

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(IN THE DISTRICT REGISTRY OF KIGOMA)

AT KIGOMA

(DC) CRIMINAL APPEAL NO. 49 OF 2021

(Arising from the District Court of Kasulu at Kasulu in Criminal Case No. 147 of 2021)

UWEZO ZIBWEAPPELLANT

VERSUS

REPUBLICRESPONDENT

JUDGMENT

25/3/2022 & 01/4/2022

F. K. MANYANDA, J.

The Appellant, Uwezo Zibwe, after been distressed by a decision of the District Court of Kasulu at Kasulu which convicted him with an offence of incest by males and sentenced him to a term of twenty years imprisonment on 3/11/2021 has preferred this appeal. He has raised five (5) grounds of appeal namely: -

- 1. That the trial court Magistrate erred in law and facts by convicting and sentencing the appellant without considering the evidence adduced by PW3 which cannot establish the case against the*



accused because the victim's vaginal bruises were not fresh so it is difficult to prove whether the accused is the one who committed the offence or not;

- 2. That the trial; court Magistrate erred in law and facts by convicting and sentencing the appellant relying on victim's evidence only without corroboration with other reliable evidence;*
- 3. That the trial court Magistrate erred in law and facts by convicting and sentencing the appellant relying on PW2 who did not prove whether the victim's door was broken by the accused or not;*
- 4. That the trial Court Magistrate erred in law and facts by convicting and sentencing the Appellant without taking into consideration PW1 allegations if she could not go to hospital on time due to the fact that she was unable to walk, how could she manage to got to the ten-cell leader on time; and*
- 5. That the guilty of the appellant was not proved beyond doubts as required by the law.*

The brief background of this matter is that the Appellant is a biological son of the victim, who is his biological mother. At the time of commission of the offence both lived in one home stead but in separate rooms. The victim is a disabled woman whose legs have a partial paralysis. On

22/4/2021 the Appellant allegedly at night time broke the door of his mother's room and had carnal knowledge of her without her consent. The victim reported the incident to the ten-cell leader and the later reported to Police.

On the next day the Police arrested the accused and sent the victim to a medical hospital where a doctor examined her and found that she had some bruises in the inner part of her vagina. The Appellant was charged with incest by males, contrary to section 158(1)(b) of the Penal Code, [Cap. 16 R. E. 2019].

After full trial he was found guilty, and sentenced to 20 years imprisonment. He is dissatisfied, hence this appeal.

At the oral hearing of the appeal the Appellant appeared in person unrepresented. The Respondent/Republic was represented by Mr. Clement Masua, learned State Attorney.

Being a layman, the Appellant simply adopted the grounds of appeal and asked the State Attorney to start so that he may reply.

The State Attorney supported the appeal on only one ground that there is no enough evidence on identification. He was of the views that since the incident took place at night the victim ought to have explained how

she identified the Appellant. He cited the case of **Waziri Amani vs Republic**, [1980] TLR 250.

Having heard the State Attorney supporting his appeal, the Appellant had nothing to add rather than to pray his appeal to be allowed.

As it can be seen from the grounds of appeal, there is basically one complaint, that is, whether or not the offence was proved beyond all reasonable doubts.

In order to determine this question, I will need to re-apprise the evidence.

This being a first appellate court, it is entitled to re-evaluate the evidence and by following the footprints of my Brother Hon. Galeba, Judge, as he then was, in **Masatu s/o Mjarifu vs Republic**, Criminal Appeal No. 21 of 2020, this Court may come to a conclusion which need not necessary be the same as that of the trial court.

In that case, Hon. Galeba, Judge, after surfing through various authorities, found the cases of **Halid Hussein Lwambano vs R.** Criminal Appeal No. 473 of 2016 (unreported), (CAT at Iringa) and **Jumanne Salum Pazi vs Republic** [1981] TLR 246, as useful, then he stated that:

"I will step into the shoes of the trial court and analyze the evidence and come to a conclusion which need not c=necessary be the same as that

*the Court. See **Halid Hussein Lwambano vs R.** Criminal Appeal No. 473 of 2016 (CAT at Iringa) (Unreported) and **Jumane Salum Pazi vs R.** [1981] TLR 246, where in the latter case this court (Kisanga, J.) (as he then was) held that;*

'(i) this court being the first appellate court must consider the evidence, evaluate it itself and draw its own conclusion...;."

In this appeal, the prosecutions evidence was built on four (4) prosecution witnesses, the first witness PW1 is the victim who testified that she is a biological mother of the Appellant. That both the victim and the Appellant lived in one home stead. On the fateful date 22/4/2021, the Appellant entered into her room after breaking open first the window then the door and had sexual intercourse without her consent. She screamed with no help.

According to the testimony of PW2, Joseph Amos @ Mbaye, a ten-cell leader who knew well the Appellant as a son of the victim is that on the morning of 23/4/2021 saw the victim (PW1) at his home complaining of been raped by the Appellant.

He escorted her to Muyama Police Station where she was given PF-3 and escorted her to Muyama Health Center. He witnessed the broken door of the victim room.

PW3 was Muyama Health Centre human being doctor who examined the victim and found her having signs of been penetrated a day ago. PW3 also medically estimated the victims age to be 70 years old and she had paralyzed lower limbs. The said doctor filled the PF3. Witnessing her findings of penetration in Exhibit P1, the PF-3, she stated follows;-

"There is obvious visible signs of penetration due to presence of hyperemic bruised inner vaginal wall..."

PW4 was the Police officer who investigated the case he testified that the victim is a disabled, she named the Appellant as a person who raped her hence, he arrested him.

In his defence, the Appellant testified as DW1, he admitted that the victim is his biological mother. He also admitted to have been living with her at one home stead. He denied to have carnally known his mother. He stated that he was in dispute with her over farms left to him by his late father.

In short, that is the evidence of the incident. As it can be seen, there is no dispute that the Appellant is a biological son of the victim with whom they lived together in one compound. The Appellant admits that on the incident day 22/4/2021 was at their home.

The testimony of the victim is that at the fateful night, the Appellant broke the door of her house and entered into her room house where he had carnal knowledge of her. She did not consent.

As far as penetration is concerned, the victim (PW1) is corroborated by PW3 the medical doctor that she was carnally known. PW3 testimony through PF3 is that the victim was penetrated a day before she examined her. The incident took place on 22/4/2021 and PW2, a ten cell who helped the victim to hospital after obtaining the PF3 shows that the victim is a disabled whose legs are loose therefore, she could not resist the assault. This fact of the victim's legs to be lame is supported by PW3.

The trial court believed the evidence of the prosecution witnesses that the victim was carnally known. My examination of the evidence I have described above makes me believe the same, that the victim was penetrated on the incident day 22/4/2021.

I am also fortified by the authority in the case of **Suleimani Makumba vs Republic** [2006] TLR 357 where it was held as follows: -

"A medical report or evidence of a doctor may help to show that there was sexual intercourse but it does not prove that there was rape, that is, unconsented sex, even if bruises are observed in the female sexual organ. 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 woman where consent is irrelevant, that there was penetration."

In the instant matter, PW1, the victim testimony is that she was raped by son, in this matter, the offence becomes incest by males in which consent is immaterial because it is a prohibited sexual relationship.

The question is whether the evidence implicates the Appellant. From the evidence summarized above, the victim named a person who raped her to be the Appellant, her own son. She stated as follows: -

"The accused entered the house then to my room by breaking the window then the door to my room where I sleep and raped me the same way his father used to do to me..."

Although the victim did not demonstrate the penetration in my opinion the words *"the same way his father used to do to me"* connotes the penetration of a male organ inter the female member of her. The Court has accepted indirect descriptions of acts of sexual intercourse. In the case of **Haruna Mtasiwa vs Republic**, Criminal Appeal No. 206 of 2018 it was held that:-

"Gone are the times in this jurisdiction when the victim was expected to graphically explain that the ravisher inserted his penis in her vagina."

Moreover in cross examination by the Appellant the victim made it even clearer when she stated as follows: -

"I was only hurt because you inserted your penis into my vagina".

On top of these words in cross examination, the victim confidently was telling the trial court that she vividly identified the Appellant because he is her son with whom she was living together all the time of their life from his childhood to adulthood having grand children to her.

The State Attorney opined that the victim might have mistaken identity, however, he did not pin point elements of mistaking identity apart from contending that the victim did not explain how she identified him.

In my opinion, just as the trial court found, the circumstances of this matter assure identification of the Appellant by the victim because of the high degree of familiarization they had. Secondly, the act of rape took a considerable long time from breaking the window, breaking of the door and then entrance into her room, to commission of the rape and then leaving the room.

Moreover, the victim was helpless at night but named the Appellant to PW2 immediately in the morning where she went to report. PW3 testimony is to the effect that the victim named the Appellant.

Also, there is evidence that the Appellant was arrested after fleeing from their home to his cousin's home.

Another piece of evidence is that there is no plausible explanation as to why the victim, an adult of 70 years who bore the Appellant reared him to adult hood and she was still raising him and his children, who are grandchildren, would frame him with a serious offence of raping her; the contention of dispute over land is not substantiated by the evidence.

I have also examined the fact that a woman of the age of the victim can not easily volunteer to invent a fake story of rape., in particular of incest, which also tarnishes her social status. In my firm opinion the victim (PW1) evidence is reliable.

In law, once the evidence of a victim of rape once is found reliable and believed to be true, and nothing but truth, suffices to found a conviction without even corroboration. This is per the provisions of the law under section 127 (6) of the Evidence Act, [Cap. 6 R. E 2019] which reads as follows: -

"Notwithstanding the preceding provisions of this section, where in criminal proceedings involving sexual offence the only independent evidence is that of a child of tender years or of a victim of the sexual offence, the court shall receive the evidence, and may, after assessing the credibility of the evidence of the child of tender years or of a victim of the sexual offence on its own merits, notwithstanding that such evidence is not corroborated, proceed to convict, if for reasons to be recorded in the proceedings, the court is satisfied that the child of tender years or the victim of the sexual offence is telling nothing but the truth".

Like, the trial court, I don't see any reason to differ from its findings that PW1, the victim's testimony is reliable and it gives the true account of what happened on the fateful day 22/4/2021 when she was raped by the Appellant.

The Appellant complains that the evidence of PW3 that the bruises were not fresh is of no importance because PW3 testimony shows that she examined the victim just a day after and her findings are that she was raped on day before as she found bruises inside the vagina.

I have adequately covered the complaint in ground two that the victim's evidence has no corroboration that the Appellant raped. That a conviction

may be found based on sole evidence of the victim of sexual offence if is believed to be credible and true as per section 127 (6) of the Evidence Act.

The Appellant's complaint in ground three that PW2 did not witness a broken door in the house of the victim is an afterthought. PW2 stated in cross examination by the Appellant stated as follows;-

*"She came in the morning because of her disability to work and she was scared of being beaten with dogs, she slept in the forest because it was dark outside I did took (sic) her to the Police Station; you broke her door and enter her room, **I went to the scene and saw the door was broken**". (emphasis added).*

In ground four the Appellant complains that the victim been incapable of walking could not go to hospital. I have examined the evidence, I could not find such evidence that the victim was incapable of walking. Instead there is evidence from the victim and PW2 that she was capable of moving though she is a crippled, such movement enabled her to reach at PW2 house and then to hospital via police.

In the result I find that the charge of incest by males was proved by the prosecution beyond all reasonable doubts.

I disagree with the submissions by the State Attorney that identification was not established. It was established as explained above. The appeal is dismissed.

However, I found an anomaly in the judgment as there is no conviction entered.

Having found that the offence was proved, just as the trial court did, I do hereby direct that the trial court's file be remitted to the trial court for it to enter the conviction in accordance with the law.

For clarity, the trial court must, for keeping the record in order; record that it has "convicted" the accused, not only finding him guilty. The accused must be summoned and be present when conviction will be entered. Order accordingly.




F.K. MANYANDA

JUDGE

01/4/2022