IN THE HIGH COURT OF TANZANIA

THE DISTRICT REGISTRY OF SHINYANGA

AT SHINYANGA

CRIMINAL APPEAL NO.95 OF 2021

(Originating from Shinyanga District Court Criminal case175/2020)

PETRO MARO .....APPELLANT

VERSUS

THE REPUBLIC .....RESPONDENT

JUDGMENT

28th Sept & 7th Oct, 2022

Nongwa, J.

The appellant was charged, convicted and sentenced to 30 years term of imprisonment for the offence of incest by male contrary to section 158 (1) and 159 of the penal code cap 16 R.E 2002. It is alleged that on 29th day of September 2020 at Lubaga area within Shinyanga Municipality in Shinyanga Region the accused person had a prohibited sexual intercourse with her daughter aged 14 years.

The record of the lower court shows that in 2006 the accused person married one Neema Paulo. On January 2017 they were blessed with one daughter, the victim. Unfortunately, on October 2017 the accused wife passed

away. Neema's parent namely Bhoke Mwita (PW2) took the victim to his house and started raising her. In 2019 the appellant took back the victim to his house where he started abusing the victim.

The evidence of the victim shows that in 2020 on several nights she went to sleep and when she woke up in the morning, she used to discover that she had been smeared with some oil and white fluid at her vagina. She did not know what was happening to her. She asked appellant who said perhaps their neighbor was responsible. Before the incidents occurred, the appellant would bring some biscuits, groundnuts and juice and give her to eat. Once she eats, she would get a deep sleep to the extent of not being aware of what was happening to her. One night when she was asleep, she woke up and saw the appellant on her bed. asked him if it was real him. The appellant jumped from the bed. She switched on the light and saw appellant naked. The accused had already removed her clothes and raped her. The victim informed the neighbors.

Apart from those incidents her father was very cruel to her. He was beating her accusing her of misusing money and prohibited her from having food from the neighbors. The incident was reported the appellant faced the charges, convicted and sentenced accordingly. The appellant being aggrieved he has appealed before this court on grounds that ground I hereby reproduce as they are:-

1. *'**That**; the learned trial Magistrate erred in law and fact convicted me on the different offence as stated on the charge sheet.*

2. ***That**, the learned trial Magistrate erred in law and fact to receive and admit the P3 contained the report of the doctor which was not read over,*

after it was admitted as exhibit P1 contrary to the requirement of the law.

3. ***That;*** *my defense was not property considered by the trial court as I testified that I a m a watchman and do not sleep at home generally.*

4. ***That,*** *that the trial court wrongly believed the evidence of family members, namely PW4 and PW6 while the same were not credible and against the law.*

5. ***That,*** *the learned trial Magistrate totally misapprehending the nature and quality of the prosecution evidence against me which did not prove the charge beyond reasonable doubt.*

At the hearing the appellant had nothing more than prayer that, his grounds of appeal be adopted, considered as his submission and he be released join his family.

The learned State Attorney, Ms. Edith Tuka had the following in reply that the Court was right to convict and sentence the appellant and that as to the first ground, the records were rectified as it was just a typing error.

Submitting on the 5th ground on proof beyond reasonable doubt, Ms. Tuka said that having gone through the records, all 9 witnesses have testified against the appellant. The victim PW3 testified at page 11 of the typed proceedings. From the evidence, all ingredients of offence has been proved, the Appellant being her biological father and how he used to abuse her sexually. That the victim managed to explain how it was happening and some scenarios it shows she was being given drink and get lost in deep sleep but some scenarios she managed to see him.

The State attorney further argued that the victim has explained on what was happening, her evidence has been corroborated by the evidence of the doctor attended her medically and the evidence herself and the neighbors whom she informed about what has been done by his father, that is abusing her sexually, PW4, PW5 and PW6 corroborated what the victim testified.

The state Attorney explained further that, being a child of tender age, she Promised to tell the truth before she could testify as per S.127 (2) of the Evidence Act was complied with, she also referred the case of the case of **Wambura Kiginga Criminal Appeal No. 301/2018** Court of Appeal Mwanza. That there was no reasonable doubt to say the victim fabricated the case against her father.

In respect of 2nd ground, the PF3 was read in Court at page 29 of the typed proceeding shows that the document 'P1' was read to the caused person upon admission, while on 4th ground the appellant challenged credibility of testimony of PW4 and PW6 being family members. Clearly, they are not prohibited to appear before Court and testify, the issue is if they can be believed they can to explain as to how they know about the abuse and how they managed to hear the child screaming and the appellant had a chance to cross examination them. Ms. Edith supported her argument with the case of **Waiki Amiri Vs Republic Criminal Appeal No. 230 of 2006, Court of Appeal Tanga, at page 10**, that no law which prohibits family members from giving evidence.

Submitting on the on the 3rd ground, Ms. Edith stated that the Appellant claims that his defense was not analysis was baseless and the Judgement has

analyzed both sides evidence that of prosecution and defence at page 4 and 6 of the judgement, shows analysis of evidence and that of defence side was put on consideration. Ms. Edith Tuka, prayed that the Appeal be dismissed.

Having gone through the grounds of appeal and the submission by the Respondent, I will deal with all the four grounds at once, and all these grounds are held up in the last ground which to my understanding the appellant alleges that the case was not proved beyond reasonable doubt. The issues that the PF 3 was not read in court has no basis because it is clear from the proceedings at page 28-29 the witness read out exhibit P1. Moreover, as stated by, Ms Edith Tuka, that the evidence of the appellant has been analysed save that the court was not convinced with, the defence did not throw any strong stone able to pierce the prosecution evidence.

The appellant's doubts also the evidence of witnesses who are related, again as submitted by the Learned state attorney Ms. Edith Tuka, there is no law that prohibit those who are family members to testify. In the case cited by Ms. Tuka, the court of appeal in **Waiki Amiri case** (supra), at page 10 stated that;

> *'.....there is no law which forbids family members from giving evidence so long as they are competent and credible witness. In this case the likelihood of the family members teaming up against the appellant seems to be remote in view of the observation we made about PW4'*

Likewise in the case at hand the neighbours who had for a long time witnessing the abuse to the victim, also who sometimes helped the victim with food, were competent and credible witnesses to testify.

The Evidence Act, cap 6 R.E 2022, under section 127 (1) provides that every person is competent to testify, nowhere family member or neighbours and even a spouse is forbidden to testify. Section 127(1) provides;

> *'Every person shall be competent to testify unless the court considers that he is incapable of understanding the questions put to him or of giving rational answers to those questions by reason of tender age, extreme old age, disease (whether of body or mind) or any other similar cause.'*

Therefore, the appellants argument in respect of the second, third and fourth grounds are baseless. Now the remaining issue is on whether the case was proved beyond reasonable doubt for the court to enter conviction against the appellant.

In evidence, the provision of section 127 (1) to (4) of the Evidence Act, safeguards the evidence of a child of tender age, also subsection (4) defines who is a child of tender age and subsection (2) gives the modality of giving evidence by the child of tender age. I wish to reproduce the whole provision for clarity;

> *'S. 127.- (1) Every person shall be competent to testify unless the court considers that he is incapable of understanding the questions put to him or of giving rational*

answers to those questions by reason of tender age, extreme old age, disease (whether of body or mind) or any other similar cause.

(2) A child of tender age may give evidence without taking an oath or making an affirmation but shall, before giving evidence, promise to tell the truth to the court and not to tell any lies.

(3) Notwithstanding any rule of law or practice to the contrary, but subject to the provisions of subsection (6), the evidence of a child of tender age received under subsection (2) may be acted upon by the court as material evidence corroborating the evidence of another child of tender age previously given or the evidence given by an adult which is required by law or practice to be corroborated.

(4) For the purposes of subsections (2) and (3), the expression "child of tender age" means a child whose apparent age is not more than fourteen years " '

In the case at hand, it is indicated, as submitted by the State Attorney the child of tender age, 14 years of age, the court had choice to either subject her to the promise to tell the truth or not as per the law. In the case at hand the child promised to tell the truth.

Law of Evidence Act [Cap 6 RE 2019] under section 111 puts a burden of proof in criminal case to be on the shoulder of the prosecution and so is the

authority in the cases of **Mwita & Others Vs Republic [1977] LRT 54** as well as **Jonas Nzike Vs Republic [1992] T.L.R 213 HC (Katiti, J)** (as he then was). Moreover, in discharging such a burden the prosecution is duty bound to attest the two important elements as directed in the case of **Maliki George Ngendakumana Vs Republic, Criminal Appeal No. 353 OF 2014** (CAT) BUKOBA (unreported) which held inter alia that;

> *'...it is the principle of law that in criminal cases, the duty of the prosecution is two folds, one, to prove that the offence was committed and two, that it is the accused person who committed it.'*

Furthermore, section 114 (1) of the Evidence Act (supra) sets a standard of proof of these two elements to be beyond reasonable doubts. In proving that, the prosecution is duty bound to prove first, that the victim was indeed sexually abused and that it is the appellant who committed the offence. It is the law that the best evidence of sexual offences comes from the victim.

In the case at hand the victim who is a child of tender age, 14 years of age, after promising to tell the truth, she managed to explained thoroughly what his father was doing to her. Her evidence has been very credible in that she knew what she was speaking to be the whole truth, even at page 14 of the typed proceedings, while being cross examined by the appellant, she firmly stated to have not been couched by anyone to say what she was testifying, where the appellant was being responsible father she spoke about it, like the visiting the appellant to remand prison to collect Tsh 80,000 for her graduation. Being abuser and being in remand did not exempt the appellant from his

parental duties to the victim. The neighbors have explained what they witnessed for some time while the victim was facing the abuse from the appellant.

Moreover, the evidence of the medical doctor the PF3, clearly showed that the victim was abused sexually. The evidence is that the victim when examined, she had no bruises, perhaps because of the lubricants the appellant was applying to her before lavishing the victim, however, the doctor observed that the victim hymen was torn and the vagina was wide with dirty discharge. (see. page 28 of the typed proceedings). Again, looking at the PF3 exhibit P1 at page two last part, the medical practitioner remark is that;

'Vaginal canal is patent with discharge
suggestive of penile penetration.'

It the findings of this court that the prosecution firmly discharged their duty imposed by section 111 and section 114 (1) of the Evidence Act (supra). In this case these two elements, that the victim was indeed raped and that it is the appellant who committed the offence, has been proved beyond reasonable doubts. I fully agree with the leaned State Attorney, Ms. Edith Tuka that there were sufficient and direct evidence to prove that the appellant committed the offence. In the event, I find no merit in the appeal, the same is dismissed.

Dated and delivered at Shinyanga, this 7th October 2022.

THE HIGH COURT OF TANZANIA

V. M. Nongwa
JUDGE
7/10/2022