IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

MBEYA DISTRICT REGISTRY

AT MBEYA

CRIMINAL APPEAL NO. 124 OF 2020

(*Arising from Criminal Case No. 2 of 2020 in the District Court of Chunya at Chunya*)

Between

BAHATI LUDOVIKO ..... APPELLANT

Versus

THE REPUBLIC ..... RESPONDENT

JUDGMENT

A.A. MBAGWA, J.

The appellant herein was arraigned, prosecuted and finally convicted of Incest by Male contrary to section 158(1)(a) of the Penal Code by the District Court of Chunya at Chunya. Following his conviction, he was sentenced to imprisonment for thirty (30) years.

The evidence which led to the appellant's prosecution and subsequent conviction may, briefly, be told as follows;

It was alleged that on the 24th day of December, 2019 at night at Upendo village within the district of Chunya in Mbeya region, the appellant did have sexual intercourse with XX (PW2) aged 12 years while he knew that the said XX was his daughter.

In a bid to prove the accusations, the prosecutions side called a total of seven witnesses and produced two documentary exhibits namely, exhibit P1 birth certificate of the victim (PW2) and exhibit P2 (the PF3). The appellant, on his side, stood a solo defence witness.

The prosecution evidence was to the effect that the appellant was living with his two children namely, PW2 and PW3 at Upendo village in a renting house. This was after the appellant had divorced his wife one Eva Ally Mwakanyamale (PW1) in 2016. The rented premises contained a sitting room and bed room. As such, the victim PW2 and her young brother (PW3) used to sleep in the sitting room whereas their father, the appellant was sleeping the bed room. The appellant had thus to pass through the sitting room before he entered his bedroom.

On the fateful day i.e. 24th day of December, 2019 at night when the appellant came back from drinking, he woke up the victim (PW2) and ordered her to enter the appellant's bedroom. The victim heeded to the instructions. Having entered the bedroom, the appellant ordered her to remove her clothes. The appellant undressed as well and inserted his penis into the victim's vagina five times. The victim screamed due pains she sustained but she had assistance. The cries were heard by the victim's young brother (PW3) who was left sleeping in the sitting room. Thereafter, the victim returned to the sitting room and continued to sleep.

In the following morning, the victim rushed to her grandmother Maria Maliyabibi who, according to the evidence, was living in a nearby house. The victim narrated her the ordeal which had befallen her in the previous night. The victims's grandmother Maria Maliyabibi reported the incident to the Village Executive Officer of Upendo village one Twigisye Ephraem

Mwaipungu (PW4) who issued an arrest warrant. The appellant was therefore located, apprehended and brought before PW4. On being interrogated by PW4, the appellant admitted having sexual intercourse with the victim but claimed that he was drunk. PW4 therefore referred the appellant and the victim to Makongolosi Police Station for further investigative procedures.

At Makongolosi Police Station, they were received by G. 4684 DC Deogratius (PW7) who issued a PF3 (exhibitP2) to the victim for medical checkup. The victim in the company of her grandmother Maria Maliyabibi went to Makongolosi Dispensary where they were attended by a Clinical Officer one Bernard Nguli (PW6). Upon medical examination, Bernard Nguli found the victim's vagina had been perforated. He concluded that the victim's vagina was inserted by a blunt instrument. When all this had been done, the appellant was arraigned in the District Court of Chunya.

The appellant, on his part, denied the allegations. He told the trial court that the victim (PW2) and her younger brother PW3 were sleeping at their grandmother's house. He delved much to criticize the prosecution evidence saying that the case against him was concocted.

After hearing the evidence of both parties and upon evaluation of the same, the trial court was of unfeigned findings that the prosecution case was proved beyond reasonable doubt. Consequently, the trial District Court convicted the appellant of Incest by Male contrary to section 158(1)(a) of the Penal Code and proceeded to sentence him to imprisonment of thirty (30) years.

Aggrieved by both conviction and sentence, the appellant approached this Court to assail the decision of the trial District Court.

The appellant filed a petition of appeal containing several grounds of appeal which could be condensed in the following meaningful grounds;

1. That the trial court erred in law and facts to convict the appellant based on the hearsay evidence
2. That the trial magistrate erred in law and facts by convicting the appellant based on the exhibits which were not read out after their admission
3. That the trial magistrate erred in law and fact by his failure to consider the defence evidence.
4. That the trial court erred in law and fact to believe PW2 that she was raped whereas no bruises, swelling, bleeding or spermatozoa were found in her private part.
5. That the trial magistrate erred in law and fact to convict the appellant while the prosecution case was not proved beyond reasonable doubt.

When the appeal came for hearing, the appellant appeared in person to prosecute his appeal whereas the Republic was represented Hebel Kihaka, learned State Attorney. As usual, the appellant being unrepresented, did not have much to submit. He prayed the Court to consider his grounds of appeal and finally allow his appeal.

Mr. Kihaka, on his part, resisted the appeal. He supported both conviction entered and sentence meted out by the trial District Court.

To start with the 1st ground of appeal, Mr. Kihaka submitted that the ground was devoid of merits in that in convicting the appellant, the trial court

heavily relied on the evidence of the victim (PW2). He further submitted that PW1, the victim's mother told the court that PW2 was the biological daughter of the appellant aged twelve (12) years. Similarly, Kihaka submitted that PW3 testified that the appellant was their father. The learned State Attorney concluded that there was no hearsay evidence.

In addition, Mr. Kihaka argued that PW2 explained it well that the alleged rape took place and that on the fateful day the appellant took her in his bedroom where he had sexual intercourse with her while PW3 was asleep. Further, Kihaka submitted that PW6 examined the victim and found that the victim's vagina had been perforated.

It is the submission of the State Attorney that by looking at the judgment, the court relied on the evidence of PW1, PW2 and PW3 hence there was no hearsay evidence as contended by the appellant.

With respect to the 2nd ground of appeal, Mr. Kihaka partly conceded. He said that at page 20 of the proceedings, it is indicated that the birth certificate exhibit P1 was tendered by PW5 but was not read out after its admission. He thus submitted that it should be expunged from the evidence. He, however, hastily submitted that P1 is birth certificate which was intended to establish the age of the victim as such, even if it were expunged, the fact of age is still covered by the oral testimony of PW1 who testified that the victim was born on 15th day of May, 2008. Kihaka told the court that the age of the victim was also corroborated by the appellant himself during preliminary hearing when he admitted this fact.

With respect to the second exhibit to wit, PF3 which was produced in evidence and marked as exhibit P2, Mr. Kihaka parted company with the

appellant. The State Attorney said at page 24 of the proceedings, it is clearly indicated that the exhibit was read and or explained immediately after its admission in evidence. He thus submitted that the second ground was demerited as well.

On the 3rd ground of appeal, Mr. Kihaka submitted that the trial magistrate dispassionately considered the evidence of both parties. He particularly referred this court to page 7 and 8 to buttress his argument. In alternative, Kihaka argued that even if this Court finds that the defence evidence was not considered, still this being the appellate court, it has powers to re-evaluate the evidence and come out with its own findings. On this note, he referred the Court to the case of **Aman Ally @ Joka vs the Republic, Criminal Appeal No. 353 of 2019, CAT at Iringa** in particular at page 20.

Coming to 4th ground of appeal to the effect that the trial court wrongly relied on the evidence of PW2 that she was raped while there were no ingredients of rape like sperms etc, the learned State Attorney was opined that the ground has no merits for the following reasons;

He said that in rape offence, the main ingredient is penetration as explained under section 130(4)(a) of the Penal Code. Further, 130(4)(b) is to the effect that it is not necessary to have bruises in order to prove rape. He therefore submitted that the evidence of PW2 proved the offence beyond reasonable doubt that there was penetration and the responsible person was no other than the appellant.

Like the preceding grounds, the learned State Attorney dismissed the 5th ground. He submitted that it is not true that the trial court considered the prosecution evidence only. He said that the trial court considered the

defence evidence as well. More so, Mr. Kihaka argued that the trial court relied on PW1, PW2 and PW3 who testified in court and the appellant was given the opportunity to cross examine them but the question of bad relation was not raised. Thus, raising it at the appellate stage is an afterthought.

Mr. Kihaka continued to submit that PW3 said it well at page 13 of the proceedings he was sleeping with the victim PW2 but he was awakened by noises of PW2 who was crying in the appellant's room. Thereafter he saw PW2 coming from the father's room. Kihaka further told the court PW3 was only 5 years old, thus even if he had gone to the appellant's room in response to the alarm, still he could not help anything.

Again, Mr. Kihaka told the Court that PW2 clearly testified that after the incident, the following day she left for her grandmother who later on made a report to the village leadership on 28/12/2019. He therefore submitted that the delay was caused by her grandmother. But after the information was conveyed to the village leadership, the responsible organs acted promptly.

Regarding the complaint that no neighbour was called to testify, the learned State Attorney submitted that it has merits. He said that the prosecution witnesses who were called were enough to prove the offence. He referred the Court to section 143 of Evidence Act and submitted that there no specific number of witnesses required in order to prove a specific fact in issue. He concluded that the evidence of PW2 is sufficient to prove the case. He backed up his contention with the case of **Said Majaliwa vs the Republic, Criminal Appeal No. 2 of 2020, CAT at Kigoma** and particularly at page 15 where it was held that the best evidence in sexual offences is of the victim.

On the strength of the prosecution evidence, the State Attorney prayed this Court to dismiss the appeal and uphold conviction and sentence.

I have had an occasion to go through the trial court record, grounds of appeal and the submission by the Republic.

To start with the 1st ground, whereas the appellant complains that his conviction was predicated on hearsay evidence, the respondent/Republic was opined differently. It was the respondent's submission that the conviction was mainly based on the evidence of the victim (PW2). After revisiting the trial court evidence, I have failed to find substance in this ground. The evidence of the victim (PW2) is very clear on how sexual intercourse took place on the fateful night. PW2's evidence is further corroborated by PW3, the younger brother of the victim who heard the victim crying from the appellant's bedroom, PW4 who testified that the appellant orally confessed before him and PW6 who examined the victim and found his vagina perforated. On this regard, I find no merits in this ground of appeal and therefore I dismiss it.

In the 2nd ground of appeal the appellant attacked the trial court findings on the ground that it relied on the illegally admitted exhibits. The appellant said that the exhibits were not read out after admission as such they ought to be expunged from the evidence. Responding on this ground of appeal, Mr. Kihaka partly conceded to this ground. He said that exhibit P1 (birth certificate of the victim) was not read out. However, he differed with the appellant on exhibit P2 (PF3). Kihaka referred to page 24 of the proceedings and submitted that the said exhibit was read out. Mr. Kihaka continued to submit that whereas he conceded that exhibit P1 should be

expunged from record, he was of the view that its substance was covered by oral account of PW1.

It is common cause in this case that there were tendered two exhibits in the trial court namely, birth certificate (PE1) and PF3 (PE2). As rightly submitted by both parties, exhibit PE1 was not read out after its admission. The law is settled on such anomaly that where an exhibit is not read out after its admission it should be expunged from the record. See the case of **Hassan Said Twalib vs the Republic, Criminal Appeal No. 95 Of 2019, CAT at Mtwara.** It therefore goes without say that exhibit PE1 should be expunged and I hereby expunge it from the evidence.

Having expunged exhibit PE1 from the evidence, the next issue for consideration is whether its exclusion from the record vitiates the conviction. As rightly submitted by the learned State Attorney, the essence of birth certificate (PE1) was to establish the age of victim. However, this fact was well testified on by the victim's mother one Eval Ally Mwakanyamale (PW1). Thus, I agree with the State Attorney that the age of the victim was proved through oral account of PW1 whose evidence, in my view, is competent and reliable. It is a settled position of law that the evidence of victim's age in sexual offences case may come from birth certificate, victim or her parents. See the cases of **Isaya Renatus vs the Republic, Criminal Appeal No. 542 of 2015** and **Mwalimu Jumanne vs the Republic, Criminal Appeal No. 18 of 2019, CAT at Dar es Salaam**.

In addition, the appellant admitted the age of the victim alleged by the prosecutions. At page 4 of the proceedings in the memoransum of agreed matters, the appellant admitted that the victim is his daughter and was born in 2008.

With regard to the second exhibit namely, PF3 (exhibit PE2), the record speaks against the appellant complaints. As submitted by the learned State Attorney, at page 24 of the proceedings it is clear that the PF3 was read out after its being tendered in evidence as such the appellant's lamentation on this is baseless. That said, I find this ground of appeal devoid of merits and therefore dismiss it.

Furthermore, the appellant assailed the trial court decision on the ground that the trial magistrate did not consider the defence evidence. In contrast, Mr. Kihaka submitted that the trial magistrate properly considered the evidence of both parties. After reading the trial court judgment particularly from page 7 through 10, I have been satisfied that the trial magistrate properly analysed the evidence of both parties and finally arrived at the conclusion that the appellant carnally knew his biological daughter (PW2). This ground of appeal is therefore dismissed.

Also, it was the appellant's complaints that the trial court erred in law and fact to believe PW2 that she was raped whereas no bruises, swelling, bleeding or spermatozoa were found in her private part. In response Mr. Kihaka submitted that in rape offences, the main ingredient is penetration as explained under section 130(4)(a) of the Penal Code. He argued that in the spirit of section 130(4)(b), it is not necessary to have bruises in order to prove rape. He therefore submitted that the evidence of PW2 proved the offence beyond reasonable doubt because there was penetration and the responsible person was no other than the appellant.

As I said in the 1st ground of appeal, the testimony of the victim (PW2) is very clear that the appellant had forceful sexual intercourse with the victim on the fateful night. It is the position of law that in sexual offences, the best

evidence comes from the victim. See the case of **Selemani Makumbi vs Republic TLR [2006] 384.**

Furthermore, PW2's evidence is corroborated by PW3, the younger brother of the victim who told the court that he heard the victim crying from the appellant's bedroom. More so, PW4 told the trial court that the appellant orally confessed before him that he did have carnal knowledge of the victim and PW6 who examined the victim and found his vagina perforated. The cumulative evidence as analysed above leaves no doubt that the appellant had carnal knowledge of her biological daughter namely, PW2. As such, this ground of appeal is unmerited.

In the similar vein, on the basis of prosecution evidence as hinted above, it remains my findings that the prosecutions proved the case beyond reasonable doubt.

In the upshot, I find this appeal devoid of merits and consequently proceed to dismiss it. The conviction entered and sentence meted by the trial court are hereby upheld.

Right of appeal is expressed

A.A. Mbagwa
Judge
08/11/2021