions of section 158 (1)(b) of the Penal Code, Cap. 16 and sexual exploitation contrary to section 138 B (b) of the Penal Code, Cap. 16. It was alleged by the prosecution side in the particulars of the offence that, on unknown dates from September 2016 to November 2016 at kambarage area within Shinyanga Municipality and Region, the Appellant did have carnal knowledge of one DORICAS PETRO UPEPO his daughter of 16 years old. Also the Appellant on unknown dates and place, being the father of the said victim, did abuse her sexually by sucking her breasts and vagina for purposes of procuring sexual intercourse.

Brief facts of the case are as follows; the victim, Doricas Petro Upepo, (PW1) was residing with her father (the Appellant) and her young sister. Her mother was not around. From September 2016 to November 2016, she was sleeping in her father's bed room, because her father told her to share a

bed with her young sister who was in standard one. As from September 2016 to November 2016, on different dates, when she was asleep at night, the Appellant shifted from his bed and went to their bed and told her to put off her clothes. The Appellant then inserted his penis on her vagina and also touched her breasts and her private parts. PW1 then went and stayed to Mzee Lukelesha from January 2017 to February 2017 and later on she shifted to "Mama Gile" where she narrated her story to the local leader who told her to return home. She refused and instead, went to her grandmother at Old Shinyanga. On 20/03/2017 while at school, she informed her headmaster who directed her to Myola (the Director of AGAPE). The latter took her to police station where she was issued with PF3 for treatment.

Though the Appellant denied involvement, on those facts, the trial court convicted him and was sentenced to thirty (30) years imprisonment in the first count and five (5) years imprisonment in the second count. This was on 17/12/2018.Being aggrieved, the Appellant appealed to this court on six grounds of appeal as follows;

1. *That, the trial magistrate erred in law and in facts in totally misapprehending the nature and quality of the prosecution evidence against the Appellant which did not prove the charge beyond reasonable doubt.*
2. *That, the magistrate erred in law and fact by basing the conviction on the evidence of PW1 which was frame-up against the Appellant through Land Lord.*
3. *That, the evidence adduced by PW1, PW2, PW3, PW4 and PW5 before court of law is weak which cannot establish the case beyond reasonable doubts to warrant conviction and sentence the Appellant.*

4. *That, the trial magistrate erred in law and fact to convict and sentence the Appellant based on hearsay evidence adduced by, PW2,PW3 and PW4.*
5. *That, the trial magistrate erred to believe the evidence of PW1 who was beaten by her mother and run away afraiding the punishment. Hence no even a single person under the Appellant's family who testified before the court that the Appellant raped PW1.*
6. *That, PW5 and its exhibit P2 did not prove that PW1 raped, so the case was not proved beyond reasonable doubt by prosecution side.*

On 26th of March 2020, the appeal was heard, where the Appellant appeared in person and the Respondent Republic had the service of Mr. Nestory Mwenda, Learned State Attorney.

The Appellant on his submission argued all grounds of appeal as one by praying to be adopted as part of his submission. He further submitted that, the evidence was fabricated and the person who fabricated the matter did not come to court to testify. Hence, he prayed his appeal be allowed.

The Learned State Attorney did not support the appeal, as to him, the conviction and sentence of the trial subordinate court was proper. He started to submit on the first ground of appeal that, the prosecution proved the case in both counts through 5 witnesses called in evidence. He further submitted that, PW1(the victim) testified and her testimony was corroborated by that of PW2 and PW5. He stated that, the victim testified that her father had sexual intercourse with her and also did touch her private parts. He cited the case of **Seleman Makumba V. Republic (2006) TLR** at page **384** to support his point that, PW1 has testified the best

evidence and managed to establish the offence the Appellant got charged and convicted of.

In the second ground of appeal, the Learned State Attorney argued that, it is not true that the case was a framed one because PW1 did not state anything about the Land Lord. As to the third ground of appeal, the Learned State Attorney stated that, the prosecution case was not weak. The evidence of PW1 is clear that, the Appellant committed the offence.

As to the fourth ground of appeal, the Learned State Attorney submitted that, the evidence used to convict the Appellant was that of PW1 and not other witnesses as complained by the Appellant. In the fifth ground of appeal, it was the Learned State Attorney's submission that, the offence was committed in the night when other members of the family were asleep. Thus, nobody could have witnessed except PW1 alone. Therefore, he found this ground of appeal unfounded because PW1 was trusted by the court.

In the last sixth ground of appeal, the Learned State Attorney submitted that, the court did not use the PF3.The evidence used was that of PW1 which the court trusted. He further submitted that, the Appellant also did not state what happened from September to November as constituted in the charge.PW1 alone therefore proved the case.

On his part, the Appellant rejoined that, it is not true that he did not state on a fabricated case. The Land Lord who fabricated the case was not called to testify. He further submitted that, the issue as contained in the charge was not reported in the family. He knew the same when he reported the matter to police on absence of the victim (PW1). He added that, the prosecution did not bring those witnesses who had the victim in custody after she had escaped and that, the doctor also did not diagnose the victim

after almost three months. To him, under the premises, he did not know what happened when the victim was to the place she escaped.

Having gone through the submissions of both parties, and upon perusal of the records of the Resident Magistrate's Court of Shinyanga, the issue for determination by this court is whether the prosecution proved its case beyond reasonable doubt.

As to the first ground of appeal that the prosecution evidence did not prove the charge beyond reasonable doubt; the provisions of **section 110** and **111 of the Evidence Act, Cap. 6** places, the burden of proof in criminal cases to the prosecution and the standard is one beyond reasonable doubt. The section provides that;

> *"When a person is bound to prove the existence of any fact , it is said that, the burden of proof lies on that person."*

This also was observed in the case of **DPP V. Peter Kibatala, Criminal, Appeal No. 4 of 2015** (CAT) Dar es salaam (unreported), at page 18 that;

> *"In criminal cases, the duty to prove the charge beyond doubts rests on the prosecution and the court is enjoined to dismiss the charge and acquit the accused if that duty is not discharged to the hilt.*

Also in the case of **Ramanlal Trambaklal Bhatt V. Republic (1957) EA, 332-335** regarding this duty, the court made following observation;

> *"Remembering that the legal onus is always on the prosecution to prove its case beyond reasonable doubt."*

On that legal position and on the basis of the evidence of prosecution witnesses, it is clear that the evidence of the prosecution rests on the evidence of PW1(victim).That of PW2,PW3 and PW4 is hearsay evidence and not direct one. What is of essence therefore is the credibility of that evidence to ground conviction. PW1 stated that, the Appellant inserted his penis and touched her private parts when she was asleep on the same room with her father. Furthermore, along with her in the bed, was also her young sister on the same room. However, the prosecution did not call that young sister to testify. It is not known if the said young sister witnessed or not. It is equally not on record if the prosecution and investigation team attempted to investigate and procure her attendance in evidence.

Furthermore, PW1 testified that, after her father committed that sinful act, she stayed to mzee Lukelesha from January 2017 to February 2017 and later on she shifted to "Mama Gile". She narrated further her story to the leader and told her to return home but she refused and later on went to her grandmother at old shinyanga. As it is, the victim was under custody of so many people, but the prosecution did not call those people to prove the case. It is equally doubtful as to why the victim was selective for the people to tell her story. Her credibility is questionable.

The rationale of having, for example witnesses from where she was after escaping her father's premises, will have the taste and test of proving and corroborating her story as she would have told them what happened.

This also will allow application of principles in evidence of narrating or telling the immediate person the victim meets on what happened to her/him. This has always been relevant for being able to recorrect events while still fresh in her/his mind. Choosing to tell and not in the selection exercise of PW1, again has adverse inference on her credibility. Our courts

are not short of such principles. In the case of **Dickson and Msafiri Atiende Abour V. Republic, Criminal Appeal No.322 of 2014**,the Court of Appeal referred the case of **Aziz Abdalla Vs Republic (1991),TLR 71** at page 72 which stated that;

> *"The general and well known rule is that, the prosecution is under a prima facie duty to call those witnesses who from their connection with transaction in question, are able to testify material facts. If such witnesses are within reach but are not called without sufficient reason being shown, the court may draw an inference adverse to the prosecution."*

Since the prosecution failed to call "Mama Gile", a person at Shatimba village, Aunt at Salawe village, Mzee Lukelesha, the one at Old Shinyanga and others without sufficient cause, then the evidence of prosecution is doubtful. Adverse inference is accordingly drawn. In view of the above findings, it shows that, a prima facie case was not made out against the Appellant. With this, one cannot, with certainty, state that, the prosecution case was proved to the required standard in criminal cases.

Yet, there is an issue relating to variance of dates between the evidence tendered by the prosecution and Exhibit P2 (PF3). PW5 testified that, the victim went to police to have PF3 for treatment on 21/03/2017.And upon examination, the Doctor (PW5) established that there was penetration. After perusal of the records of the trial court, I found that, PF3 (exhibit P2) was filled on 20/03/2017. This means that, PF3 was filled one day before PW5 examined the victim. Therefore, this also creates doubt in the prosecution case.

As stated in the case of **Peter Ndiema and Nikas Ndiema V.Republic,Criminal Appeal No.469 of 2015**,where the court of Appeal referred the case of **Leonard Raphael and Another V.Republic,Criminal Appeal No.4 of 1992(unreported)** that:

> *"Variance of dates between the charge and evidence tendered by the prosecution witnesses rendered the acquittal of the Appellants."*

Furthermore, there is another piece of evidence generated from caution statement of the Appellant (exhibit P1) .As the Appellant in the caution statement denied to have had carnal knowledge with his daughter and to have done nothing relating to sexual exploitation, and since the statement got deployed in evidence (P1), then, the act of sleeping in one room alone cannot amount to sexual exploitation. With this, the Learned Magistrate at page 9 of the judgement faulted to make the following observation;

> *"The fact that, the accused admitted to sleeping with PW1 adds strength to PW1's testimony as to what transpired in the accused bedroom during the time frame in question. It does not make sense as to why the accused would sleep in the same bedroom who his years old daughter."*

For clarity, exhibit P1, the caution statement is reproduce in part as hereunder;

> *"**Swali-***
>
> *Kutokana na mazingira hayo,hakuna ubishi kuhusu wewe kufanya mapenzi na mtoto wako Dorcas*
>
> ***Jibu-***

Sijafanya mapenzi na mtoto wangu kabisa kwa kipindi chote hicho cha miezi miwili

Swali-

Unafikiri kwa nini mtoto wako Dorcas amethibitisha kuwa umefanya naye mapenzi? ***JIBU****-Hapo sina jibu la kwanini mtoto wangu amesema hivyo.*

Swali*- Kwa hiyo ni wazi kuwa ulifanya mapenzi na shemeji yako ambaye ni mama yake Dorcas.* ***JIBU*** *- Hilo ni kweli kabisa.*

Swali*; Kama uliweza kufanya hivyo, je si kweli hata hili umefanya?*

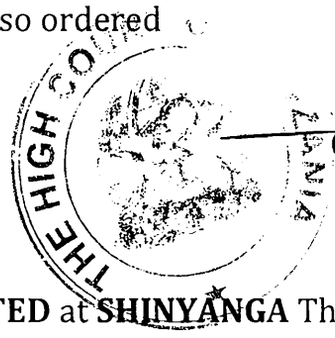
Jibu *Sijalala na mwanagu na kufanya naye mapenzi....."*

In my considered view, the act of the Appellant does not fall within the ingredients of sexual exploitation as provided for in section 138B (b)of the Penal Code, Cap. 16 in the following version;

> *"Any person who acts as a procurer of a child for the purposes of sexual intercourse or for any form of sexual abuse, or indicent exhibition or show, commits an offence of sexual exploitation of children"*

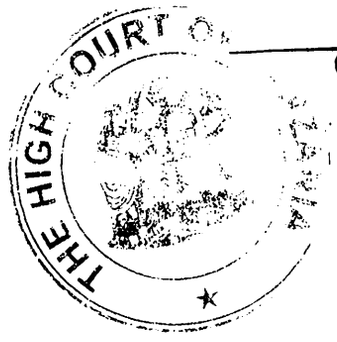
In the instant appeal, the conviction was based among others, on the evidence of PW1 (victim), PW5(Doctor) who filled PF3 and the caution statement (P1). As stated, such evidence of prosecution side is doubtful. I therefore quash conviction and set aside the sentence of the trial court, and consequently, order release of the Appellant from prison unless, for lawful cause, he is held thereto.

It is so ordered



Gerson J. Mdemu
JUDGE
03/04/2020

DATED at **SHINYANGA** This 3rd day of April, 2020



Gerson J. Mdemu
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