IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

IRINGA DISTRICT REGISTRY

AT IRINGA

CRIMINAL APPEAL NO. 05 OF 2022

OSWARD MGOMBELA ..... APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

(Being an appeal from the judgment of the District Court of Mufindi at Mafinga)

(Hon. S.E. Kyungu - RM)

dated the 25th day of October, 2021

in

Criminal Case No. 69 of 2021

JUDGMENT

Date of Last Order: 19/08/2022 &
Date of Judgment: 24/08/2022

S. M. Kalunde, J.:

The appellant was charged with Incest by Male contrary to section 158(1)(a) of **the Penal Code [Cap. 16 R.E. 2019]**. In a judgment delivered on 25.10.2021, the District Court of Iringa at Iringa (henceforth "the trial court"), convicted him of the offence and sentenced him to imprisonment for thirty (30) years. The appellant has filed the present appeal to impugn the whole judgment of the trial court.

To understand the scope of challenge made in this appeal, the brief facts are required to be stated. The appellant is a married man and has been blessed with 10 issues, the victim (name and identity

withheld) in this case being one of them. It was alleged that 26.06.2021, at Mhameni area Nundwe village within the district of Mufindi in Iringa Region, the appellant had prohibited sexual intercourse with his daughter aged 10 years. The appellant did not plead guilty, consequently, the prosecution had to parade three witnesses and tendered in evidence one documentary exhibit namely: the Police Form Number 3 (PF3) (**Exhibit P1**).

It was the prosecution case that on the fateful day, in the morning, the appellant and the victim went to Mhameni area within Nundwe village. Whilst there the appellant dragged the victim to a nearby bush told her to lay down. The victim heeded to the order, she laid down. Thereafter the appellant ordered the victim to undress her underwear, as she did the appellant took off his trouser and proceeded to penetrate the victim. The victim screamed for help in vain. After finishing what he intended to do the appellant warned the victim not to say a word and left her lying on the ground. The victim got up and went home where she reported the incident to her mother and her sister. To her dismay, her mother did not say or take any measure. The victim then went to report the issue to aunt Neema (**PW1**). Her aunt then reported the matter to the village office and then to the police. The victim was given PF3 for medical examination. The report to the police led to the arrest of the victim. The medical examination (Exh. P1) revealed that:

> *"Normal Female genitalia, No bruises, No Breeding, hymen perforated."*

In his defence the appellant alleged that the case could have been fabricated by PW1 whom he had a dispute concerning a piece of land. According to the relation between them had gotten bitter to the extent that PW1 burned one of his houses. In addition to that the appellant contended that there was contradiction as to the date of the commission of the offence. Having analyzed the prosecution and defence case, the trial court was satisfied that the appellant raped his daughter and as earlier stated convicted him of the offence of incest contrary to section 158(1)(a) of the Penal Code.

Disgruntled, the appellant filed a notice of appeal on 27.10.2021 to challenge the decision of the trial court. His petition of appeal contains four grounds of appeal which may be summarized into one major complaint that the trial court erred in convicting him based on contradictions and inconsistencies in prosecution witness testimonies.

During hearing, before me, the appellant was unrepresented, he appeared in person to argue his appeal. The respondent, Republic was represented by **Ms. Blandina Manyanda**, learned Senior State Attorney.

Arguing the appeal, the appellant submitted that no prosecution witness stated the date when the incident took place. He contended that PW2 (the victim) failed to mention when the incident took place. The appellant stated further PW1 also failed to state when the incident place. He added that whilst PW2 she was raped in June, PW1 stated that the incident took place in July. In his view the incident could not have happened in July as he was arrested on 30.06.2021. Owing to

the above contradictions, the appellant, is convinced that the charges against him were not proved to the required standard.

Ms. Manyanda did not support the appeal. she insisted that there was no contradiction in prosecution witnesses. Whilst acknowledging that the victim did not mention a specific date, the counsel submitted that that in her testimony PW1 stated that the incident took place last, since she testified in August, that meant she referred to July, 2021. The counsel insisted that there were no discrepancies in the prosecution witnesses and if there was any the same were minor and did not affect the prosecution case. In bolstering her argument, she cited the case of **Twinogone Mwambela vs Republic** (Criminal Appeal 388 of 2018) [2021] TZCA 515 (24 September 2021 TANZLII).

The appellant rejoinder on this subject was brief, he insisted that the was inconsistency in the prosecution witness, particularly, regarding the specifics of when exactly did the incident happen. In view of that the appellant insisted that his appeal be allowed so that he is set free and rejoin his beloved family.

The crucial issue for my determination is whether the trial court decision was faulty, and so whether the fault fundamentally undermined the root and essence of the decision as a whole. From the outset, I wish to point out that the parties have contradictory views on the existence and consequences, if any, of the alleged contradiction and inconsistencies.

My take off in resolving the appeal before me is by looking at the substance of the charge which the appellant was charged with. I pick

this approach whilst acknowledging the now settled position of law that a charge is a foundation of criminal proceedings upon which a criminal case is built (see **Hebron Kasigala v. Republic**, Criminal Appeal No. 3 of 2020; **Rajab Khamis @Namtweta v Republic**, Criminal Appeal No. 578 of 2019; **Samwel Lazaro v. Republic**, Criminal Appeal No. 2017 and **Maweda Mashauri Majenga @ Simon v. Republic**, Criminal Appeal No. 255 of 2017 (all unreported).

I am also alive that it is now trite law that the particulars of the charge shall disclose the essential elements or ingredients of the offence. This requirement hinges on the basic rules of criminal law and evidence to the effect that the prosecution has to prove that the accused committed the **actus reus** of the offence charged with the necessary **mens rea**. Accordingly, the particulars, in order to give the accused a fair trial in enabling him to prepare his defence, must allege the essential facts of the offence and any intent specifically required by law. These were words of the Court of Appeal (**Rutakangwa, J.A.**) in **Isdor Patrice v. The Republic**, Criminal Appeal No. 224 of 2007 (unreported).

Reverting to the records, in the present case, the charge against the appellant was as follows:

STATEMENT PF OFFENCE

INCEST BY MALES: *contrary to sections 158(1)(a) of the Penal Code [Cap. 16 R.E. 2019].*

PARTICULARS OF THE OFFENCE

OSWARD MGOMBELA, *on the 26th June, 2021 at Mhameni area Nundwe Village within the District of*

Mufindi in Iringa Region, had prohibited sexual intercourse with one, ***G.M*** *a girl of 10 years of age, who is to his knowledge his own daughter.*

Dated *at Mafinga this 19th Day of July, 2021*

Sgd.

SENIOR STATE ATTORNEY

The settled position of the law is that it was incumbent upon the Republic to lead evidence showing that the offence was committed on the date alleged in the charge sheet to which the appellant was expected to know and prepare his defence. Two witnesses were paraded to establish this; PW1 and PW2. During her testimony PW1 was recorded to have said:

> *"I am living with the accused's daughters because, they once told me that their father always rapes them. It was last month, July 2021, that was when the victim to me that. She told me that, he had raped her at their farms (Mahameni)."*

In addition to that PW1 said that the victim reported the matter to her last month, meaning July, 2021 and then he went to report the village authorities. During cross examination and re-examination, she said that the report to the village authorities was on 30.06.2021. It is evident from the above testimony that PW1 did not provide any useful testimony on the date of the incident. She was not even certain as to when the matter was reported to her.

On her part the victim (PW2) did not state anything about when the incident took place. All she stated was that her father raped her

twice and that on both occasions it was in the morning. Part of her testimony reads:

> *"That day when my father did that to me it was in the morning. Even in the second day, it was in the morning at the farm."*

The learned trial court magistrate took note of the appellants complaint. However, she was convinced that the prosecution had discharged their statutory obligation in proving the charge against the appellant. At page 6 of the typed judgment the learned trial magistrate made the following observation:

> *"DW1 also stated that, PW2 the victim does know/remember the dates and saying she was raped on June/2020 but from the court record and proceedings, the victim did not say that date, rather she referred on the date reminded by the prosecutor, on the charge sheet that June/2021."*

I have gone through the victim's (PW2) testimony at page 5 through to page 7 of typed proceedings, with due respect to the learned trial magistrate, I have not found anywhere where the victim was referred to a particular date by the prosecutor. This finding, in my view, was not supported anywhere in the trial court proceedings. It was therefore fatal for the trial magistrate to make such a statement whilst it was not found on evidence available on record. As stated earlier it was the duty of the prosecution to lead evidence stablishing the date alleged in the charge sheet. However, from the records, as quoted above, there was nowhere the prosecution paraded evidence

establishing that the incident took place on 26.06.2021. Up to this point the charge against the appellant remained unproved.

I have to say that the variance and uncertainty on the dates was not remedied by the learned trial court magistrate by merely making her own extrapolation that the witness (PW2) was referring to the date in the charge sheet. It was a duty of the prosecution to lead evidence establishing the charge sheet not for the trial magistrate to re-read the prosecution evidence into the charge sheet.

Another aspect related to the age of the victim. The appellant was charged under the provisions of section 158(1)(a) of the Penal Code. That section reads:

> *"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) if the female is of the age of* ***less than eighteen years****, to imprisonment for a term of not less than thirty years;*
>
> ***[Emphasis is mine]***

In accordance with the above provision, for the charge against the appellant to sustain, it was imperative for the prosecution to establish that the victim's age was less than eighteen years. Having examined and analyzed the records herein, I am completely mollified that prosecution did not lead any evidence tending to prove the age of the victim. That evidence should have come from the victim herself,

parent, close relative, close friend, teacher in which she was schooling or any person who knew well. (See **Elia John vs. Republic, Criminal appeal No. 306 of 2016** (unreported). There was no evidence from any direction validating the age of the victim.

Ms. Manyanda, tried to convince this Court that if there was any inconsistency or discrepancy the same was minor. She relied in the decision of **Twinogone Mwambela vs Republic** (supra). I have carefully gone through the said decision, whilst I agree entirely with finding therein, I think circumstances in that case differ with those established in the present case. In that, the Court of Appeal, looking at the evidence cumulatively, was satisfied that the victim, given her age, PW5 and the police might have acted under a mistake of fact wrongly indicating the 23.06.2017 as the date when PF3 was requested while it was 22.06.2022. The Court took note that the examination was conducted at night and that dates changes at night. In the present case, besides the charge sheet, none of the witnesses testified that that the incident took place on 26.06.2021; in the present case there is no correlation between the date of the incident and examination as the examination was 5.07.2021 several days after the incident; and finally, the appellant herein indicated existence of a dispute with PW1 one of key prosecution witness. In view of an alleged dispute between the appellant and PW1, the trial tribunal should have approached the prosecution case with caution. That was a material misdirection on the part of the learned trial magistrate. That misdirection was fundamental as it touched the root of the matter.

As pointed out above, that was not the only discrepancy, the prosecution in the present had failed to prove the age of the victim

which is an important ingredient of the offence under section 158(1)(a) of the Penal Code. However, gleaning from the records there is no single witness who testified on the age of the victim nor did the trial court make a specific finding on the age of the victim. This was a serious misdirection which rendered the charged unproved. The prosecution should have led the victim to establish her age in evidence, or otherwise a parent, relative, medical practitioner or, where available, the production of a birth certificate should have sufficed. However, that was done.

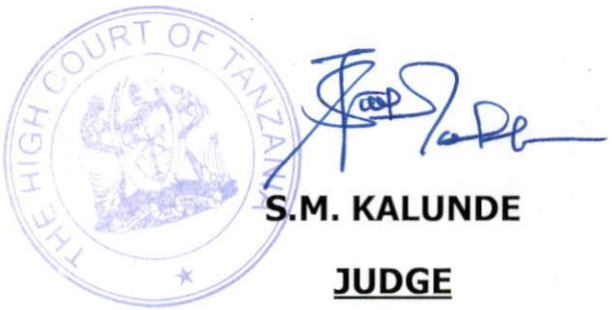
In addition to that I think there was laxity on the part of the police and prosecution in investigation and handling of the present case, in view of the allegations of grudges between the appellant and the complainant (PW1), I am of the considered view that the prosecution ought to have explained why the victim was not examined on time. For example, if the appellant was indeed arrested on 30.06.2021, why wasn't the victim examined on the same day. This raises even more doubts, which works in favour of the appellant.

It is the duty of the prosecution to prove the case against any accused person beyond reasonable doubt. Times without number, courts have demonstrated that need and casted that duty on the prosecution who, in our criminal jurisprudence is, imperatively obliged to prove the charge beyond all reasonable doubt. See **Rutoyo Richard vs Republic** (Criminal Appeal 114 of 2017) [2020] TZCA 298 (16 June 2020 TANZLII). In view of the above glaring inconsistencies and irregularities, it cannot be vouched with certainty that the case against the appellant was proved beyond all reasonable doubt.

It is for the foregoing reasons that I will allow the appeal, thereby quashing the conviction and set aside the sentence. I therefore direct that, the appellant be set at liberty unconditionally unless he is otherwise lawfully held for some other justifiable cause.

It is so ordered.

DATED at **IRINGA** this **24th** day of **AUGUST**, **2022**.



S.M. KALUNDE

JUDGE