

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
SONGEA SUB - REGISTRY
AT SONGEA**

DC. CRIMINAL APPEAL NO. 39 OF 2023

(Originating from Songea District Court in Criminal Case No. 14 of 2023)

STEVEN KAPINGA APPELLANT

VERSUS

THE REPUBLIC RESPONDENT

JUDGMENT

Date of last Order: 16/10/2023

Date of Judgment: 19/10/2023

U. E. Madeha, J.

To begin with, before the District Court of Songea (trial Court), the Appellant was charged and convicted with the offence of incest by male contrary to section 158 (1) (a) of the *Penal Code* (Cap. 16, R. E. 2022). It was alleged that, on 13th, March 2023, at Subira Village within Songea Municipality in Ruvuma Region, the Appellant did had prohibited sexual intercourse with XY (not her real name) a girl of 17 years of age knowing that she is his biological daughter.

After conviction, the Appellant was sentenced to serve thirty (30) years imprisonment. Dissatisfied with both conviction and sentence the Appellant filed this appeal. in his petition of appeal she has only two grounds of appeal which are are to the effect that:

1. *That, the trial Court erred in law and fact by convicting and sentencing the Appellant while he prosecution side failed to prove their case beyond reasonable doubt.*
2. *That, the trial Court erred in law and fact to convict and sentence me without considering the defence evidence.*

It is important to note that, before the trial Court, the Appellant denied to have committed the offence he was charged with. In a nutshell, the prosecution case, as obtained from the original case records was as follows; PW1, who is a teacher at Londoni Secondary School, told the trial Court that on 13th March, 2023, at around 08:00 hours, XY approached her and she was told that at 00:00 hours on the same date, while she was at home, her father was coming back home from his daily routine. Her farther knocked the door and she respondend by opening it. Then she prepared food for her farther. When her father was having food he asked her to sit close to him and he told her that he wanted to have sex with her. XY denied and she ran towards the room where her young brother was

sleeping. The Appellant followed her and she was grabbed and he took her to the sitting room where he succeeded to have sexual intercourse with her. PW1 further told the trial Court that she examined XY's neck and he found bruises. He reported the matter to the school administration and the matter was reported to the Police Station where they were given PF3 and went to the hospital for treatment.

PW2 was the Medical Doctor who examined XY's (victim's) female organ and found not to be virgin. PW2 further told the trial Court that he conducted a thorough check up and found XY to be HIV negative, her vagina was penetrated but no sperm was found rather there was a pus cell which can be caused by sexual intercourse. Later, he filed PF3, which was admitted as exhibit P1.

PW3 was the Police Officer who arrested the Appellant and managed to sent him at the Police Station.

The victim (XY) testified as PW4 and she told the trial Court that she was born on 10th November, 2005. She further told the trial Court that, the Appellant is her father and he is a bodaboda driver and he usually used to came home at around night hours. On 13th March, 2023, her father came

home at around 00:00 hours. The Appellant knocked the door and she responded by opening it and she prepared food for the Appellant. After preparing food for the Appellant, she asked him if she would go to sleep but she was told that he had something to tell her. At that moment she was standing near to the small sofa and the Appellant was sitting on the other sofa. The Appellant started by telling her not to be afraid and he went on telling that he has a problem and she was the only person who could solve and he asked her to assist him in solving that problem.

Then the Appellant asking her if she knew that he had misunderstandings with his wife who is her mother. She told him that she don't know and the Appellant went on telling her that he went to the witchdoctor who told him that, there are people who are bewitching him and XY was the only person who could help him. The Appellant became angry and he asked XY to sit in his lap but she ran towards her young brothers room. The Appellant followed her and she was grabbed and sent back into the sitting room where her neck was strangled and she was badly beaten by the Appellant. The Appellant went on pushing her on the sofa, undressed her pants, tight and his trouser and inserted his male organ in her vagina. She was raped and when the Appellant finished his ravish act

he went into his bedroom and she also went to her bedroom too. The following day, she reported the matter to PW1 who is her teacher and she told her what had transpired last night at home with her father.

On other hand, the Appellant brought four witnesses to disprove what has been testified by the Prosecution. DW1 who was the Appellant himself, told the trial Court that before the incident date he had quarrels with XY (the victim) for the reason that she used to bring different men at his house. Also, on 9th March, 2023, he saw XY being chased by a man with a motorcycle. Basically, he disliked the victims behavior.

The Appellant further told the trial Court that, XY is her daughter and he was working hard to make sure that they are taken care but he was surprised to hear her telling the Court that he raped her. He further told the trial Court that he is suffering from hernia; therefore, he has no ability to have sexual intercourse and his male organ cannot even erect.

In their part, DW2 and DW3 told the trial Court that the Appellant is their husband. From November, 2022 he was found to have kidney problems which makes him unable to have sexual intercourse. They went

on telling the trial Court that they were surprised to hear that the Appellant raped his daughter (XY).

DW4, the Appellant's son, who is 10 years old, testified that he live with the Appellant and the victim (XY) who is his sister. He told that trial Court that, normally XY leaves him alone at home. He informed the Appellant on that habit. The Appellant took a stick and beat her. DW4 told the trial Court that he knew nothing more about the Appellant and XY.

As stated earlier herein above, the trial Court found the Appellant guilty, convicted him and he was sentenced to serve thirty years in jail. Aggrieved with that decision, he preferred the present appeal.

At the hearing of this appeal, the Appellant had no representation; he appeared in person whereas Mr. James Robby, the State Attorney and Ms. Ester Mfanyakazi represented the Respondent.

In his submission, the Appellant submitted that the trial Court erred in law and in fact in convicting him while the case was not proved beyond reasonable doubt. He argued that DW4, who is ten years old, told the trial Court that the Appellant did beat the victim (XY) with the stick, which is

contrary to the testimony given by PW4. That's why he said that the prosecution failed to prove the case beyond a reasonable doubt.

He further contended that the trial Court erred in law and in fact in convicting the Appellant without considering the defence evidence that he is suffering from hernia and he is unable to perform sexual intercourse. Lastly, he prayed for this Court to allow this appeal and set him free.

On the contrary, Mr. James Robby while resisting the appeal, he told this Court that, to prove the offence of incest by male the prosecution has to prove that there was a prohibited sexual intercourse with a relative. He argued that in this appeal the evidence given by the prosecution side proved that the Appellant had sexual intercourse with XY who is his daughter. He submitted that the prosecution side proved its case beyond reasonable doubt and the trial Court was satisfied and proceeded to convict and sentence the Appellant for the offence he was charged with.

Mr. Robby contended further that, during trial the Appellant failed to ask important questions during cross examination which mean that he accepted what was testified by the prosecution witnesses. To buttress his stance, he referred this Court to the decision made in the case of

Christopher Marwa Mтуру v. the Republic, Criminal Appeal No. 561 of 2019, in which the Court stated that, a party who fails to cross examine a witness on a certain matter is deemed to have accepted it and will be estopped from asking the court to disbelieve what the witness has said.

Also, he went on expounding that, in cases involving rape, the victim's evidence, is the best evidence and in this appeal the victim's evidence was corroborated by that given by the doctor. To cement his argument he made reference the decisions made in the case of **Mohamed Juma v. Republic**, Criminal Appeal No. 273 of 2018 (unreported) and **Selemani Makumba v. Republic** (2006) T. L. R 379.

In his part, Mr. Frank Chonja, the learned State's Attorney for the Republic, arguing against this appeal, he started by citing the provision of section 158 (1) (a) of the *Penal Code* (supra) which provides for the offence of incest by male. He stated that for the offence of incest by male to be proved, there must be sexual intercourse between a male person and a female person, who is to his knowledge his granddaughter, daughter, sister or mother. He went on submitting that in this appeal the Appellant had sexual intercourse with XY who is to his knowledge his daughter.

Therefore, he prayed for this appeal to be dismissed since the prosecution side proved its case beyond reasonable doubt.

As far as I am concerned, having gone through the petition of appeal, which encompasses two grounds, I find that they boil down into two (02) issues namely; **One**, whether the prosecution side proved its case beyond a reasonable doubt and **two**, whether the defence case was considered by the trial Court while composing its judgment.

Starting with the first issue of whether the prosecution side proved the offence of incest by male contrary to section 158 (1) (a) of the *Penal Code* (supra), the evidence given by XY (PW4) who is the victim of the offence and the doctor who testified as (PW2) are to the effect that. PW4 testified that, the Appellant who is her biological father is a bodaboda driver and he usually comes home at night after his daily routine and they were not living with her mother. In the sinful day, the Appellant went home at the midnight, XY prepare food for him and she was told that he has something to tell her. The Appellant told her that he went to the witchdoctor who told him that his problems between him and XY's mother who they were not living together, will be solved by XY. He told her that she was the only person who would have assisted him. In that case, he

requested to have sexual intercourse with her. She refused but the Appellant dragged her, put on the sofa undressed her underpants and his trouser and had sexual intercourse with her. PW4's testimony was corroborated by that given by the doctor (PW2) who examined the victim (XY) and found her vagina to be penetrated.

I am aware that in sexual offences, the victim's evidence is the best evidence and the Court may rely on it in and enter conviction. See the decision in the case of **Mohamed Juma v. Republic**, Criminal Appeal No. 273 of 2018 (unreported) and **Selemani Makumba v. Republic** (2006) T. L. R 379. Therefore, I absolutely agree with the learned State Attorneys that the prosecution side that, penetration was proved to the required standard. The evidence given by the victim is complete sufficient to convict the Appellant for the offence of incest by male since the Appellant is the biological father of the victim (XY).

To the best of my knowledge, I find the offence of incest by male was proved against the Appellant beyond reasonable doubt, since the available evidence proves that the Appellant had sexual intercourse with PW4 (XY), who is his biological daughter and he did so on superstitious

beliefs. Consequently, the first ground of appeal is unfounded and it is dismissed.

As much as the second ground of appeal is concerned the issue here is whether the trial Court considered the defence evidence. The Appellant has contended that the trial Court failed to consider the defence evidence. In **Allen Francis vs Republic** (Criminal Appeal 327 of 2019) [2022] TZCA 689 (26 October 2022: TanzLII), the Court of Appeal of Tanzania had this to state:

" ... it is the duty of the trial Court to subject the entire evidence on record to scrutiny, which entails considering the defence evidence before making any finding of guilty".

In the instant appeal, the defence that was put by the Appellant who testified as DW1, is that he is suffering from hernia and his male organ cannot erect to enable him to have sexual intercourse with the victim (XY). DW2 and DW3 testified that the Appellant was suffering from kidney disease. Moreover, DW4 told the trial Court that he didn't know what happened between the Appellant and his daughter (XY).

In fact, this piece of evidence was well considered by the trial Court at page twenty of the typed judgment. The trial Court found the

Appellant's defence of inability to commit the offence on the ground that he was suffering from hernia was unfounded and cannot shake or raise any reasonable doubt to the prosecution testimonies.

Taking into account on the defence that was put by the Appellant, I find there is no need to fault the findings of the trial Court that the Appellant's evidence failed to raise reasonable doubt to the evidence given by the prosecution side. The Appellant failed to prove on whether he was suffering from hernia and his testimony also contradicted with that was given by DW2 and DW3 who told the trial Court that the Appellant had kidney disease. Therefore, I find the second ground of appeal has no merit.

In the upshot and from what has been discussed above, I find this appeal has no merit and it is dismissed in its entirety. The conviction and sentence of the trial Court are upheld. It is so ordered.

DATED and **DELIVERED** at **SONGEA** this 19th day of October, 2023.



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U. E. MADEHA

JUDGE

19/10/2023

COURT: Judgment is read over in the presence of the Appellant and Mr. Madundo Mhina, the learned State Attorney for the Respondent. Right of appeal is explained.



A handwritten signature in blue ink, appearing to read "Madeha", with a long horizontal stroke extending to the right.

U. E. MADEHA

JUDGE

19/10/2023