IN THE HIGH COURT OF THE UNTED REPUBLIC OF TANZANIA

MOSHI DISTRICT REGISTRY

AT MOSHI

CRIMINAL APPEAL NO. 30 OF 2020

(C/F Criminal Case No. 185 of 2017 Mwanga District Court)

SHARIFU S/O BAKARI @ MDEE ..... APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

8th February & 27th April, 2021

JUDGMENT

MKAPA, J.

Sharif S/o Bakari @ Mdee the appellant was charged with and convicted of the offence of incest by males, contrary to section 158 (1) (a) of the Penal Code Cap 16 [R.E. 2002] [now R.E. 2019] by the District Court of Mwanga, in **Criminal Case No. 185 of 2017.** A sentence of 30 years imprisonment was imposed on him. It was alleged that on the 1st of September 2017 at Lengurumo village within Mwanga District in Kilimanjaro Region the appellant had carnally knowledge of her own daughter a 16 year old whom I shall conveniently be referring her as the victim or **WS**,

The appellant pleaded not guilty to the allegations put forward by the prosecution hence a full trial was conducted. At the conclusion

of the trial, the trial Magistrate found the appellant guilty as charged convicted him and sentenced him to serve 30 years imprisonment. Aggrieved, the appellant preferred this appeal raising 13 grounds of appeal which are so overlapping. However, for the purpose of this appeal they are all centered on challenging the prosecution for failure to prove their case against him beyond reasonable doubt. From a close reading of the 13 grounds of appeal the same can be summarized into seven grounds as follows;

1. That, the trial court erred in law and fact in holding that the alleged offence was committed on 01/09/2017 while PW4, medical expert (doctor) who examined the victim stated that the incident might have happened a month back hence variance on the exact date of occurrence of the crime.
2. That, the trial court erred in law and fact in relying on contradictory evidence of PW1 and PW2 in convicting the appellant while their testimonies varied as to whom the victim reported first about the ordeal.
3. That, the trial magistrate erred in law and fact in failing to hold that the victim took too long to report the matter while she had ample time to do so.
4. That, the trial magistrate erred in law and fact in failing to hold that teachers from Vudoi Secondary School who played

big role in dealing with the victim after she had reported the incident were not summoned as important witnesses.

5. That, the trial magistrate erred in law and fact in not considering PW4's expert opinion that the victim was penetrated without stating whether it was sharp or blunt object which penetrated her considering the fact that her genitalia was mutilated.
6. That the trial court erred in law and in fact in failing to consider the evidence adduced by the defence on the existed grudges between the appellant and the victim's mother instead shifted the burden of proof to the appellant.
7. That, the trial magistrate erred in convicting the appellant based on the victim's testimony which was not credible hence the case was not proved beyond reasonable doubt.

Hearing of this appeal was by way of filling written submissions. The appellant appeared in person unrepresented while Ms. Lilian Kowero learned State Attorney appeared for the respondent Republic.

Supporting the appeal, the appellant submitted on the 1st ground that, PW4 (the doctor) testified to have examined **WS** on 10/11/2017 and stated that she was raped one month before

examination which means on 10/10/2017. However, the rape incident is alleged to have occurred on 1/9/2017 two months before the medical examination was conducted. Hence contradictions on the dates raised reasonable doubt on the exact date when the actual rape occurred as a lapse of two months could not have given a meaningful result in examination.

On the 2nd and 4th grounds the appellant submitted that, after the alleged incident, it was PW's testimony that the victim was picked up by Vudoi teachers while the victim testified to have reported to school on her own and narrated the ordeal to Vudoi teachers. That later the teachers took initiatives to report the matter to the authorities. Further, PW1 alleged to have heard about the rape incident from the victim but PW1 failed to report the same until Vudoi teachers intervened by writing a letter to the victim's parents demanding the victim to be sent back to school hostel. It was the appellant's argument that, PW1's evidence was doubtful since as a mother she should not have kept quiet for such a long time after she had discovered what had happened to her daughter and yet had to wait for the victim's teachers to intervene and disclose the ordeal. Thus the case against him was fabricated by PW1 due to existing family feud. More so, Vudoi teachers were not summoned to corroborate PW1's evidence.

As to the 3rd ground of appeal the appellant challenged the victim (PW2) for the delay in reporting the ordeal (more than a month) allegedly after being threatened by the appellant. That, she testified the fact that after she was raped she deceived the appellant by requesting for permission to go to Mwanga from Lengurumo. The appellant added that the victim alleged that her father (the appellant) followed her to Mwanga and demanded to have sexual intercourse with her that's when she had to leave for Kisaranga where her mother lived and reported the incident. The appellant averred that all this time when the victim was moving from one place to another she had all the time to report the matter early.

Regarding the 5th ground the appellant challenged PW4 (doctor's) testimony to the effect that the victim was genitalia mutilated, that she was not a virgin as her vagina was loose compared to her age with smelly discharge due to bacterial infection. Despite the observation made the appellant faulted PW4 for failure to disclose the type of object which made the victim's vagina loose considering the fact that she was also mutilated.

As regards the 6th ground the appellant challenged the trial court's decision for not considering appellant's defence that he had long time grudges with the victim's mother for refusing to provide for

the victim's maintenance hence the case against him was fabricated. He informed the Court that the trial magistrate shifted the burden of proving the existence of such grudges while it was prosecution's duty to prove the case beyond reasonable doubt.

Lastly, the appellant submitted that although the victim's evidence in sexual offences deserves credence as ruled out by the trial magistrate such evidence should not be accepted and believed wholly instead the Court has to ensure credibility before convicting the accused. It was appellant's view that the prosecution did not prove the victim's credibility as her evidence leaves a lot to be desired. He prayed for this Court to allow the appeal, quash the conviction, set aside the sentence and set him free.

In reply Ms. Kowero dismissed the 1st, 3rd and 5th grounds of appeal as misconceived because PW4's evidence to the effect that the victim was raped a month before only cements the victim's testimony that she was raped but failed to report on time because she was threatened to be killed by the appellant. More so, although the doctor, PW4 did not elaborate what kind of object penetrated the victim vagina, this does not raise doubt that the victim's vagina was penetrated since her evidence alone was sufficient that she was penetrated.

Opposing the 2nd ground, Ms. Kowero argued that, whether the victim first reported the incident to her mother or to school authorities is a minor contradiction which does not go to the root of the case. She added that, such kind of discrepancy is inevitable when giving testimonies in criminal cases due to lapse of time as it was held in the case of **Luzaro Sichone V Republic**, Criminal Appeal No. 231 of 2010.

Ms. Kowero went on arguing the 4th and 6th ground, that the case against the appellant was proved at the required standard hence a mere fact that a teacher from Vudoi was not summoned does not vitiate the whole proceedings. Furthering her argument Ms. Kowero contended that, the trial magistrate did not disregard appellant's defence testimony but she did consider it and proceded to convict the accused since the testimony did not raise any doubt to the prosecution case. In addition DW2 and DW3's testimonies also failed to raise doubt to the prosecution case since the witnesses did not even know which offence the appellant was charged with. Ms. Kowero added that failure by the appellant to cross examine PW1 on the alleged grudges does not amount to shifting prosecution's burden of proof to the defence. Since the appellant alleged the existence of such grudges, he was the one to prove the same short of which is just an afterthought.

She finally submitted on the last ground the fact that, the victim's testimony successfully established that it was the appellant who raped her as she felt pain and discovered blood stains on the bed after being raped, thus there was no room for mistaken identity. She thus prayed for this Court to uphold the trial Court's conviction and sentence and dismiss the appeal. In his brief rejoinder, the appellant reiterated his denial and prayed that he be released from prison.

Having considered the competing arguments of both parties for and against the appeal and perusal of records, I think the question for determination is whether the prosecution has proved their case against the appellant at a required standard to ground conviction on the offence charged.

From the outset it is necessary to refer to section 158 (1) (a) of the Penal Code which discloses the essential ingredients of the offence of incest by male as follows;-

158. *(1) Any male person who* ***has prohibited sexual intercourse with a female person*** *who* ***is to his knowledge his*** *granddaughter,* ***daughter*** *sister or mother, commits the offence of incest and is liable on conviction-*

*(a) if the female is of the age of less than **eighteen** years to imprisonment for a term of not less than 30 years. [Emphasis added]*

A reading from the above provision, it seems a prohibited sexual intercourse with a female person and the knowledge that this person is one's daughter are essential ingredients of section 158 (1) of the Penal Code. It is on record the appellant did not dispute the fact that he is a biological father of the victim when he alleged that the case was fabricated by the PW1 (victim's mother) allegedly because of the existed grudges between himself (victim's father). Also not in dispute is the victim's age 16 years which is below 18 years. What needs to be established now is whether the appellant did actually rape the victim.

To begin with the 1st and 7th grounds of appeal and considering the manner in which I intend to deal with the appeal at hand it is necessary to also refer to essential ingredient of rape namely "**penetration**" bearing in mind this is an incest rape. The decision in the case of **Ally Mkombozi V R** Criminal Appeal No. 227 of 2007 (CAT) is illustrative on the fact where the Court had this to say;-

"The essence of the offence of rape is penetration of the male organ into the vagina. Sub-section (a) of section 130 (4) of the Penal Code Cap 16 as amended by the Sexual Offences (Special Provisions Act) 1998 provides that;

> *"for the purpose of proving the offence of rape, penetration however slight is sufficient to constitute the sexual intercourse necessary to the offence."*

The legal position laid down in the aforementioned case was sufficiently established through PW2 (the victim) at page 10 of the trial court's typed proceeding, where she narrated the following;-

> *"That was Friday – 'Eid' at 20 hours, he called me to his room, I didn't know what he wanted, I went and found him sited on bed he told me to go to bed, I was refusing as I don't usually sleep with him, he told me to undress him and I refused telling him I could not do that he forced me and he took a knife threatening to kill me if I will not comply with what he tells me.*

*I had to undress and he inserted his penis in my vagina I felt serious pain and in the morning I found blood on bed *witness crying**

Accused continued to do that for the whole week, at every night after dinner. I was trying to warn me since I am his child, I am his property and he cannot get out and get HIV while I was there."

The appellant claimed that this case is fabricated against him due to the existed family feud between himself and victim's mother but at the same time he admitted the fact that there had been no grudges between himself and the victim. In the case of **Mohamed Said V Republic,** Criminal Appeal No. 145 of 2017, Court of Appeal of Tanzania observed that a conviction for sexual offence may be grounded solely on uncorroborated evidence of the victim but with thorough scrutiny. The Court held *interalia*;

However we wish to emphasize the need to subject the evidence of such victims to scrutiny in order for the courts to be satisfied that what they state contain nothing but the truth."

I fully subscribe to the position above especially on the aspect of the importance of guarding against untruthful evidence because a

witness may be false and corrupt in her testimony. In her testimony the victim at page 10 of the trial court's proceedings narrated how the appellant called her into his room raped her and threatened to kill her with a knife if she dared disclose the ordeal to any person. From her testimony I find it difficult to believe the victim would lie against her biological father (the appellant) more so, it is on record the appellant denied to have grudges with the victim. I thus consider her evidence is based on truth as there is no doubt to prove otherwise. I find these grounds misplaced and I dismiss them.

Turning to the 2nd, 3rd and 5th grounds of appeal regarding the unexplained delay by the victim in reporting the incident and the manner it was reported, it is worthy to note that reporting incest rape is a difficult task especially because of the society's stigma surrounding it. In many cultures including African, incest is considered to be a social taboo. This is clearly established by the victim at page 10 of the trial court's typed proceedings when the victim was pleading to the appellant (biological father) not to rape her when she said;-

....."I was refusing as I don't usually sleep with him....."

Additionally, the appellant had threaten to kill her with a knife if she narrated or reported the appellant's act to anyone. Intimidated and ashamed while scared with death threats the victim remained silent for the whole period while the appellant repeated the act. It was not until she had a chance after she managed to deceive the appellant and visited her mother when she narrated the ordeal to her mother and later to the school authorities. The appellant's argument on the contradiction by the victim regarding the first person to have been informed by the victim about the ordeal is irrelevant as **firstly**, the said contradiction does not go to the root of the case and did not prejudice appellant in any way, **secondly**, it is not an essential ingredient in proving incest offence.

Turning to the argument by the appellant which faulted PW4's Doctor's observation that the victim might have been penetrated a month ago and that no bruises were found to substantiate that the victim was recently raped and failure by PW4 to disclose whether the victim was penetrated by a blunt or sharp object, PW4's testimony that the victim was penetrated a month ago corroborates the reasons for the victim's delay in reporting the ordeal as I have explained earlier. As regards PW4's disclosure of the type of an object which had penetrated victim's vagina and made it loose, this fact should not detain me much as the same is

not an ingredient for proving incest offence and further does not vitiates the whole of prosecution evidence, rather corroborate victim's testimony as to the appellant's complaints. As to the date of occurrence of the offence as per the charge sheet and PW4's report on when the penetration occurred, recent decisions of the court shows that such discrepancies are inevitable due to among others lapse of time. Encountered with similar situation in the case of **Dickson Elia Nsamba Shapwata and Another V Republic**, Criminal Appeal No. 92 of 2007 (unreported) at page 7 while quoting with approval the authors of Sarkar, The Law of Evidence, 16th Edition, 2007, The Court of Appeal had this to say;

> *"Normal discrepancies in evidence are those which are due to normal errors of observation normal errors of memory due to lapse of time, due to mental disposition such as shock and horror at the time of the occurrence and those are always there however honest and truthful a witness may be. Material discrepancies are those which are not expected of a normal person. Courts have to label the category to which a discrepancy may be categorized. While normal discrepancies do not corrode the credibility of a parties case, material discrepancies do."*

A reading of the aforementioned legal position it is inevitable to avoid shortfalls here in there in criminal cases what matters as observed above such discrepancies should not go to the root of the case as is the case of the instant case. Additionally, my view is if proven that the appellant had carnal knowledge of her daughter mentioning a wrong date in the charge sheet in itself would not render the charge sheet defective unless proved that the defect prejudiced the appellant which in the instant case the appellant has failed to prove. I do not see merit on these grounds and are hereby dismissed.

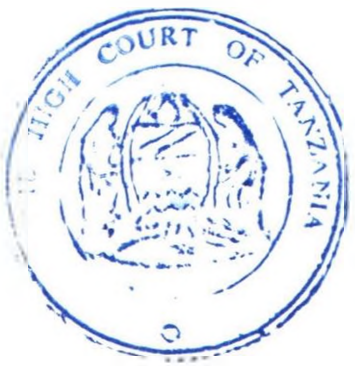
Turning to the 4th ground, that Vudoi Secondary teachers were not summoned, as rightly submitted by Ms Kowero, even without their testimonies the victim's testimony alone can warrant appellant's conviction. As per my observations on the 1st and the 7th grounds of appeal I find the victim's testimony trustworthy and deserves credence. Additionally, no number of witnesses is required to prove a fact. This ground of appeal also fails.

Regarding the 6th ground on the appellant's complaint that his defence was not considered. This complaint was not supported by the record of proceedings thus there can be no doubt that his defence was considered but the trial magistrate found that it failed to raise any doubt to the prosecution case. More so, the appellant

never cross examined on the matter. It is trite principle that failure to cross examine a witness on a particular important issue may lead the court to infer that the cross examining party accepts the witness evidence. I do not see any merit in this complaint. This ground also crumbles.

For the reasons discussed above, I find the appeal by the appellant lacking merit and dismissed it in its entirety. The trial Court's decision is hereby upheld.

Dated and Delivered at Moshi this 27th day of April 2021



S.B. Mkapa

JUDGE

27/04/2021