IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

IN THE SUB- REGISTRY OF MANYARA

AT BABATI

CRIMINAL APPEAL NO. 26 OF 2023

(Appeal from the decision of the District Court of Simanjiro in Criminal Case No. 70 of 2021 Hon. C. S. Uiso-SRM dated 29th December 2022)

SALIM HASSAN.....APPELLANT

VERSUS

REPUBLIC .....RESPONDENT

JUDGMENT

Date:22/5/2023 & 27/6/2023

BARTHY, J.

The appellant in this appeal, was arraigned before Simanjiro District Court (hereinafter referred to as the trial court), charged with two counts. On the first court, the appellant was charged with unnatural offence contrary to Section 154(1) (a) (2,) while on the second count he was charged with the offence of incest by male contrary to Section 158 (1) (a) of the Penal Code [CAP 16 R.E 2019 now R.E 2022].

On the first count the prosecution side alleged that, the appellant on 16th September 2021 at Zaire Kati street-Mirerani area within Simanjiro District in Manyara region, did have a carnal knowledge with a girl aged 12 years old against the order of nature.

On the second count, the appellant was alleged to have sexual intercourse with a girl child aged 12 years, who to his knowledge was his daughter. For the purposes of protecting the identity of the girl, she shall be referred to as PW1 or simply the victim.

The appellant pleaded not guilty to both counts; hence full trial ensued. In attempt to prove their case beyond reasonable doubt, the prosecution side called a total of four witnesses and tendered one documentary exhibit.

Upon hearing the evidence, the trial court was convinced that, the case against the appellant was proved to the hilt. Hence, the appellant was convicted and sentenced to serve 30 years imprisonment for each count and the sentence was to run concurrently.

Before going to the merits or otherwise of the present appeal, a brief factual background leading to the arraignment of the appellant before the trial court is necessary. The victim is the biological child of the appellant and PW2 whom lived in the same house.

It is also on record that, PW2 used to sell vegetables in the market, thus she would leave early at 5:00 in the morning to go for her business errands. When PW2 was out doing her business, she would leave the victim under the care of the appellant.

On the fateful morning of 16/9/2021 at 5:00, PW2 left for her usual business, the appellant then took the victim to his bed, took off her underwear, undressed himself and inserted his manhood to the victim's womanhood and her anus. The victim stated before the trial court that she felt pain, but her mouth was covered by the appellant's hand so that she does not raise an alarm.

The records further reveal that, the victim stated it was not the first time the appellant had ravished the victim as the event of 16/9/2021 was the fourth time.

PW2 recalled to have left home on 16/9/2021 for market at 5:00hours and she returned at 6:00 hours after she had sold all of her merchandise. On her arrival at home, she found the door of the house locked. She called the victim to open the door.

When victim opened the door, she was wearing a khanga around her waist and a t-shirt, then the appellant came out of his bedroom hurriedly and left. PW2 became suspiciou; accompanied with her aunt she went ahead to inspect the victim and they found some spermatozoa on her vagina and anus. They inquired to the victim who informed them it was the appellant who ravished her.

PW2 was then taken to Mirerani police station where she was issued with PF3 and was taken to Mirerani health center where she was examined by PW4. In his examination, PW4 discovered that the victim's vagina was not intact and her anal muscles were loose, suggesting she was penetrated several times.

The appellant was the sole defense witness. He denied to have committed the offences he stood charged. He claimed that the case against him was plotted by PW2; after he has refused to have sexual intercourse with her because he suspected she had HIV.

Having heard the parties, the trial court convicted the appellant on both counts and sentenced him accordingly.

The appellant aggrieved with both conviction and sentence; he preferred the instant appeal with six grounds of appeal, which after a carefully scrutiny can be reduced into three grounds as follows;

1. *There was no sufficient evidence to ground the appellant's conviction hence the case against him was not proved to the required standard.*
2. *The trial court did not consider the appellant's defense.*
3. *That the documentary exhibit was wrongly tendered.*

At the hearing, the appellant appeared in person while the respondent was represented by Mr. Leons Bizimana learned state attorney.

When the appellant was called upon to expound the grounds of appeal, he prayed to the court to adopt them to form part of his submission. He had nothing further to elaborate.

On the respondent's side, Mr. Bizimana he apposed the appeal entirely. Arguing against it, Mr. Bizimana submitted that, the appellant was charged with two counts which were proved beyond reasonable doubt.

He added that the victim was carnally known against the order of nature given on her own detailed account of evidence and there was further proof that the victim is the appellant's child.

Mr. Bizimana was of the view that, on sexual offences best evidence had to come from the victim herself. To amplify his position he referred to the case of **Weston Haule v. Republic,** Criminal Appeal No. 504 of 2017, Court of Appeal of Tanzania at Mbeya (unreported).

He further submitted that; the evidence of the victim was corroborated with that of PW4 whose report on PF3 proved that the anal sphincter of the victim was loosened indicating that she was penetrated against the order of nature. He was therefore firm that unnatural offence was proved beyond reasonable doubt.

As for the offence of incest, Mr. Bizimana pointed out that, the prosecution had the duty to prove there was penetration as well as existence of blood relationship as required under Section 158 (1) of the Penal Code.

He went on arguing that, in the instant case it was proved that the appellant was the victim's father. The fact which was never disputed by the appellant, who also on his defence he admitted the victim to be his child.

Mr. Bizimana was firm on the testimony and the report of the doctor to have corroborated the evidence of the victim who testified that the appellant had sexual intercourse with her. He thus argued the first ground lacked merits.

Submitting on the second ground, he maintained that trial court considered the appellant's evidence which was found to be weak.

As for the third ground regarding the admission of the PF.3, Mr. Bizimana contended that, the PF3 was properly tendered in accordance to the dictates of the law and it corroborated with other evidence. He therefore sought the third ground lacked merits.

He therefore urged this court to dismiss the appeal for being devoid of merits. On rejoinder, the appellant had nothing to rejoin.

Having gone through the submission in relation to the grounds of appeal, the point for determination is whether this appeal has merits.

I will begin my deliberation with the first ground of appeal in which the appellant faults the trial court for sustaining the conviction based on weak evidence, which did not prove the offences beyond reasonable doubt.

As stated before, the appellant was charged with two counts of unnatural offence contrary to Section 154(1) (a) and (2) and incest by male contrary to Section 158 (1) (a) of the Penal Code. These are two distinct offences, although both share an element requiring the proof of sexual act/penetration.

This court will regard each offence in relation to the evidence adduced in determining as to whether or not they were established.

Rightly as pointed out by Mr. Bizimana that, the best evidence in sexual offences comes from the victim himself/herself. This position of the law was underscored in the case of **Selemani Makumba v. Republic,** [2006] T.L.R 379, where the Court of Appeal of Tanzania stated as follows;

> *"The true evidence of rape has to come from the victim if an adult that there was penetration and no consent and in the case of any other woman where consent is irrelevant that there was penetration."*

To begin with the first count of unnatural offence, the victim testified before the trial court that she was taken to bed and undressed by the

appellant who also undressed himself then he inserted his manhood into her vagina and anus. To quote her evidence the victim stated;

... he inserted his "dudu" inside my vagina and anus."

There are many expressions by victims of sexual offences to explain the manner in which the act was done and are all acceptable in courts. In the case of **Hassan Kamunyu v. Republic,** Criminal Appeal No. 277 of 2016 (unreported), the Court of Appeal referred to different expressions used to refer sexual act as follows:

> *"Thus, words like "[he] removed my underwear and started intercourse with me" is stated in the case of **Matendele Nchanga @ Awilo** (supra), "sexual intercourse" or "have sex" was held in the case of **Hassan Bakari @ Mamajicho** (supra), "[he] undressed me and started to have sex with me" is referred in the case of **Nkanga Daudi Nkanga** (supra), "kanifanyia tabia mbaya" was also referred in the case of **Athumani Hassan** (supra), "alinifanya matusi" was stated in the case of **Jumanne Shabani Mrondo** (supra) or "he put his dudu in my vagina" as held in the case of **Simon Erro** (supra) or did*

sex me by force " "this accused raped me without my consent" "while this accused was sexing me I alarmed" and "fortunately one B s/o T came to my home and he found this accused still sexing" was quoted in the case of ***Baha Dagari*** *(supra) were, though not explicitly described, were taken by the Court to make reference to penetration of the penis of the accused person into the vagina of the victim."*

From the above referred authority, the fact that the victim stated that the appellant inserted *his 'dudu' into her anus* it proved that the appellant inserted his male organ into victim's female sex organ to complete the sexual act.

The victim's evidence was corroborated by that of PW4 who told the trial court that upon examining the victim, he found her anal sphincters were not intact which suggested that the victim had been penetrated against the order of nature.

This piece of evidence was supported by the testimony of PW2 the victim's mother, who inspected the victim and found some spermatozoa on her womanhood and anus.

With regard to that evidence, I am settled whole evidence in totality proves that the victim was carnally known against the order of nature.

The important issue therefore was to determine as to whether or not it was the appellant who committed the offence.

The victim on her testimony she mentioned the appellant to be the perpetrator of the offence. The victim was able to mention the appellant as her aggressor at the earliest time when she was intercepted with her mother on the fateful day.

The ability to name the perpetrator at the earliest possible time is the assurance that the victim was able to identify him. The importance of this has been re-stated in a number of times by this court in various decisions. To mention just few, it was so determined in the case of **Republic v. Mwita Cornel Philimon @ Gaucho** (Criminal Session Case No. 64 of 2019) [2020] TZHC 2482 (3 July 2020). See also the case of **Samwel Nyamhanga v. Republic,** Criminal Appeal No. 70 of 2017, the Court of Appeal of Tanzania (unreported).

The victim and appellant are daughter and father respectively, they lived together in the same house, therefore they are not strangers to each other.

On 16/9/2021 when PW2 returned home from her business errands, she found the door to the house has been locked, thus asking the victim to open the door for her. As soon as the door was opened, the appellant got out of the house. In the manner the victim was dressing up, it prompted PW2 to inquire further and inspect the victim in her private parts where she found her with spermatozoa on her vagina and anus.

The appellant casted a blame to PW2 his wife for fabricating this case against him because he refused to have sexual intercourse with her after he suspected her to have HIV.

However, there was no reason as to why the victim would implicate the appellant with such serious offence. This is even supported by the appellant himself who state before the trial court that;

"I have no grudge against my daughter..."

The evidence tendered was clear and pointed irresistibly to the appellant. There is no flicker of doubt that the appellant was identified to have carnally known the victim against the order of nature. It is for that reason I find that the first count was proved beyond reasonable doubt.

The second count the appellant stood charged was the offence of incest by male, which is also proved by establishing sexual intercourse between closely related people.

In the instant case, there is no dispute that the appellant and the victim are father and daughter respectively. This is supported by the victim himself during her testimony, the evidence of PW2 and the appellant himself on his defence he admitted that the victim is her daughter.

The element of sexual intercourse is crucial to be proved in determining this offence. The evidence of the victim herself, that of PW2 who examined her private parts soon after the ordeal and the evidence of PW4; the medical doctor who conducted medical examination on the victim found the victim's had no hymen and her anal muscles were loosen. All these evidences suggesting that she had been penetrated several times.

It is for that reason I hold that the second count was as well established beyond reasonable doubt.

Consequently, I proceed to dismiss the first ground of appeal for lacking merits.

Next ground for determination is the second ground in which the trial court is faulted for not taking into account the appellant's defense. Rightly

as pointed out by Mr. Bizimana that the trial court did consider the appellant's defense evidence, but it was found to have no substance.

On page 3 of the typed judgment, the trial court considered the appellant's claim that, the case against him was fabricated by PW2 because of his refusal to have sexual intercourse with her, after he suspected her to be HIV positive.

The trial court on its finding considered that the appellant could not cross examine PW2 on his claim. Hence, I am also satisfied that the appellant's claims were just an afterthought. The second ground of appeal is also devoid of merit and therefore dismissed.

On the third and last ground of appeal, the trial court is being faulted for improperly admission of the documentary exhibit. On this ground, Mr. Bizimana had contended that the PF.3 was the only documentary evidence tendered and properly admitted by the trial court.

It is on record that, the appellant had objected against the admission of PF.3 as the exhibit of the case, however the trial court did nothing regarding the objection and proceeded to admit the document.

When the prosecution side sought to tender the said PF3 as the exhibit of the case, the appellant responded as such "no, it is not true" the argument

which was not addressed further by the parties and finally determined by the trial court. Considering this is the first appellate court, it has to step into the shoes of the trial court and make its findings.

In essence the objection raised was not on the point of law, but purely on fact. It a settled principle that, the objection needs to be on a point of law and not on facts, as decided by the Court of Appeal in the case of **Ottu on behalf of P. L. Asenga & Others v. Ami T. Ltd.** (Civil Application No. 20 of 2014) [2019] TZCA 13 quoting with approval the case of **Mukisa Biscuit Manufacturing Company Ltd. v. West End Distributors Ltd**, [1969] EA 696 where it was held that;

> *Preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained.*

In the present case, the basis of objection raised against the admission of the PF.3 before the trial was on the point of fact which required further proof through evidence. Its credibility would have been tested through cross examination.

with the unnatural offence which under Section 154(1) (a) and (2) of the Penal Code had prescribed punishment of life imprisonment if the victim is below 18 years.

In the instant case, the victim was 12 years old according to her evidence and that of PW2 during the commission of the offences. It follows therefore that the appropriate sentence which ought to have been imposed against the appellant is life imprisonment and not 30 years.

In such above observation, I invoke revisional powers of this court under section 373(1)(a) of the Criminal Procedure Act, Cap 20 R.E. 2022 in regard to the sentence of 30 years imposed to the appellant on the first count is accordingly quashed and set aside, in lieu thereof I substitute it with the sentence of life imprisonment.

It is so ordered.

Dated at **Babati** this 27th June 2023.

G. N. BARTHY

JUDGE

Delivered in the presence of the appellant in person and state attorneys Mr. Leons Bizimana assisted with Ms. Esther Malima.