IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

ARUSHA DISTRICT REGISTRY

AT ARUSHA

CRIMINAL APPEAL NO. 66 OF 2023

(Originating from the District Court of Arusha at Arusha in Criminal Case No. 56 of 2021 before Hon. P. Meena, RM dated 27/10/2021)

GODWIN ALFREDY ..... APPELLANT

VERSUS

THE D.P.P. ..... RESPONDENT

JUDGEMENT

01/11/2023 & 14/11/2023

KINYAKA, J.:

Before the District Court of Arusha, the Appellant was charged and found guilty of the offence of incest by male contrary to section 158(1)(a) of the Penal Code Cap. 16 R.E. 2022 (herein after, the Penal Code). The Appellant was sentenced on 27/10/2021 to serve 30 years in prison. Aggrieved by the conviction and sentence of trial Court, the Appellant has preferred six grounds of appeal as reproduced hereunder: -

1. That the trial court erred in law and fact in not finding that section 127(2) of Tanzania Evidence Act Cap. 6 R.E. 2019 was not complied with;
2. That the trial court erred both in law and fact in not finding that there was a contradiction between PW2 (mother of the victim) and PW3 (Doctor) as regard whether PW1 (victim) was admitted or not;
3. That the trial court erred in law and in fact by holding that the prosecution side proved the case against the appellant beyond reasonable doubt;
4. That the trial court erred both in law and fact in not finding that the present case lacked an investigator;
5. That the charge against the Appellant was not proved beyond reasonable doubt; and
6. That the trial court erred both in law and facts for violating section 235(1) of the Criminal Procedure Act Cap. 20 R.E. 2019.

At the hearing of the appeal, the Appellant appeared in person and the Respondent was duly represented by Ms. Alice Mtenga, State Attorney.

Submitting in support of the appeal, the Appellant started by submitting on the second ground of appeal on contradiction of evidence of prosecution's witnesses. He contended that the evidence of PW1 (the victim) and PW2 (the victim's grandmother) varies. He stated that while PW1 stated to have been raped two times, PW2 stated that the victim was raped three times. The Appellant submitted that the medical doctor did not state the date and time she admitted and treated the victim.

Supporting the first ground of appeal, the Appellant submitted that the trial court erred to receive and rely on the evidence of the child of tender age. He stated that the trial court erred to rely on the evidence of PW1 without asking him to defend against PW1's testimony and allegations against him.

The Appellant submitted in support of the third and fifth grounds that, the prosecution did not give evidence as to length of time the Appellants stayed with the victim on the alleged dates of commission of offence. He contended that the prosecution did not produce before the trial court an independent eye witness who saw him committing the offence. He stated that the prosecution failed to prove the time of commission of an offence, either in

the afternoon or at night. He complained of being detained for one month and seven days without investigation, which denied him to an opportunity to understand the nature and information of the offence charged for preparation of his defence.

On the fourth ground, the Appellant submitted that the case did not have an investigator to investigate the offence charged. He claimed that, the lack of investigation to establish that the offence was committed prejudiced him.

The Appellant submitted in support of the sixth ground that he was not prepared for the judgement. The sentence was pronounced at his surprise. He prayed to the Court to do justice and set him free as the case was fixed against him. He contended that source of the present criminal charge is the land dispute between him and his aunt (PW2) who promised to do something bad to him.

In opposing the second ground of appeal, Counsel for the Respondent submitted that the evidence of the victim (PW1) as appear on page 6, 7 and 8 of the proceedings and that of PW2 on page 9 of the proceedings do not

vary. She stated that both PW1 and PW2 testified that, the victim was raped twice. Counsel stated further that, there was no contradiction in the evidence of the Doctor (PW3) as it is clear on page 14 of the proceedings that she admitted the victim on 02/05/2021 when she was on duty.

Submitting in opposition to the first ground of appeal regarding the alleged violation of section 127(2) of the Evidence Act, she stated that the proceedings on pages 6 to 7 clearly established that the procedure of admitting evidence of a child of tender age was complied with. She stated that, the court was satisfied that the witness could state the truth while under oath. She refuted the Appellant's claim that, he was not given chance to test the veracity of the victim's evidence. She stated that on page 8 of the proceedings, the Appellant was given right to cross examine PW1 but he did not cross examine. She referred the Court to the case of **Nyerere Nyague v. R., Criminal Appeal No. 67 of 2010**, where the Court of Appeal on page 5 held that a party who fails to cross examine on a matter in controversy, is deemed to accept the matter and is estopped from asking the trial court to disbelieve the testimony.

The Counsel contested the third and fifth ground by submitting on PW1's testimony that the Appellant raped her on 24/1/2021 when her grandmother was away is corroborated by the testimony of the grandmother (PW2) that on the said date, she went to the burial ceremony. Counsel stated that PW1 did not remember the other date when she was raped by the Appellant but testified that, his grandmother (PW2) was also not at home. Counsel argued that it is a settled position that, in sexual offences, the best evidence is the evidence of the victim which can be relied upon independently to convict the accused person without corroboration, referring to the case of **Jacob Mayani v. R., Criminal Appeal No. 558 of 2016** o page 5 of the decision of the Court of Appeal.

On the Appellant's claim that there was no evidence as to the time of commission of the offence, Counsel submitted that it is an immaterial aspect in establishing the offence charged against the Appellant. She contended that what matters is the evidence of the victim who was able to identify the Appellant and explained the manner she was raped. According to the Counsel, the evidence of PW1 was corroborated by the evidence of PW2 that the victim informed her at earliest opportunity that the person who raped

her was her biological father, the Appellant herein. Counsel referred to the case of **Jacob Mayani (supra)**, where on page 16 the Court of Appeal quoted the decision in the case of **Marwa Wangiti Mwita and Another v. R. (2002) TLR 39**, where it was observed that the ability of a witness to name a suspect at the earliest opportunity is an important assurance of his reliability.

Submitting against the fourth ground, Counsel stated that lack of evidence or testimony of an investigator who investigated the case, does not mean that the case was not investigated. Counsel stated that depending on the nature of the witness's testimony, it is not necessary to call every witness to testify in court. Counsel cited section 143 of the Evidence Act to conclude that the Respondent did not find it necessary to call the investigator as the ingredients of offence the Appellant was accused of, were proved by the witnesses who testified in the trial court.

Submitting against the sixth ground of appeal, the Counsel stated that the trial court adjourned the case on 13/10/2021 and scheduled the judgement on 27/10/2021. She stated further that on the date of judgement, parties

were asked and responded that they were ready to receive judgement. Counsel contended that the Appellant was given a chance to state his mitigation which he did before the trial court passed sentence. Counsel argued that there was no contravention of section 235(1) of the CPA. Counsel concluded that the Respondent supports the conviction and sentence and prayed the conviction and sentence of the trial court be sustained.

The Appellant informed the court that he had nothing to add as his submissions in chief were sufficient.

In determining the grounds of appeal, the Court is enjoined to establish whether the prosecution evidence was sufficient to justify conviction of the offence of rape against the Appellant.

I will start with the first ground where the Appellant faults the decision of the trial court for violating section 127(2) of the Evidence Act. The trial court found the accused guilty of the offence relying on the evidence of the victim

(PW1), a child of tender age, the victim's grandmother (PW2), and the medical doctor (PW3), together with PF3 admitted as Exhibit P1.

On pages 6 and 7 of the proceedings of the trial court, PW1 was asked questions to verify before she gave evidence, that she understood the meaning of oath or the meaning of telling the truth. PW1 promised to tell the truth to court and not to tell lies. The trial court was satisfied and recorded that PW1 understood the meaning of telling the truth before taking her oral testimony. The trial court certified that the child understood the nature of speaking the truth by stating on page 7 of the proceedings that *'after interrogating the witness the court is satisfied that she knows the meaning of telling the truth therefore swear and state as follows.'* I find that section 127(2) of the Evidence Act was complied with by the trial court.

The Appellant's claim that the evidence of the victim was received without according him an opportunity to defend against the allegations is unfounded. My finding is based on the proceedings of the trial court on page 8 where the Appellant decided not to cross examine PW1 after she concluded her

evidence in chief. The Appellant is precluded from complaining that the court erred to rely on the evidence of PW1. I am guided by the holding of the court of appeal in the case of **Nyerere Nyague v. R., Criminal Appeal No. 67 of 2010**, where the Court of Appeal held on page 5 that a party who fails to cross examine on a matter in controversy, is deemed to accept the matter and is estopped from asking the trial court to disbelieve the testimony.

Again, on page 18 of the proceedings, the Appellant informed the trial court when he was cross examined, that he failed to ask her daughter (PW1) questions. Further, the trial court accorded the right to the Appellant to defend himself as reflected pages 16 and 17 of the proceedings. I find the first ground of appeal unmeritorious.

The Appellant complains in the second ground that there are contradictions between the evidence of PW1, PW2 and PW3. I have read the proceedings of the trial court and found no contradictions alleged by the Appellant between PW1 and PW2. The evidence of PW1 found on page 8 was that the Appellant raped him twice. That evidence is similar to the evidence of PW2

on page 9 of the proceedings, where she stated to have been informed by PW1 that the Appellant raped her twice.

Regarding the evidence of PW3, I agree with the submission of the learned State Attorney that there was no contradiction in the evidence of the doctor (PW3) as it is clear on page 14 of the proceedings that she admitted the victim on 02/05/2021 when she was on duty. That notwithstanding, I am of the view that whether PW3 admitted PW1 in the afternoon or at night, it does not change the fact that she admitted and examined the victim and found that her vagina was penetrated by a blunt object, which established that the victim was raped. PW3's testimony and Exhibit P1 together with the evidence of PW1 and PW2 proved the offence of incest by male against the Appellant. I therefore dismiss the second ground for lack of merit.

In the third and fifth grounds of appeal, the Appellant complains that the prosecution failed to prove the offence beyond reasonable doubt to justify conviction. The Appellant attacked the decision of the trial court to rely on the evidence of the PW1 without an eye witness.

I have noted from the judgement of the trial court that, in finding the Appellant guilty of the offence of incest by male, the trial court acted upon the evidence of the PW1 as an independent eye witness after assessing the credibility of the evidence of PW1. That evidence appear on page 8 of the judgement of the trial court. On page 6 and 7 of the proceedings, PW1 was able to narrate without hesitation and contradiction, how the Appellant asked her to take drinking water to his house, how the Appellant took the victim to his bed, undressed and raped her. PW1 was able to inform her grandmother the person who raped her, at the earliest opportunity. I find that the evidence of the victim was credible, notwithstanding its corroboration by evidence of PW2 and PW3 and Exhibit P2. I am fortified by the decision of **Omari Salum @ Mjusi v. R, Criminal Appeal No. 125 of 2020** (TanzLII), where on page 10 of the decision, the Court of Appeal held:-

> *".....Many times, this Court has stated that the import of section 127 (2) of the Evidence Act requires a simple process to test the competence of a child witness of a tender age to know whether he/she understands the meaning and nature of an oath before it is concluded that his/her evidence can be taken on oath or on promise to the court to tell the truth and not to tell lies. See Godfrey Wilson v. R, Criminal Appeal No. 168 of 2018, Salum*

Nambaluka v. R, Criminal Appeal No. 272 of 2018 and John Mkorongo James v. R, Criminal Appeal No. 498 of 2020 (all unreported)".

I agree with the learned State Attorney that PW1's evidence that the Appellant raped her on 24/01/2021 and the other day when her grandmother was also away, is corroborated by the testimony of the grandmother (PW2) that on that particulate day, she went to the burial ceremony. It is a settled position of the law that, in sexual offences, the best evidence is the evidence of the victim which can be relied upon independently to convict the accused person without corroboration. Section 127(6) of the Evidence Act provides:-

'127(6) Notwithstanding the preceding provisions of this section, where in criminal proceedings involving sexual offence the only independent evidence is that of a child of tender age or of a victim of the sexual offence, the court shall receive the evidence, and may, after assessing the credibility of the evidence of the child of tender years as the case may be the victim of sexual offence on its own merits, notwithstanding that such evidence is not corroborated, proceed to convict, if for reasons to be recorded in the

proceedings, the court is satisfied that the child of tender age or the victim of the sexual offence is telling nothing but the truth.'

I therefore find that the evidence of PW1 was credible and the trial court was correct to rely upon the evidence of PW1 regardless of the corroboration of the evidence of PW2, PW3 and Exhibit P2.

I now turn to the Appellant's claim that there was no evidence as to the time of commission of the offence. I find that the timing of commission of the offence is immaterial in establishing the offence of incest by male. The victim knew the Appellant very well as he is her Appellant's biological father. The evidence of PW1, the victim, which was corroborated by the evidence of PW2, was sufficient to establish that it is the Appellant who raped the victim regardless of the time of commission of the offence. PW1 was able to testify on how she was raped by her biological father, the Appellant, and informed her grandmother at the earliest opportunity. I am fortified by the case of **Marwa Wangiti Mwita (supra)**, where on page 5 of the decision, the Court of Appeal observed that the ability of a witness to name a suspect at the earliest opportunity is an important assurance of his reliability.

With regards to the Appellant's complaint that he was detained for one month and seven days without investigation which denied him an opportunity to understand the nature and information of the offence charged for preparation of his defence, I have held in respect of the first ground above, that the Appellant was accorded a fair hearing before the trial court. With regards to alleged detention, I find that it is immaterial to the right of the Appellant to a fair hearing, that he was duly accorded by the trial court during hearing of the case.

I am also of the view that investigation may take time until an accused person is arraigned in court. Time differs depending on the circumstance of each case. I find the omission to be a minor irregularity which cannot vitiate proceedings of the trial court. I am fortified by the decision of the Court of Appeal in **Makenji Kamura v. R., Criminal Appeal No. 30 of 2018**, on page 8 and 9, which quoted with approval its decision in **Jaffari Salum @Kikoti versus v. R, Criminal Appeal No. 370 of 2017** (unreported), where the Court of Appeal held:-

'This is not the first time we are dealing with an issue like this. We were confronted with an akin situation in ***Jaffari Salum @Kikoti versus v. R, Criminal Appeal No. 370 of 2017*** *(unreported), where, like in this case, the appellant faulted the judgment and proceedings of the trial court on account that he was arraigned to the trial court after 39 days from the date of his arrest and detention contrary to section 32(1) of the CPA. We held that, the omission was a minor irregularity which could not vitiate the judgment and proceedings of the trial court. Guided by that authority, we dismiss the second ground of appeal.'*

Further, in this case, the offence against the Appellant had police bail. If the Appellant was not granted bail, the Appellant should have informed the trial court upon being arraigned in court. I find nothing in the record to suggest that the Appellant raised such complaint before the trail court. I find that section 32(1) of the CPA and Article 13(6) (e) of the Constitution were not violated. There is no merit in the third ground of appeal and I dismiss it.

The fourth ground should not detain me much. I have read the proceedings and established that the evidence of the prosecution witnesses, PW1, PW2

and PW3 and Exhibit P2, established the offence charged against the Appellant beyond reasonable doubt. The evidence of the investigator would not have any impact on the prosecution evidence that has sufficiently established the offence against the Appellant. I agree with the learned State Attorney that the fact that the investigator did not testify in a case, does not mean that the case was not investigated or that the prosecution failed to establish the offence against the Appellant.

The last ground is the allegation that the trial court violated section 235(1) of the CPA. I understand from the Appellant's submissions and section 235 of the CPA that the trial court failed to comply with the requirement of convicting the Appellant. Indeed, reading the decision of the trial court, especially on page 8, the trial court failed to convict the Appellant of the offence charged. My finding is based on the excerpt of the trial court decision found on page 8 through to 9 of the decision.

I am of the opinion that from the evidence given by both PW1 and PW2 and in the circumstances of the case suggested that the accused person was the one who raped her since on the incident day her father called her and asked

her to take drinking water to him at his house. She gave him water and he touched her hand and took her to his bed. He undressed his trouser and short trouser, he also undressed her dress and pant. She stated that her father did rape her twice whereas the other day also her grandmother was not around. PW3 finds that there was evidence of previous penetration patient has mild bruises in her vagina, hymen not intact and shows patient has been penetrated by a blunt object which was also reflected on the exhibit P1.

P. A. Meena-RM

27/10/2021

Previous records: *Nil*

Mitigation: *I pray for lenient punishment, I am suffering from pneumonia also I have nose bleed.*

Sentence: *Following a mitigation of accused person I hereby sentence him to serve jail imprisonment for 30 years.*

Court: *Right of appeal explained.*

P. A. Meena-RM

27/10/2021

Previously, a failure or an error to convict an accused person was an incurable irregularity. This position was elaborated in the decisions of the Court of Appeal in cases of **Musa Mohamed v. Republic, Criminal Appeal No. 216 of 2005**, **Shabani Iddi Jololo and Others v R., Criminal Appeal No. 200 of 2006**, and **Khamis Rashid Shaban v. DPP**, **Criminal Appeal No. 184 of 2012** (both unreported).

However, the current position expounded by the Court of Appeal in the case of **Mabula Mkoye and Another v. R., Criminal Appeal No. 227 of 2017** is that the omission is curable under section 388 of the CPA. Upon quoting with approval its decisions in the cases of **Bahati Makeja v. Republic, Criminal Appeal No. 118 of 2006** (unreported) and **Amitabachan Machaga @ Gorong'ondo v. Republic, Criminal Appeal No. 271 of 2017** (unreported), the Court held on page 14 of the decision that:-

'We think, with the overriding objective in our midst, the position taken in ***Musa Mohamed (supra)***, ***Ally Rajabu & 4 Others (supra)*** *and* ***Amitabachan Machaga @ Gorong'ondo (supra)***, *would be the most progressive path to take in the determination of this appeal. That is why, we*

think, the first appellate court took a proper path to entertain the appeal, despite the omission by the trial court to enter a conviction before sentencing the appellants. After all, that infraction prejudiced nobody, not even the law. In the premises, we find and hold that the appeal is competent before us.'

Guided by the above developments in our jurisprudence, I find that the trial court's failure to convict the Appellant is a curable omission which is rectifiable under section 388 of the CPA. I find the Appellant's fourth ground of appeal partly meritorious that the trial court failed to convict the Appellant. But the omission being a curable irregularity, is rectifiable.

Based on my findings above that the prosecution evidence established the offence against the Appellant beyond any reasonable doubt, I hereby convict the Appellant of an offence of incest by male contrary to section 158(1) (a) of the Penal Code. I uphold the trial court's sentence against the Appellant to serve thirty years imprisonment in jail. The sentence should be counted from 27/10/2021, when the Appellant was sentenced by the trial court. Consequently, the appeal is devoid of merit, and it is hereby dismissed.

It is so ordered.

Right of Appeal fully explained.

DATED at **ARUSHA** this 14th of November 2023.

H. A. KINYAKA

JUDGE

14/11/2023