THE UNITED REPUBLIC OF TANZANIA

JUDICIARY

IN THE HIGH COURT OF TANZANIA

(DISTRICT REGISTRY OF MOROGORO)

AT MOROGORO

CRIMINAL APPEAL NO. 70 OF 2022

(Originated from judgement of Resident Magistrate Court of Morogoro at Morogoro before Hon. E.J. Mrema in Criminal Case No. 216 of 2017)

EVANCE HATIBU BENO.....APPELLANT

VERSUS

THE REPUBLIC.....RESPONDENT

JUDGEMENT

Hearing on: 14/12/2022

Judgement on: 06/3/2023

NGWEMBE, J:

The appellant Evance Hatibu Beno was charged, convicted and sentenced to thirty (30) years imprisonment for the offence of incest by male contrary to section 158 (1) (a) of the Penal Code. The victim in that offence was a girl of nine (9) years old, whose actual name is reserved, instead she is baptized as AB or victim a name used throughout this judgement. The appellant was alleged to have carnal knowledge with a biological daughter.

For convenient purposes, the genesis to this appeal traces back to the night of 24th July, 2017, at Maskati village within Mvomero District in Morogoro Region, where the appellant was alleged to have carnal knowledge with AB in a banana farm, while knowing that she is his daughter. Two people with a torch alleged to see the appellant in

flagrante delicto that is, the appellant was caught in the act of defiling her daughter in the banana farm. Those two persons alleged to raise an alarm of *"njoo umuone Evance Hatibu anambaka mtoto wake"* meaning, come and witness Evance Hatibu is raping his own daughter. Out of that shout, the appellant ran away in the farm land.

The victim's grandmother reported the incident to the village chairman, also the victim was taken to Village Executive Officer who gave them a letter to report to the hospital for medical checkup. Later the appellant was arraigned in court, charged for the offence of incest by male.

Upon hearing the evidences of both parties, the trial court, was satisfied that the prosecution case was established and proved to the standard required by law, consequently the court convicted him and sentenced him to suffer thirty (30) years in jail. Having so sentenced, the appellant found his way to this house of justice. Thus, lodged notice of appeal timeously and appealed to this court grounded with seven grievances, which may be summarized into two namely: -

1. That, the trial court Magistrate erred in law for failure to evaluate the defence evidence.
2. That, the prosecution's side failed to prove the case beyond reasonable doubt.

All pleadings being complete, this appeal was called for hearing, whereas the appellant was unrepresented, while Mr. Edgar Bantulaki learned State Attorney, appeared for the Republic/respondent.

Unfortunate, when the appellant was called to address this court on his appeal, he had tongue tied, rather denied generally to have committed the alleged offence and prayed to this court to consider his grounds of appeal. Added that, the case against him was fictitiously cooked by the victim's grandmother due to land dispute, otherwise, he never committed the offence.

In turn the learned State Attorney Mr. Edger Bantulaki, strongly resisted the appeal by supporting the findings of the trial court, conviction and sentence thereto. He summarized the seven grounds into two as herein above.

Starting with the second ground of appeal, that the prosecution's side failed to prove the case beyond reasonable doubt. Mr. Bantulaki submitted that, it is true in our laws that the victim's evidence is capable of convicting the accused, he cited the case of **Selemani Makumba Vs. R [2006] T.L.R 379.** The evidence of PW2 (Victim) explained the whole event so clear that, she could not lie about her own father. The event was witnessed by PW3. Equally PW3 and PW5 corroborated the evidence of the victim (PW2) as per page 14 of the proceedings. He further argued that, in the contrary the appellant failed to discredit the evidence of PW2, and referred this court to the case of **Goodluck Kyando Vs. R (2006) T.L.R. 363.** That failure to ask questions on a relevant point it is taken as admission of the evidence to be true. Hence the evidence of PW2, PW3 and PW5 was capable of convicting the appellant. Above all, the punishment of 30 years was proper for the victim was 13 years old.

According to the evidence of PW1 and PW2 proved that the victim was born on 7/03/2008 and the incident occurred on 24/07/2017, therefore the victim was nine (9) years old. Mr. Bantulaki cited the case of **Wilson Elias Vs. R Criminal Appeal No. 449 of 2018 (CAT)** to the effect that, age may be provided by the victim, parents, relatives, doctors and other documents. He submitted that, the evidence on the birthdate of PW2 is contradictory, hence the sentence of 30 year was proper.

On the first ground that, the trial court Magistrate erred in law for failure to evaluate the defence evidence, Mr. Bantulaki submitted that the Republic find the defence case was irrelevant as per page 10 of the proceedings and that the ground is purely an afterthought. At the end he prayed this appeal be dismissed, conviction and sentence of the trial court be upheld.

Considering deeply on the facts and grounds of appeal, I find certain issues are indisputable, such as the relationship between the victim and the appellant. That the appellant is a biological father of AB. Equally important is to note that the victim was still at Primary school studying at Standard six as per PW1. However, the age of the victim is questionable as PW1 managed to mention correctly the birth day, month and year of the victim that is 07/3/2008. The victim in her testimony boldly testified that she was 13 years old on the eventful date. Specifically mentioned the date, month and year of her birth, that is, on 7/3/2008. Above all, PW5 a clinical officer testified that a ten (10) years old girl was brought before her for examination.

Undoubtedly, the issue of age of the victim was not established and proved to the standard required. Notably, if it is true that she was born on 7/3/2008 then up to 24/7/2017 she was nine (9) years not thirteen (13) years. This point may equally be supported by PW5 who said the girl was about ten (10) years when she appeared before her for medical examination. Moreover, the charge sheet disclosed that the victim was ten (10) years old. Usually, the prosecution has a duty to prove the contents of the charge sheet in every criminal trial. In this appeal, the prosecution failed to establish and prove the contents of the charge sheet.

Still, the question of age raises serious doubt to the extent that, assuming she was born in year 2008, whether it was possible at the age of nine (9) years be at standard six? According to the National Education Policy, pupils may commence primary school at the age of six or seven up to eight years. Assuming she started primary school at the age of six years, obvious by standard six she was 12 years old or above.

From the above, the date, month and year of birth of the victim is highly questionable. In our jurisdiction, the issue of age in sexual related offences is fundamental, because it determines the punishment of the accused.

The Court of Appeal in respect to this point, had strict requirement of proof as was discussed and held in the case of **Leonard s/o Sakata Vs. DPP, Criminal Appeal No. 235 of 2019 CAT at Mbeya**, where two schools of thought regarding proof of victim's age in rape cases were discussed in extenso. In the same vein, the case of **Winston Obeid Vs. R, Criminal Appeal No. 23 of 2016**; **Edson Simon**

Mwombeki Vs. R, Criminal Appeal No. 94 of 2016; and **Aloyce Maridadi Vs. R, Criminal Appeal No. 208 of 2016 (all unreported)** discussed in details on the need of proof of age of the victim.

Accordingly, one school of thought, held that the victim's age must be strictly proved. The other school of thought held that, the age of the victim can be inferred from other facts, even when not directly proved. In my reasoning, the first school fits more in the circumstance of this case at hand. Failure to establish and prove the age of the victim may raise reasonable doubt. In this case strict proof of age was required to establish if the victim was an adult matured woman or still a child. However, that alone does not exonerate the appellant from liability because the charge preferred against the appellant is not rape per se, but incest by male contrary to section 158 (1) (a) of the Penal Code, Cap 16 R.E. 2002.

I think the second fundamental legal issue to decide is whether there was incest as known by our laws. The most important element of incest is blood relationships between the appellant and the victim. This point seems to be unquestionable, the two are father and daughter. Another element is existence of prohibited relationship. The section cited above is clear like a day followed by night that, any male person who has prohibited sexual intercourse with a female person, who is in his knowledge his granddaughter, daughter, sister or mother, commits the offence of incest. To constitute this offence, there must be sexual intercourse, which according to section 130 (4) of the Penal Code, penetration however slight is sufficient to constitute the sexual intercourse necessary to the offence.

Repeatedly, in the cases of this nature, we have sought guidance from decision of the Court of Appeal in the case of **Godi Kasenegala Vs. R, Criminal Appeal No. 271 of 2006 (CAT)** whereby the Court raised a valid question on what constitutes an offence of rape? They proceeded to answer as follows: -

> *"under our Penal Code rape can be committed by a male person to a female in one of these ways. One, having sexual intercourse with a woman above the age of 18 years without her consent. Two, having sexual intercourse with a girl of the age of 18 and below with or without her consent (Statutory rape). In either case,* ***one essential ingredient of the offence must be proved beyond reasonable doubt.*** *This is the* ***element of penetration*** *i.e.* ***the penetration, even to the slightest degree, of the penis into the vagina"***

In similar vein the Court in the case of **Mbwana Hassan Vs. R, Criminal Appeal No. 98 of 2009 (CAT – Arusha)**, held: -

> *"It is trite law also that, for the offence of rape ... There must be unshakeable evidence of penetration"*

In respect to this appeal, the question remains, whether there was penetration of the appellant's male organ to his daughter's female organ to constitute incest? This question is answered by perusing inquisitively on the evidences adduced during trial and the medical opinion. The evidence of PW2 was supported by PW3 an eye witness of the event though was at night. The two testified clearly that the appellant inserted his penis to the victim's vagina. Such evidence seem to have sexual

intercourse, but the law is strict on this issue as rightly referred above, that there must be penetration. Failure of which may constitute other offences known by law.

The evidence of Clinical officer (PW5) Pulcheria Kimario at page 20 of the proceedings disclosed as follows: - *"I examined her the whole body and I found out that there were minor bruises on top of her vagina. The bruises were caused by a blunt object".* In cross examination, she testified that *"the child was still a virgin"* Equally important is the documentary evidence tendered in court as exhibit P1 which is PF3 its contents do not disclose if there were penetration.

It is a concern of this court, that nowadays, we have seen shoddy opinions on sexual related offences involving medical experts. At most we receive expert opinions from clinical officers who, in my considered view are not experts. Their opinions do not help our courts to determine the real issue in question. In this appeal, the question is not answered by the clinical officer if at all there were penetration to the vagina of the victim to constitute an offence of incest by male.

In other jurisdictions, like India there are specific rules guiding experts who are capable to opine for the court use. This was so decided in the case of **Ramesh Chandra Agrawal Vs. Regency Hospital Ltd. and others, MANU/SC/1641/2009: JT 2009 (12) SC 377,** where the Apex Court considered the issue pertaining to expert opinion in a detailed way. In para 11, the Court held: -

"The law of evidence is designed to ensure that the Court considers only that evidence which will enable it to reach a

reliable conclusion. The first and foremost requirement for expert evidence to be admissible is that it is necessary to hear the expert evidence. The test is that the matter is outside the knowledge and experience of the lay person... The scientific question involved is assumed to be not with the Court's knowledge. Thus, cases where the science involved, is highly specialized and perhaps even esoteric, the central role of expert cannot be disputed. The other requirements for the admissibility of expert evidence are:

i. that the expert must be within a recognised field of expertise

ii. that the evidence must be based on reliable principles, and

iii. That the expert must be qualified in that discipline."

I would therefore encourage responsible institutions to introduce rules on experts to opine for the court use. This will help to clear any doubt on the qualifications of a person opining his opinion for the court use. In respect to this appeal, it is unknown if the alleged slight bruises on top of the victim's vagina constituted penetration?

The question is yet to be answered, that in the absence of penetration as per the cited provision of law, whether incest by male was committed? In answering this question, I have no slight doubt in my mind, the offence of incest was not committed, rather the prosecution ought to look for an appropriate offence instead of incest which involve penetration.

In totality and on the circumstances of this appeal, together with the medical opinion that the victim was still virgin, and lack of cogent

evidence to constitute incest by male, meaning there was no penetration which is the most important element to constitute incest by male.

Accordingly, this appeal is meritorious, I therefore, proceed to quash the conviction and set aside the sentence of thirty (30) years imprisonment passed to the appellant. Consequently, I order an immediate release of the appellant, unless otherwise, held on account of any other lawful cause.

Dated at Morogoro in chambers this 6th March, 2023.

P.J. NGWEMBE

JUDGE

06/03/2023

Court: Judgement delivered at Morogoro in chamber on this 6th March, 2023, **before Hon. L.B. Lyakinana, Ag,DR** in the presence of the appellant in person and Vestina Massalu State Attorney for the Republic.

Right to appeal to the Court of Appeal explained.

Sgd: L.B. Lyakinana

Ag DEPUTY REGISTRAR

06/03/2023

I Certify that this is a true and correct copy of the original

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Deputy Registrar

Date 09/08/2023 at Morogoro