THE UNITED REPUBLIC OF TANZANIA

JUDICIARY

IN THE HIGH COURT OF TANZANIA

(MTWARA SUB-REGISTRY)

AT MTWARA

CRIMINAL APPEAL NO 111 OF 2023

(Originating from the Resident Magistrate's Court of Mtwara at Mtwara in Criminal Case No. 9 of 2023)

ALOYCE AMBROSE SEFURIA @ ISSA .....APPELLANT

VERSUS

THE REPUBLIC..... RESPONDENT

JUDGMENT

10th & 27th November 2023

LALTAIKA, J.

In some parts of Tanzania, stories abound of fathers keeping dogs purposely to protect their daughters. Others simply put a warning sign that there is a ferocious bulldog around *"Kuna Mbwa Mkali"* even where there is not any dog. Unfortunately, the bad news is, stories of fathers accused of sexually abusing their own daughters are also increasing. The appellant in this case is, allegedly, in that bad news category. My task is to re-examine the evidence adduced in the trial court and decide whether the appeal has merit. I will start with a recap on proceedings in the trial court.

The appellant, **ALOYCE AMBROSE SEFURIA @ ISSA,** was arraigned in the Resident Magistrate's Court of Mtwara at Mtwara charged with two counts namely (i) Incest by male c/s 158(1)(a) of the Penal Code Cap 16 RE 2022 and (ii) Causing grievous harm c/s 225 of the Penal Code (supra).

It was alleged by the prosecution that on diverse days in January and February 2023 at Mbae Mashariki Area in Mtwara the appellant had carnal knowledge with his own child aged 13. On the same days he caused grievous harm to the same child by beating her up with a stick and biting her on several parts of her body.

When the charge was read over and explained to the appellant (then accused) he pleaded not guilty (denied wrongdoing). This necessitated conducting of a full trial. The prosecution paraded 7 witnesses and tendered 2 exhibits. The appellant was found with a case to answer and given an opportunity to present his defence. Needless to say, he was the only defence witness and tendered no exhibit.

Having been convinced that the prosecution case was proved beyond reasonable doubt, the learned trial Magistrate convicted the appellant as charged. He sentenced him to serve a term of 30 years for the first count and 5 years for the second count running concurrently.

Dissatisfied, the appellant has appealed to this court by way of a petition of appeal containing six grounds. I take the liberty not to reproduce them.

When the appeal was called for hearing, the appellant appeared in person, and without legal representation. The respondent Republic, on the

other hand, appeared through **Mr. Steven Aron Kondoro**, learned State Attorney. The appellant indicated that he had nothing to add to his expounded grounds of appeal. Nevertheless, he reserved his right to a rejoinder if the need arose.

Taking up the podium, Mr. Kondoro announced that the respondent was in full support of the trial court's decision. He clarified that having gone through the grounds of appeal it came to his knowledge that they all boil down to one complaint namely absence of proof beyond reasonable doubt. To this end, and with a note of approval from this court, the learned State Attorney rolled up his sleeves to counter the assertion. Mr. Kondoro's submission is summarized in the next paragraphs.

There is no doubt that in sexual offences, reasoned the learned State Attorney, penetration is a key aspect that needs to be proved by evidence. To support his point, Mr. Kondoro referred this court to the Court of Appeal case of **KAYOKA CHARLES v. REPUBLIC** Crim Appeal No 325 of 2007 CAT, Tabora (unreported).

Moreover, stated the learned State Attorney, **section 127(6) of the Evidence Act** Cap 6 RE 2022 provides that the evidence of a victim in sexual offences is the best evidence. In the matter at hand, asserted Mr. Kondoro, PW1 was a young girl aged 13 and a STD 5 pupil at [Name of the School withheld.] I noted in my proceedings that the appellant appeared deeply remorseful and extremely sad as the learned State Attorney described the victim.]

Exhibiting **outstanding mastery of the lower court's records,** Mr. Kondoro narrated that the victim had stated that she was raped by her own father five (5) times in different occasions. She also narrated that even on the fateful day, her father wanted to rape her, and she run away to her aunt at 1AM. The father went after her to the aunt's place carrying a knife as documented on page 2 and 3 of the proceedings, emphasized Mr. Kondoro.

Upon arrival at the aunt's place, the appellant demanded that the aunt (PW3) allows him to take back the victim while uttering disrespectful words that the victim was not a child anymore but a fellow adult because his penis would go through her vagina effortlessly. The learned State Attorney emphasized that the aunt's testimony as recorded in the trial court's proceedings appeared on page 4.

Coming back to penetration, albeit after passionate recollection of the testimonies of prosecution witnesses, Mr. Kondoro averred that PW4, a medical doctor, had testified that the child had told him how she was raped and bitten up by her father and that she had lost her virginity. The witness had filed a PF3, argued Mr. Kondoro, which was admitted as evidence.

Premised on the above submission, Mr. Kondoro prayed this Court to consider the evidence adduced in the trial Court supported the allegations and proved the case of the prosecution beyond reasonable doubt. Henceforth, the learned State Attorney opined, the appeal warranted dismissal for lack of merit.

The Appellant on his part, lamented that there was no way he could commit such an act to her own daughter whom he had taken from her

mother since she was 2.6 years. He emphasized that he took care of her and when she turned 5, he took her to kindergarten.

The appellant lamented further that the root cause of the problem was a land conflict between him and his neighbours. He did not expound on this point further but proceeded to narrate how he was arrested.

According to the appellant, he just saw a car coming toward him with his child in it. He was told to finish eating while under arrest. He was taken to the police station where he was informed that he had been arrested for raping his own child. The appellant emphasized that in his knowledge, the girlchild was taken to hospital but nothing was found indicating that she was raped. He never saw his daughter again, but he recalled telling the police officer that the real problem was a plot.

In what appeared to be a contradiction, the appellant stated that after divorcing his wife (the victim's mother) he lived with his daughter in a house that belonged to his neighbour who was in Dar es Salaam. No mention of a plot was made. He prayed that he was set free as, he asserted, the allegations were not true.

I have **dispassionately considered the grounds of appeal**, the lower court's records and attentively considered the learned State Attorney's submission. As alluded to earlier, my role as the first appellate court is to re-evaluate the evidence tendered in the trial court and come up with my own findings if necessary. See **LEORNARD MWANASHOKA V. REPUBLIC** Crim Appeal No 226 of 2014 CAT.

The learned State Attorney had averred that the main complaint raised by the appellant is that the prosecution case was not proved beyond reasonable doubt. Indeed, our criminal justice requires that the prosecution case is proved beyond reasonable doubt. This duty rests on the prosecution. See **WOODMINTON V. DPP** [1935] AC 462. Although the term proof beyond reasonable doubt has not been defined in statutes, in the case of **MAGENDO PAUL AND ANOTHER V. REPUBLIC** [1993] TLR 219 the CAT held:

> *"For a case to be taken to have been proved beyond reasonable doubt its evidence must be strongly against the accused as to leave a remote possibility in his favour which can easily be dismissed."*

Before examining whether the assertions by the State Attorney that the case was proved beyond reasonable doubt hold water, admittedly there was another complaint by the appellant namely failure to observe the requirements of section of section **127(2) of the Evidence Act [CAP 6, RE 2002]**, as amended, since PW1 was a child of tender age (13 years old). See the first ground of appeal. Nevertheless, I have no doubt after going through the proceedings that the complaint is without merit as the legal requirement was adhered to as required. I now turn to the offence.

According to the **Black's Law Dictionary** incest means "Sexual relations between family members or close relatives, including children related by adoption." The Encyclopedia of Crime and Justice 880, 880 (Sanford H. Kadish ed., 1983) as quoted in the Black's Law Dictionary, provides the following insights on the offence of Incest:

> "Although incest under both English and American law is a distinct crime, its commission may involve any of eight different offenses: illegal marriage, consensual cohabitation by unmarried persons, fornication (consensual intercourse), forcible rape, **statutory rape**, child abuse, and juvenile delinquency (sexual relations between minor siblings or cousins) .... **The choice of crime charged is generally one of prosecutorial discretion.** Unless one of the participants is a minor and the other an adult, both parties may be prosecuted for incest." Lois G. Forer, "Incest," in *Encyclopedia of Crime and Justice* 880, 880 (Sanford H. Kadish ed., 1983) (Emphasis added).

In this case the prosecution chose the statutory rape approach. This means, since there is no dispute on the father-daughter relationship between the appellant and the victim, my task is narrowed down to reviewing the evidence adduced to support statutory rape. I say there is no disagreement because throughout the trial, the appellant indicated that he was the biological father of the victim whose mother he had divorced when the victim was less than three years old. That consistency was maintained by other prosecution witnesses including PW3, the appellant's sister.

On statutory rape, proving the age of the victim is very important. See **OMARY HASHIMU V. R.** [2022] TZHC TANZLII where this court (Ngwembe J. as he then was) stated:

> *"In statutory rape, proof of age is fundamental. In fact, the age of a woman is a determining factor which differentiates between normal rape and statutory rape. Even punishment depends on the age of a woman."*

Save for disparaging remarks allegedly made by the appellant is justifying his deplorable acts that the victim was no longer a child because

he was capable of penetrating his male organ through her, the age of the victim remains largely uncontested. Even if the appellant had made it a habit to sexually abuse the victim to the extent of viewing her as an adult, she remained a thirteen-year-old girl child.

Another important element that must be proved is penetration. The Court of Appeal of Tanzania in **GODI KASENEGALA V. REPUBLIC** CRIM APPEAL NO 271 of 2006 CAT, Iringa p. 12 stated:

> *"In either case one essential element or ingredient of the offence must be proved beyond reasonable doubt. This is the element of penetration. That is the penetration even the slightest degree of penis into the vagina."*

The evidence of the victim that she was raped several times by her own father, which evidence is corroborated by the PF3 tendered as an exhibit by PW4 a medical personnel. It appears that the only explanation given by the appellant is that it was impossible for him to rape his own daughter whom he had "rescued" from her mother when she was 2.6 years old. This argument does not hold water. The evidence is overwhelming that he did the exact of what he is trying to run away from.

Premised on the above, I dismiss the appeal in its entirety for lack of merit.

E.I. LALTAIKA
JUDGE
27.11.2023

Court

Judgement delivered under my hand and the seal of this court this 27th day of November 2023 in the presence of Mr. Melchior Hurubano, learned State Attorney for the Respondent and the Appellant who has appeared in person, unrepresented.

E.I. LALTAIKA
JUDGE
27.11.2023

Court

The right to appeal to the Court of Appeal of Tanzania is fully explained.

E.I. LALTAIKA
JUDGE
27.11.2023