THE UNITED REPUBLIC OF TANZANIA

JUDICIARY

IN THE HIGH COURT OF TANZANIA

(DISTRICT REGISTRY OF MTWARA)

AT MTWARA

CRIMINAL APPEAL NO. 33 OF 2021

(Originating from Kilwa Masoko District Court Criminal Case No. 105 of 2020)

SAIDI HAMISI MCHANJAMA .....APPELLANT

VERSUS

THE REPUBLIC.....RESPONDENT

Date of Hearing: 09/03/2022

Date of Judgment: 28/03/2022

JUDGMENT

Muruke, J.

The appellant, Saidi Hamisi Mchanjama, was charged with two counts and convicted by District court of Kilwa. The first count is rape contrary to sections 130(1)(2)(e) and 131(1) to her own daughter PW1, the second count is rape to her step daughter PW2 contrary to section 130(1)(2)(e) and 131(1) both of the Penal Code, Cap 16 R.E 2019. He was thus sentence to serve 30 years imprisonment on each counts, that was ordered to run concurrently.

Being dissatisfied, with both conviction and sentence, he filed present appeal raising eight grounds.

On the date set for hearing, Principle State Attorney, Ajuaye Bilishanga, represented the respondent, while appellant was unrepresented. He thus prayed for his grounds of appeal to be received as his submission in chief, prayer which was not objected by respondent counsel. Court then, asked learned State Attorney to submit replying grounds of appeal. Respondent counsel supported conviction and sentence meted by trial court, thus submitted that, appellant was charged with an offence of rape, to all the two victims, PW1 and PW2. Appellant's PW1 is biological daughter while PW2 is appellant stepdaughter. The law provides that, once the offence, related with blood relative, the offence is incest by male or female. In the case at hand, appellant was charged for an offence of rape to the girls below 18 years. Although he was supposed to be charged with an offence of incest by male to the 1st victim PW1, but it is not fatal. Ingredients of the offence are the same. It is a girl below 18 years in which consent is immaterial. Thus, charge sheet is proper argued, principal state Attorney, Ajuaye Bilishanga.

On grounds of appeal filed on March 19, 2021, the five grounds both speak of lack of evidence to ground conviction. On ground one, complaint is that appellant did not admit the charge. Respondent counsel submit that, evidence available at the trial court was the basis of conviction. Evidence of the victims was the one that grounded conviction. They both said they were raped by their own father. Evidence of PW1 victim at page 4 up to page 5 explained in details on what has been happening since 2018 to 2020. PW1 said, she was called for the first time when told by his own father that he was putting medicine on her vagina. Appellant has been doing this on several occasions, last time was on November 2020, when, appellant raped her in the forest. Appellant told PW1 that, he should not tell her mother. Evidence of PW2

second victim, from page 8 to page 9, explained in details how appellant raped her at different times and places. The two victims both insisted that, it is the appellant who has been raping them. Appellant complain that, the victim was being raped by other persons other than himself, it is not true. So, it is the evidence of the victims that grounded conviction.

Not only evidence of PW1 and PW2 victims that grounded conviction, but also. Amina Omari Mkumbalu(PW5), victim biological mother. She testified that, there were misunderstandings between appellant and the two victims because of appellant raping them. PW3 Dr Daudi Hassan Selemani, proved that the victims were raped, on many times and that PW1 first victim was pregnant. Evidence of PW1 proves that PW1 was pregnant and that, it was not her first pregnant, even PW5 victim biological mother, knew about PW1 first pregnancy and decided to do abortion. PW5 evidence at page 16 proves that, she knew her daughter PW1 was pregnant, she also proved the age of the victim, being child below 18 years. In totality all the five grounds lacks merits, insisted State Attorney.

On the additional grounds of appeal, first complaint is that trial court did not take into the consideration his defense. According to the record at page 10 of the judgment last paragraph, it is clear that trial court did consider defense evidence but refused the same at page 11 of the typed judgment. Second complaint is on receiving of PF3 as exhibit. PW3 Doctor who examined the victims, at page 10 of typed proceedings, while PF3 was being tendered, appellant then accused upon being asked he did not object. Thus, PF3 were received as exhibits P1 and P2. Complaint that judgment started on issues, then analysis of evidence, then issues were answered, there is nothing wrong, argued State

Attorney. In totality Learned State Attorney argued this court to dismiss, appeal for lack of merits.

This court having gone through trial court records, grounds of appeal, and submission by respondent counsel, issue for determination is whether the prosecution proved the case beyond reasonable doubts. In criminal litigations it is the duty of prosecution to prove the case beyond reasonable doubts. In our jurisdiction, this principle was stated in various laws and case laws. Under section 3(2) and section 110 of the evidence Act, Cap 6 R.E 2019, provides for this mandatory requirement. Similarly, in the case of **Mohamed Said Matula Vs. R [1995] TLR 3,** it was held that;

> *"In criminal trial the burden of proof always lies on the prosecution. And the proof has to be beyond reasonable doubt."*

This principle was also repeated in the case of **Joseph John Makune Vs. The Republic [1986] TLR 44,** that;

> *"The cardinal principle of our criminal law is that the burden is on the prosecution to prove its case; no duty is cast on the accused to prove his innocence."*

Prosecution paraded six witnesses, to prove the case, amongst them PW1 and PW2 the victims. The testimony of PW1 was to the effects that, she was raped by her own father, she explained in details on what has been happening since 2018 to 2020. For easy of reference part of her evidence is quoted hereunder as seen at page 4 of the typed proceeding;

> **"The bad relation with accused, is accused do sexual intercourse with me. One day when I was at standard four accused called me at his bedroom and told me he**

wants to give me medicine. He took that medicine rubbed on my vagina rubbed on his penis and did sexual intercourse with me on 2018..."

While being examined by accused, at page of proceedings PW1 responded that;

"Yes, you were doing sexual intercourse with me your penis is thick not short or long."

PW2 also testified on the same line that, the accused now appellant did sexual intercourse with her. She said the appellant called her into his bedroom and do sexual intercourse with her. At page 8 of the typed proceeding part of her evidence is quoted as follows;

"Accused did sexual intercourse with me since 2019. At first accused called me to his bed room at night and told me he wants to give me medicine. Instead, he did sexual intercourse. Accused proceeded doing sexual intercourse to me until this year 2020. Sometimes he called me on coconut trees and did sexual intercourse to me."

During cross examination by accused. PW2 responded that;

"Yes, I asked you forgiveness you did sexual intercourse several times. Your penis is tall not thicker and short."

PW1 and PW2 the victims, both clearly explained in details on how the appellant called them to his bedroom to commit his evil desire by raping them in different times and locations pretending that he was giving them medicine. These witnesses are credible, and are the best witness who clearly testified on them being raped. In the case of **Selemani Makumba Vs. Republic [2006] TLR 384**, court held that;

"True evidence of rape has to come from the victim, if an adult, that there was penetration and no consent, and in

case of any other woman where consent is irrelevant, that there was penetration."

In this case at hand PW1 and PW2 managed to clarify and explained how appellant approached them at the first time and how he continued raping them since 2018 until 2020 when the appellant then accused was charged with the offence of rape. Their testimonies were corroborated by the evidence of Daudi Hassani Selemani Medical Doctor at Masoko Healt center who examined them as to whether they were raped and penetrated. The most important ingredient for the offence of rape is **penetration,** PW3 in his findings which accompanied by his examination report PF3, indicating clearly that both PW1 and PW2 were penetrated. In respect of PW1 he said; **"I examined PW1 vagina, her vagina was perforated and had express sexual intercourse. I examined her urine for urine pregnancy test. The result was positive. PW1 was pregnant."**

In accordance to PW2 he said; "**I examined PW2 at her vagina, PW2 vagina hymen was perforated. I identified PW2 vagina was express for sex. She had penetration on vagina for several times. I examined her urine on pregnancy. PW2 had no pregnancy."**

According to PW3 testimony. Both victims were penetrated. In the case of **Mustapha Khamis Vs. The Republic, Criminal Appeal No. 70 of 2016 (**unreported) court held that;

"It is not disputed that in the offence of under discussion, rape, penetration is one of the essential ingredients. The learned counsel for the parties seems not to dispute that proof of penetration is a mandatory statutory requirement under section 130(4)(a) of the penal code."

More so, at page 10, 11 and 12 of the typed proceedings PF3 tendered by PW3 Medical Doctor was received as Exhibits. Appellant then accused upon being asked if he had objection in regard with the admissibility of the said PF3, he said he had no objection and he did not even cross examine the witness when tendering the said exhibit. It is settled principle of law that, failure to object/ cross examine witness during tendering of exhibit means acceptance of the said exhibit. In the case of **Hawadi Msilwa Vs. Republic, Criminal Appeal No. 59 of 2019** (unreported) at page 5, court stated that;

> *"Failure to object to the admissibility of the caution statement, the appellant is now stopped from denying his statement at this stage."*

This principle was emphasized in the case of **Issa Hassan Uki Vs. Republic, Criminal Appeal No. 129 of 2017**(unreported) CAT at Mwanza, that;

> *"The appellant did not challenge the testimony of the witness. This connotes that he was comfortable with the contents of the testimony of the witness. Had he any query or doubt as to the veracity of PW1'S testimony he would not have failed to cross-examine on the same. It is settled in this jurisdiction that failure to cross examine a witness on a relevant matter ordinarily connotes acceptance of the veracity of the testimony."*

As shown above, the appellant then accused did not object the admissibility of the PF3, likewise, he did not cross examine PW3 who's testimony was to the effects that, PW1 and PW2 victims was raped and penetrated. Therefore, it is taken that he admitted what was testified by PW3.

The appellant complained that, no prosecution witness witnessed the appellant committing the alleged offence, evidence was narration not direct, the case was fabricated. It is true that the offence was committed in secret, but PW1 and PW2 victims managed to clarify on how the appellant raped them, their testimonies is direct, even when the appellant given chance to cross examine them, their answers were direct. Trial court managed to look the demeanour/ conducts of the witnesses during trial and satisfied itself that there is no any indication that the case was fabricated.

Another crucial ingredient in rape cases to prove is the age of the victim. PW5 Amina Omari Mkumbalu, victim biological mother proved the age of the victims at page 16 of the typed proceeding she said PW1 was born on 2005. PW2 was born on 03 July 2007 so by 2019 there were below 18 years. In the case of **Mathew Kingu Vs. Republic, Criminal Appeal No. 589 of 2015** (unreported) CAT at Dodoma, court stated that;

> *"In the instant appeal because the issue of the age of the complainant was disputed at the Preliminary Hearing, it required proof during the trial. But no evidence was led to prove the age of the complainant."*

PW5 mentioned date and years on which both victims were born, thus she managed to prove the age of the victims.

The last complaint for consideration is that, trial court did not take into the consideration defense case. I have reviewed the trial court records. At page 10 and 12 of the typed judgment, the records speak by itself, trial court considered defense case. For easy reference the said pages are quoted below.

"Analyzing accused defense, accused defense is mere denial to the charges....." "with the above analyzation and determination of prosecution case and defense case this court is satisfied that the

case has been proved beyond reasonable doubts by prosecution against the accused person".

According to the evaluated evidence, there is no reason to depart from the trial court findings. Evidence of PW1, PW2, PW3 and PW5 both grounded conviction of the accused now appellant, thus appeal is without merits. It is therefore dismissed. Trial court conviction and sentence is upheld.

Z.G. Muruke

Judge

28/03/2022.

Judgment delivered in the presence of appellant in person and Wilbroad Ndunguru Senior State Attorney for the respondent. Right of appeal explained.

Z.G. Muruke

Judge

28/03/2022.