IN THE HIGH COURT OF TANZANIA

(MTWARA DISTRICT REGISTRY)

AT MTWARA

CRIMINAL APPEAL NO. 40 OF 2022

(Originating from Nachingwea District Court in Criminal Case No.179 of 2020 before Hon. N.M. Mhelela, RM)

KHALIFA RASHIDI..... APPELLANT

VERSUS

THE REPUBLIC..... RESPONDENT

JUDGMENT

Date of Last Order:13/6/2022
Date of Judgment: 1/8/2022

LALTAIKA, J.:

The appellant, **KHALIFA RASHID**, was arraigned in the District Court of Nachingwea at Nachingwea where he was prosecuted on allegation of two counts. 1. Incest by males contrary to section 158(1) of the Penal Code, [Cap 16 R.E. 2019] now the Revised Edition 2022 and 2. Rape contrary to section 130(1)(2)(e) and 131(1) of the Penal Code.

When the charge was read over and explained to the appellant, he pleaded not guilty to both counts thus, the matter went to full trial. At the trial the prosecution paraded six (6) witnesses, namely, the victim (PW1), Swalehe Khalifa Rashid (PW2), Agness Rajabu (PW3), Zainab Chande Litambe (PW4), Shaban Abdallah Ntilange (PW5) and WP 7841 D/C Ikupe (PW6). The prosecution also tendered two (2) exhibits; a clinic card of the

victim (exhibit "M1") and student admission register (exhibit "M2") which were admitted in evidence.

In defence, the appellant vehemently distanced himself from the allegation and contended that there was no eye witness who saw him committing the offence. He further disputed the credibility of prosecution witnesses. He testified that their evidence was not water tight to ground his conviction. He finally raised the issue of family misunderstanding especially between him and his wife.

Having been convinced that the prosecution had proved their case at the required standard namely beyond reasonable doubt, the learned trial Magistrate found the appellant guilty of the offence of incest by males contrary to section 158(2) of the Penal Code and sentenced him to serve a term of thirty (30) years' imprisonment. Aggrieved, the appellant lodged a substantive petition of appeal comprised of three grounds namely:

1. *That, the trial Magistrate erred in law and fact by convicting and sentencing an accused person while the prosecution did not prove the case beyond reasonable doubts.*
2. *That, the trial Magistrate erred in law and fact by failure to analyses the testimony of PW1 as the incidence was reported lately.*
3. *The trial Magistrate erred in law and fact by convicting the Appellant while the prosecution failed to call important witness and tender an important exhibit namely PF3.*

At the hearing of this appeal, the appellant appeared under custody while enjoying legal services of Ms. Priscila Mapinda and Ms. Acrala Blanket, both learned advocates. The respondent/republic on the other hand, was represented by Mr. Enosh Kigoryo, learned State Attorney.

In her oral submission, Ms. Mapinda argued on the first ground of complaint that there are a lot of discrepancies that shed doubt in the prosecution case. She further submitted by pointing those discrepancies. On the first discrepancy, she referred this court to page 12 and 13 of the trial court proceedings. The learned counsel stated that at page 13, PW2 (Swalehe Halifa Rashidi), the younger brother of the victim testified that the offence was committed several times with the victim and Sofia. She stressed that PW1 did not mention Sophia as one of the people she slept with in the same room. In that regard, Ms. Mapinda wondered why Sophia was not called to testify on the same.

Submitting on the second inconsistency, the learned counsel argued by referring to page 8 and 13 of the typed proceedings of the trial court. She submitted that PW1 had testified that her father raped her by inserting his penis in her vagina. However, THE learned counsel contended that PW2 reportedly said that the victim revealed to him that the appellant used to have sex with her through the vagina and her anus.

Ms. Mapinda took this court to the third inconsistency and referred me to page 8 of the typed proceeding. She insisted that the victim testified that the offence was committed from 2019 to 2020. In line with this observation, the learned counsel submitted that on the other hand the victim testified that the offence was committed during the time her step mother was away because of her 40th ceremony (arobaini ya uzazi). To this end, the learned counsel argued that those discrepancies create contradictions that raise doubts as to whether evidence testified by PW1 was credible. To cement her argument, she referred to the litany of authorities decided by the Court of Appeal. These include the case of

Paschal Kiteu vs. Republic, Criminal Appeal No.12 of 2008 CAT, Dar es Salaam, **Dickson Elia Shakwata vs Republic**, Criminal Appeal 97.

Referring to **Gaudence Mpepo vs Republic**, Criminal Appeal No.67 of 2018 Ms. Mapinda submitted that the trial court ought to decide whether the contradiction and inconsistency goes to the root of the case. Regarding the present case she opined that the discrepancies outlined and argued goes to the root of the matter since the trial court based its conviction on the evidence of the victim. Learned counsel stressed that that was fatal since the evidence of the victim can be fabricated. However, she contended that in sexual offences the victim's testimony is the best evidence but the court has to be careful in considering such evidence as failure to do that may occasion to miscarriage of justice.

Arguing on the third ground, Ms. Mapinda submitted on two tiers. Submitting on the first tier, the learned counsel argued that the prosecution had failed to tender the material evidence and call upon a material witness. She submitted that at page 4 prosecution listed and informed the court that would tender two exhibits which are victim's PF3 and birth certificate. She insisted that surprisingly the victim's PF3 was not tendered. Ms. Mapinda argued that the fact that the prosecution listed the PF3 as one of the documents they would tender but they did not do so creates an adverse inference that may be the PF3 withheld contained information or evidence that would result into the case to flop.

The learned counsel argued furthermore that the PF3 was important because was referred by several prosecution witnesses as the only thing that reassured them that the victim was sexually violated. To substantiate her argument, she referred to page 21 of the trial court proceedings.PW6 was the one who sent the victim for medical

examination and testified that the medical examination revealed that the victim was raped. On top of that, learned counsel stressed that the testimonies of PW2 all the way to that of PW6 none of them had the evidence to prove the commission of the offence. However, Ms. Mapinda submitted that the only way that the trial court could corroborate the contradictory testimony given by the victim was through the PF3.To back up her argument, Ms. Mapinda referred this court to the case of **Emanuel Senyagwa vs Republic**, Criminal Appeal No.22 of 2004 CAT, Dar. Ms. Mapinda concluded that failure to tender the PF3 confirms to their doubt that the contents of PF3 might have destroyed the prosecution's case.

On the second tier that the prosecution had failed to call a material witness, Ms. Mapinda insisted that she was aware that the prosecution is not obliged to call upon any particular number of witnesses. However, Ms. Mapinda insisted, in the matter at hand, the prosecution had indicated their intention to call one particular witness namely the doctor who conducted medical examination of the victim.

Still on the same issue, the learned counsel referred this court ato page 23 to 26 of the typed proceedings of the trial court where the prosecution had indicated their intention to call the doctor but their intention was not successful in spite of many adjournments. At the end, Ms. Mapinda argued that the doctor was not called and no reason was advanced for such failure. She further stressed that the Dr. was a material witness because he was the only person on record who had physically examined the victim and was the only person who could clear the doubts on whether the offence was actually committed. To fortify her argument, she referred to the case of **Azizi Abdallah v. R** [1991] TLR 71. Thus, she submitted that if such witnesses are within reach but not called without

sufficient reason, they court may draw adverse inference on the prosecution.

To this end, Ms. Mapinda submitted that in general the prosecution failed to prove their case beyond reasonable doubt. She stressed that it is a well-known principle that where there is doubt in criminal cases, the benefit of such doubt, should be given to the accused. Therefore, she called this court to allow the appeal and appellant be set free.

Responding to the arguments advanced by the appellant, Mr. Kigoryo supported the appeal. Learned State Attorney conceded on the presence of the discrepancies and inconsistencies on the prosecution's case. In line of that argument, he argued that PW1 testified (at page 8) that she could not tell anyone because the appellant threatened her. Surprisingly at page 9 she also testified that she managed to inform PW2 on the incidence of rape. He went on and argued that during cross examination PW1 testified that her vagina was open and swollen though there was no evidence to corroborate her testimony.

On the same argument, Mr. Kigoryo submitted that PW1 testified that she used to have sex with the appellant even in her room which she shared with other people including PW2. Learned State Attorney stressed that there is no evidence from those other people as to how the act was conducted while there were other people in the room.

Furthermore, Mr. Kigoryo submitted on another inconsistence pertaining to the evidence of PW2 as it is reflected at page 13 of the trial court proceedings. Learned State Attorney argued that the appellant used to enter into the room by jumping over the wall. He stressed that there was no evidence to corroborate that fact since PW2 had also stated that the room used to locked. Mr. Kigoryo went further and argued that on the

other hand PW2 testified that he was informed by PW1 that she was both raped and sodomized the fact which was not raised by PW1 in her testimony.

Learned State Attorney argued that the testimony of PW3 shows that PF3 was issued for medical examination but it was not tendered. He insisted that may be this document could corroborate the evidence of PW1 that her vagina was swollen. More so.Mr. Kigoryo submitted the evidence of PW4 and PW5 never testified on the incident. He further argued that the evidence of PW4 proved age of the victim. Whereas, the evidence of PW5 tendered the pupils register and that he interrogated the victim though he did not testify on what was told by PW1 during interrogation. Submitting on the evidence of PW6, she argued that PW6 testified that she was directed by the OC-CID to send the victim to hospital. However, learned State Attorney wondered since no record shows that PW6 took the victim to hospital for medical checkup. To this end, Mr. Kigoryo joined hands with the appellant's counsel that the case was not proved beyond reasonable doubt.

Ms. Mapinda had no rejoinder due to the fact that Mr. Kigoryo has not objected the appeal.

Having dispassionately but keenly gone through the record of the lower court, grounds of appeal and the submissions in support of the appeal. There is no doubt that the pinpointed discrepancies and inconsistencies on the evidence of PW1 and PW2 creates reasonable doubts which waters down the evidence of the prosecution which amounted to the appellant's conviction. It is true that PW1 did not testify by mentioning the SOPHIA as among the persons who were present when rape was committed in their room. Therefore, the evidence of PW1 and PW2 do not meet on the

description of the parties who slept with her. Their evidence does not tally because PW1 testified that she used to sleep with PW2 while PW2 told the trial court that she used to sleep in same room with her sisters including the victim and SOPHIA. Also, PW1 testified that she used to have sex with the appellant at the toilet, her room and also appellant's room since 2019 to 2020. However, the PW2 testified that the appellant used to enter into their room during the midnight to take the victim to the toilet.PW2 emphasised that the appellant used to jump on top of the wall because the door was closed. Indeed, with this evidence, there are two doubts I should explain. **One**, if real PW1 informed PW2 about the incident why then did she failed to narrate all the places the appellant used to make unlawful sex with her. As per the evidence of PW2 it only shows that the incident was committed in the toilet from 2019 to 2020.

Furthermore, I am alive of the settled principle that in sexual offences the best evidence comes from the victim which even not corroborated may result into conviction of the accused. See, **Selemani Makumba v R** [2006] TLR 379. However, in the present case, I find it difficult to believe PW1 if told the trial court on basis of what she promised before she testified. I am saying so because, how comes appellant used to jump on top of the wall without being noticed by either the victim, SOPHIA and PW2. I think if the appellant had to climb the wall and thereafter jump down obvious there was roar which could in anyhow ambush the victim, PW2 and SOPHIA. **Two**, I am surprised how the appellant managed to make sexual intercourse with the victim in the presence of PW2 and SOPHIA without being noticed. Mind you, already PW1 when cross examined testified that there was no eye witness who saw the incident. Also, I am shocked how the appellant managed to climb the wall and

jumped down without being noticed by either the victim or PW2 or SOPHIA. Remember that the incident started way back in 2019 to 2020.Worse enough the evidence of PW1 and PW2 shows that the incident used to take place during the midnight neither PW1 nor PW2 who testified on the conditions of visual identification. I am aware that the facts do not feature the conditions of identification as per case of **Waziri Amani vs Republic** [1980] TLR 250. Thus, my question is how did PW1 and PW2 identify the appellant? In that regard, it is very possible that the one who used to make unlawful sex with the victim is not the appellant.

Three, the length of time of which the offence was committed gives doubts as to when PW1 told PW2 about the occurrence of the incident. Also, as to why the victim or PW2 kept quite for so long.I am aware that she testified that she was threatened by the appellant upon disclosure of the odeal.The issue here is the length of time taken to reveal to PW2 who also PW1 and PW2 had hidden the same before PW2 revealed the incident to PW3.As the circumstances of the matter are concerned, I am of the view that PW1 was matured enough and able to report the matter to her seniors or even her relative or age mates.PW2 testified that he saw the appellant taking the victim in the midnight, the question which comes into my mind is why did he fail to communicate the information to his relative or mother while he was not threatened by the appellant? By considering the circumstances of this case, I find the reason of PW1 for failure to relay the ordeal to her superiors is wanting and cannot be taken to her advantage. See, the case of **Selemani Hassani vs Republic**, Criminal Appeal No.203 of 2021

Four, the evidence of PW1 and PW2 do not tally on the type of carnal knowledge which the appellant was being alleged with it. I am saying so,

since PW1 testified that she was used to be raped by the appellant. She described how the appellant used to insert his penis into her vagina. However, the evidence of PW2 who was told by PW1 about the incident shows that the appellant had sex with the victim at the vagina and anus (inchonyoni). If real PW1 revealed those facts to PW2 then, why did she fail to testify in court and to the police officer who investigated the matter? Also, PW3 testified that she was informed by BONITA about the incident and also, she interrogated the victim and PW1 narrated about the incident to her. However, when PW3 was being cross examined by the appellant told the trial court that she saw the appellant taking the victim at the midnight. Surely, I get another hard time which part of evidence of PW3 I should believe between being told about the incident or seeing the appellant taking the victim in the midnight. In fact, these discrepancies and inconsistencies on the evidence of the PW1, P2 and PW3 waters down the credibility of PW1, PW2 and PW3 particularly when they are related to each other plus the evidence of the appellant. See, the case of **Shabani Daudi v. Republic**, Criminal Appeal No.28 of 2000(unreported).

Also, the facts of PW1 are not being certain as to the whereabout of PW4 from 2019 when the incident was alleged to commence to 2020 when PW2 revealed it to BONITA.I was trying to think beyond and imagine if through out PW4 was in the "arobaini" ceremony her last born child.

To wind up on the first and second ground, I concede with what Ms. Mapinda submitted in chief. **First**, not every discrepancy in the prosecution case would cause the prosecution case to flop but it is only when the gist of the evidence is contradictory then the prosecution case would be dismantled. See, **Dickson Elia Shapwata vs Republic**(supra). **Second**, I agree that the learned trial Magistrate failed

to note the discrepancies and the contradictions on the evidence of the PW1, PW2 and PW3 as observed above. And if he could have noted the discrepancies and contradictions then he ought to have addressed them and decide whether they are minor or they go to root of the case. Regarding the present appeal, I am convinced that the discrepancies and inconsistencies pinpointed on the evidence of PW1, PW2 and PW3 have led to material contradictions which goes to the root of the matter and in turn led doubts which waters down the proof of the prosecution case against the appellant beyond reasonable doubt.

As to the third ground, I concede with the submissions of both learned counsel and State Attorney that the prosecution did not call the doctor who examined PW1 and also no PF3 was tendered and admitted as prosecution exhibit. I alive with the principle that prosecution case is not required to be prove a case by a certain number of witnesses but even the evidence of a single witness may prove it. However, failure to tender a PF3 and call a material witness (doctor) while the prosecution had shown intention to call him and tender the PF3 without assigning reasonable reasons while the intended witness was within reach may lead to make an adverse inference against the prosecution case. See, the case of **Emanuel Senyangwa vs Republic** (supra) and also the case of **Boniface Kaundakira Tarimo vs Republic**, Criminal Appeal No. 350 of 2008(unreported)the Court of Appeal held:

> *"It is thus now settled that where a witness who is in a better position to explain some missing links in the party's case, is not called without any sufficient reason being shown by the party, on adverse inference may be drawn against that party, even if such inference is only permissible one"*

In the present case, PW1 testified that her vagina was swelling and also when cross examined, she testified that her vagina was open and swelling. In this regard, I subscribe what the learned Counsel and State Attorney submitted that the evidence of the doctor who medically examined the victim and filled the PF3 was so crucial in corroborating the evidence of PW1 in three perspectives. **One**, if PW1 was really penetrated by a blunt object like a penis of the appellant. **Two**, if the PW1's vagina was found open and swelling. The mere testimony of PW1 alone that is vagina was found open and swelling did not amount to proof of penetration. Indeed, it ought to be corroborated with the evidence of the doctor and PF3 taken. **Three**, the evidence of doctor could have proved that the victim was brought to Hospital for medical examination as alleged by PW6.The absence of doctor's evidence gives doubts if PW1 was sent to hospital for medical check-up.

With the foregoing, I find the appeal merited and hence, allow it, quash the judgment, and set aside the sentence meted out to the appellant. I order that the appellant **KHALIFA RASHIDI** be released forthwith from custody unless otherwise held for other lawful reasons.

It is so ordered.

E.I. LALTAIKA

THE HIGH COURT OF TANZANIA

JUDGE

1.8.2022