IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
IN THE DISTRICT REGISTRY OF SHINYANGA

AT SHINYANGA

CRIMINAL APPEAL NO. 50 OF 2020
(Arising from Criminal Case No. 30 of 2012 of the District Court of shinyanga at Shinyanga)

DEOGRATIOUS PHILIPO .....APPELLANT

VERSUS

THE REPUBLIC.....RESPONDENT

JUDGMENT

8th & 12th March, 2021

MKWIZU, J.:

Appellant was arraigned before the District Court of Shinyanga on 27th March, 2012 charged with two counts, incest by male c/s 158(1) of the Penal Code, Cap 16 R.E 2002 and unnatural offence c/s 154 (1) (a) and (2) of the Penal Code, Cap 16 R.E 2002. On the first count prosecution alleged that on diverse dates in February, 2012 at Mshikamano area within the municipality, District and Shinyanga Region appellant had the prohibited sexual inter course with her daughter -MMQ (not her really name. And in the second count, it was alleged that during the same period and place, appellant

had carnally knowledge with his daughter, a girl of 9 years old. He pleaded not guilty to both accusations.

To prove their case prosecution called 6 witnesses. The evidence from the records is that, Appellant and victim's mother had after having the victim as their child of their union separated. PW2 (Victim) was left with her grandmother in Bukoba for a while and later returned to her mother at Ibadakuli area. For undisclosed reasons, the mother decided to send the victim to her father at Mshikamano area in Shinyanga District. This was in February, 2012. At this time, victim was not attending school. From there on PW2 (victim) stayed with her father, appellant. Narrating her life story, PW2 said, at Mshikamano, she was living with her biological father in one room, She said, they were sleeping on one bed. During night , his father used to have sexual intercourse with her and he did so four times . PW2 explained how the intercourse was being done. she said, her father was inserting his penis in her vigina in a promise that he would give her money for bites at school. Narrating further, PW2 said, in one of the occasion, appellant inserted his penis in her anus leading to wounds and bruises in her private parts.

In February, 2012, PW3, George Augustine a teacher by professional and the victim's grandfather made efforts and managed to enroll the victim at Bugoyi B primary. During the same months, according to PW3, he got information from good Samaritan that PW2 is having sexual intercourse with his father. In an effort to find the truth of the matter he sought an assistance from Hadija Chizenga (PW1), the victim's teacher. PW1 interrogated the victim who admitted and narrated the story to her.PW1 relayed the information to the Head teacher and health teacher and agreed to take the victim to the hospital for checkup, but before they did so, police intervened. According to PW1, Victim was then taken to the police, issued with a PF3 and taken to hospital for investigation.

PW4, Fredric Mlekwa is a doctor at the government hospital, he performed medical examination to PW2 and concluded that she was no mor virgin and that her anus was loose. He however, found no bruises on the victim's private part.

PW5, WP 3638 DCL Secilia, is a police officer from Shinyanga police station who together with her fellow F 875 DSG Alfred (PW6) participated in investigating the matter. They first interrogated PW1 and the victim and took the victim to the hospital as well as arresting the appellant. PW6 informed the court that he got the information of the alleged offences from a civilian who wanted him to work on the information.

In his defence, appellant admitted to have been staying with her daughter, PW2 since 2010 after he had separated with her wife. On 14th January, 2012, victims grandfather, PW3 took the victim on the reason that he would admit her to a good school. On 15th February, 2012, again, PW3, teacher Georgy visited appellant at his working place where he demanded from him Tshs 300,000/= as a fee fir enrolling the victim to school the amount which appellant had not hence misunderstanding between them leading to his arrest on 20/3/2012.

Appellant pointed out some discrepancies and contradictions in prosecutions' evidence. He said PW2's failed to report the rape incidents to any of the co tenants at the house they were residing. He urged the court to find the

evidence by PW2, as a mere story without truth in it. Appellant, was of the view that PW3 should not be believed because he could not disclose the person from whom he received the rape information. After he had received the rape accusations against him, PW3 took her daughter and stayed with her for about three months. On PW3's evidence, appellant said, his examination of the victim could not detect any bruises nor sperms contrary to Pw1's evidence which stated that PW2 had bruises.

After a full trial, appellant was convicted in both counts and sentenced to thirty (30) years imprisonment in respect of the 1st count and life imprisonment in the second count. He was also ordered to pay his daughter TSH 2,000,000/= as compensation. The sentences were ordered to run concurrently. Dissatisfied, he has lodged this appeal comprised of eight grounds of appeal which can safely be condensed into four main grounds that:

1. No voire dire examination was conducted on PW2.
2. The trial court failed to properly evaluate the evidence on the records.

3. The prosecution failed to prove the case beyond reasonable doubts.
4. Trial court failed to consider appellant's defence.

At the hearing of the appeal, the appellant appeared in person and unrepresented. He adopted his grounds of appeal and had nothing to say in elaboration thereof.

The respondent, Republic was represented by Mr. Enosh Gabriel Kigoryo, learned State Attorney. Mr. Kigoryo opposed the appeal and insisted on the correctness of the trial court's conviction and sentence.

Submitting on the 1st ground, the learned State Attorney said, viore dire examination was properly conducted to PW2 before her evidence was received under oath and after the court was satisfied that the child is intelligent enough and understood the meaning of speaking the truth.

On whether prosecution proved its case, the learned State Attorney argued that PW2's evidence is elaborative that she was raped by her biological father whom she was living and sleeping with the victim on one bed. It was the

learned State Attorney's submission that at page 26, PW2 explained how she was raped. He argued that trial court believed PW2's evidence, PW2 being a victim and ana important witness in sextual offences, then the conviction was justifies. He cited to the court the case of **Maguna Kubilu @ John V. The Republic**, criminal Appeal No 564 of 2016 and invited the court to evaluate the coherence of PW2's evidence and find that she was credible.

The learned State Attorney however, prayed the court to expunge from the records, the PF3 for being irregularly tendered and admitted in evidence. Mr. Kigoryo contended that, instead of being tendered by the witness, PW3, PF3 was tendered in court by the State Attorney who was not a witness. He cited to the court the case of **Masalu Kayeye V. Republic,** Criminal Appeal No 120 of 2017(Unreported). He however, added that even without the PF3 the rest of the evidence on the is enough to support the conviction.

On evaluation of evidence, the learned State Attorney said, trial court did properly evaluate the evidence on the records, It believed Pw2 as a truthful witness and that nothing on the records suggested that PW5 had any grudges with the appellant and no matrimonial dispute was referred to by

the parties. He specifically stated that, the complaint by the appellant in ground 7 is not supported by the records.

Responding to the issue whether defence evidence was considered or not, State Attorney refereed the court to page 7 of the trial court's judgement that trial court considered the defence but found PW2 to be more credible. Mr. Kigoryo prayed for the dismissal of the appeal for lacking in merit.

In this case appellant was charged and convicted of incest by male and unnatural offence. The offence as earlier on stated in the introductory paragraphs of this decision, was committed to a girl aged 9 years old, a daughter to the appellant. I have considered the grounds of appeal and the submission by the parties. The duty of this court is to see whether the case against the appellant was proved beyond reasonable doubt or not. I propose to determine the appeal generally.

In its judgement, the trial court was satisfied that, the appellant is a biological father of the victim. That, PW2 was living with his father at Mshikamano area. This was so established by the evidence of both side. It

noted however and took it, and rightly so, as issues whether the appellant had the alleged prohibited sexual intercourse with his daughter and secondly whether the appellant had committed the alleged unnatural offence.

In answering the above issues, trial magistrate summarized the evidence of PW2 saying that it was supported by that the doctor PW3. It went on to say that, PW2 had narrated the same story to the rest of the prosecution witnesses and found the offence proved. The trial court's decisions was not without reasons. The reasons for the said findings were as follows:

On the first count, the trial court said:

> *"...apart from the evidence adduced in court, since the accused was residing with PW2 in a single room while sleeping on one bed only two of them the whole night if not days, there is high possibility for the accused to had sexual intercourse with PW2 in as far as circumstantial in concerned..."*

Reasons for convicting the appellant on the second count were that:

> *"...the fact that DW1 was the only parent residing with PW2 (Victim) as well as sleeping together he can not be delaminated (person this liability) not only that, when cross examined by the*

state attorney, he admitted to have no quarrel with PW2 (victim) hence I can see no any reason for PW2 to state lies against his father.."

Gleaned from the reasoning of the trial court, the appellant was not convicted on the credibility of witnesses, but because he was sleeping in a single room with the victim, then, trial court sought that there was a "***possibility"*** of committing the offence. I think the trial court went astray. This is a criminal case where the prosecution carries the burden of proving the guilt of the accused beyond reasonable doubt. The court in such a case has to be satisfied that prosecution witnesses testified to nothing but the truth. This is done by evaluating the witnesses' credibility and their entire evidence. In Mustapha **khamis v the Republic**, Criminal case No 70 of 2016, (unreported) Court of appeal citing with approval the case of **Okethi Okale and Others v. Republic**, (1965) 1EA 555 observed that:

"In every criminal trial a conviction can only be based on the weight of the actual evidence adduced and it is dangerous and inadvisable for a trial judge to put forward a theory not canvassed in evidence or in counsel's speeches"

In this case, I think, trial court was in error by convicting appellant on a "*possibilities*" that by sleeping with the victim in one room there was a possibility for the accused to have sexual intercourse with PW2.

What is then the position of the prosecution evidence on the records? I understand that this is a first appeal. The settled principle is, first appeal is in a for of re- hearing. The first appellate court has a duty to re-evaluate the entere evidence in an objective manner and arrive at its own findings of fact, if necessary. I will go by the letters of this theory.

PW2 is the only eye witness and the victim of the offense. She is therefore an important witness in this matter. She categorically stated that she was living with her father and sleeping in one bed room and that her father raped her four times and unnaturally known her once. This witnesses' credibility is questionable. I will explain while conscious of the settled position that the credibility of a witness in any judicial proceeding is a domain of the trial court but an appellate court can assess the witnesses' credibility by assessing the coherence of the testimony of that witness and taking into consideration the testimony of that witness in relation with the evidence of other witnesses,

including that of the accused person.See the case of **Shabani Daud v. Republic**., Criminal Appeal No. 28 of 2000 (unreported).

As indicated in this decision, PW2 is alleged to have narrated the rape incidents to PW1, PW4 and PW5. PW3 got the information of the alleged offence which were being committed to her granddaughter from good Samaritan. His efforts to find the truth landed to PW1, victims' teacher. He said, he sought an assistance from her. This was done on unmentioned date of February, 2012.

Two weeks later, explained PW3, victim went to school with teeth problems. He took the victim to his home place where he took her to the Government hospital for teeth treatment. He later leant of the victims' wound on her private parts, through his daughters, who never testified in court. He then took action of inspecting the victim and found that truly he had the said wounds in her vigina. From there, stated PW3, he went to the appellant's work place (bus stand) and informed him about the victim's teeth problem> he also queried as to why he is not visiting her daughter. Appellant gave unpleasant answers.

Two weeks later, according to PW3 after the returning of the victim to school, PW1 interrogated the victim on the alleged offences by her father and admitted to have been raped.

This evidence is supported by PW1, the victim's teacher who testified that after PW3 had reported incidents to her, she interrogated the victim who admitted to have been raped by her own father. After that revelation, PW1 reported the matter to the headteacher and the plan was to send the victimto the hospital for medical examination. Before they could do so, PW2 felt sick (teeth problem) they advised PW3 to take the child to his home and later Police intervened on 20/3/2012 before the completion of their plan.

A serious doubt rises on how PW1 and PW3 acted on such serious information. ***One***, after having received that information, PW3 (Victim's grandfather did not take any action towards knowing the truth of the matter apart from seeking assistance from Pw1. Even after the victim has come to his home, nothing was seriously done to verify the information. Instead, Pw3 took the victim to the hospital for teeth treatment and he never disclosed to

anybody about the vigina wounds. A close examination of the prosecutions evidence fails to reveal why PW3 did not report the incident to the Police and the private parts wound were not mentioned to the Doctor who treated the victims teeth nor appellant when PW3 reported the teeth problem to him.

Secondly, even after confirmation of the victim to her teacher Pw1 that she was raped, no communication was done between Pw1 and PW3 and /or to the police. PW1 testified to the effect that she interrogated the victim after he got the information from PW3 and she was unable to send the victim for medical check up because she was suffering from teeth problems and advised PW3 to take the victim to his home stead. Even at that stage, no disclosure to PW3 was made on the confirmation of the allegation by the victim no report was made to the police. The question arising here is if truly victim was raped, why did PW3 and PW1 kept it as a secret and hesitated to report the matter to the police.? Why after he had inspected the victim and found her with wounds in her virginal, PW3 did not take any visible steps to report the matter to any authority? The prosecution witnesses were not credible worth believing.

Another doubt is on the reason why PW2 (victim) went to stay at PW3's home. While PW1 and PW3 say it was because of teeth problems, PW6 a police officer who initiated the investigation says he was informed by the victim that she went to stay with PW3 because of the pains in her private parts. In addition to that PW6 informed the court that teachers informed them that victim was suffering from private pains but they did not know the cause, whereas PW1 , the victim's teacher said nothing on this. In fact her evidence did not say whether victim had ever complained about private parts pain except for the teeth problem.

PW5 is a police officer who with PW6 also a police officer visited the victims school, interrogated the victim and PW1, issued PF3 to the victim, participated in taking the victim to the hospital, and arrested the appellant. Their evidence is contradictory. While PW6 says he arrested the appellant and remanded him in custody after he had received the information of the alleged rape from the informer and before he together with PW5 went to the victim's school, PW5 speaks of the opposite. In her evidence, PW5 said, She was called by PW6 and informed of the alleged rape incidents. They went to the victims school where they interrogated the victim and the teacher. After

that they took the victim to the hospital after they had issued her with a PF3 and thereafter appellant was found and arrested. The contradictions pointed out above, are not minor they destroy the credibility of the prosecution witnesses hence goes to the root of the matter.

In his defence appellant complained of having grudges with PW3. He said, PW3 became furious and the misunderstanding between them arose after he had failed to give him 300,000/= so as to enroll victim in a good school. His defence is supported by PW3 himself. He confessed to have made efforts to enroll the victim to school with no avail as appellant took no action. PW3 also admitted to have gone to the appellant to inform him about the victims teeth problems which was negatively received : at page 31 pW3 was recorded to have said:

> *"... I went to a bus stand to look for his(sic) father (accused). I met him there and told him that her child (PW2) is at my home place and she is having teeth problem. I asked him as to why is not coming to visit her? And he replied that because I have decided to take her proceed to stay with her and if she will became sick, I will look for him"*

It is evident from prosecution evidence that appellant had separated wit his wife, a mother to PW2(Victim). It is also clear that Pw3 is a guardian to victims mother and therefore a grandfather to her. This is reflected in Pw3's own evidence. It is also clear that, PW3 had to no avail advised appellant to enroll PW 2 to school. And it is the prosecution evidence that PW3 had gone, to the appellant and spoke to him about PW2's teeth problems. While being cross examined by the appellant at page 32 of the records, Pw3 said:

> *"...it was in February, I came at Ndembezi to advise you to enroll (PW2) to school, I took her because she was on a very bad condition having teeth problem, I came at the buss stand to inform you that your child has teeth problem so as a father you should visit her, even my whole family knows that PW2 was having teeth problems, that child was handled to you while you were at the bus stand"*

The above state of affairs were ignored by the trial magistrate. It neither took cognizance of it nor evaluated it as against the defence evidence. Had she considered this evidence and the rest of the prosecution evidence, trial magistrate would not, in my view, have found the the appellant responsible. This is because, going by the prosecution evidence, apart from a clear evidence of misunderstanding between the appellant and PW3, there were no tangible proof as to whether appellant committed the alleged offences.

Another glaring error connected to the above in this case is that the trial court omited to consider the defence case. In his submissions, the learned State Attorney invited the court to revisit page 7 of the trial court's judgment and find that the defence was considered. With dure respect to Mr. Kigoryo, what trial court said in page 7 was not a consideration of the defence evidence but its opinion on why it finds the 2nd count proved. In the case of **Leonard Mwanashoka vs Republic** Criminal Appeal No. 226 of 2014 (unreported), the Court had stated:

> *"It is one thing to summarise the evidence for both sides separately and another thing to subject the entire evidence to an objective evaluation in order to separate the chaff from the grain. It is one thing to consider evidence and then disregard it after a proper scrutiny or evaluation and another thing not to consider the evidence at all in the evaluation or analysis."*

I have gone through the entire trial court judgment apart from the summary of the defence evidence in page 5 of the judgement, n o where in that judgement the defence case was considered. This is a serious omission. In

Hussein Iddi and Another V Republic [1986] TLR 166, the Court of Appeal of Tanzania observed that:

> *"It was a serious misdirection on the part of the trial Judge to deal with the prosecution evidence on its own and arrive at the conclusion that it was true and credible without considering the defence evidence"*

The consequence of failure to consider defence were stated **in Leonard Mwanashoka's** decision (Supra) that

> *"We have read carefully the judgment of the trial court and we are satisfied that the appellant's complaint was and still is well taken. The appellant's defence was not considered at all by the trial court in 6 the evaluation of the evidence which we take to be the most crucial stage in judgment writing. Failure to evaluate or an improper evaluation of the evidence inevitably leads to wrong and/or biased conclusions or inferences resulting in miscarriages of justice...* ***It is universally established jurisprudence that failure to consider the defence is fatal and usually vitiates the conviction.*** *" [Emphasis added].*

Having considered the coherence of the prosecution's evidence and the pitfalls discussed above, I am satisfied that there is no sufficient evidence to warrant the appellant's conviction.

As a result, the appeal is allowed, the conviction quashed and the sentence of life imprisonment meted against the appellant is accordingly set aside. The appellant is to be released from prison forthwith unless otherwise lawfully held.

DATED at **SHINYANGA** this **12th** day of **MARCH**, 2021.

E.Y.MKWIZU
JUDGE
12/3/2021

Court: Right of appeal explained.

E.Y.MKWIZU
JUDGE
12/3/2021