IN THE HIGH COURT OF TANZANIA

(DAR ES SALAAM DISTRICT REGISTRY)

AT DAR ES SALAAM

CRIMINAL APPEAL NO. 73 OF 2021

(Appeal from the decision of the District Court of Kibaha at Kibaha in Criminal Case No. 206 of 2019 before Hon. R.E. Kangwa, **RM** dated 12/10/2020)

SAID MOHAMED..... APPELLANT

VERSUS

THE REPUBLIC..... RESPONDENT

JUDGMENT

09th Aug, 2021 & 20th Aug, 2021.

E. E. KAKOLAKI J

The appellant in this appeal is aggrieved with conviction on the offence of **Incest by Male**; Contrary to Section 158(1)(a) of the Penal Code, [Cap. 16 R.E 2019] and the sentence of twenty (20) years meted to him by the District Court of Kibaha at Kibaha in Criminal case No. 206 of 2019 in its decision handed down on 12/10/2020. He has preferred this appeal equipped with six grounds of appeal which I am intending to reproduce in seriatim as raw as they are:

1. That the learned trial Magistrate grossly erred in relying to incredible, unreliable and un-procedural visual and voice identification of PW2 against the appellant at Locus in quo.
2. That the learned trial Magistrate erred in holding that PW2 knew and recognised the appellant at the locus in quo, where she did not describe attires worn by the appellant.
3. That the learned trial Magistrate erred in failing to realize wide discrepancies within PW2' and PW5's evidence in regard to the type pf the weapons allegedly used by the appellant to threaten the victm at locus in quo.
4. That the learned trial Magistrate erred in holding huge contradictory evidence between PW2 and PW5 in respect of various aspects.
5. That the learned trial Magistrate erred in failing to appraise objectively credibility of the prosecution evidence.
6. That the learned trial Magistrate erred in holding that prosecution proved its case against the appellant beyond reasonable doubt as charged.

In view of the above grounds of appeal the applicant invited this court to allow the appeal by quashing the conviction and set aside the sentence imposed on him the result of which is to acquit him.

Briefly the facts giving rise to this appeal are simple to narrate. It was alleged by prosecution side that on the 06/11/2019 at about 1.00 hours a Msua area within Kibaha District in Coastal Region, the appellant who is a blood brother to one Ester Emmanuel (victim), had a prohibited sexual intercourse with full knowledge that she is his sister. As per evidence of PW2 on the fateful day while asleep at her home was awaken from sleep by the appellant who asked

for fire. As she identified him as her brother she opened the door and came out before the appellant grabbed and dragged her to the grasses where he removed his trousers and forceful raped her under threat to harm her with the knife which he had in possession. In the next morning the incident was reported to the village suburb chairman PW3 who ordered PW6 to arrest the appellant before the matter was reported at police. On his arrest the appellant confessed before PW3 and PW6 to have committed the offence and asked for forgiveness but the matter was forwarded to police where after report the victim PW2 was issued with a PF3 before she went for medical examination and treatment at Kwala Dispensary. At the dispensary she was attended by Dr. Mustapher Abdallah (PW1) who upon examination established that her vagina was penetrated as she had bruises seen on her labia majora with presence of spermatozoa upon high vaginal swabs collected as per the PF3 which was tendered and admitted in court as Exh. P1. Two saws were also collected from the scene of crime and tendered in court by PW5 together with exhibit register as exhibits P3 and P2 respectively. In his defence the appellant alleged to have been framed up in the case by her sister due to odd relationship between them as he had advanced her Tshs. 70,000/= which she failed to pay back. And that, he got surprised to be informed of accusation of raping of her sister on 06/11/2019 when called to the suburb chairman (PW3). In short he flatly denied the accusation.

The trial court upon weighing evidence of both parties the scale tilted to the appellant that he had committed the offence hence found that the prosecution had proved its case beyond reasonable doubt and proceeded to convict and sentence the appellant accordingly. It is that decision which

seem to have aggrieved the appellant hence the present appeal on the above stated grounds.

During the hearing the appellant appeared unrepresented while the respondent was represented by Ms. Frida Winchenslaus learned State Attorney and were both heard viva voce. The appellant chose to let the respondent take the floor first as he would respond in accordance to her submission. In her submission the learned State Attorney opted to combine and argue jointly and together the 1st and 2nd grounds of appeals as well as the 3rd, 4ht and 5th grounds of appeal while canvassing the 6th ground separately. From the outset she informed the court that the respondent proved its case beyond reasonable doubt and therefore the appellant's appeal is unmeritorious. Submitting on the 1st and 2nd grounds of appeal she informed the court that in principle the appellant's complaints in both grounds are aiming at challenging visual and voice identification made by the victim (PW2) against him. She argued the victim (PW2) no doubt properly identified the appellant as he was her blood bother to their mother whom she saw several times when growing and on that day there was moonlight which assisted her to clearly identify him. Further to that she said, the victim spent one hour with the appellant in the course of that rape act which is sufficient enough to make unmistaken identity of the person. On conditions favourable for proper identification she referred the court the case of **Mabula Makoye and Another Vs. Republic**, Criminal No. 277 of 2017 (CAT-unreported). On the 3rd, 4th and 5th grounds where the complaints are contradictions of the evidence of PW2 and PW5, Ms. Winchenslaus voiced, there was no such meaningful contradictions and if any were not going to the root of the case. She argued the testimony of PW2 that, he the appellant

had knife at the scene and that of PW5 that was handed with two saws which he tendered as exhibit P3, which exhibits were collected from the scene of crime is not a contradiction as the tendered exhibits were not used to commit the offence. So to her the grounds were not meritorious. On the 6th ground, it was her submission that the prosecution proved its case beyond reasonable doubt against the appellant. She echoed, the evidence by PW2 on identification of appellant during night under moonlight, telling her tale on how the appellant who is her blood brother called at her home pretending to ask for fire before he grabbed her down and raped her, corroborated with PW1's evidence on examination of PW2 and the findings of bruises in her vagina as per exh. P1 as well as the confession made by the appellant before PW3 and PW6 was enough evidence to prove the case beyond reasonable doubt. It was therefore her prayer this appeal be dismissed for want of merits.

On the appellant's side while contending to be illiterate for not attending formal education, he urged the court to consider his grounds of appeal which he said are self-explanatory and proceed to allow the appeal as prayed in his memorandum of appeal.

I have taken time to peruse the proceedings, impugned judgment as well as considering the arguments and prayers by both parties. Before venturing into determination of the merits of the appeal, I find it apposite to put the record clear. An eye to the impugned judgment though not raised in the grounds of appeal has revealed irregularity of the decision which in my opinion is curable. This is none but the omission by the trial magistrate to convict the appellant before sentencing him as per the requirement of

section 235(1) of the Criminal Procedure Act, [Cap. 20 R.E 2019] which provides that:

> *235.-(1) The court, having heard both the complainant and the accused person and their witnesses and the evidence,* ***shall convict the accused and pass sentence upon or make an order against him according to law*** *or shall acquit or discharge him under section 38 of the Penal Code. (Emphasis added).*

What the trial magistrate did was just to find the appellant guilty of the offence and proceed to sentence him as per the law. To be precise this is what he said and I quote from page 5 of the typed judgment:

> *Basing on what stated above, this court is convinced that the prosecution side they have been able to prove their case to the required standard. And this court found the accused person guilty of Incest by Male contrary to section 158(1)(a) of the Penal Code Act [Cap. 16 R.E 2019]*
>
> *Sgn: R.E Kangwa –SRM*
>
> *12/10/2020*

Now one would ask a question does the omission to convict of the appellant render the whole judgment a nullity? My answer would be no. The reason is only one that the omission has prejudiced no one amongst the parties in this appeal. Before 2005 it was the stand of the law in our jurisdiction that failure to convict is a fatal ailment. However that position of the law was departed by the Court of Appeal in the case of **Musa Mohamed Vs. Republic**,

Criminal Appeal No. 216 of 2005 (CAT-unreported) the decision which was quoted in the case of **Mabula Makoye** (supra) where the Court had this to state:

> *"This Court being the final court of justice of the land, apart from rendering justice according to law also administer justice according to equity. We are of the considered opinion that we have to resort to equity to render justice, but at the same time making sure that the Court records are in order."*

The Court went on to say:

> *"One of the Maxim of Equity is that 'Equity treats as done that which ought to have been done'.* ***Here as already said, the learned Resident Magistrate for all intent and purposes convicted the appellant and that is why he sentenced him. So, this Court should treat as done what which ought to have been done.*** *That is, we take that the Resident Magistrate convicted the appellant." (Emphasis supplied)*

In a similar situation in the case of **Ally Rajabu and 4 Others Vs. Republic**, Criminal Appeal No. 43 of 2012(CAT-unreported) where the issue of the judge's omission to enter conviction before passing the sentence was under discussion the Court of Appeal said the irregularity was curable under section 388 of the Criminal Procedure Act and proceeded to dismiss the appeal. In that case the Court had this to say on the irregularity:

> *"In the light of the above decisions,* ***we are of the considered view that no injustice has been occasioned by the***

inadvertence of the judge to enter a conviction before passing sentence. In view of the above named decisions, the irregularities can be cured under section 388 of the Criminal Procedure Act. *Therefore, in exercise of our revisional powers under section 4(2) of the Appellate Jurisdiction Act (CAP 141 R.E. 2002) we hereby "treat as done that ought to have been done" by entering a conviction." (Emphasis supplied)*

Yet in another case of **Amitabachan Machaga @ Gorongo Vs. Republic**, Criminal Appeal No. 271 of 2017 (CAT-unreported) on similar issue of omission to convict the Court of Appeal observed:

"...Although we are aware that an appeal is not properly before us where no conviction has been entered by the trial court, ***we think it is not always that such omission to enter conviction will necessarily lead to an order of remission of the record to the trial court especially, in in this case, where the justice of the case demands otherwise****. In other cases,* ***it has been considered prudent to treat the omission as a mere slip and the Court has deemed the conviction to have been entered****. See the case of* ***Imani Charles Chimango Vs. Republic****, Criminal Appeal No. 382 of 2016 (unreported). We shall therefore ignore the omission and proceed with the determination of the appeal on merit." (Emphasis added)*

From the above authorities and as already alluded to the yard stick as to whether the omission is fatal or not is the level of prejudice that caused or

likely to be caused to the party if the omission to convict is ignored. In this case in my assessment there is no prejudice which is likely to be caused to any party if the omission is ignored and proceed to determine the appeal on merit as no party has raised it. As the irregularity is curable under section 388 of the CPA, using the revisionary powers bestowed to this court under section 373(1)(a) of the Criminal Procedure Act, I hereby 'treat as done that ought to have been done' by the learned trial magistrate by entering a conviction.

Having so found and done, I now move to consider and determine the appeal on merits. What is discerned from the grounds of appeal by the appellant is that, it is not in dispute that the incident of rape occurred to the victim as there is no single ground of appeal by the appellant challenging that fact. Even if the same was to be questioned by the appellant, I would have held there was proof of penetration of the victim's private parts as evidence of PW1 and exhibit P1 (PF3) that her labia majora had bruises and her high vaginal swabs showed presence of spermatozoa coupled with the evidence of the victim herself that when raped she felt pains proves beyond reasonable doubt that the victim was in fact raped. What remains in dispute is whether it is the appellant who committed the offence or not as in his 1st and 2nd grounds of appeal is raising the issue of his identification by the victim (PW2) under both visual and voice identification. Ms. Winchenslaus says it the appellant while the appellant denies that, his identification by PW2 is questionable. It is the law that evidence of visual identification is one of the weakest kind and most unreliable evidence. Courts are therefore warned to refrain from acting on such evidence unless all possibilities of mistaken identity are eliminated and the court is satisfied that the evidence is

absolutely watertight. See the case of **Mugo Vs. Republic** [1966] EA 124. It follows therefore that when convicting or upholding conviction basing on such evidence court must carefully consider and analyse all surrounding circumstances of the crime as it was rightly stated in **Mugo's** case (supra) where the Court enumerated factors to be considered and observed:

> *"We would for example, expect to find on record questions as the following posed and resolved by the judge:* ***the time the witness had the accused under observation; the distance at which he observed him; the condition in which such observation occurred, for instance, whether it was day or night time, whether there was good or poor lighting at the scene; and further whether the witness knew or had seen the accused before or not.*** *These matters are but few of the matters to which the trial judge should direct his mind before coming to any definite conclusion on the issue of identity". (emphasis supplied)*

The above guidelines were almost restated in a celebrated case of **Waziri Amani Vs. Republic** [1980] TLR 250. Now applying the said guidelines in the circumstances of this case I agree with the learned State Attorney that evidence of visual identification against the appellant is watertight as I shall soon explain. In sexual offences the victim is always in a better position to prove that sexual intercourse occurred and that it is none than the accused person who committed the offence. See the case of **Seleman Makumba Vs. Republic**, [2006] TLR 379. In this case PW2 told the court the rape incident took during night time and lasted approximately an hour which I find was enough and sufficient time to put the appellant under observation.

Secondly the appellant was known the appellant before as he is her blood brother. Thirdly, there was enough moonlight that aided her to properly identify him. To let the witness testimony come to light I quote part of her evidence in court during examination in chief at page 16 of the typed proceedings:

> *"It was night but I was able to recognize him because I know him, he is my brother since we were young, but also there was enough moonlight, but also the act of raping took like one hour."*

With such evidence I have no flicker of doubt that the proximity between the two was so close to allow unmistaken identity as the rape act attracts close contact of the bodies. So while performing the show PW2 had sufficient time to observe the appellant. Further to that prior to the raping incident as per PW2 the evidence which is corroborated by PW3 and PW6, the appellant had conversation with PW2 for some time when asking her to wake up and give him fire. On recognition of her brother's voice that is when she decided to come out before meeting the appellant. That evidence aside what gives me more assurance of the appellant's identification is PW2's act of reporting the incident early in the morning to the village administration and mentioning the appellant as the perpetrator of rape incident at the earliest possible time as evidenced by PW3 and PW6 in their testimonies. Reporting of the incident and mentioning the perpetrator at the earliest possible time is an assurance of the reliability of the witness' evidence on identification. I am therefore satisfied the conditions that prevailed during the incident were such that eliminated all the possibility of unmistaken identity by PW2. It is from that evidence and reasoning I find the 1st and 2nd grounds of appeal lacking merits and I dismiss them.

As to the 3rd, 4th and 5th grounds of appeal, I do not find merits on them. As rightly submitted on by Ms. Winchenslaus there is no substantial contradiction on the evidence of PW2 and PW5 as regard the weapons used to threaten PW2 as alleged by the appellant to demand for reassessment of credibility of the witnesses. It is true PW2 said the appellant threatened her with a knife before raping her and that PW5 tendered in court two saws that were collected from the scene of crime. However, there is no contradiction as which amongst the knife and two saws used to threaten PW2 with as PW5 never told the court that the two saws were used to threaten PW2. When cross examined by the appellant PW5 said the exhibits were received from Cpl Shedrack who said were concerned with the case rape. And on further cross examination he added, did not know who committed the offence of rape and who was related with the said exhibits. With such clear explanation I do not find anything tangible to call for reassessment of credibility of the alleged two witnesses by this court basing on the appellant's assertion that there was contradiction on the weapon used by the appellant to threaten PW2 with as the appellant never cross examined PW2 on that aspect to establish the alleged contradiction. I so find as credibility of witness is usually binding on the appeal Court unless there are special circumstances calling reassessment. See the case of **RASHID ISSA Vs. R, Criminal Appeal No. 280 of 2010 (CAT-unreported)** where the Court stated:

> *"It is trite law that the trial Court's finding as to the credibility of witnesses is usually binding on an appeal Court unless there are circumstances on the record which call for a reassessment of their credibility. (See,* ***Omari Ahmed V.R.****[1983] TLR 52). In*

the present case, we have found no compelling circumstances meriting reassessment of the said witnesses' credibility."

As the appellant has failed to establish and prove the alleged contradictions on the evidence of PW2 and PW5 that affects their credibility, I hold the 3rd, 4th and 5th grounds of appeal have no merits too and I dismiss them. Lastly is the 6th ground of appeal where the appellant claims the prosecution case was not proved against him beyond reasonable doubt. The learned State Attorney in response submitted at long substantiating the decision arrived at by the trial court. I am at one with her and therefore of the holding that, in this case the prosecution managed to prove its case beyond reasonable doubt as the evidence of PW2 corroborated by that of PW1, PW3, PW6 and exhibit P1 pointed irresistibly to the guilty of none but the appellant to have committed the offence. During testimony before the trial court it was clear from both PW2 and appellant that the two were blood relatives as sister and brother respectively and therefore sexual intercourse between them is prohibited by the law under section 158(1)(a) of the Penal Code which provides thus:

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) N/A

(b) if the female is of the age of eighteen years or more, to imprisonment for a term of not less than twenty years. (Emphasis supplied).

It is evident from the evidence and finding of the trial court that penetration of PW2's private parts was proved by the evidence of PW2 herself corroborated with that of PW1 and PF3 (Exh. P1). Further to that there is evidence of PW2 who identified the appellant as perpetrator of the offence whose evidence is corroborated by evidence of PW3 and PW3 whom she reported the incidence to at the earliest possible time mentioning the appellant as perpetrator. That evidence proves and leaves me without scintilla of doubt that, it is the appellant who committed the said offence. As if that is not enough the appellant orally confessed before PW3 and PW6 to have committed the said offence and pleaded for forgiveness. The appellant in his defence never retracted the said confession which the trial court believed to be true and based its conviction among other evidence as there was no need of warning itself of the danger of acting on such confession for not being retracted by the appellant.

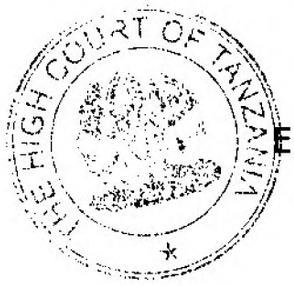
The appellant's defence was properly considered by the trial court before it was rejected for failure to shake the prosecution case. It was his defence that the case against him was fabricated by PW2 who owed him Tshs. 70,000/= as she failed to repay it. And that PW2 had odd relationship with his wife which fuelled hatred against him to the extent that the same was known to the village suburb chairman (PW3). To the surprise when PW2 and PW3 were testifying the appellant never cross examined them on those facts to establish and prove his defence of fabrication of case basing on ill relationship between him and PW2. In rejecting his defence the trial court considered and reasoned that the appellant failed to cross examine PW2 and PW3 hence failure to discredit prosecution evidence, the finding which I find to be correct and justified in law. Thus the 6th ground of appeal lacks merit

too. In totality I find no reason to fault the findings of the learned trial magistrate.

In the premises and for the fore stated reasons, law and authorities, I am of the finding this appeal is devoid of merits and the same is hereby dismissed in its entirety.

It is so ordered.

DATED at DAR ES SALAAM this 20th day of August, 2021.



E. E. KAKOLAKI

JUDGE

20/08/2021

Delivered at Dar es Salaam in chambers this 20th day of August, 2021 in the presence of the appellant in person and Ms. Monica Msuya, court clerk and in the absence of the respondent.

Right of appeal explained.

E. E. KAKOLAKI

JUDGE

20/08/2021