IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

MOSHI DISTRICT REGISTRY

AT MOSHI

CRIMINAL APPEAL NO. 5 OF 2021

(C/f Criminal Case No. 64 of 2020 District Court of Rombo at Rombo)

VALENTINE CHRISTIAN MASSAWE ..... APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

27th May & 25th June, 2021

JUDGMENT

MKAPA, J.

The appellant Valentine Christian Massawe, 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] by the District Court of Rombo, in **Criminal Case No. 64 of 2020**. A sentence of 30 years was imposed on him. It was alleged that on 29th February 2020, at Kataranga Village within Rombo District Kilimanjaro Region at 12:00 noon the appellant had carnal knowledge of her daughter aged 12 years whom I shall conveniently be referring her as the victim or **SB.**.

The appellant pleaded not guilty to the allegations put forward by the prosecution hence a full trial involving four prosecution witnesses and one defense witness was conducted. At the conclusion of the trial the appellant was found guilty, convicted

and sentenced to serve 30 years imprisonment. Aggrieved, the appellant preferred this appeal raising seven grounds of appeal as follows;

1. That, the trial magistrate erred in law and fact in not considering contradictions in the evidence of the prosecution witness which goes to the root of the case.
2. That, the trial court erred in law and fact in relying on exhibit P1 which was irregularly tendered.
3. That, the trial magistrate erred in law and fact in not addressing the appellant on his rights at the defence hearing.
4. That, the trial magistrate erred in law and fact in failing to consider prosecution's failure to summon key witnesses thus prejudiced the appellant.
5. That, the trial magistrate erred in law and fact in convicting and sentencing the appellant basing on evidence which was not proved beyond reasonable doubt.
6. That, the trial magistrate erred in law and fact in sentencing the appellant to serve imprisonment term for other unfounded counts while he was charged with only of one count.
7. That the trial court erred in law and in fact in relying on evidence of a child of tender age without complying fully with the requirements of the law.

The appeal was heard orally and Mr. Julius Focus learned advocate appeared and represented the appellant while Ms. L. Kowero, learned State Attorney represented the respondent.

Supporting the appeal, Mr. Focus submitted on the first ground that, the trial court did not consider the fact that the prosecution evidence was full of contradictions as regards the time and date of the occurrence of the crime. According to PW1's testimony, she was told by her daughter PW2, (the victim) to report to her school on 2/3/2020 at around 09:00 hrs. Upon arrival, she met with the head teacher in her office together with other school teachers and they jointly examined PW2's private parts and discovered that she had been penetrated several times as her vagina was abnormally loose.

Mr. Focus went on explaining that the charge sheet stated that the incident occurred on 29/2/2020 at 12:00 noon. That, upon being cross examined PW1 testified that she was told by the victim that the incident occurred at 10:00 hrs. At the same time the victim (PW2) at page 9 of the trial court's typed proceedings testified that on 02/3/2020 while playing at her grandfather's place at around 10:00 hrs she was called inside the house by the appellant and raped her at the same time PW1 testified that on the same day she inspected PW2's private parts at school. To

support his argument he referred the court to the decisions in **Frank Majanga V. R. Criminal Appeal No. 93 of 2018, CAT** (unreported) and that of **Mohamed Said Matola V. R** 1995 TLR 3 where the court had this to say;

> *"Where the testimonies by witnesses contained inconsistence and contradictions the court has a duly to address the inconsistence and to resolve them where possible or else the court has to decide whether the inconsistence and contradictions are minor or whether they go to the root of the matter".*

It was Mr. Focus's view that, such contradictions goes to the root of the case and the trial magistrate ought to have considered them.

On the 2nd ground Mr. Focus submitted that, admission of Exhibit P.1, (PF3) was contrary to the required procedure as the same was admitted but not read out as shown at page 16 of the typed proceedings. He prayed for the same to be expunged from the records.

As to the 3rd ground Mr. Focus challenged the prosecution for failure to summon key witnesses such as the victim's head teacher who was participated in examining the victim's private parts.

Regarding the 4th ground on the allegations that prosecution had failed to prove their case beyond reasonable doubt, the learned

counsel submitted that the prosecution evidence is tainted with contradictions on the date and time when the incident occurred. That, while PW2 (the victim) testified the fact that she was raped in the morning at 10:00 hrs, the charge sheet stated the incident had occurred at 12:00 hrs.

On the 5th and 6th grounds, Mr. Focus challenged the trial magistrate's observations that although the appellant was the 1st offender the offence he stand charged is rampant thus harsh punishment will serve as a deterrent and proceeded to sentence him to serve 30 years imprisonment and that, **to each offence the sentence shall run concurrently** while the appellant was only charged with one count thus the sentence was inappropriate.

On the last ground that the learned counsel challenged the trial magistrate in relying on the evidence of a child of tender age without fully complying with the requirement of the law. He placed his reliance on section 127 (2) of the Evidence Act which reads;

> *"A child of tender age may give evidence without taking an oath or making an affirmation but shall before giving evidence promise to tell the truth to the court and not to tell lies."*

Mr. Focus informed the Court that at page 8 of the trial court's proceedings before testifying, PW2 promised to tell the truth and that telling lies is bad thing. It was Mr. Focus' view that the phrase "**telling lies is bad thing'** does not mean that the victim was not going to tell lies. He prayed for the court to declare that PW2's evidence did not meet the required standard of the law thus cannot ground conviction against the appellant. He finally prayed for the appeal to be allowed and the decision of the trial court be quashed and set aside.

In reply Ms. Kowero submitted first on the 6th ground on the allegations that the trial court did not comply with S. 127 (2) of the Law of evidence (as amended) Ms. Kowero elaborated that the said section provides that a child of tender age may give evidence without taking oath or making an affirmation but shall before giving evidence promise to tell the truth and not to tell lies. Ms. Kowero referred the last sentence of page 8 of the typed proceedings where PW2 did promise to tell the truth when she said "*speaking lies is bad thing*" hence complied with section 127 of the Law of Evidence Act.

Arguing on the 5th and 6th grounds jointly regarding sentencing of the appellant for unfounded counts it was Ms. Kowero's argument that, that was a clear typing error. She went on arguing that section 158 (a) of the Penal Code provides for 30

years imprisonment upon conviction for an offence of incest by male in which the trial magistrate did impose on him. Therefore, the phrase "The sentence shall run co-currently" was just a slip of a pen.

Regarding the 3rd and 4th grounds of appeal that the prosecution side failed to summon key witnesses. She asserted that, it is now well settled that the best evidence in rape offence comes from the victim. In support of her contention she relied on the decision in the case of **Suleiman Makumba V. R [2006] TLR 379**. That, PW2 testified at page 8 to 10 of the typed trial court proceedings by narrating how the appellant raped her on 29th February, 2020 and on 2nd March, 2020. Further that, her testimony was corroborated with that of PW1's who narrated how he examined the victim's private parts at school in the presence of the head teacher and other teacher and discovered that the victim's vagina was loose as a result of penetration and when asked who was responsible she mention his father, (the appellant).

Ms. Kowero informed the court that PW4, the doctor testified on his observation which was conclusive having examined the victim that she was no longer a virgin as she had been penetrated by a blunt object. In addition the appellant testified to the effect that he had no grudges with PW1 nor the victim thus they had

no reason to tell lies. It was Ms. Kowero's view that the case against the appellant was proven beyond reasonable doubt.

On the second ground that PF3 was not read out after being admitted as exhibit P1, Ms. Kowero conceded and prayed the same to be expunged from the court's record. However, she added that the evidence of the doctor PW4, being an expert suffices, hence sufficient to corroborate victim's testimony.

Regarding the 1st ground relating to inconsistence and contradictions as to the time and date of the occurrence of the crime, Ms. Kowero averred that, PW1 testified that on 02/03/2020 she was asked to report to the victim's school. That, while at school in the presence of the school head teacher and other teachers the victim informed them that she had been raped by the appellant at 09:00 hrs that's why her vagina was loose when they had examined her in one of the school offices. It was Ms. Kowero's argument that although there were some inconsistences but the same are minor and cannot be escaped due to victim's shock and horror thus it was possible for the victim to mix up dates and even time of the occurrence of the incident after all when the victim was being raped one would not have expected the victim to have watched the time for record purposes.

She finally argued that all the contradictions stated by the appellant are minor as they do not touch on the root of the case she finally prayed for the appeal to be dismissed in its entirety and the judgment and decree of the trial court be upheld.

In his brief rejoinder, Mr. Focus reiterate his earlier submission and maintained his prayer for the appeal to be allowed.

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 the required standard to ground conviction on the offence charged.

From the outset it would be necessary 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 upon 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 ingredient of section 158 (1) of the Penal Code. It is on record at page 20 of the trial court's typed proceedings that while being cross examined the appellant did not dispute the fact that he is a biological father of the victim when he said;

"*.....**Neema is my daughter, she is twelve years old***"

Also not in dispute is the victim's age 12 years, which is below 18 years. What need to be established now is whether the appellant did actually rape the victim.

At this juncture I find it necessary to refer to essential ingredient of rape offence namely "penetration" bearing in mind that 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 vagina"*

The legal position laid down in the aforementioned case was sufficiently established through the victim at page 8 of the trial court's typed proceedings when she graphically narrated how the appellant raped when he stated;-

*"On 29/2/2020 at about 09:00hrs I was at my grandfather playing ... my father (accused person) called me to our home (house) when I went there he told me to undress my clothes (underpants), he (my father) also undress his trouser and told me to lay down ... accused person come and laid on top of my body, and told me "panua miguu" then "**akachukua dudu** lake **na kuniingizia kwenye kuma yangu**" I felt so bad, I cried but no one helped me, accused told me stop crying and continue "kunifanyia tabia mbaya" for a long time, thereafter I saw blood from my vagina, after finished doing "tabia mbaya" my father (accused person) wore his trouser and go away, he left me inside the house and told me not to tell anyone what happened."*

From the above enumeration of the ordeal I find it difficult why the victim's evidence should not be given credence.

Additionally, penetration was proven by an expert, PW4' doctor's testimony whose report revealed that the victims was no longer a virgin as had been penetrated by a blunt object.

In **Republic V Kirstin Cameroon** [2003] TLR 84, Rutakangwa, J. (as he then was,) had this to say on evidenced of an expert;

"The evidence of an expert is likely to carry more weight than that an ordinary witness."

Now turning to the 1st ground on contradictions in the prosecution's evidence as regards to the dates and time of the occurrence of the incidence, the victim narrated how his father

first raped her on 29th February, 2021 then he continued raping her up until the 2nd March 2020. That he raped her five times between around 09:00hrs and 10:00hrs. As rightly argued by the learned State Attorney, it is beyond any reasonable mind's imagination that the victim could have taken time to look at the watch in order to be sure of the exact time when the ordeal happened.

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 **Elia Nsamba Shapwata & another V R. 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 or inconsistences in evidence are those which are due to normal errors of observation normal errors of memory due lapse of time, due to mental disposition such as shock and horror the time of occurrence and those are always there however honest and truthful a witness may be.*

In light of the above legal authority a mere fact that the charge sheet states the ordeal to have happened **about** 12:00 noon on 29th February, 2020 while the victim testified to have been raped

around 10:00hrs on the very day does not dispute the fact that the rape incident did occur. This ground lacks merit and is hereby dismissed.

On the 2nd ground, the respondent conceded to the fact that since PF3, Exhibit P1, was not read aloud after being admitted as required by the law the same should be expunged from the records, as I hereby do. PW4 testified to the effect that, after examining the victim, her vagina was discovered to be loose and was no longer a virgin that suggested she was penetrated by a blunt object. More so, the trial court did not rely solely on the said exhibit P1 in reaching at its decision. PW2's (the victim) evidence and that of her mother PW1 were sufficient to prove the charge of rape against the appellant. This ground also crumbles.

Regarding the 3rd ground the same was never submitted on however, a thorough perusal of the trial court's records reveal that the appellant was accorded the right to defend himself after the evidence had established a case to answer. This is evident at page 18 of the trial court's typed proceedings. I find this ground lacks merit.

Turning to the 4th ground relating to failure by the prosecution to summon the head teacher as a key witness, this will not detain me much since the law is settled in terms of section 143

of the Evidence Act, Cap 6 R.E. 2019 to the effect that, there is no specific number of witnesses required for the prosecution to prove any fact. See; **Yohanes Msigwa V R (1990) TLR 148.** What matters is the quality of the material evidence and not the number of witnesses. The burden of proof is always on the prosecution to prove the case beyond reasonable doubt even if from a single witness. This grounds is meritless and the same is disallowed.

As to the 5th and 6th grounds, the trial magistrate had this to say when sentencing the appellant;

> *"Taking into account the accused records that he is the 1st offender however, the offence stands charged is rampant and it is only strict punishment will diminish these acts. Thus accused is hereby sentenced to serve thirty (30) years imprisonment to* ***each offence. The sentence shall run co-currently****, this is to deter him and the like minded."*
> (Emphasis mine)

As rightly argued by the learned state attorney this is a slip of a pen which did not occasion miscarriage of justice as the law is clear on the sentence for the offence of incest by males if proven, to wit; 30 years imprisonment. It is the same sentence that the trial magistrate imposed on the appellant. Since the

appellant did not prove as to how the phrase "to each offence ... shall run co-currently" did prejudiced him, this ground also fails.

Lastly, the appellant has challenged the fact that the victim's testimony was not taken as required by the law, hence the trial court erred in relying on it. Before PW2's testimony was taken this is what transpired in the court as stated at page 8 of the typed proceedings;

> *"PW2- NV, 12 years old*
> *Court questions*
> *I am a student at Njamta Primary School, Standard five, my father's name is Valentine and my mother's name is Glasiana Valentine.*
>
> *PW-2* ***I promise to speak*** *the truth because* ***speaking lies is a bad thing****." (emphasis added)*

Afterwards she went on testifying without oath. It is sufficiently clear that, the victim promised to tell the truth and not to tell lies as she said "*speaking lies is bad thing*". In **Crospery Ntagalinda @ Koro V R, Criminal Appeal No. 312 of 2015**, CAT- Bukoba (unreported), the Court of Appeal had this to say:

> *"Every witness is entitled to credence and his testimony believed unless there are good and sufficient reasons for not believing the witness."*

Guiding by the above principle I found no reason for not believing the victim.

For the reasons discussed above, I find the appeal is meritless and proceed to dismiss it in its entirety. The trial Court's decision is hereby upheld.

It is so ordered.

Dated and Delivered at Moshi this 25th day of June, 2021.

S.B. Mkapa
Judge
25/06/2021