IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

MOSHI DISTRICT REGISTRY

AT MOSHI

CRIMINAL APPEAL NO. 21 OF 2023

(Originating from Criminal Case No. 121 of 2022 of Mwanga District Court)

ROBERT PETERSON MCHOMVU..... APPELLANT

VERSUS

REPUBLIC ..... RESPONDENT

JUDGMENT

24/07/2023 & 21/08/2023

SIMFUKWE, J.

This is an appeal against the decision of the District Court of Mwanga in Criminal Case No. 121 of 2022 in which the appellant was charged with two offences:

1st count: Incest by male contrary to **section 158 (1) (a) of the Penal Code [Cap 16 R.E. 2019].**

2nd Count: Impregnating a school girl contrary to **section 60A (3) of the Education Act, Cap 353** as amended by **section 22 of the Written Laws (Miscellaneous Amendment) Act (No.2) of 2016.**

It was alleged by the prosecution before the trial court that on divert dates between January 2022 and August 2022, at Songoa village within Mwanga district in Kilimanjaro Region, the appellant herein being the grandfather of the victim JJR (hereinafter referred as the victim) aged 16 years, did have carnal knowledge of her.

In her testimony before the trial court the victim narrated how the tragedy began. That, one morning while she was still asleep her grandfather (the appellant) went into her room and asked her to undress herself. After the victim had undressed herself, the appellant also undressed, ordered the victim to lie on the bed and proceeded to have sexual intercourse with her. The victim never told anyone that she was raped by his grandfather as she was forbidden to do so on promise to be given some pocket money which she said that she used to be given even before she had started having sex with her grandfather. Thereafter, the victim continued to have sex with the appellant several times. On 03/9/2022, the victim was not feeling well and had stomach pain. In the evening, she told the appellant how she was feeling. The appellant required her to go to the dispensary. At the dispensary the victim was found pregnant whereas the nurse advised her not to disclose the information to anyone else, even her grandfather.

PW3 Wemael Mshana the nurse who attended the victim, testified among other things that she informed the Social Welfare Officer (PW1) about the victim's tragedy. The Social Welfare Officer went at Songoa village in the company of the police officer. PW3 showed them the house of the appellant, who was then arrested. Evidence of PW3 corroborated evidence

of the Social Welfare Officer (PW1). PW4 the doctor who examined the victim testified before the trial court and tendered a PF3 as exhibit.

In his defence, the appellant denied to had committed the offence and raised the defence of alibi. He also alleged that the case was cooked against him because he used to forbid the victim to do bad things.

The trial court found that the prosecution had proved the offence charged on the first count beyond reasonable doubts. It convicted and sentenced the appellant to serve 30 years imprisonment. Aggrieved with the decision of the trial court, the appellant filed this appeal on the following grounds of appeal:

1. *That the trial court erred in law and fact to convict and sentence the appellant while prosecution side failure (sic) to prove their case beyond reasonable doubts.*
2. *That, the trial magistrate erred in law and fact to convict and to sentence the appellant on relied to insufficient evidence. (sic)*
3. *That, the trial Magistrate erred in law and fact to convict and sentence the appellant on relied (sic) to contradictory evidence adduced by prosecution witnesses.*
4. *That, the trial Magistrate erred ·in law and facts for failure to consider the evidence adduced by defence side.*

The hearing of the appeal was conducted by way of written submissions. The appellant was unrepresented while the respondent was represented by Mr. John Mgave, the learned State Attorney.

The appellant argued the first and second grounds of appeal jointly. He submitted that it's clear that the prosecution case was not proved beyond

reasonable doubts as a requirement of **section 110(2) of the Law of Evidence Act, Cap 6 R.E 2019.** The appellant contended that the victim stated before the trial court that she never had sexual intercourse with anybody else, while the trial court found that the prosecution had not proved the offence of impregnating a school girl, beyond reasonable doubts. It was contended further that the offence of incest by male and impregnating a school girl inter-relate as the second offence is the product of the first offence. That, the same create doubts which should benefit the appellant to be released on both counts. The appellant added that PW2 (victim) stated before the trial court that she had sex with the appellant for the last time on 29/8/2022 and the victim was medically examined on 9/9/2022, which was bad in the eyes of law as there was a possibility of fabricating evidence against the appellant.

On the third ground of appeal the appellant submitted that there was a contradiction of the evidence of PW2 and PW6. Whereas PW2 stated that she was taken for medical examination on 8/9/2022 while PW6 said that she issued a PF3 on 9/9/2022. He was of the view that, the contradiction should have benefited him.

On the last ground of appeal, the appellant faulted the trial court for failure to consider his evidence that he was the one who had sent the victim to the Health Centre for medical check-up. That, it was the appellant who was taking care of the victim and he had not made any promise to her.

In his response to the first ground of appeal, Mr. John Mgave learned State Attorney stated that the ground lacks merit as the prosecution did prove their case beyond reasonable doubt that led to the conviction of the

appellant. It was submitted that among six prosecution witnesses who were called, PW2's (the victim) evidence intended to prove who was the perpetrator of the act of incest to her. The victim testified that she was living with her grandfather the appellant herein and her grandmother. She identified the appellant in court and stated that it was the appellant who had raped her. The learned State Attorney recalled that during the preliminary hearing the appellant admitted that the victim was his granddaughter. Thus, through the evidence of PW2 alone the prosecution was able to prove the offence of incest by male, since it is trite law that the best proof of sexual offences must come from the complainant whose evidence if credible, convincing and consistent with human nature can be acted upon singly as the basis of conviction as stated in the case of **Selemani Makumba v. Republic [2006] TLR 379** and **section 127(6) of the Evidence Act** (supra). That, it was on that basis that the court believed evidence of PW2 and convicted the appellant as the prosecution proved their case beyond reasonable doubt.

Responding to the second ground of appeal, it was the respondent's submission that evidence of PW2 and PW4 (sic) was sufficient to convict the appellant as the victim had named the appellant to PW4 (sic) the nurse during medical examination at the health centre. The same was considered as naming the suspect at the earliest possible opportunity as an utmost important assurance of credibility as an unexplained delay or complete failure to do so should put a prudent court into inquiry as stated in the case of **Marwa Wangiti Mwita and Another v. Republic [2002] TLR 39.**

On the third ground of appeal, Mr. Mgave replied that there was no contradiction in prosecution evidence as evidence of all prosecution

witnesses passed the test of coherence as stated in the case of **Shabani Daudi v. Republic, Criminal Appeal No. 28 of 2001** (unreported).

On the fourth ground of appeal, it was replied that the trial Magistrate considered the defence evidence whereas the appellant relied on the defence of alibi. The trial court noted that defence and found that the same did not shake the prosecution case. Reference was made to page 7 to 9 of the trial court judgment and the case of **Shabani Haruna @ Dr. Mwagilo v. Republic, Criminal Appeal No. 396 of 2017 [2021] TZCA 708** in which it was held that the appellant was supposed to prove the defence of alibi raised by him. In this case, Mr. Mgave was of the view that the defence of the appellant never raised any doubt and it was contrary to the mandatory provision of **section 194(4) of the Criminal Procedure Act, Cap 20 R.E 2022.**

The learned State Attorney prayed that this appeal be dismissed in its entirety for lack of merit and sustain conviction and sentence of the trial court.

Having keenly gone through the grounds of appeal, submissions by the parties, and the trial court's record, the issue for determination is whether the raised grounds of appeal have merit.

On the first and second grounds of appeal the appellant was of the view that evidence marshalled against him was insufficient to prove the offences charged. That, since the trial court found that the second count of impregnating a school girl was not proved, the same raised reasonable doubts on part of prosecution. Hence, the prosecution case was not proved beyond reasonable doubts. The learned State Attorney contended that the prosecution proved its case beyond reasonable doubts.

According to the evidence of both parties, the fact that the appellant is the grandfather of the victim is not disputed. Also, the appellant did not dispute that he was residing with the victim. Unlike other scenarios where the victim is a stranger to the perpetrator, in the case at hand among the questions to be resolved is, why did the victim decide to victimize her grandfather who was taking care of her? In his defence before the trial court, the appellant alleged among other things that the victim fabricated this case against him because he used to forbid her to do bad things. In the case of **Maruzuku Hamis v. Republic [1997] TLR 1** it was held that:

> "*"An accused's story does not have to be believed. He is only required to raise reasonable doubt, that is to say, his explanation must be within the compass of the possible in human terms."*

Is the story of the appellant in this case within the compass of the possible in human terms? I hesitate to answer that question in the affirmative as evidence of PW1 and PW3 corroborated evidence of the victim and eliminated any possibility of thinking that the victim could victimise her grandfather. The peculiar setting of how the ordeal came to light through the assistance of PW3 clears all reasonable doubts on part of prosecution.

Concerning the findings of the trial court on the second count, that the offence of impregnating a school girl was not proved, on my settled view, being the best judge of facts, I think the trial court was justified to find as it did. The findings could raise doubts if the appellant was acquitted of the offence of incest by male and convicted of impregnating the victim. I therefore find the first and second ground of appeal devoid of merit.

On the third ground of appeal the appellant condemned evidence tendered by the prosecution for being contradictory. The learned State Attorney submitted that evidence of all prosecution witnesses was free of contradictions. I have examined the proceedings of the trial court and noted that evidence of PW1 and PW3 was to the effect that they arrested the appellant on 08/9/2022 and took him together with the victim to the police station. At the same time evidence of PW4 the doctor who examined the victim and PW6 the investigator of this case was that the PF3 was issued on 09/9/2022 and the victim was examined on the same date. A PF3 (exhibit P1) which was tendered before the trial court supports evidence of PW4 and PW6. The discrepancy in the circumstances of this case if any is very minor in the sense that PW1 and PW3 said that they took the victim to the police station together with the appellant on 08/9/2022. After interrogation, the victim was taken to the Health Centre for medical examination. It is on record that the appellant did not dispute the fact that he was taken to the police station together with the victim. Thus, I am of considered opinion that since what was done by the doctor was preceded by what PW1 and PW3 did, the contradiction is not material one and the same is curable under **section 388(1) of the CPA** (supra). The case of **Dickson Elia Nsamba Shapwata v. Republic, Criminal Appeal No. 92 of 2007** cited page 48 of **Sarkar, the Law of Evidence, 16th Edition,** which states that:

> *"Normal discrepancies in evidence are those which are due to normal errors of observation normal errors of memory due to lapse of time, due to mental disposition such as shock and horror at the time of the occurrence and those are always there however honest and truthful a witness*

may be. Material discrepancies are those which are not expected of a normal person. Courts have to label the category to which a discrepancy may be categorized. ***While normal discrepancies do not corrode the credibility of a party's case material discrepancies do.*** *" Emphasis added*

In another recent case of **EX. G. 2434 PC. George vs Republic (Criminal Appeal 8 of 2018) [2022] TZCA 609** at page 11 the Court of Appeal held that:

"We shall therefore bear in mind that not every contradiction and inconsistencies are fatal to the case ***[Dickson Elia Nsamba Shapwata & Another v. Republic, Criminal Appeal No. 92 of 2007*** *(unreported)]. And that minor contradictions are a healthy indication that the witnesses did not have a rehearsed script of what to testify in court.* ***[Onesmo Laurent @ Saiikoki v. Republic, Criminal Appeal No. 458 of 2018*** *(unreported)]."*

On the last ground that the trial Magistrate did not consider the evidence of the appellant, in rebuttal it was submitted that the trial court considered the defence of alibi of the appellant although he had not filed notice in respect of the same as required by the law. I am aware that failure to consider the defence evidence amounts to denial of fair hearing. The case of **Hussein Idd and Another v. Republic [1986] TLR 166** is relevant. At page 7 to 9 of the judgment of the trial court, the learned trial Magistrate discussed thoroughly the defence of alibi raised by the

appellant which over weighed other aspects of his defence. At page 9 of the judgment of the trial court, it was concluded that:

> *"Now I came to the accused alibi defence, its alibi does not create any doubt to the prosecution as the accused failed to bring any evidence whatsoever to prove the same, due to that I do not give any weight to that defence." (sic)*

Thus, it is not true that the defence of the appellant was not considered.

Having found all the grounds of appeal raised by the appellant devoid of merit, I find no justification to fault the decision of the trial court. I therefore dismiss this appeal in its entirety.

Dated and delivered at Moshi this 21st day of August 2023.

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
MOSHI DISTRICT REGISTRY

X

S. H. SIMFUKWE
JUDGE
Signed by: S. H. SIMFUKWE

21/08/2023