IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(IN THE DISTRICT REGISTRY OF DAR ES SALAAM)

AT DAR ES SALAAM

APPELLATE JURISDICTION

CRIMINAL APPEAL NO. 6 OF 2022

(Originating from the decision of the District Court of Temeke at Temeke, in Criminal Case No. 4 of 2019, by Hon. Ngeka-RM dated 3rd day of March, 2021)

HAFIDHI MOSES MBUNDA..... APPELLANT

VERSUS

THE REPUBLIC..... RESPONDENT

JUDGMENT

14th February, 2022 & 16th February, 2022

ISMAIL, J;

The appellant was arraigned in court facing a charge of incest by males, an offence committed contrary to the provisions of section 158 (1) (a) of the Penal Code, Cap. 16 R.E. 2019. The allegation is that on 14th day of November, 2018 at Kiburugwa kwa Nyoka within Temeke District in Temeke, in Dar es Salaam region, the appellant had a prohibited carnal knowledge of XYZ (in pseudonym), his daughter.

After a trial that came after the appellant pleaded not guilty to the charge, the District Court of Temeke at Temeke in which the appellant was arraigned, entered a conviction and sentenced him to imprisonment for twenty (20) years.

Brief facts of the matter, as gathered from the trial proceedings, inform that the appellant, the father, and the victim (PW2), his daughter, were living in the same house at their Mbagala Kiburugwa home. This followed the appellant's divorce from two of his erstwhile wives, including the victim's mother. On 14th November, 2018, at around 1700 hours, the appellant allegedly pulled PW2 into the room he was sleeping and covered her mouth with a piece of cloth. He then tied her hands while threatening her with a knife. The appellant then undressed PW2 after which he inserted his penis into PW2's vagina. At the time of the alleged incident, the person who was staying in the neighbouring room was not around. This was followed by three other encounters of sexual intercourse. The appellant is also alleged to have threatened PW2 with death if she ever revealed the incident.

A while later, PW2 visited her mother but she chose to stay there. This drew the attention of PW2's mother, who wanted to know the reason

for PW2's reluctance. It is at that point in time that PW2 revealed what she had been going through. They resolved that the matter should be reported to Maturubai police station in Mbagala. Text messages were shared with the police from the victim's mobile handset (Exhibit P1) to draw a conclusion that an offence had been committed. The police laid a trap that finally nabbed the appellant.

Afterwards, investigations were carried out after leading to institution of the proceedings in court. Four witnesses testified for the prosecution while the appellant had a sole witness for his defence. At the end of the proceedings, the trial court took the view that charges against the appellant had been sufficiently proved. It, therefore, convicted and sentenced him to imprisonment for a term of twenty (20) years.

This verdict did not sit well with the appellant, hence his decision to institute an appeal against both, conviction and sentence. The petition of appeal has seven grounds, paraphrased as hereunder:

1. *That, the trial magistrate erred in law and fact by convicting the appellant based on insufficient and doubtful evidence of PW1 and PW2 while there was nothing to prove that the mobile phone numbers stated were those of the appellant and PW2 and if Exhibit P1 belonged to PW2.*

2. *That, the trial magistrate erred in law and fact by convicting the appellant based on based on discredited evidence and when the prosecution had failed to tender a mobile phone that would link the appellant with the incident.*

3. *That, the trial magistrate erred in law and fact by convicting the appellant based on the testimony of PW1 and PW2 which was contradictory of one another.*

4. *That, the trial magistrate erred in law and in fact when it failed to draw an adverse inference against the prosecution and by failing to call a guest house attendant or a "militia man" who would establish the appellant's arrest.*

5. *That, the trial magistrate erred in law and fact by rejecting or disregarding the appellant's evidence which raised reasonable doubt on the prosecution's case.*

6. *That, the trial magistrate erred in law and fact by failing to critically scrutinize and assess the evidence of PW1 and PW2 which was fabricated against the appellant in view of the fact that PW2 was an who could reveal the alleged incident immediately after its commission.*

7. *That, the trial magistrate erred in law and fact by convicting the appellant of incest by males while commission of the said offence had not been proved at the required standard.*

Hearing of the appeal saw the appellant fend for himself, unrepresented, while the respondent was represented by Ms. Jackline Werema, learned State Attorney. Ms. Werema prayed to address the Court ahead of the appellant. She submitted that she was in support of the appeal, urging the Court to allow the appeal and set aside the conviction and sentence. She also implored the Court to order that the appellant be set at liberty.

Making reference to ground one of the appeal, learned attorney argued that evidence adduced against the appellant is weak as there is no proof of ownership of the phone numbers that PW2 alleged were registered in her name and that of the appellant. Ms. Werema argued that the seriousness of the offence required the prosecution to step up efforts to concretize their case, especially on the allegation that PW2 received messages on her mobile phone with number 0710-825924, allegedly sent from 0713-226636, belonging to or registered in the appellant's name. This allegation, learned counsel argued, was not supported by any proof from mobile service provider or any expert in the field of telecommunication.

One wonders if the contention that the author and sender was the appellant had any credence worth relying on.

Ms. Werema took a serious exception to the fact that the incriminating text messages were not tendered in court and admitted, yet the trial magistrate quoted and used them in determining the appellant's guilt. She doubted if the said messages were extracted from the PW2's mobile phone. It was her contention that, in the absence of such evidence, the testimony of PW2 should be treated with a serious caution or be given less weight.

Punching one more hole, Ms. Werema argued that the victim has lived with the appellant since childhood until she clocked 20 years of age, only to be molested at that age. She attributed what she considered to be a concoction to the appellant's misunderstanding with PW1, and that the allegation may have been fuelled by PW1, to settle scores with the appellant.

She was convinced that absence of the vital elements that would give credence to the adduced evidence has caused severe bruises which have rendered the prosecution's case weak and unsupportable.

For his part, the appellant urged the Court to be moved by the respondent's submission and allow the appeal.

From the respondent's stunning confession, the issue is whether the case against the appellant was proved at the required standard.

As Ms. Werema aptly submitted, the evidence that determined the appellant's culpable role in the offence he was charged with was that of the PW2, the victim who alleged that the appellant had known her carnally. In doing so, she relied heavily on the exchange of text messages which, as conceded by the respondent's counsel, were not retrieved from the electronic devise in which they resided. This includes Exhibit P1 that allegedly bore number 0710825924. One would not say, with any semblance of precision, that what PW2 narrated on the text messages that allegedly revealed the duo's prohibited relationship ever existed and, if any, the same were authored and sent by the appellant. As Ms. Werema appreciably argued, this would not be possible without enlisting services of a personnel from the mobile service provider. In this case, none was lined up for testimony, leaving the contention by PW2 unproven.

As if this was not enough, the trial magistrate entered the fray. In an uncharacteristic manner, and a step from the ordinary, the trial magistrate

produced messages that he alleged that they came from PW2's mobile handset. These messages were neither tendered and admitted in the course of PW2's testimony, nor were they brought to the attention of the parties during the trial proceedings. It would not be an exaggeration or a baseless insinuation if one were to contend that what is quoted by the trial magistrate and swayed his decision were his own invention. It is also fair to contend that what the trial magistrate did was to indulge in the business of stitching a torn case on behalf of the prosecution. This conduct has been censured abhorred in numerous judicial pronouncements, including in the case of ***Khalfan Abdallah Hemed v. Juma Mahende Wang'anyi,*** HC-Civil Case No. 25 of 2017 (unreported), in which this Court observed as follows:

> *"It also infers that the Court is cast upon itself, the duty of creating a case for the parties and, specifically in this case, the plaintiff's case. That is an abhorrent conduct that no court would be prepared to indulge in. The Court is only charged with the responsibility of evaluating and making sense of what is presented before it. It does not plug the gaps or stitch torn cases to a party's interest."*

The foregoing position was inspired by the holding in ***Haji v. New Building Society Bank*** [2008] MWHC 36, wherein the High Court of Malawi faced a situation akin to this. Unable to bear out it held as follows:

> *"It is never the duty of the Court to create a case for the parties and, specifically in this case, for the plaintiff by contradicting the defendant's case.* ***Where the plaintiff has no evidence on the matter in issue the Court has to analyse the evidence of the defendant and make a finding one way or the other, and then decide the case on the merit of the evidence available."*** [Emphasis added]

In the recent decision of the Court of Appeal of Tanzania in ***Butongwa John v. Republic***, CAT-Criminal Appeal No. 450 of 2017 (unreported), the upper Bench was deeply disturbed by the conduct of proceedings by a magistrate who took upon himself to examine an accused person who claimed that he was uncircumcised. The superior Court viewed this as an act of making an inquiry, a function that ought to have been assigned to a medical personnel.

I feel inspired by the cited decision and hold that the trial magistrate's conduct went far overboard and was prejudicial to the rights

of the appellant. I hold that the sneaked part of purported testimony did not form part of the testimony which should be expunged. Once this is done, the prosecution's residual testimony becomes deficient and incapable of founding a conviction. It follows that the decision to convict and sentence the appellant was a total sham that deserves nothing else but to have it set aside, as I hereby.

Simultaneous with setting aside the conviction and sentence, I order that the appellant be released from prison forthwith, unless he is held for some other lawful reasons.

It is so ordered.

Rights of the parties have been duly explained.

M.K. ISMAIL,

JUDGE

16/02/2022

DATED at **DAR ES SALAAM** this 16th day of February, 2022

M.K. ISMAIL,

JUDGE

16/02/2022