IN THE HIGH COURT OF TANZANIA

AT TABORA

DC CRIMINAL APPEAL NO. 57 OF 2020

(Originating from Criminal Case No. 53 of 2020 of the District Court of Tabora)

JOHN S/O HENRY ..... APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

Date of Submissions: 11/07/2022

Date of Delivery: 12/07/2022

AMOUR S. KHAMIS, J:

Before the District Court of Tabora the appellant John s/o Henry was tried on a charge of Incest by Male contrary to section 158 (1) (a) and 2 of the Penal Code [CAP 16 RE 2019].

The particulars of the charge were that, on 27th day of April, 2020 during day hours at around or about 10:00hrs at Iyombo area, Tumbi Ward within Tabora Municipality, the accused had prohibited sexual intercourse with XXX d/o YYY aged 13 years who to his knowledge is his daughter.

Upon full hearing of the case, the appellant was convicted and sentenced to serve 30 years imprisonment. Aggrieved by the decision and sentence meted against him, he appealed to this Court on the following grounds: -

1. *That, the case for the prosecution was not proved beyond reasonable doubt as required by the law.*

2. *That, the evidence by PW3 was invalid to rely upon to convict the appellant as no voir dire test was conducted in order to ascertain whether she possessed sufficient intelligence and knows the meaning of oath.*

3. *That, the age of the victim of the offence (PW3) was not proved to the requirement of the law as no birth certificate was tendered neither the head teacher appeared to testify to that effect, the rest of evidence regarding age was approximation.*

4. *That, the learned trial magistrate erred in law by failure to draw an inference adverse to the prosecution who failed to summon SAUTI SIJENGA the neighbour to PW2 in support of the evidence by PW2.*

5. *That, the cautioned statement tendered in Court as exhibit P2 was not proved that the appellant confessed to have committed the crime.*

6. *That the evidence of PW1 to PW5 are all hearsay and should not be relied upon to convict the appellant.*

7. *That, there was non direction in the evaluation of the evidence of the appellant's defence by the trial Court which occasioned injustice in that the trial court did not consider the grudge between the appellant and PW2 (his wife)*

It is on the above listed grounds the appellant prays this court to allow the appeal by quashing the conviction, setting the sentence aside and letting him go free from prison custody.

At the hearing of the appeal the appellant appeared in person whereas the respondent Republic had the service of Mr. Deusdedit Rwegira, learned Senior State Attorney. The appellant moved the Court to allow the State Attorney make his submission first so that he could make a rejoinder in the end.

Opposing the appeal, Mr. Rwegira submitted that there was sufficient evidence for the appellant's conviction, that the testimony of the victim (PW3) at page 18 -19 met all the required legal standards by promising to tell the truth; that her evidence was clear as she stated that her own father had sexual intercourse with her the fact which the appellant did not dispute in his evidence.

Further, Mr. Rwegira submitted that the appellant did cross examine the victim on allegations that he married a second wife and the victim's mother had malice upon him. The learned state attorney implored this court to adopt the holding of the court in ***Selemani Makumba vs Republic*** 2006 TLR 384 to the effect that the true evidence of rape comes from the victim.

Mr. Rwegira continued to submit that the victim's mother (PW2) narrated to Court that she saw signs of penetration on the victim and she told her that it was her father who did the act. She subsequently reported the matter to hamlet charman. It is Mr. Rwegiras contention that, since the appellant failed to cross

examine PW2 (victim's mother) when he was given a chance it means he admitted what PW2 had stated.

In relation to the admission of PF3, Mr. Rwegira submitted that the PF3 was crucial evidence because it showed that the victim was raped. It was tendered by the right person a medical doctor who explained what was contained therein.

Lastly, the learned State Attorney submitted that the cautioned statement of the appellant was admitted without objection form the appellant.

In reply, the appellant hand nothing more to add rather he prayed the Court to adopt content of his supplementary records of appeal.

Having carefully scanned the submissions made by both parties, the issue calling for determination is whether this appeal has merit or not.

In disposing the grounds levelled by the appellant, I find it proper to condense grounds 1 and 4 because they are interlinked. For proper analysis I will start by analysing ground 2, 3, 5, 6, 7 and later I will finalise on the consolidated ground which is on whether the prosecution case was proved on a required standard.

Starting with 2nd ground of appeal, my determination is that, upon examination of the record, it came to my knowledge that the trial Court misdirected itself by not guiding the victim (PW3) to promise to tell the truth as required by Section 127 (2) of the

Evidence Act, Cap 6 R.E 2019 and instead conducted the old style of voir dire test. The law under subsection 2 reads: -

> *(2) A child of tender age my give evidence without taking an oath or making an affirmation but before giving evidence promise to tell the truth and not tell lies.*

As per the requirement of the law set in subsection 2 above, PW3 who was 13 years of age falls under the category of a child of tender age as defined by Section 127 (4) of the Evidence Act to mean a child who is under the age of 14 years so she was required to promise to tell the truth.

It has been a practice that, any evidence taken in contravention of Section 127(2) of the Evidence Act lacks evidential value and it must be expunged from the record. However, having read the evidence adduced by PW3 (the victim) in comparison to the appellant's defence, I will adopt the course taken by the Court of Appeal of Tanzania in a recent case of ***Wambura Kiginga vs Republic*** (Criminal Appeal 301 of 2018) [2022] TZCA 283, where in the Court observed that: -

> *"In this case we are fully convinced, that although the child did not promise to tell the truth, what she narrated was original, true and authentic. We will now proceed to the evidence particularly of the victim, PW5 and that of the appellant"*

In this ground, my finding is that, though the victim's evidence was taken without promising to tell the truth, her narration of what transpired sounds so original and authentic.

As to the second ground that the age of victim was not proved; I think this ground should not detain me much. It has been decided by this Court in numerous occasions that in any criminal proceedings where a child is involved, the age of that child may be proved by either producing a certificate of birth or a parent may prove the age of the child.

In the case at hand, at the trial Court there was no controversy about the age of the victim rather it is the appellant who rose that question at this stage. My determination of this ground is that, proving the age of the victim would not exonerate the appellant from being charged with the offence he stood charged. If it could be proved otherwise it could only lower the sentence from 30 years to 20 years of imprisonment but that was not proved.

The victim in her evidence stated in Court that she is 13 years old and she is a standard 4 pupil, that fact was not opposed by the appellant so that this Court could believe his allegation and further, in the cautioned statement that the appellant did not oppose. He stated that her daughter (victim) is 13 years old.

As to ground number 5 that the cautioned statement did not prove that the appellant did confess to have committed the crime; having read the cautioned statement that was admitted in Court

as exhibit P2 it shows that the appellant confessed to have committed the offence charged on 27/04/2020 at 10:00hrs.

The appellant did not submit anything in relation to the allegations that the evidence of PW1 – PW5 was hearsay hence unreliable.

In my examination of the record of the trial Court, I found that, the evidence of PW1 and PW2 was corroborated by the evidence of PW3. The rest, PW4 and PW5 were members of Police Force who investigated the crime so their evidence was based on the findings of their investigation. Those findings were corroborated by PW3 and PW4, a doctor who examined the victim.

As to ground 7 on non-evaluation of the appellant's defence, I perused the record to find that at page 8 of the impugned judgment, the trial magistrate observed a fact that the appellant denied to have committed the offence but upon consideration of the evidence from both prosecution and defence, he concluded that the evidence of the victim (PW3) is strong, honesty and reliable to find the appellant responsible for the crime.

Back to the consolidated grounds. As regards to the degree required for establishing a Criminal Offence and basing on my findings herein above, I join hands with the learned trial magistrate and the learned Senior State Attorney that, the case against the appellant was proved beyond reasonable doubt as required by the law.

Having said and done, I find the appeal to be devoid of merit. It is therefore hereby dismissed.

It is so ordered.

AMOUR S. KHAMIS

JUDGE

12/07/2022

OREDER

Judgment delivered in Chambers in presence of the appellant in person and Mr. Deusdedit Rwegira, Senior State Attorney for the Republic.

Right of Appeal explained.

THE HIGH COURT OF TANZANIA

AMOUR S. KHAMIS

JUDGE

12/07/2022