IN THE HIGH COURT OF TANZANIA

(DODOMA DISTRICT REGISTRY)

AT DODOMA

DC CRIMINAL APPEAL NO. 76 OF 2022

ERNEST PARA.....APPELLANT

VERSUS

THE REPUBLIC..... RESPONDENT

(Originating from the District Court of Dodoma at Dodoma)

In

Criminal Case No. 125 of 2021

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JUDGMENT

Date of Last Order: 24th October, 2023

Date of Judgment: 14th November, 2023

SARWATT, J:.

The appellant herein was arraigned in the District. Court of Dodoma (trial court) for the offence of incest by male contrary to section 158(1)(a) of the Penal Code (cap 16). The particulars of the offence reveal that the appellant, on 22nd September 2021 and 5th November 2023 at Manchali within Chamwino District in Dodoma region, did have unlawful sexual intercourse with his daughter, aged nine years old.

The appellant, having pleaded not guilty to the charge, the prosecution brought a total of four witnesses and tendered one exhibit,

PF3 to prove the case against him and the appellant on his part, fended himself. The trial court heard the matter and found the appellant guilty of the offence, went on to convict him, and sentenced him to serve thirty years imprisonment.

The appellant, dissatisfied with the trial court's findings, has filed this appeal with six grounds. However, all entail that the charge was not proved beyond reasonable doubt.

During the hearing, the layperson appellant had nothing to submit other than praying the Court to adopt his petition of appeal. The respondent, under the service of Ms Patricia Mkina, the learned State Attorney, opposed the appeal by contending that the prosecution successfully proved the case beyond reasonable doubt as correctly found by the trial court.

Ms Mkina scrutinized the evidence of the victim, arguing that the same proved that the appellant committed the offence charged, which was corroborated by PW2, the victim's mother. It is her further argument that the prosecution also succeeded in proving the age of the victim.

She further argued that the evidence of the doctor who tendered PF3 reveals that the victim was found not a virgin, supports the conviction entered by the trial court against the appellant. Moreover, she contended

that the evidence of the victim (PW1) was properly relied on by the trial court because she promised to tell the truth.

Ms. Mkina also contended that the defence raised by the appellant that the case is fabricated lacks substance, considering that the victim is his daughter. Lastly, she prayed the Court to dismiss the appeal.

The appellant, having heard from the learned State Attorney, responded to the evidence adduced by the doctor, who testified that having examined the victim, he observed that she had UT1.

Now, the issue to determine is whether the case was proved beyond reasonable doubt. I wish first to recite the provisions of section 158 (1)(a) of the Penal Code, which constitutes the alleged offence of incest by the male. The same 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;"*

For the case at hand, it is apparent that the appellant is a male person, and it is not disputed that the victim is the appellant's daughter

at nine (9) years old. Therefore, this Court, being the first appellate Court, shall re-examine the evidence adduced during the trial to find out if the appellant had prohibited sexual intercourse with the victim as alleged.

As I have noted above, the prosecution witness produced a total of four witnesses, whereas the victim testified as PW1. It is in the record that the victim being a child of tender age, her evidence was taken in compliance with the provision of section 127 (2) of the Evidence Act, [Cap 6 R.E. 2022] which provides that:

> *"A child of tender age may give evidence without taking an oath or making an affirmation but shall, before giving evidence, promise to tell the truth to the court and not to tell any lies."*

This means the contention raised by the appellant in his grounds of appeal that prosecutrix evidence was unsworn fails. The records are clear that she promised to tell the truth and not lies. That being the position, I shall consider the testimony of the victim, having in mind that the best evidence in sexual offences, as in the matter at hand, comes from the victim. See the case of **Selemani Makumba vs Republic (2006) TLR 379.**

I have carefully examined the testimony of the victim. Nevertheless, I have failed to agree with the learned State Attorney in opposing the appeal. The evidence of PW1 mentions the appellant as the culprit of the

offence by stating that the appellant used to have sexual intercourse at their home when his brothers Lister and Lucas were not at home. She further testified that she informed her aunt about the incident, who advised her to tell his uncle Mosi, but no measure was taken to halt the situation. The appellant continued having sex with her.

With this evidence, it is my considerate opinion that it was necessary for the prosecution to bring the said aunt and uncle, who, in the early stage, the victim reported the incident to them, to corroborate the victim's testimony. Also, the victim's brothers, Lister and Lucas, were not called to testify even though the records show they were also informed prior to PW2.

I am aware that no particular number of witnesses shall be required to prove the case as per section 143 of the Evidence Act [Cap 6 R.E 2022]. Still, in the case at hand, considering the nature of the offence, I find it was of material significance if the said uncle, aunt, as well as Lister and Lucas would testify to the Court being the one who was informed of the incident by the victim in the early stage and for Lister and Lucas were residing with the victim together with the appellant at the same home where the offence is alleged to have been committed. This position was illustrated in the case of **Sadick Hussein Nyanza and Another vs the**

Republic, Criminal Appeal No. 186 of 2016, Court of Appeal, Dar es Salaam. It was held that;

> *"We agree with the learned state Attorney that under section 143 of TEA no specific number of witnesses is required to prove a case and that what is important is the credibility of the witness (See **Yohanis Msigwa Vs. Repulic [1990] TLR 148**). But the watchman was an essential witness in proving both the occurrence of the alleged robbery and the identity of the bandits.... This, no doubts, leads us to an irresistible inference that had he been called as a witness he would have given a testimony unfavourable to the prosecution case."*

The same here, this Court draws an irresistible inference that if they were called to testify, they would have given unfavourable testimony to the prosecution case.

Further, I find it awkward for the said aunt and uncle and the brothers of the victim to remain silent without taking any measure regarding the information they got in view of the fact that the offence by itself is weird and unbearable.

On the other hand, despite the evidence of the victim that the appellant was threatening to kill him if she refused to have sex with him, it is my considered view that it is pretty unusual for a child of nine (9) years to proceed with the act without getting pain or crying. It was

expected that she would produce detailed information on how the incident occurred and how she felt during the incident.

Also, it is surprising that if the victim was scared of the threat posed to her by the appellant that, he would kill her if she resisted, but her testimony reveals that the same threat was posed to her if she told anyone of the incident. Yet, she informed her aunt, uncle, brothers, and mother PW2. Hence, this Court finds that the victim's testimony has a lot of doubts, which goes to the appellant's favour.

It is a trite rule that the victim's testimony must be dealt with care and caution to avoid the danger of incriminating the innocent person. See the case of **Hamis Halfan Dauda vs The Republic**, **Criminal Appeal No. 231 of 2009, Court of Appeal, Dar es Salaam** made clear that;

> *"We are alive however to the settled position of law that best evidence in sexual offences comes from the victim, but such evidence should not be accepted and believed wholesale.* ***The reliability of such witness should also be considered so as to avoid the danger of untruthful victims utilizing the opportunity to unjustifiably incriminate the otherwise innocent person(s). In such cases, therefore, the victim's evidence should be considered and treated with great care and caution****."*
>
> [Emphasis Added]

Also, in the case of **Abdul Mohamed Namwanga@ Madodo vs The Republic, Criminal Appeal No. 257 of 2020, Court of Appeal, Mtwara,** it was held that;

> *"In addition, we are alert that in view of the inherent nature of the offence of rape or any other sexual offence where only two persons are usually involved when it is committed,* ***the testimony of the complainant is mostly crucial and must be examined and judged cautiously****."*
>
> [Emphasis Added]

In the event, I find that the prosecution failed to prove the case beyond reasonable doubt. For that reason, the appeal is hereby allowed, and accordingly, the conviction and the sentence imposed to the appellant by the trial Court is quashed and set aside. Thus, the appellant be immediately set free unless he is held for other lawful cause.

Ordered accordingly.

S. S. SARWATT

JUDGE.

14/11/2023

Dated at **Dodoma** this 14th day of November, 2023.

S. S. SARWATT

JUDGE.

14/11/2023