IN THE HIGH COURT OF TANZANIA

(DAR ES SALAAM SUB DISTRICT REGISTRY)

AT DAR ES SALAAM

CRIMINAL APPEAL NO. 106 OF 2023

(Originating from Criminal Case No 265 of 2018 of the District Court of Mkuranga at Mkuranga before K.P. Mrosso- RM*)*

IDDI MOHAMED @MNG'OGE.....APPELLANT

VERSUS

THE REPUBLIC.....RESPONDENT

JUDGMENT

Date of last Order: 7th August, 2023

Date of Judgment: 18th August, 2023

E.E. KAKOLAKI, J.

The appellant herein Iddi Mohamed @Mng'oge was arraigned in District Court of Mkuranga at Mkuranga facing one count of Incest by Male; contrary to section 158 (1) (a) of the Penal Code, [Cap 16 R.E 2002], now R.E 2022.

It was prosecution's case that on 15th day of November 2018 at about 2100 hrs at Kiziko village within Mkuranga District in Coast Region the accused had canal knowledge of the victim, ABX (in pseudonym) a school girl aged 11 years while knowing her to be his own daughter.

Appellant flatly denied his charges, the fact that necessitated the prosecution to parade six (6) witnesses and tender one (1) exhibit PF3 in a bid to prove the case against him, while appellant fended himself. After full trial the trial court was satisfied that prosecution case was proved to the hilt against appellant thus convicted him of the offence charged with and awarded him a statutory sentence of 30 years imprisonment, while ordering in addition compensation of Tsh. 500,000/= to the victim.

Briefly as gathered from proceedings the facts of the case can be narrated thus, the appellant who is the victim's biological father and resident of Kiziko had divorced victims' mother, hence left the victim with her young brother living with the appellant. It appeared that, there were two houses at the victim's compound in which the appellant lived in a small house while the victim (PW1) and his young brother living in the big house. The fact lead that, on 15th November 2018 the appellant came at home when it was already dark the result of which the victim (PW1) and her young brother being afraid to spend a night alone invited their neighbour one Hidaya (PW2) to accompany them. At around 20.00 hours the appellant came back and was given food by the victim before she later on engaged in children's night play with her two mates in their room commonly known as *"kidali po"* in

which the appellant came back from his small house and ordered PW1 to get outside. Thereafter appellant went to his room where he collected machetes and ordered PW1 to follow him, in which PW1 adhered to thinking that she was going to punished by him on accusation of making noise during night, before the appellant dragged her up to at a mango tree and ravished her. The victim (PW1) shouted and PW2 who was closely following them got closer but was chased by the appellant though resisted the threat and witnessed what appellant was doing.

News of the appellant's wrong doing were reported to victim's aunt, school teacher (PW4), village hamlet chairperson (PW3) and later on police station whereby the victim was issued with PF3 and was medically examined by PW5, who confirmed that, PW1 was raped as there was deep penetration, bruises and tears on the Labia Minora and Labia majora and further that, she had no hymen and felt pain on her lower abdomen. The reporting of the incident culminated into appellant's arrest on 16th November, 2018 before his arraignment in court on 19/11/2018, tried, convicted and sentenced as alluded to above.

Protesting his innocence, the appellant has lodged this appeal fronting six (6) grounds of grievances as paraphrased here under;

1. That, the trial magistrate erred both in law and in fact for convicting and sentencing the appellant on the offence which was not proved beyond reasonable doubt.
2. That the trial Magistrate erred in convicting the appellant basing on the evidence of PW1 and PW2 which is contradicting each other.
3. That the conviction of appellant wrongly based on fabricated evidence of PW1 and PW2.
4. That the trial magistrate relied on contradictory evidence of PW3 and PW4.
5. That the trial Magistrate wrongly interpreted the law and admit exhibit P1.
6. That the case was fabricated by the victim's mother.

Hearing of the appeal was conducted virtually as the appellant was at Kigoma central prison and fended himself against Ms. Elizabeth Olomi, learned State Attorney who represented the respondent. Kicking of the submission was the appellant whose submission was expectedly brief for being a lay person and fended himself. He informed the court that, he has raised seven grounds of appeal and since he is not conversant with the law, he prayed the court to

weigh and consider his grounds of appeal, hence proceed to allow the appeal and set him free.

On the other side, Ms. Olomi's submission followed the sequence of grounds of appeal as preferred by the appellant. With respect to the first ground of appeal it was her submission that, the charge against the appellant was proved beyond reasonable doubt as victim's evidence (PW1) at page 9-11 of the proceedings was such detailed to exhibit to the court on how the appellant being her biological father raped her under the mango tree. She said PW1's evidence was corroborated by PW2 who witnessed the appellant chasing PW1 before he raped her as can be seen at pages 17-18 of the proceedings. On how the appellant was identified she argued, according to PW2, though it was dark there was enough light from the moon and she saw the appellant from the point he started chasing the victim from home until when he ravished her at the mango tree.

Ms. Olomi went on submitting that, PW1's evidence was also corroborated by PW5 the doctor who examined her and established that she had vaginal bruises and tears with no hymen, hence concluded that there was deep penetration into victim's vagina and that his evidence is exhibited in exhibit P1, the PF3. Apart for that she argued PW3 and PW4 whom the victim

reported the incident to soon after its commission also cemented prosecution case, hence assurance of identification of the appellant as perpetrator of the offence as the incident was reported at the earliest possible time. He added that PW6 the investigator also corroborated the victim's evidence as after investigating the case she established that, it was the appellant who rapped the victim. Basing on the submission above she concluded that the appellant's offence was proved beyond reasonable doubt bearing in mind concrete evidence and best evidence of victim (PW1) who is also presented herself as reliable witness.

Regarding the second ground where the appellant's contention is that there was contradiction between PW1 and PW2's evidence. That, while PW1 testified that the appellant chased PW2 from the scene, PW2 gave contrary version in that she witnessed the whole incident of appellant raping her own daughter, Ms. Olomi countered that there was no such contradiction. She argued that looking at PW1 and PW2's evidence, there is no dispute that, appellant chased Pw1 up to the Mango tree before he fell her down and raped her, and that, there is no dispute that the appellant threw the machete to PW2 threatening her to leave the scene of crime. According to her, the only dispute is whether after throwing the machete PW2 left the place or

remained behind to witness what was going on. She argued that, though PW1 claimed that PW2 left the place, PW2 herself told the court that she saw what the appellant did to her daughter. According to Ms. Olomi, since PW1 was laid down by then she might have believed that PW2 left the place after being threatened by panga, thus to her there were no contradiction and if any the same does not go to the root of the matter as the fact remains unshaken that the appellant raped PW1. Reliance was placed by her in the case of **Bakari Hamisi Ling'ambe Vs R,** Criminal Appeal No. 161 of 2019 (CAT) at page 3 and 4 where the Court of Appeal referred to the case of **Said Ally Ismail Vs. R**, Criminal Appeal No. 2014 of 2008, and stressed that not every contradiction will dismantle prosecution case. She concluded that, if there was any contradiction, the same did not affect prosecution case.

On the third ground of appeal, it was appellant's grievance that, PW1 and PW2's evidence of was fabricated because PW1 said she took bath in the morning and then went to school before she told her teacher (PW4) while PW2 said the first information was passed to PW1's aunt before going to PW4.

In her reply Ms. Olomi submitted that, going by the proceedings at page 11, it is true PW1 testified to have taken bath and went to inform the teacher

(PW4) but that does not mean the case was fabricated. As to whether the victim's aunt was told or not, Ms. Olomi argued that, it is immaterial as it does not affect the truth that the offence was perpetrated and was so done by the appellant, as in sexual offences the best evidence comes from the victim who is PW1 in this matter. She took the view that, the victim's evidence is watertight worth of reliance by the Court to confirm appellant's conviction and sentence.

As for the fourth ground of appeal, it was appellant's assertion that his conviction wrongly relied on the contradictory evidence of PW3 and PW4 as PW3 testified that, they went straight to the health center before going to report the incident at police while PW4 deposed that they passed at police first and later on to the health center. In this, Ms. Olomi countered that, these witnesses were speaking nothing but the truth. She referred the court to pages 23, 24 and 27 of the typed proceedings where PW3 and PW4 informed the court that, they took the victim to the Kiziko dispensary before going to police, where they did not get any medical attention before were referred to the district hospital where they passed first at police for collection of the PF3 and then went to the hospital at Mkuranga. Thus, to her the ground is devoid of merit.

Regarding the 5th ground appellant is faulting Court's reliance on section 130 (4) of the Penal Code to prove penetration, while the doctor said there were signs of deep penetration meaning was not sure. In response it was Ms. Olomi's submission that, penetration however slight it is, is sufficient to prove the offence of rape, and in this case the doctor confirmed that penetration in PW1's vagina was deep thus to her this ground should be dismissed as well.

With respect to ground number 6 where the appellant contended that the case against him was framed by his wife due to their misunderstanding, it was Ms. Olomi's submission that, this is an afterthought as PW1's mother was neither a witness in this case nor was that fact put in cross examination to PW1 by the appellant. She prayed the court to dismiss this ground of appeal for want of merit. In concluding, Ms. Olomi implored the court to dismiss the appeal for want of merit as the prosecution case was proved to the hilt.

In a short rejoinder the appellant invited the court to review PW1's evidence and the allegations that PW2 was chased with a machete yet spend the night in appellant's house. He also alleged that, the doctor said PW1 had no hymen and was found with STDs but did not medically examine him to find whether

he had sexual transmitted diseases as well or not. Further that he argued, victim's vagina was not found with sperms meaning that had sexual intercourse before, as he once caught her with letter with love contents and reported it to her teacher one Ramadhan. He contended that, all this evidence was not considered by the court while insisting that the case was framed against him, otherwise he reiterated his prayers in submission in chief.

I have keenly considered the grounds of appeal and the rival submission by the parties as well as lower court records which I have inquisitively scrutinized. Starting with the first ground of appeal as to whether the case was proved beyond reasonable doubt, it is worth of a note that in criminal cases it is the prosecution that bears the burden of proving the case and the standard is beyond reasonable doubt. Such requirement is underscored in numerous authorities. For instance in the case of **Mohamed Haruna @ Mtupeni & Another vs. R,** Criminal Appeal No. 25 of 2007 (CAT-unreported) on the same subject matter the Court observed thus:

> *"Of course, in cases of this nature, the burden of proof is always on the prosecution. The standard has always been proof beyond a reasonable doubt. It is trite law that an accused person can only be convicted on the strength of the*

prosecution case and not on the basis of the weakness of his defence."

The charge that faced the appellant in which he alleges was not proved against him beyond reasonable doubt is Incest by Male, while the respondent insistent that the same was proved to the hilt. To bring into terms parties fighting arguments, I wish first to quote the provisions of section 158 (1)(a) of the Penal Code, constituting the said offence of Incest by Male which reads:

> ***158****.-(1) Any male person who has prohibited sexual intercourse with a female person, who is to his knowledge his granddaughter, daughter, sister or mother, commits the offence of incest, and is liable on conviction-*
> *(a) if the female is of the age of less than eighteen years, to imprisonment for a term of not less than thirty years;*

From the cited provisions, it is clear that indulging of a male person in a prohibited sexual intercourse with *his granddaughter, daughter, sister or mother* while in full knowledge of blood relationship constitutes key ingredients of the offence of incest by male. This position of the law was cemented in the case of **Festo Mgimwa vs. Republic**, Criminal Appeal No. 378 of 2016 (CAT-unreported), in which the Court of Appeal of Tanzania observed thus:

"In a charge of incest by males, the prosecution must prove that the accused knew the female as his grandmother, daughter, sister or mother at the time of sexual intercourse."

In the instant case no doubt the prosecution sufficiently proved that the appellant had carnal knowledge of PW1 while knowing that she is her daughter as the appellant himself does not disputed the fact that PW1 is her biological daughter. I so find as through testimonies of PW1 and PW2 whom the trial magistrate found at page 9 of the judgment to be witnesses of truth firmly informed the Court on how the appellant indulged in sexual intercourse with the victim on the fateful date. PW1 at pages 10 -11 of the typed proceedings is quoted to have registered her testimony as follows:

There after my father took a matchet and told me that I should follow him to the mango tree, I thought he was going to beat me, I followed him then akanipiga ngwala nikawa sijadondoka vizuri nikawa nakimbia then father chased me, nikajikwaa na jani nikadondoka, father drag me up to the mango tree he hold my hand when drag me at the mango tree I was stand, there after I was shouting, Hidaya came, Father told Hidaya toka, toka, Hidaya was still looking at what father did to me. Father threw a machete to Hidaya but it missed her, she did go away, then father undressed my clothes, I wore red short skirt, grey t-shirt and black pants He undressed my skirt and

underpants at the time father wore a pens which tone apart at the middle of two legs it was of nylon. Then father lied me down "chali" then he took out his penis through the hole on his trouser "tundu" ambapo imetoboka, akaingiza mdudu wake katika uchi wangu… after father insert his penis into my vagina he was used to take his penis out and insert into my vagina several times "wakati baba anaingiza uchi wake katika uchi wangu sehemu ninayokojolea mtu anayetwanga, anaingiza na kutoa mara nyingi at that time I was bite him by using my teeth. At that time when he lied down chali he lied on my body and start having sexual intercourse with me. Even though I bite him with teeth he did not leave me he continued there after he get out and left, when he had sexual intercourse with me I feel pain…

This cogent evidence of PW1 on how she was ravished by her father was corroborated by PW2 who also saw the appellant with the aid of moonlight chasing PW1 from home/house to the mango tree before he sexually abused her, as she witnessed the incident at closer distance after pursuing the two. As PW1 and PW2 were known to the appellant before and the move started from home to the mango tree, this Court is freed from any doubt that, there might be mistaken identity of the appellant who no doubt had carnal knowledge with PW1. PW1's evidence is further cemented by PW5, the doctor who medically examined her and exhibited to the court that, she had

no hymen, with bruised and torn vagina, hence a conclusion that her vagina was deeply penetrated as evidenced in exhibit P1, the PF3. That aside, PW3 and PW4 evidence hit the last nail on appellant's head as according to their evidence rape incident was reported to them by PW1 at the earliest possible time on the next morning before the information was relayed to police, in which the appellant was mentioned as perpetrator of the offence, something giving assurance that is PW1 a reliable witness. In the case of **Swalehe Kalonga & Another v. R**, Criminal Appeal No. 45 of 2001 (CAT-unreported) on reliability of the witness who mentions his assailant the soonest the Court of Appeal observed that:

> *"The ability of a witness to name a suspect at the earliest possible opportunity is an all-important as assurance of his reliability."*

With the above demonstrated evidence there is nothing convincing as the appellant would want this Court to believe that, PW1 was not a witness of truth since she had no reason to testify lies against her father whom she had no any grievances with before. The appellant's defence that the case against him was fabricated by the victim's aunt, I find is an afterthought as the alleged fact of existence of misunderstanding between him and his sister (PW1's aunt) who might have solicited PW1 to testify lie against him was

never put to PW1 when had opportunity to cross examine her. It is settled law that, failure to cross examine a witness on an important matter implies acceptance of the truth of the witness evidence in that respect. See the case of **Jaspini s/o Daniel @Sizakwe Vs. DPP,** Criminal No. 519 of 2019, (CAT-unreported)**.** In my considered view, the totality of prosecution evidence succeeded in proving the appellant's culpability beyond reasonable doubt, and I find no reason to doubt the trial court's reasoning and finding against him. Thus, I dismiss this grounds of appeal.

Next for consideration is the second ground of appeal in which appellant contends that, there was contradiction between the evidence of PW1 and PW2. It is a true fact that existence of contradictions and inconsistences of witnesses' evidence in a case is the basis for a finding of lack of credibility of their testimony. Nevertheless it is worth noting that, in rape cases, incest included, victim's evidence can ground a conviction without resorting to any form of corroboration upon court's fully compliance with the provisions of section 127 (6) of the Evidence Act, [Cap. 6 R.E 2022]. See also the case of **Selemani Makumba V. R** [2006] TLR 379. The provision therefore permits the court to convict the sexual offender upon satisfying itself the victim is telling nothing but the truth. In orther words corroboration of victim's

evidence is not a mandatory legal requirement in cases of this nature provided that victim's evidence is believed by the court to be nothing but the truth. In this matter as alluded to above PW1 is a trustworthy witness and there is see no reason as to why her evidence should not be accorded credence and believed as sufficient enough to ground appellant's conviction. I agree with Ms. Olomi's submission that, her evidence cannot be discredited on mere statement that after being chased by the appellant PW2 ran away from the mango tree hence could not observe what was going on as claimed by the appellant, since it was difficult for PW1 who by then had been laid down struggling do detach from father possessed with sexual arousal to observe closely whether after being chased by the appellant PW2 remained at the crime scene or not. That aside, even if there was contradiction between the evidence of PW1 and PW2 in which none exists, still I would hold the same does not go to the root of the mater as the issue as to whether PW2 closely witnessed the raping incident or not is not material, as the material fact is whether the victim was raped by her father or not, the fact which was proved by the victim (PW1). Thus, this ground is destitute of merit and the same is dismissed forth with.

As to the third ground of appeal, appellant contended that the evidence of PW1 and PW2 was fabricated because PW1 said she took bath in the morning and went to school before she told her teacher while PW2 said the first information was passed to Pw1's aunt before going to Pw4. I do not find merit is this ground as well. It was held in **Goodluck Kyando Vs. R,** [2006] TLR 363 that, every witness is entitled to credence and must be believed and his testimony accepted unless there are cogent and good reasons for not believing him/her. See also the case of **Mathias Bundala Vs. R,** Criminal Appeal No 62 of 2004.

As rightly submitted by Ms. Olomi it is true that PW1 took bath in the morning and went to school where she informed her teacher (PW4) of what had befell her. Taking bath in my opinion could not and in any case did not affect PW1 examination by the doctor PW5 and the results thereto as absence of sperms in her vagina does not conclusively mean she was not raped in abundant evidence from exhibit P1 (PF3) that, she had her vagina bruised and torn with no hymen. As to the appellant's concern whether the information was passed first to the teacher or aunt, I also find the same to be immaterial for not displacing the truth that the offence was perpetrated and was so done by the appellant as per PW1 whose evidence is the best

and reliable evidence in terms of the case of **Selemani Makumba** (supra). Thus, this ground is also baseless.

In now turn to the fourth ground in which appellant faults the trial court for convicting him wrongly relying on the contradictory evidence of PW3 and PW4 on what came first between the taking of the victim to police first for PF3 issue and then to the hospital for examination or vice versa. In my view this ground need not detain this court as a thorough perusal of witnesses evidence at pages 24 and 27 of the typed proceedings it is noted in both PW3 and PW4's evidence that, they first reported the incident at the police station for issue of PF3 to PW1 before taking her to Mkuranga District Hospital for medical examination. As to whether medical service was sought from the village dispensary, the record reveals that they did not get any medical attention there after being advised to attend at Mkuranga District Hospital and that is when they decided to pass at the police for collection of the PF3 before going the hospital. Thus, I also find appellant's allegations in this ground destitute of merit.

Next is on the allegation that, the trial Magistrate wrongly interpreted the provision of section 130 (4) of the Penal Code when observed relying on admitted exhibit P1 that, penetration however slight it is, is sufficient to

prove rape as the doctor's findings were to the effect that there were **signs** of deep penetration, meaning that PW5 (doctor) was not sure whether the victim was raped or not. Now the issue here is whether the PW1 was raped or not. Having considered the appellant's above complaint versus the available evidence on record, I also find this ground wanting in merit. I will tell why! Glancing at the proceedings there is no evidence that the appellant objected admission of exhibit P1 so as justify his assertion that it was wrongly admitted. Secondly, there is nothing suggestive in the impugned judgment that there was wrong interpretation of the provision of section 130 (4) of the Penal Code by the trial court on proof of penetration as asserted by the appellant. Section 130(4) of the Penal Code states thus:

> *(4) For the purposes of proving the offence of rape-*
> *(a) penetration however slight is sufficient to constitute the sexual intercourse necessary to the offence;*

The wording of the above section no doubt suggests that, penetration however slight it is, is sufficient evidence to prove the offence of rape. And this is what the trial magistrate stated at pages 9 - 10 of the judgment when rejecting the appellant's defence that absence of sperms in PW1's vagina was a proof that she was not raped. In so doing the learned trial magistrate observed thus:

"The evidence of PW1 is further corroborated by evidence of PW5 and exhibit P1 which prove that upon being examined, PW1 had bruises and tears on her vagina something suggests that PW1 was carnally know. DW1's evidence that PW1 was not rapped because no semen were found in her vagina does not hold water as under 130(4) of the Penal Code, [Cap. 16 R.E 2002], penetration however slight is suffices to prove the offence of rape."

With due respect to appellant's complaint, the learned trial magistrate who having considered both evidence of PW5 and exhibit P1 on existence of bruises and tears proving penetration in PW1's vagina was justified to conclude that, absence of semen in PW1's vagina would not conclude that PW1 was not raped as basing on the settled law under section 130(4) of the Penal Code that, penetration however slight it is, is sufficient to prove rape. The ground is lacking in merit and I dismiss it as well.

With respect to ground number 6 where the appellant's contention is that the case was framed against him by his wife due to their misunderstanding. Having revisited the evidence adduced in court, I find nothing in support of appellant's contention that he had misunderstanding with his wife to the extent of framing him up with such serious case, hence the same is fronted as an afterthought. I hold a view as what is alleged by the appellant in his

defence though not true as found in the fourth ground are grudges with his sister/victim's aunt and not his wife. Further to that, my assessment of the prosecution evidence does not convey the feeling that the testimony was fabricated to the appellant's detriment as it was credible and factual and therefore I find no reason to discredit it. In the wholesome, I find this ground of appeal destitute of any merit and dismiss it.

In the upshot, I find the appeal barren of fruits and it is hereby dismissed in its entirety.

It is so ordered.

Dated at Dar es Salaam this 18th August, 2023.

E.E. KAKOLAKI

JUDGE

18/08/2023