IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(IN THE DISTRICT REGISTRY OF MWANZA)

AT MWANZA

CRIMINAL APPEAL NO. 30 OF 2021

(Appeal from the Criminal Case No. 175 of 2020 in the District Court of Sengerema at Sengerema (Salehe, RM) dated 3rd of December, 2020.)

JACKSON JOHN ..... APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

JUDGMENT

14th, & 28th June, 2021

ISMAIL, J.

The appellant was arraigned in District Court of Sengerema at Sengerema, facing six counts of incest by males, c/s 158(1) of the Penal Code, Cap. 16 R.E. 2019; and rape c/s 130 (1) (2) (e) of the Penal Code. It was alleged that on diverse dates 5th January, 2019 and 5th May, 2020, the appellant had carnal knowledge of AB, CD and XY (all in pseudonym), who were all his daughters. The appellant pleaded not guilty, necessitating the conduct of trial proceedings.

Gathering from the proceedings, it is alleged that the appellant, a peasant and resident of Ngweli – Majengo Mapya, in Sengerema, lived with his three daughters AB, CD and XY, in a two-bedroom house. The daughters were aged 15 years (for AB and CD) and 12 years for XY. While the daughters were sleeping in a double-decker bed in the bedroom, the appellant was sleeping in a bedroom-cum living room. It all started with AB (PW1) who was waken up at 22:00 hours on 15th January, 2019, and was ordered to acceded to the appellant's demand of having a sexual indulgence. After the first encounter, the appellant repeated this for countless times. He then turned on to CD whose sexual encounter allegedly occurred on 21st September, 2019, while XY's turn was on 9th May, 2020.

News of the appellant's alleged wrong doing was reported to the police, culminating in his arrest on 23rd October, 2020, before his arraignment in court on 2nd November, 2020. After the trial proceedings that saw the prosecution marshal attendance of five witnesses, against one for the defence, the trial court found him guilty as charged. It convicted and sentenced him to thirty (30) years imprisonment for 1st, 2nd, 3r, and 4th counts, while 5th and 6th counts attracted a sentence of twenty (20) years imprisonment. Protesting his innocence, the appellant has lodged this

appeal. The petition of appeal has six grounds of appeal, paraphrased as hereunder:

1. *That, the appellant's conviction was not based in lawful, legal and valid expert investigation by the police and that the evidence was not analyzed in a fair manner, thereby victimizing the innocent appellant.*
2. *That, the trial court wrongly relied on the testimony of PW3 while she gave the testimony without promising, in her words, that she was going to tell the truth.*
3. *That, the appellant's conviction was wrongly based on the testimony of PW1 and PW2 which was procured without letting the said witnesses promise to tell the truth in their testimony.*
4. *That, the appellant's conviction was based on bare claims without subjecting the appellant to a venereal disease test or DNA test that would link the appellant to the allegation.*
5. *That, the conviction was based on concocted and uncorroborated evidence of penetration and a doubtful report which was purely based on an afterthought and did not take into account the strong defence evidence.*
6. *That, the prosecution case was too shaky and unproven to the hilt and incapable to base a conviction.*

Hearing of the appeal was conducted by way of audio tele-conference and it pitted the appellant, who fended for himself, against Ms. Ghati Mathayo, learned State Attorney, representing the respondent.

Kicking off the discussion was the appellant whose submission was expectedly brief. He only prayed that his appeal be allowed and that he be set free, as he was not involved in the offence with which he was charged.

Ms. Mathayo's submission followed the sequence in which the grounds of appeal were preferred. With respect to ground one, her submission was that, while the prosecution has a duty of proving the case beyond reasonable doubt, no number has been set for witnesses who should testify for the prosecution. This is in line with section 143 of the Evidence Act, cap. 6 R.E. 2019. The learned attorney argued that in rape cases it is the victim's testimony that is important. To fortify her contention, the counsel cited the decision of the Court of Appeal in ***Goodluck Kyando v. Republic*** [2006] TLR 367.

With respect to ground two, the counsel's contention is that, whereas the law requires that a child of tender age should promise to tell the truth, such requirement was duly met, as evidenced at page 11 of the proceedings. The respondent's counsel found nothing blemished in the proceedings. Submitting on ground three, Ms. Mathayo took the view that PW1 and PW2

were both aged 15 years, meaning that these are not covered by section 127 (4) of Cap. 6 which recognizes them as being outside the tender age. The counsel referred the Court to pages 6 and 9 of the proceedings.

As regards ground 4 of the appeal, the argument by Ms. Mathayo is that the ground is baseless, because in rape cases it is not the DNA or STD test that proves rape. She argued that the evidence of the victims and PW5 was to the effect that the appellant was responsible for the rape incidents she was charged with. This was also complimented by the testimony of PW4, the appellants' sister, which was to the effect that the victims were the appellants' daughters. She contended that this ground is lame.

Submitting on ground five, the contention by the respondent's counsel is that, in rape cases, the victim's testimony need not be corroborated. This is in terms of section 127 (6) of Cap. 6, and the decision in ***Selemani Makumba v. Republic*** [2006] 379. The counsel further contended that, besides the victims' testimony that is covered at pages 6, 7 and 8, the doctor who examined them testified at page 17 that the victims had no hymen, meaning that the victims proved that the unlawful acts were committed by the appellant.

With respect to ground six, Ms. Mathayo's take is that all the ingredients of the offence were proved, key among them being penetration,

which was proved by all of the victims. She held the view that rape was proved.

Before she wound up, Ms. Mathayo raised an issue on the charge sheet which shows that the appellant was charged with rape and incest. She held the view that the combination of these offences was not appropriate, though not prejudicial to the appellant. She argued that the offence of incest was the most appropriate charge. The counsel urged me to invoke the provisions of section 388 of the Criminal Procedure Act, Cap. 20 R.E. 2019 and set aside the sentences in respect of rape offences. Overall, the respondent's counsel prayed that the appeal be dismissed.

The appellant's rejoinder was as short at his submission in chief. He only prayed that the appeal be allowed.

The singular question to be resolved is whether the appeal presents a credible case on the basis of which the decision of the trial court may be vacated.

I will begin by combining grounds one and six of the appeal which question the adequacy and strength of the prosecution's case. By and large, these grounds appear to suggest that the prosecution did not prove its case beyond reasonable doubt. The respondent is opposed to this contention. Its counsel holds the view that all of the victims proved that they had been

known carnally, the culprit being none other than their biological father, the appellant.

It is worth of a note that the provisions of sections 110 and 111 of Cap. 6 require that a person who alleges as to the existence of a fact bears the burden of that proof. With respect to criminal cases, such burden is borne by the prosecution. This requirement was underscored in ***DPP v. Peter Kibatala***, CAT-Criminal Appeal No. 4 of 2013 (DSM-unreported), in which it was held:

> *"In criminal cases, the duty to prove the charge beyond reasonable 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."*

This cardinal principle of evidence, which has stood the test of time, is derived from the decision of the defunct East African Court of Appeal in an old case of ***Ramanlal Trambaklal Bhatt v. Republic*** [1957] E.A. 332, wherein it was guided as follows:

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

In the trial proceedings which bred the instant appeal, the allegations were in relation to rape and incest by males, and the trial court convicted the appellant of all the counts. It is quite unfortunate that these two offences

were combined and, as Ms. Mathayo submitted, where incest occurs, the allegation of rape play second fiddle to that of incest. I subscribe to her reasoning that the rape charges shouldn't have been preferred after the decision had been made, or where it is established that the victim's relationship with the appellant is prohibited. I will, therefore, confine, myself to the incest charges.

Incest by males is an offence that is provided for under section 158 (1) and (2) of Cap. 16 which states as follows:

> *"(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 age of less than eighteen years, to imprisonment for a term of not less than thirty years.*
>
> *(2) It is immaterial that the sexual intercourse was had with the consent of the woman."*

From the cited provisions, it is clear that indulging in a prohibited sexual intercourse, and knowledge of the relationship by the accused person constitute key ingredients of the offence of incest. This position of the law was cemented in ***Festo Mgimwa v. Republic***, CAT-Criminal Appeal No. 378 of 2016 (unreported), in which the Court of Appeal of Tanzania held:

"In a charge of incest by males, the prosecution must prove that the accused knew the female as his grandmother, daughter, sister or mother at the time of sexual intercourse. In the present case, the prosecution sufficiently proved that the appellant had carnal knowledge of PW1 while knowing that she is her daughter. He has never stated in his defence that he mistook the identity of the victim with whom he had sexual intercourse to another girl or woman. ...."

See: ***Sharifu s/o Bakari @ Mdee v. Republic***, HC-Criminal Appeal No. 30 of 2020 (MS-unreported).

The testimonies of PW1, PW2 and PW3, all victims of the alleged incident, laid bare how the appellant indulged in sexual intercourse with each of the victims on different occasions. The testimony of PW1 set the matter in motion when she was quoted, at pp. 6-7, as saying as follows:

"We were only two me and my father, my young sister were in Mwanza with our aunt. The house has two rooms, one bed room and sitting room. We use one bed room, I sleep on the upper decal and my father on lower decal. It is a double decal. My father forced me to sleep in that room. While asleep, I saw my father kissing me and then forced me to have sex with him, if I denied he would kill me. He raped me until I started bleeding a lot. He started touching me and pressing my breasts. He took off my clothes and raped me on the upper decal. He inserted his penis into my

vagina. I felt too much pains. I saw blood coming from my vagina. He raped me many times I cannot count how many .... I saw my father raping my young sisters also."

The same was said of the appellant's indulgence with PW2 whose testimony appears at page 9 as follows:

"On that day, we were asleep my father called me to the lower dacal and forced me to take off my clothes. I obeyed, he started raping me. He inserted his penis into my vagina. He hold my legs wide and proceeded raping me. His penis penetrated into my vagina. After finishing I started bleeding and also sperm were coming into my vagina .... I also saw my father raping my young sister (XY in pseudonym). I also saw my father raping AB (in pseudonym) and laid her on the floor and having sex with her."

PW3's account of facts is gathered from page 12 of the proceedings. She quoted as testifying as follows:

"On 09/05/2020 around night I was asleep my father called me, I went there and he forced me to take off my clothes. I obeyed, he forced his penis into my vagina. I was asleep with AB (PW1) and CD (PW2). They saw everything. He laid me down, took my pant and took his also widened my hips and inserted his penis into my vagina. I felt too much pains. I started crying for pains."

The prosecution's testimony demonstrated, as well, that the victims were the appellant's own children, meaning that they were under a prohibited relationship which would not allow indulging in any sexual relations. In my considered view, the totality of this testimony succeeded in proving the appellant's culpability beyond reasonable doubt, and I find no reason to doubt or reverse the trial court's reasoning. I dismiss these grounds of appeal.

In ground two, the appellant has decried the trial court's admission of PW3's testimony without taking her through the process of having to make a promise of telling the truth and not telling lies. The respondent's counsel argues that this was done, and that page 11 of the proceedings bears a testimony. Promising to tell the truth and no lies is a prerequisite set out in section 127 (2) of Cap. 6. In the instant case, the trial court recorded its own assessment of PW3 before she testified. The trial court's finding was in the following words:

> ***"Court:*** *This witness have (sic) sufficient memory of what happened to her and have promised this Court to tell the truth only."*

The question that arises from this excerpt is whether such a phrase exhibits compliance with the law. While the requirement of giving promise is

imperative and its defiance constitutes an infraction, what isn't clear from the governing provision is the modality or wording that should be used by a trial court in procuring the promise. The Court of Appeal has filled the void by giving a guidance of what should be done by a trial court. This was held in ***Geoffrey Wilson v. Republic***, CAT-Criminal Appeal No. 168 of 2018 (unreported), in which it was observed:

> *"We think, the trial magistrate or judge can ask the witness of a tender age such simplified questions, which may not be exhaustive depending on the circumstances of the case as follows:*
>
> 1. *The age of the child.*
> 2. *The religion which the child professes and whether he/she understands the nature of oath.*
> 3. *Whether or not the child promises to tell the truth and not to tell lies."*

See also: ***Hamisi Issa v. Republic***, CAT-Criminal Appeal No. 274 of 2018; ***Issa Salum Nambaluka v. Republic***, CAT-Criminal Appeal No. 272 of 2018 (both unreported)

From the record of proceedings, it is not clear if what was recorded was a result of a clear process that involved posing questions which would establish if the witness was ready and willing to give answers which would suggest her readiness to tell the truth. It remains that the test which was

applied by the trial magistrate to draw a conclusion that the witness was telling the truth, is unknown and it compels me to conclude that the set procedure was not followed. I consider this to be a violation that has the consequence of rendering PW3's testimony irregularly procured, and I allow this ground of appeal. I order that PW3's testimony be expunged from the prosecution testimony.

The appellant's contention in ground three is that the testimony of PW1 and PW2 was taken without requiring the said witnesses to promise to tell the truth. This, in the appellant's view, constituted an irregularity. This ground of appeal need not detain me as my considered view is that the appellant's contention is misplaced. Section 127 (2) of Cap. 6 requires that a child of tender age should, prior to giving evidence, promise to tell the truth and not to tell lies. Child of tender age has been defined in sub-section 4 to mean a child whose apparent age is not more than fourteen years. From the testimony of PW1 and PW2, it is clear that both of them were aged 15 years, meaning that they were not children of tender age. It follows that they would not be required to make any promises before they testified. I hold the view that this ground of appeal is misconceived and unsustainable.

Ground four of the appeal queries the prosecution's failure to subject the appellant to STD test or a DNA test which would link him with the alleged

offence. The view held by the respondent's counsel is that such test would not establish an offence of rape or incest by male. I agree with this latter contention. In rape cases, the only evidence that bears relevancy is that of penetration. Any medical tests on the accused, as contended by the appellant, is of no significance in such cases and the clamour by the appellant is baseless. This ground of appeal is dismissed.

Ground five takes an exception to the prosecution testimony which has been labelled as concocted and uncorroborated. As rightly argued by the respondent's counsel, in rape cases, it is the evidence of the prosecutrix of the rape incident, and this includes incest, and that the same can ground a conviction without resorting to any form of corroboration. ***Selemani Makumba*** (supra) and a host of other decisions amplify what is provided for by section 127 (7) of Cap. 6 which states:

> *"Notwithstanding the preceding provisions of this section, where in criminal proceedings involving sexual offence the only independent evidence is that of a child of tender years or of a victim of the sexual offence, the court shall receive the evidence, and may, after assessing the credibility of the evidence of the child of tender years as the case may be the victim of the sexual offence on its own merits, notwithstanding that such evidence is not corroborated, proceed to convict, if for reasons to be recorded in the*

proceedings, the court is satisfied that the child of tender years or the victim of the sexual offence is telling nothing but the truth."

This provision permits courts to convict offenders of sexual offences if they are satisfied that the evidence of the victim of the sexual offence is telling nothing but the truth. This means that corroboration is not a legal requirement in cases like this. But even assuming that corroboration was a prerequisite, I would hold that the testimony of the victims corroborates each other's testimony, while PW5's evidence complimented the evidence of all of the victims.

With respect to concoction of the testimony, I find nothing to support the appellant's contention. My assessment of the prosecution testimony does not convey the feeling that the testimony was fabricated to the appellant's detriment. It was credible and factual and I find no reason to discredit it. In the whole, I find this ground of appeal barren and I dismiss it.

As I move towards the tail end of this decision, I have found one thing that is disquieting. This is in respect of the sentences which were imposed on the appellant subsequent to conviction. As I address this point, I am not oblivious to the fact that the settled law is that sentencing is a domain of the trial court and that such domain ought not to be interfered with except in

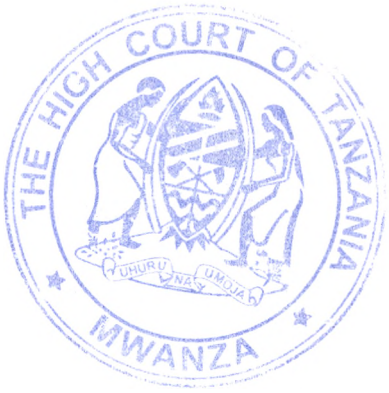
cases where the Court is satisfied that the sentence imposed is manifestly excessive, or that the sentencing court failed to consider a material circumstance or that it otherwise erred in principle (See: ***Yohana Balicheko v. Republic*** [1994] TLR 5; ***Bernadeta Paul v. Republic*** [1992] TLR 97; and ***Rashid S. Kaniki v. Republic*** [1993] TLR 258). In this case, with respect to 1st to 4th count, the trial court imposed a sentence of thirty (30) years imprisonment, while with respect to 5th and 6th counts, the imposed penalty was a twenty (20)-year prison term. No reasons were given for the disparity in the sentences, notwithstanding the fact that these offences attract prison sentences of not less than thirty (30) years. It is my view that the sentencing court's act constituted an error in the sentencing principle and this attracts an intervention by this Court with a view to addressing this anomaly. Taking into consideration the fact that Courts touching on rape offences have been expunged, the sentence on count six collapses with the death of the said counts. This leaves the sentence in respect of count five which is substituted with a fitting sentence of 30 years. This and other sentences shall run concurrently.

In the upshot of all this, I find the appeal barren of fruits and, as such, I dismiss it. I uphold the conviction and sentence passed by the trial court, save for rectification on the sentences, as shown above.

It is so ordered.

Right of appeal duly explained.

DATED at **MWANZA** this 28th day of June, 2021.



M. K. ISMAIL

JUDGE

Date: 28/06/2021

Coram: Hon. M. K. Ismail, J

Appellant: Present online.

Respondent: Ms. Ghati Mathayo, State Attorney

B/C: J. Mhina

Court:

Judgment delivered in chamber, in the virtual presence of the appellant and that of Ms. Ghati Mathayo, State Attorney for the respondent, this 28th June, 2021.

M. K. Ismail

JUDGE

<u>At Mwanza</u>

28th June, 2021