IN THE HIGH COURT OF TANZANIA

GEITA SUB-REGISTRY

AT GEITA

CRIMINAL APPEAL NO. HC/GTA/CRM/DCA/5923/2024

HASSAN RAMADHANI .....APPELLANT

AND

THE REPUBLIC..... RESPONDENT

JUDGMENT

Date of last Order: 19/03/2024
Date of Judgment: 03/04/2024

K. D. MHINA, J.

In the District Court of Chato at Chato, the appellant, Hassan Ramadhani, was charged with the offence of incest by a male contrary to section 158 (1) (a) of the Penal Code [Cap. 16 R.E. 2022] (the Penal Code).

It was alleged that on diverse dates between the years 2020 and 2023 at Katale Village within Chato District in Geita Region, the appellant had carnal knowledge of a child aged twelve (12) years, whom I shall refer to as "ASR" to conceal her identity; while having knowledge that she is his biological daughter.

The appellant denied the charge. Further, during the preliminary hearing, which was conducted under section 192 of the Criminal Procedure Act, the appellant denied the commission of the offence. He only admitted that "ASR" [hereafter shall be referred to as the "victim"] was his biological daughter, and he was his second-born child. Thus, as a result, the case proceeded to a full trial.

In a bid to prove the charge against the appellant, the prosecution relied on the evidence of six witnesses and three documentary evidence.

ASR, the victim who testified as PW1, gave an account of how it all started.

One day, her father took her to Chato Msilale and told her he would buy her school uniforms. They ended up at her grandfather's house, where they slept in one room with the appellant, who slept on the sack beside her, and other children, who slept together on the mattress. While sleeping, she felt someone touching her legs, and it was her father (the appellant) who warned her not to say a word or else he would kill her.

Thereafter, the appellant took her to a sack, undressed her and had sex with her, and she felt severe pain.

According to the evidence, from that night, it became routine for the appellant to ravish his own daughter. On the next day, the appellant again raped her. She reported the issue to her grandmother, who called a meeting and chased the appellant out of the house.

The victim stayed with her grandmother until the appellant decided to take her to Nyambiti Village and then to Katoro to a rental house, where they lived as a family with a stepmother and her little brother. At Katoro, the appellant had sex with her three times.

When they shifted to Nyalwambu village, the appellant continued to have sex with her at night during the Ramadhan period. Whereby she lost her virginity. Blood was flowing from her vagina, and the appellant told her to wash her body.

They shifted to Biharamulo, where the appellant built a small house on his friend's premises. The accused told her to go to sleep where she had only a piece of the sheet on the floor, and later, the appellant entered, woke her up and raped her.

She went on to say that when the appellant married, they returned to Katale to her grandmother. On 27.08.2023, while sleeping, her grandmother

heard someone opening the door, and on asking, the person ran away. On the second day, the appellant entered her room with the local medicine and told her it was for her dental. The appellant put some medicine on her body while she was naked and raped her. Her stepmother was suspicious and asked if she saw someone in her room, but she told her nothing. Later, the appellant returned, took her to the bed, raped her and left.

She decided to report the incident to her aunt, Mariam Muhoja (PW2) but did not take any action. She went to the Hamlet chairman and again to her aunt, who called her stepmother Salma. They reported the matter to Buzirayombo Police Station, where the appellant was arrested, and the victim was sent to the hospital.

PW1's evidence was also supported by PW2 (Mariam Muhoja), who testified to be her aunt and a blood sister to the appellant, and PW4, a village chairman. They testified to have received the victim's complaints and reported the matter to the Police Station, which resulted in the arrest of the accused.

On the part of PW3, the appellant's wife testified that she, on different occasions, noticed the appellant coming from the victim's room at midnight.

Before the victim revealed it, she had already suspected that her husband was having an affair with her child, and she asked the appellant after she saw him coming from her daughter's room at night when she went for a bath, but the appellant denied.

Both PW5, a police officer who received the appellant at the police station and wrote his caution statement and PW6, the clinical officer who examined the victim and discovered that she had no hymen and when his two fingers into the victim's vagina for about six centimetres. They caution Statement and the PF3, respectively.

In his defence, the appellant accepted that the victim was his biological daughter, but he denied the fact that he had any sexual relation with her or raped her as charged. He insisted the evidence was fabricated against him because *PW1 wanted to be sent to a private school*.

Disputed the evidence of PW2 (his sister), the appellant testified that he had quarrels with her.

Further, regarding the evidence of PW3 (his wife), he stated that her evidence should not be relied on because she was close to PW2, her sister.

The appellant also reacted to the evidence of PW5, claiming that he was tortured to make the statement; therefore, the evidence of PW5 should not be believed.

At the end of the trial, the trial Court convicted and sentenced the appellant for a term of thirty (30) years after it accepted the evidence of PW1 that she was carnally known by the appellant. The evidence which the trial court held that was corroborated by the PW2, PW3, PW4, PW5 and PW6. Further, the court considered the medical evidence (PF3) tendered as Exhibit P2 tendered and testified by PW6 as supporting the fact that there was penetration.

Undaunted, the appellant has preferred this appeal. In the Memorandum of Appeal, the appellant raised the following grounds of complaint, I quote;

1. *That the trial court erred in law and facts to convict and sentence the Appellant a thirty years imprisonment based on prosecution evidence which is covered with many doubts as the victim (PWl) testified that she lives at Katale village with her father and one Salma Hamis-PW3 (stepmother) and PW1 further stated that the house they used to live had two rooms(sitting room and living room) and PW3 while giving her evidence did confirm to live together, now when DW1 was raping*

PW1 all those times:-

i. *On those nights from 27.08.2023, where was PW3 sleeping?*

ii. *If she (PW3) was not sleeping in the said house of two rooms, why is there no evidence to show that she was absent on those nights?*

iii. *Does it mean that DW1 carnally knew PW1 in front of PW3, who could not even notice anything, even the absence of her husband (DWl on the matrimonial bed)?*

iv. *If PW1 was sleeping in the living room, does it mean that DW1 and PW3 were sleeping/bedding in the sitting room?*

v. *Finally, why did PW1 not tell the bad conduct of her father to PW3, whom she was living with? Instead, PW1 opted to prepare a journey to PW2 to tell the story of what was happening.*

2. The trial court erred both in law and fact by relying on uncorroborated evidence of PW1, PW2, and PW3 regarding the age of the victim (PWI). There was no birth certificate or tangible evidence to prove this. At least the mother of the victim (PW1) was an important witness to prove her age, but she was not called as a witness.

3. That the trial court erred both in law and facts to convict and sentence

the Appellant by relying on contradictory evidence of PW1 and PW4, whereby PW4 testified that him being the Hamlet chairman received information of rape on 27.08.2023 whereby on the material date did forward them to Buzirayombo police station, WHILE PW1 testified that on 27.08.2023 she continued to be raped for at least two/three more days and thereafter she decided to go to PW4, now the issue is. How does it make sense that PW4 sent/forwarded them to the police before obtaining information from PW1?

4. *That the trial court erred both in law and facts to rely on evidence of PW2, PW3 and PW4 as their evidence is pure hearsay.*

5. *That the trial court erred both in law and facts to provide a decision against the Appellant where there is a contradiction between PW1 and PW3, that is, PW1 testified that she had never said anything about her rape to PW3, WHILE PW3 testified that she had received many complaints from PW1.*

6. *That the trial court erred in making its decision based on evidence of PW1 while the said evidence is enshrined with doubts.*

7. *The trial court erred in delivering the Judgment in favour of the Respondent when the case was not proved beyond any reasonable doubt.*

At the hearing of the appeal, the appellant was represented by Mr. Bartholomeo Msyangi, learned Advocate, whereas the respondent/ Republic was represented by Ms. Scolastica Teffe, learned State Attorney.

The learned advocate for the appellant addressed first and informed this Court that because the 1st, 2nd, 3rd, 4th, and 5th grounds of appeal revolve around the issue of the trial court's evaluation of evidence, he prayed that the same would be argued jointly and together. That prayer was not objected to by the learned State Attorney.

After taking the floor and submitting on the 1st, 2nd, 3rd, 4th, and 5th grounds of appeal, Mr. Msyangi argued that the evidence adduced at the District Court was not watertight enough to result in the appellant's conviction. The evidence did not prove the offence of rape which the appellant was charged with. That was because, during the trial, there were contradictions in the evidence of PW1 and PW3. The evidence of PW3 did not prove that the appellant had an intention of raping the victim (PW1).

He further argued that there was no direct evidence, and for that reason, the evidence was doubtful and did not prove the intention of the appellant to rape the victim.

Furthermore, the evidence of PW2, PW3, and PW4 was pure hearsay, while the evidence that was supposed to be adduced at the trial by the prosecution had to be direct, as per **Mohamed Haruna@ Mtopeni and another vs R**, Criminal Appeal No. 25 of 2007 (CAT-unreported), at page 8.

On this, he concluded by submitting that it was the duty of the prosecution to present the evidence with no aorta of doubt, but they failed to do so.

Faulting the trial court's decision on the sixth ground of appeal, Mr. Msyangi submitted that the evidence adduced at the trial was not watertight enough to result in the appellant's conviction. He argued that prosecution evidence was characterized by doubt. Therefore, the trial court erred in convicting the appellant.

Regarding the seventh and last grounds of appeal, he reiterated what he had submitted earlier in the sixth grounds of appeal.

In response, Ms. Teffe, State Attorney, opposed the appeal and argued that the offence in which the appellant was charged at the trial court was

incest by males. Therefore, as per the principle in sexual offences, true evidence comes from the victim.

She submitted that at the trial, there was not only the evidence of the victim, a child aged 12 years, which the trial court found her evidence was nothing but the truth, but the victim's evidence was also corroborated by evidence from other witnesses such as PW2, PW3, PW4, PW5, including the Medical Doctor (PW6) who examined the victim.

Therefore, the trial court considered the evidence of the victim (PW1) to convict the appellant, as elaborated in **Seleman Makumba vs R**, TLR 379 (2006).

Ms. Teffe insisted that the evidence of the PW1 was watertight enough to cause the trial Court to convict the appellant as per section 127 (6) and (7) of TEA, taking into account that the victim was beyond 14 years old and the procedure to record her evidence was complied with.

Reverting to the sixth and seventh grounds of appeal, she responded that the evidence of PW1 was free from doubt, the prosecution side proved the offence beyond a reasonable doubt, and the ingredients of the offence charged were proved.

First, at the trial, the victim's age was proved by the victim herself and her aunty (PW2). Further, the appellant did not challenge the victim's age during the hearing. Therefore, since the appellant did not dispute the victim's age during the trial, he cannot dispute it at the appellate level. To bolster her submission, she cited **Bundala Swaga vs. The Republic**, Criminal Appeal No. 385 of 2015 (Tanzlii), on page 4.

The Second ingredient of penetration, however slight, was proved at the trial as indicated at page 6 of the trial court's judgment that PW6 proved that the victim was penetrated.

Regarding the third ingredient of offence, whether the appellant was the victim's father, Ms. Teffe argued that PW1, PW2, and PW3, the victim's (foster) stepmother, proved that the appellant was the victim's biological father. Therefore, she argued that at the trial court, the prosecution side proved the offence beyond a reasonable doubt.

Rejoining briefly, Mr. Msyangi submitted that since the case was criminal, the burden of proof was on the prosecution's side. He responded regarding the second ingredient, penetration, and argued that the evidence was weak and did not indicate what caused the penetration to the victim. For that

reason, the evidence that the appellant did the penetration was doubtful that the appellant did the penetration.

Therefore, because the prosecution has the duty to prove the case, they failed to discharge that duty at the trial because the ingredients of the offence were not proven.

I have carefully considered the oral arguments presented by the learned State Attorney for the respondent and the learned Advocate for the appellant in accordance with the grounds of grievance lodged and adopted by the appellant. I have come to the conclusion that the crucial issue in this appeal is whether the prosecution proved the case beyond a reasonable doubt.

Therefore, in deliberating the appeal, I will analyze and determine each ground of appeal as raised and argued.

In doing so, I will start with the 1st, 2nd, 3rd, 4th, and 5th grounds of appeal, which were argued jointly and together by the counsel for the appellant because they both revolve around the issue of the trial court's evaluation of evidence. In the memorandum of appeal, the grievances in the 1st to the 5th grounds were as follows;

One, the prosecution evidence was characterized by doubts.

Two, uncorroborated evidence of PW1, PW2, and PW3 regarding the age of the victim (PWI) and the absence of the birth certificate or tangible evidence to prove the age. The absence of the victim's mother as a witness to prove the age.

Three, there was contradictory evidence of PW1 and PW4, whereby PW4 testified that him being the Hamlet chairman, received information of rape on 27.08.2023, whereby on the material date, did forward them to Buzirayombo police station. In contrast, PW1 testified that on 27.08.2023, she continued to be raped for at least two/three more days, and thereafter, she decided to go to PW4.

Fourth, the evidence of PW2, PW3 and PW4, which the Court relied on in conviction, was pure hearsay.

Fifth, there was a contradiction between PW1 and PW3. While PW1 testified that she had never said anything about her rape to PW3, PW3 testified that she had received many complaints from PW1.

Flowing from above, it is long settled that the first appellate court has the power and duty to consider and re-evaluate the evidence on record and

come to its own conclusions, except on the credibility of witnesses, which is in the exclusive domain of the trial court, which had the benefit of seeing the witnesses testify before it. See **Christina d/o Damiano vs Republic**, Criminal Appeal No 178 of 2012, CAT (unreported).

Thus, I will evaluate the evidence regarding the above grounds of appeal, which the counsel for the appellant had submitted that the trial Court did not evaluate properly; hence, the offence was not proved beyond reasonable doubt.

To start with the 2nd ground regarding the age of the victim, I have the following;

First of all, in his submission regarding the 1st to the 5th grounds, which were argued together, the counsel for the appellant did not substantiate or say anything specifically regarding the age of the victim as per the grounds of appeal.

However, having gone through the trial court proceedings, I found that the victim's age was mentioned as 12 years during the preliminary hearing, a fact that the appellant admitted.

Furthermore, when testifying, the victim mentioned her age as 12 years. This was corroborated by PW2, her aunty, who further stated that the victim was 12 years old as she was born in October 2011, and her stepmother (PW3), who stated the same.

The PF3 tendered by the Medical Doctor (PW6) also indicated that the victim was 12 years old.

From above, it is my view that this ground of complaint lacks merit because of the following;

One, it is not necessarily the age of the victim to be proved by a birth certificate or a parent alone.

In **Isaya Renatus vs. The Republic**, Criminal Appeal No. 542 of 2015 (Tanzlii), the Court of Appeal held that;

> *"That being so, it is most desirable that the evidence as to proof of age be given by the victim, relative, parent, medical practitioner or, where available, by the production of a birth certificate. We are, however, far from suggesting that proof of age must, of necessity, be derived from such evidence. There may be cases, in our view, where the court may infer the existence of any fact."*

Further, in **Bore s/o Cliff vs. The Republic**, Criminal Appeal No. 193 of 2017 (Tanzlii), it was held that;

> *The fact that none of the victim's parents was called to testify did not, in our view, render the victim's age unproved. The age of a child can be proved not only by a parent but also by, among other persons, a doctor or a guardian.*

Therefore, the absence of the birth certificate and the testimony of the victim's mother at the trial could not render the victim's age unproven. This is because there was evidence from the victim herself, PW2 (her aunty) and PW3 (her stepmother). Both testified that the victim was 12 years old. That evidence was corroborated by the medical evidence from the PF3 (ExhP2).

Two, as I alluded to earlier, during the preliminary hearing at the trial, the victim's age was mentioned as 12 years old. The appellant admitted that fact.

Also, at the trial, the appellant neither objected to nor cross-examined the prosecution evidence that the victim was 12 years old. Even in his defence, he never raised such an issue that he disputed the victim's age. From the above, I have the following,

First, Section 192 (4) of the Criminal Procedure Act, R: E 2022, clearly states that when a fact is admitted or agreed to in the memorandum of facts, that fact is deemed to have been duly proved. The section reads;

> *"(4) Any fact or document admitted or agreed, whether such fact or document is mentioned in the summary of evidence or not, in a memorandum filed under this section shall be deemed to have been duly proved, save that if, during the course of the trial, the court is of the opinion that the interests of justice so demand, the court may direct that any fact or document admitted or agreed in a memorandum filed under this section be formally proved".*

Second, once certain evidence goes into the record unchallenged, in law, it is taken to have been admitted by the accused. On this, there is a plethora of authorities, such as **Anna Moises Chissano vs. The Republic,** Criminal Appeal No. 273 of 2019 (Tanzlii), where the Court of Appeal held that;

> *"An accused is expected to challenge a witness's testimony by way of cross-examination or object to the tendering of a documentary or physical exhibit during the trial. Once certain evidence goes into the record unchallenged, it is, in law, taken to have been admitted by the accused".*

Another critical issue in the 2nd ground of appeal is regarding the law governing the offence of incest by males in connection with the victim's age. In such an offence, age is not of great essence in establishing the offence. Age is immaterial in establishing the offence. The essence of age in the offence is essential in sentencing the offender if found guilty.

On this, section 158 (1) of the Penal Code, Cap 16 R: E 2022, clearly provides that;

> *(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;*
>
> *(b) if the female is of the age of eighteen years or more, to imprisonment for a term of not less than twenty years.*

The law is clear; under the provision above, the victim does not need to be under the age of eighteen.

Therefore, the 2nd ground of appeal lacks merits.

Now, turning to the 3rd and 5th grounds of appeal regarding the contradictions in the prosecution case at the trial.

The contradictions complained of by the appellant in the memorandum of appeal were that;

One, whereby PW4 testified that him being the Hamlet chairman, received information of rape on 27.08.2023 and reported the matter to Buzirayombo police station on the same day, while PW1 testified that on 27.08.2023, she continued to be raped for at least two/three more days, and thereafter, she decided to go to PW4.

Two, while PW1 testified that she had never said anything about her rape to PW3, PW3 testified that she had received many complaints from PW1.

Having gone through the 3rd and 5th grounds of appeal, submission from both parties and the evidence on record, I have the following;

Having gone through the 3rd and 5th grounds of appeal, submission from both parties and the evidence on record, I have the following;

Though the counsel for the appellant did not substantiate the grounds and point out the contradictions in the evidence, the record reveals that

there were no contradictions on the issue which the appellant complained about.

One, regarding the alleged contradiction in the date of reporting the matter, the evidence on record indicates that PW1 stated that she was raped two times on 28 August 2023; the second time was early in the morning. She told her aunty Mariam Muhoja (PW2) but did not take any action. Thereafter, she reported the matter to the Hamlet chairman, who also did nothing. The next day, she told her aunt again, who told her mother, Salma (PW3), and they decided to go to the Hamlet chairman.

On his side, PW4, the Hamlet Chairman, stated that the victim, who introduced herself as a girl aged 12 years old on 28 August 2023, reported to him that she was raped by her father and that her father started ravishing her way back three years ago. On 29 August 2023, he reported the matter to Buzilayombo Police Station and the appellant was apprehended.

Therefore, there was no contradiction between the evidence of PW1 and PW4.

Two, coming to the alleged contradiction between PW1 and PW3, in which the appellant alleged that while PW1 testified that she had never said

anything about her rape to PW3, PW3 testified that she had received many complaints from PW1.

On this, the record indicated that the victim revealed to PW3 that the appellant was raping her after she already told PW2 and PW4. It was when she was called PW2 to hear what PW1 was saying. On her side, PW3 testified that when she "suspected" that the appellant had sexual intercourse with the victim, she informed PW2. When they called the victim and asked her about it, she told them she had already reported that matter to the Hamlet Chairman.

Therefore, what was raised as the ground of complaint found no basis in the trial court's record. Nothing in the record indicated that PW3 testified that she had received many complaints from PW1. Equally, the record does not indicate any contradiction between the evidence of PW1 and PW3.

Thus, the 3rd and 5th grounds of appeal lack merits.

Regarding the 4th ground of appeal, this should not detain me long. On this, the appellant complained that the evidence of PW2, PW3 and PW4, which the Court relied on his conviction, was pure hearsay.

In sexual offences, it is trite that the best evidence comes from the victim of the offence. See **Seleman Makumba** (supra) as cited by the learned State Attorney. On that basis, the best evidence of incest by male in this case has to come from PW1, the victim of the offence.

In convicting the appellant, the trial court was satisfied that PW1 was a credible and trustworthy witness with an unquestionable demeanour and that the evidence of PW2, PW3, PW4, PW5, and PW6 corroborated her testimony, which was straight- forward.

Therefore, PW2, PW3, and PW4 testified about their roles after becoming aware of the incident. For instance, after being told about the incident by the victim, PW2 and PW3 reported it to the Hamlet Chairman (PW4), who also reported the matter to the police station. The roles of such witnesses is not a new phenomenon in our jurisdiction; the Court of Appeal in **George Mwanyingili vs. The Republic,** Criminal Appeal No. 335 of 2016 (Tanzlii) has already held that:

> *"We now come to consider the complaint that the evidence of PWl and PW2 was improperly relied upon because it was hearsay evidence. We hurry to point out that this complaint should not unnecessarily detain us because, as correctly submitted by Mr.*

Mtenga, the evidence of those two witnesses was important in as much as they told the trial court of the roles they played after they became aware of that incident; PW1 as a responsible father, and PW2 as a dutiful police officer. In fact, both courts below understood and applied the evidence of those two witnesses in that context".

Therefore, in this appeal, the trial Court also applied the evidence of PW2, PW3 and PW4 in the context of their roles after becoming aware of the incident.

From the discussion above, the 4th ground of appeal is devoid of merits, and I dismiss it.

In further determining this appeal, I will examine the first and sixth grounds together. These grounds are particularly intriguing as the appellant has raised doubts about the prosecution case and the evidence of PW1.

At the hearing of the appeal, the appellant's counsel argued that the evidence presented during the trial was not sufficiently strong to secure the appellant's conviction.

The doubts alleged by the appellant are contained and indicated in the first ground of appeal. The appellant expressed his doubts in the form of questions.

I have carefully gone through the record of proceedings and judgment of the trial Court versus the doubts raised by the appellant.

PW1 testified by narration of all sequences of events since the day the appellant started to rape her. How she reported to her grandmother and the appellant was chased from the house. But later, how the appellant continued to ravish her as his habit. How PW1 reported the matter to PW2 and PW4.

Also, there was evidence of PW2, to whom the victim reported the incident before reporting it to PW4.

There was evidence of PW5, the police officer who recorded the appellant's cautioned statement. In that cautioned statement (Exh P1), the appellant admitted having sex with PW1. At the trial, PW5 stated that the cautioned statement was recorded on the date the appellant was arrested within four hours of the arrest. The cautioned statement was never objected to its admission.

There was also the evidence of PW6, the Medical officer who examined the victim. In his oral evidence, which was corroborated PF3 (Exh. P2), he testified that the victim was carnally known.

In his defence, the appellant denied committing the offence and claimed the case was fabricated against him because PW1 wanted him to send her to a private school. Also, because she had quarrels with his sister (PW2) and his wife (PW3) was close to PW2.

Given the uncontroverted evidence on record above and this being the first appeal, this Court is entitled to re-evaluate the evidence and come to its own conclusions. As per the above analysis, I am inclined to agree with the learned counsel for the appellant that the evidence of PW1, particularly and other prosecution witnesses, contains doubts.

The evidence of PW1 and other prosecution witnesses was straightforward and without any doubt. Nothing suggests doubting or faulting their evidence or being demolished by the defence evidence. It is trite that every witness is entitled to credence. See **Goodluck Kyando v. R** [2006] TLR 363, where it was stated that:

> *"It is a trite law that every witness is entitled to credence and must be believed and his testimony accepted unless there are good and cogent reasons for not believing a witness."*

In this appeal, there is nothing to disbelieve the prosecution witnesses' testimonies at the trial. Their testimonies were credible, consistent and coherent. Likewise, there is nothing to fault the trial court's findings that the prosecution witnesses, especially PW 1, were credible. Based on the above explanation, I find the 1st and 6th grounds of appeal devoid of merits.

Regarding the last ground that the prosecution did not prove the offence of incent by male beyond reasonable doubt, first of all, it is essential to know the meaning of the term "*beyond reasonable doubt".*

Though the term is not statutorily defined, case laws have defined it as in the case of **Magendo Paul & Another v. Republic** (1993) T.L.R. 219, where the Court of Appeal defined the term to mean:

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

In offences such as this, it is imperative to prove there is a relationship between the offender and the victim and that there is a penetration. See **Japhet Anael Temba v. Republic,** Criminal Appeal No. 78 of 2017 (Tanzlii), where the Court of Appeal held that;

"For a charge of incest of male be established, the prosecution must prove an act of sexual intercourse to a female person who to his knowledge his grandmother, daughter, granddaughter or mother".

Therefore, the degree of the relationship, as per the cited case and section 158 (1) of the Penal Code (Supra), is limited to the grandmother, daughter, granddaughter or mother.

On the other hand, regarding penetration, it is trite law, in terms of section 130 (4) (a) of the Penal Code, that in proving rape, evidence establishing penetration of the male organ into the female organ is necessary and such penetration, however slight is sufficient to constitute sexual intercourse, the ingredient necessary to prove the offence. This has been well illustrated in the case of **Paulo John vs. The Republic**, Criminal Appeal No. 420 of 2017 (Tanzlii)

In the instant appeal, there is ample evidence, which the appellant did not dispute, that the victim is his daughter. PW1 stated that the appellant is his father. Likewise, PW2 (appellant's sister) and PW3 (appellant's wife) testified that the victim is the appellant daughter.

In his defence, the appellant testified that the victim was his daughter. He even mentioned her real name.

Therefore, the first ingredient of a relationship as a father and daughter between the appellant and the victim was proved at the trial.

Regarding penetration, as I alluded to earlier in sexual offences, the best evidence comes from the victim of the offence. See **Seleman Makumba** (supra). The evidence of PW1, which was found to be credible, proved that the appellant raped her over the period of three years, as she narrated in her evidence.

In the charge sheet, it was indicated from the year 2020 to 27 August 2023.

Furthermore, the evidence of medical practitioner (PW6) testified that when he examined the victim, he found no hymen, and his two fingers slipped into the victim's vagina for about six centimetres. The same was corroborated by the PF3 (Exh. P2).

Therefore, there was no dispute that the victim, a girl aged 12 years old, was carnally known. Further, according to the uncontroverted evidence, it was the appellant who was penetrating the victim.

In that respect, the offence of incest by a male against the appellant was proved beyond reasonable doubt. The appellant was having sex with the victim while having knowledge that she was his biological daughter.

Thus, the last ground also lacks merits.

In view of the aforesaid, I do not doubt at all that with the evidence led, the trial court properly found the appellant guilty and accordingly convicted him. Thus, I uphold the finding by the court below that the appellant was guilty as charged and that his conviction and sentence are inviolable.

Consequently, I dismiss the appeal in its entirety.

It is so ordered.

K. D. MHINA
JUDGE
03/04/2024