IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(DODOMA DISTRICT REGISTRY)
AT DODOMA

DC. CRIMINAL APPEAL NO. 156 OF 2020

(Originating from District Court of Bahi in Criminal Case No. 36/2020)

SAMSON ELIEZA.....APPELLANT

VERSUS

THE REPUBLIC.....RESPONDENT

JUDGMENT

12/5/2022 & 17/5/2022

KAGOMBA, J

The appellant SAMSON ELIEZA was arraigned in the District Court of Bahi (the "trial Court") and convicted on a count of attempt incest by males contrary to section 158 (3) of the Penal Code, [Cap 16 R.E 2019] (the "Penal Code") as a cognate minor offence to incest by males. The appellant being aggrieved by the decision of the trial Court has knocked the door of this Court by way of an appeal, based on six grounds. Having perused the filed grounds of appeal, this Court has come up with four issues to be determined, which are;

1. Whether the charge which formed the basis of appellant's conviction was defective.

2. Whether the trial Court convicted the appellant while there were procedural irregularities.

3. Whether the prosecution case was proved beyond reasonable doubt to warrant appellant's conviction.

4. Whether the trial Court didn't consider defence case in making its decision.

However, before determination of the issues raised above, it is imperative that I revisit what transpired during trial. It was alleged before the trial Court that the appellant, on diverse dates between January 2018 to September 2019 at Mtitaa village within Bahi District in Dodoma Region, did have sexual intercourse with SARAH D/O SAMSON ELIEZA aged 15 years being the appellant's biological daughter.

The prosecution side brought four witnesses to prove their case and a PF3 was tendered and admitted as exhibit "PE 1" for the same purpose. PW1 Sarah Samson, who was the victim, told the trial Court that someday in January 2018 during night hours, it was the first day her father, who is the appellant, raped her. She added that, thereafter, it became a continuous habit of the appellant to rape her at night while threatening her not to tell anyone lest he would kill her. She said that her mother was usually at *pombe* shop during night hours.

PW1 further testified that on 3/04/2020 at 13.00 hours the appellant wanted to rape her again but refused and succeeded to run to her teacher, Madam Felister to whom she narrated the incident. That, Madam Felister took her to the Village Executive Office, whereafter the appellant was arrested for further legal action.

PW2 Happiness Komogo, being a doctor at Bahi dispensary, told the trial Court that she examined the victim on 06/04/2020 by checking her sexual organs but couldn't find neither bruises nor sperms. However, PW2 testified that she found the victim with no hymen in her vagina which, according to the victim's age, it wasn't normal, as it signified that the victim was carnally known. Having stated so, PW2 tendered PF3 to that effect.

PW3, WP 4392 D/CPL Mary, being the investigator of this case, told the trail Court that she interrogated the victim who told her how the appellant had been raping her since January 2018. That, the victim also told her how she managed to run to her teacher on the last date when the appellant wanted to rape her again. PW3 further testified that she also interrogated the appellant who confessed that the victim was her first born but denied committing incest.

In her testimony PW4, Felister Marko confirmed what was stated by PW1 as to what transpired on 03/04/2020. She said that while coming back home from the Village Executive Office with some other peope, the victim upon seeing the appellant, started to run to them while showing them the appellant who was looking after her. PW4 testified further that to their surprise, the appellant asked them angrily if the victim was their child.

After the close of the prosecution case, the trial Court found the accused person with a case to answer. In his defence the appellant again denied the allegation. He also alerted the trial Court on the evidence adduced by the doctor, PW2 which showed that the victim had sexual intercourse a long time before.

Upon analysis of evidence adduced, the trial Court made a finding that the prosecution had failed to prove beyond reasonable doubt the offence of incest by male against the appellant. The trial Court, however, found that the offence of attempt incest by male contrary to section 158(3) of the Penal Code was sufficiently proved and proceeded to convict the appellant and sentenced him to thirty (30) years imprisonment. It is this decision which prompted this appeal.

During hearing of the appeal, the appellant appeared personally without legal representation while the respondent was represented by Ms. Judith Mwakyusa, Senior State Attorney. The appellant being a lay person prayed this Court to consider his grounds of appeal as per Petition of Appeal. He had nothing more for his submission in chief. The grounds of appeal stated by the appellant, in summary, are;

1. The trial Court erred in law and fact when convicted the appellant while the prosecution side didn't prove the case beyond reasonable doubt.

2. The trial Court erred in law and in fact when convicted the appellant basing on the procedural irregularities.

3. The trial Court erred in law and fact by not considering the high possibility that the appellant was implicated in the case on the ground that he was not in good terms with the victim's mother.

4. The trial Magistrate erred in law and facts when convicted and sentenced the appellant basing on a charge that was defective in that the evidence tendered in Court and the charge were quite different.

5. The appellant was convicted and sentenced to 30 years in jail while the appellant's defence was not considered by the trial Court.

6. The trial Magistrate didn't warn herself that a person ought to be convicted on the strength of the prosecution evidence and not on the weakness of the defence side.

For the respondent, Ms. Judith Mwakyusa, partially opposed the appeal. She was at one with the trial Magistrate with regard to conviction but agreed with the appellant, to some extent, on impropriety of the sentence.

With regard to the 1st and 6th grounds of appeal, which jointly raise the issue whether the case against the appellant was proved beyond reasonable doubt, Ms. Mwakyusa was of the view that it was. She relied on the testimony of the victim (PW1) who proved existence of the biological relation between her and the appellant as well as the testimony that the appellant had attempted to have sexual intercourse with the victim. She was also of the view that the testimony of PW4 Felister Marko corroborated the evidence of PW1. She also argued that the appellant didn't cross-examine the victim, hence admission of her evidence.

On the issue of procedural irregularities raised by the appellant in his 2nd ground of appeal, Ms. Mwakyusa conceded to have observed an irregularity in the trial Court's proceedings. She submitted that section 231 of the Criminal Procedure Act, [Cap 20 R.E 2019] (the "CPA") which required the trial Court to explain to the accused person his rights before opening of defence case, was not observed. She quickly argued, however, that the requirement might have been observed despite the proceedings being silent because, on page 22 the typed proceedings, the appellant responded that he shall defend his case, and on page 23 of the typed proceedings he went on to adduce his evidence on oath. It was Ms. Mwakyusa's argument, therefore, that the appellant was not prejudiced as he defended his case well and that the provision of Section 388 (1) of the CPA, forgives such an irregularity.

On the 3rd ground of appeal that the case was framed up against the appellant, Ms. Mwakyusa wasn't convinced by the appellant. She argued that even if the appellant raised the issue of dispute between him and his wife during his defence, such an allegation was an afterthought. Ms. Mwakyusa justified her views based on the fact that the appellant never raised the issue of the purported family dispute during cross examination, when PW1 was adducing her evidence. She cited a case of **Nyerere Nyague V. R,** Criminal Appeal No. 67 of 2017, CAT, Arusha, to cement her contention.

On the 4th ground of appeal which raised the issue whether the charge was defective, it was Ms. Mwakyusa's views that a mere reason that the conviction was based on an offence and section of the law other than

those stated in the charge sheet didn't make the charge defective. She explained that what had happened in the trial Court was subject to provision of section 301 of the CPA which prompted conviction of the appellant with the offence of attempt incest by males under section 158 (3) of the Penal Code instead of incest by males under section 158(1)(a), the latter being the offence and section of the law the appellant was originally charged with.

On the allegation in the 5th ground of appeal that the defence case was not considered by the trial Court, Ms. Mwakyusa conceded to that fact. She, however, prayed this Court, being the first appellate Court, to consider the defence evidence and come up with its independent finding. In her own views, the defence case was weak compared to the prosecution case.

Regarding the issue of improper sentence, the learned State Attorney was of the view that, since there was no proof of age of the victim, the sentence of the appellant should be reduced to 20 years' imprisonment vide section 158(1) (b) of the Penal Code. She, therefore, supported the appeal in this aspect for the reason that 30 years imprisonment would have been a proper sentence if the victim was less than eighteen years old.

The above summarize the arguments for and against the appeal submitted to this Court. In the very beginning of this judgment the issues for determination were stated. I shall proceed to address those issues in light of the submissions made for each ground of appeal, as hereunder.

Starting with the first issue as to whether the charge which formed the basis for appellant's conviction was defective. Section 135(a)(i)(ii) &(iii) of the CPA provides for the mode in which the offences are to be charged. I prefer to reproduce this provision for clarity, as follows:

135. Mode in which offences are to be charged

The following provisions of this section shall apply to all charges and informations and, ***notwithstanding any rule of law or practice, a charge or an information shall, subject to the provisions of this Act, not be open to objection in respect of its form or contents if it is framed in accordance with the provisions of this section–***

i) A count of a charge or information shall commence with a statement of the offence charged, called the statement of the offence;

ii) ***the statement of offence shall describe the offence shortly in ordinary language avoiding as far as possible the use of technical terms and without necessarily stating all the essential elements of the offence and, if the offence charged is one created by enactment, shall contain a reference to the section of the enactment creating the offence****;*

(iii) after the statement of the offence, particulars of such offence shall be set out in ordinary language, in which the use of technical terms shall not be necessary, save that where any rule of law limits the particulars of an offence which are required to be given in a charge or an information, nothing in this paragraph shall require any more particulars to be given than those so required.

Guided by the above quoted provision of the law, and having perused the charge preferred against the appellant, it is my finding that the charge is not defective as it complied with the law. As such, the charge cannot be subjected to any objection.

On the other hand, I concur with the learned Senior State Attorney that, probably, the appellant was bothered with the fact that he was convicted with the offence which was not stated in the charge. If that is the case, this ground is devoid of merit. The law under Section 301 of Penal Code is clear that a conviction can be entered on a lesser cognate offence if there is sufficient evidence to warrant such a conviction. For this reason, this Court finds that the appellant was rightly tried basing on that charge. The first issue is therefore answered in the negative.

Coming to the second issue as to whether the trial Court convicted the appellant while there were procedural irregularities, it is unfortunate that the Petition of Appeal does not state the irregularities the appellant complains about. However, I agree with Ms. Mwakyusa that the trial Court proceedings are silent as to whether the appellant was told his rights before defending his case as mandatorily required under section 231 of the CPA. There is no clear trial Court recording on this requirement. However, the appellant is on record saying that he will defend his case.

Having consider what obtains in the proceedings regarding compliance with the provision of section 231 of the CPA, and basing on the fact that the appellant was recorded saying that he would defend his case, I am clear in my mind, as it was well argued by Ms. Mwakyusa, that such

an inadvertent recording did not anyhow result in miscarriage of justice on part of the appellant. The trial Court proceedings are very clear that the appellant did not only state that he would defend himself, but also proceeded to do so. Guided by the provision of section 388 of the CPA, this Court cannot, therefore, alter or reverse the trial Court's proceedings based on the cited omission for as long as the same has not occasioned any miscarriage of justice. That determines the second issue as framed.

Turning to the third issue as to whether the prosecution case was proved beyond reasonable doubt to warrant appellant's conviction, I have perused the evidence adduced by prosecution during trial, testimonies of PW1 and PW4. I am satisfied that all the ingredients of the offence of attempt incest by male were duly established. I therefore agree with the learned Senior State Attorney that the prosecution did prove the charge of attempt incest by males, beyond reasonable doubt.

PW1 told the trial Court that on 3/4/2020 the appellant attempted to have sexual intercourse with her, being his biological daughter, and that she succeeded to run away and informed PW4 of the incident, who also testified to such effect. The testimony of PW4 has been concisely stated herein above and needs not be repeated. The appellant's angry reaction upon seeing PW1 in the company of PW4 directly showed that he had guilty mind after his failed mission. Moreover, there is no dispute that PW1 is a biological daughter of the appellant. Therefore, the ingredients of the offence of attempt incest by males were duly established.

On the other hand, I have noticed variation of dates in the charge sheet and in the evidence adduced which I would like to address. The charge sheet stated that the offence was committed between January 2018 to September 2019 and evidence adduced during trial was to the effect that the offence was committed on 3/4/2020. It is very clear that the prosecution having charged the appellant with the offence of incest by males has caused such a variation.

In light of the evidence adduced in trial Court, difference in dates is, in my view, not vital and should not lead to quashing the conviction imposed by the trial Court, as it did not prejudice the appellant or occasion any injustice to him. In holding so, I am fortified by the decision of the Court of Appeal of Tanzania in **Osward Mokiwa @ Sudi V. The Republic,** Criminal Appeal No. 190 of 2014, Dar es Salaam, where, in a similar situation, the Court of Appeal, had this to say;

> *".....we are satisfied that the error on the charge sheet was inoffensive; it neither prejudiced the appellant nor occasioned any injustice to him. Our view is particularly based on two factors: first, that the appellant did not raise any alibi or similar defence whose effect depended so much on the exactness of the date alleged on the charge as being the date when the offence occurred."*

Therefore, taking all the above deliberations into account, I am of the settled mind that prosecution proved the case beyond reasonable doubt.

Coming to the last issue as to whether the trial Court didn't consider defence case in making its decision, there is no dispute that there was a shortfall in this aspect. All what the trial Court did was to summarize the

defence evidence without considering the same in its judgment. It is trite law that a Court, in making its findings, has a duty to evaluate evidence adduced by both parties in order to reach a just conclusion. See the case of **Hussein Idd and Another V Republic** (1986) T.L.R 166 at page 169 the Court of Appeal said;

> *"It seems clear to us that the judge dealt with the prosecution evidence on its own and arrived at the conclusion that it was true and credible and as a result he rejected the alibi put forward as a deliberate lie. In our view this is a serious misdirection. The judge should have dealt with the prosecution and defence evidence and after analysing such evidence, the judge should then reach a conclusion".*

That being the case, omission by the trial Court is fatal. However, for the purpose of rendering justice to both parties, this Court being the 1st appellate Court, has a duty to re-evaluate all the evidence adduced during trial and subject it to necessary scrutiny and come up with an independent finding on the case. For this reason, I shall heed to a valuable guidance made by the Court of Appeal of Tanzania in **Mussa Jumanne Mtandika V. The Republic**, Criminal Appeal No. 349 of 2018, CAT, Dodoma, where the Court stated as follows:

> *"As a first appellate Court, the High Court had mandate to re-evaluate the whole evidence adduced at the trial and make its own conclusion. The case of **Yasin Mwakapala** (supra) cited with approval the Court's case of **Prince Charles Junior v. R**, Criminal Appeal No. 250 of 2014 (unreported). In the latter case it was said thus; "With due respect; this is not how, a first appellate Court should have dealt with such a complaint as directed in*

PANDYA's case (supra) in a first appeal, the first appellate Court should have treated the evidence as a whole to a fresh and exhaustive scrutiny which the appellant was entitled to expect. It was therefore expected of the first appellate Court, not to only summarise but also to objectively evaluate the gist and value of the defence evidence, and weigh it against the prosecution case. This is what evaluation is all about. ***(See Leonard Mwanashoka v. Republic*** *Criminal Appeal No. 226 of 2014 (unreported)."*

Guided as above, it is now the duty of this Court to re-evaluate defence case. During trial, the appellant opposed the charge against him and stated that the victim (PW1) after being examined it was revealed that she had sexual intercourse a long period before. The appellant also denied the allegation that he was the one having sexual affair with the victim. It is my considered view that this piece of defence evidence would not shake the firmed – up prosecution case. It did not introduce any new material fact which weakened or disproved the testimony of PW1 and PW4, apart from the fact that the victim had sexual intercourse before.

The fact that PW1 had sexual intercourse a long period before does not in any way weaken the evidence on attempt incest by males because the conviction for such an offence did not require proof of penetration.

As regards the appellant's claims of being implicated by the victim's mother which was raised in his Petition of Appeal, basically this lacks limbs to stand on since he never raised this issue during trial. The appellant tried to raise the same while cross examined by the prosecution but he did not

state clearly as to who implicated him. It therefore remains unclear whether he was implicated by the victim or one Ester? The evidence of the victim is clear that her mother's name is Monica John Mgaya and not Ester.

Winding up with the issue of sentence imposed to the appellant by the trial Court, the learned Senior State Attorney supported the appellant that the imposed sentence was not proper. She submitted that the same should be reduced to 20 years because there was no proof of age as per S.158(1)(b) of the Penal Code. In my view, I think, the learned Senior State Attorney misdirected herself a bit on this aspect because the appellant was not convicted under S. 158(1) of the Penal Code but under S. 158(3). The section used for conviction his does not impose punishment. Under such circumstances, the sentence should have based on S. 382 of the Penal Code which provides:

> *"Any person **who attempts to commit an offence** of such a kind that a person convicted of it is liable to the punishment of death or imprisonment for a term of fourteen years or more with or without other punishment, is guilty of an offence and is liable, if no other punishment is provided, **to imprisonment for seven years".*** [Emphasis added]

I find the above provision of S. 382 of the Penal Code applicable because S. 158(1)(a) on incest by males imposes punishment of imprisonment of thirty years where a victim is less than eighteen years; and twenty years where the victim is of the age of eighteen years. Hence, this case being a case of attempt incest is covered under S. 382 of the

Penal Code. For this reason, the appellant had to be sentenced to seven (7) years imprisonment.

Having found as above, the appeal is partly allowed. The conviction by the trial Court is upheld while the imposed sentence of thirty years imprisonment is hereby varied. Consequently, the appellant shall serve seven (7) years imprisonment. It is so ordered.

Dated at **Dodoma** this 17th day of May, 2022.

ABDI S. KAGOMBA

JUDGE