IN THE HIGH COURT OF TANZANIA

(DODOMA SUB REGISTRY)

AT DODOMA

DC CRIMINAL APPEAL NO. 70 OF 2023

(Arising from the decision of the District Court of Kondoa at Kondoa dated 20/04/2023 in Criminal Case No. 31 of 2022 before Hon. M.F. Lukindo, SRM)

RAMADHANI KICHECHE..... APPELLANT

Versus

REPUBLIC ..... RESPONDENT

JUDGMENT

Date of last order: 06th May, 2024.

Date of Judgment: 31st May, 2024.

E.E. KAKOLAKI, J.

In this appeal the appellant is seeking to displace the decision of the District Court of Kondoa dated 20/04/2023 that found him guilty of the offence of Incest by Male; contrary section 158(1)(a) of the Penal Code, [Cap. 16 R.E 2022], convicted and sentenced him to thirty (30) years imprisonment.

It was prosecution's case before the trial court that, the appellant (DW1) on diverse dates between 2021 and October, 2021 at Berabera village within the District of Kondoa in Dodoma Region did have carnal knowledge of RN (victim) whose names are concealed to preserve her dignity, being the child, who to his knowledge is his daughter. When called to answer the charge,

the appellant who did not dispute his relationship with the victim (PW1) as his daughter save for the accusations laid on his shoulders, as result the prosecution had to present in court five (6) witnesses while relying on the victim's evidence (PW1) and her PF3 (exhibit P1) tendered by Dr. Florence Hilary (PW2), in a bid to prove of its case. Other prosecution witnesses were the victim's mother (PW4), Social welfare officer (PW3) who received the information concerning victim's sexual abuse by her father and made a follow up and the investigator of the case one D/Cpl. Asha (PW5). On other hand the appellant testified as DW1 and called his son (DW2) to support his defence without any exhibit to rely on. Upon full trial conducted and consideration of the evidence presented before it, the trial Court was satisfied that, the charge against the appellant was proved to required standard of proof and proceeded to convict and sentence him to custodial sentence as alluded above. Aggrieved with both conviction and sentence meted onto him, the appellant has preferred this appeal forwarding five grievances in his petition of appeal going thus:

1. That, the trial Court erred in law and fact to convict and sentence the Appellant while the Respondent herein failed to prove the case beyond reasonable doubt.

2. That, the trial court erred in fact and law to convict and sentence the appellant basing on the weakest and contradictory evidence adduced by the Respondent's witnesses.
3. That, the evidence adduced by the prosecution witness was not credible.
4. The trial court erred in fact and law by failing to critically evaluate and analyze evidence adduced by the Respondent's witness thus convicted and sentenced the Appellant.
5. That, the learned trial magistrate did not take into consideration the evidence of the Appellant's side and never considered also that he was already acquitted of the same offence and thus double jeopardy.

At the hearing both parties appeared represented and were heard viva voce. The appellant hired the services of Mr. Lucius Njiti, learned advocate while the respondent represented by Ms. Rachel Cosmas, learned State Attorney.

In his submission in support of the appeal Mr. Njiti opted to start with the 2nd grounds of appeal though he did not canvass all grounds of appeal, an act leading this court to draw an inference that he opted to abandon them. On the 2nd grounds the Court was made to understand him submitting that, the trial court wrongly convicted the appellant basing on contradictory

evidence of the prosecution witnesses. He said, the law under sections 8 and 9 of the Evidence Act, [Cap. 06 R.E 2022], provide that there has to be relevance of evidence adduced in court on the subject matter and the relationship between occurrence of the act and the results in relation to the fact in issue. In this case relying on the impugned judgment he argued, it is not clear as to who sent the victim to hospital after occurrence of the alleged offence between the PW1 or PW2 or PW3 or PW5? Another contradiction he mentioned is on when did the said offence take place as the charge provides that, it is on various dates between 2021 up to October, 2022 while in the evidence PW4 stated at page 4 of the judgment that it was in May, 2022 and PW3 says she was raped on 01/11/2022 contrary to the dates in the charge sheet. And further that, doctor's report in PW2's evidence says she was raped in November, 2022. Mr. Njiti went on submitting that, another contradiction is on victim's age when allegedly carnally known by the appellant. He claimed, while the social welfare officer (PW3) said the child started to be raped when she was 9 years old as the offence was committed several time ,PW5 said it started when was she was 10 years old while the doctor (PW2) contradicting both of them when said she was 11 years. All these contradictions as found in the judgment he submitted, go to the root of the

case as age of the victim is so vital in proving the offence the appellant was charged with as it was stated in the case of **Simitu Abdallah Vs. R**, Criminal Appeal No. 247 of 2021 (CAT-unreported). In view of that submission he prayed the Court to find the prosecution evidence not reliable as it was held in the case of **Awadhi Abrahamani Waziri Vs. R**, Criminal Appeal No. 303 of 2014 (CAT-unreported) when cited the decision of the Court of Appeal of Kenya in the case of **Augustine Njoroge Ritho @ Chabah Vs. R**, Criminal Appeal N. 99 of 1986 where it was held that:

> *"It is trite law that where evidence is inconsistent or where it is contradicted it cannot be relied upon."*

On the 3rd ground he contended prosecution witnesses' evidence was not credible to base on conviction of the appellant. Referring to the impugned judgment once again he attacked doctor's evidence (PW2) arguing that, it was incredible as according to him the incident occurred on 1/11/2022 and he examined the victim on 05/11/2022, five (5) days passed when she had already taken bath. According to him, it was doubtful whether the offence was committed as per PW2's evidence as found in the judgment victim's hymen was intact though with bruises while in fact ought to be raptured, hence a submission that his evidence was based on the information from

prosecution witnesses and not his own investigation. Such contradiction coupled with the ones above stated he urged the Court to find all prosecution witnesses' evidence incredible and allow the appeal as his submission was also covering the 1st ground of appeal.

Lastly he argued on the 5th ground that, there was double jeopardy against the appellant as he was once charged and acquitted of the same offence in Criminal Case No. 324 of 2018 before the District Court of Kondoa in its decision dated 23/08/2019, but later charged again in this case with the same allegations. To cement his argument he contended, the victim is the same and the offence concerns sexual abuse/acts, though the former was allegedly committed on 19/11/2018 while the present one is said to have been committed between 2021 to October, 2022. He lamented, PW4 throughout her evidence was referring to the commission of an offence from the year 2018 to 2022, the evidence which proves there is double jeopardy. In view of the above submission he prayed this Court to find the appeal has merit and proceed to allow the same.

In rebuttal Ms. Cosmas intimated from the outset that, Respondent's resistance on the merit of the appeal. On the highlighted contradiction in the 2nd ground of appeal she retorted that, the evidence on who sent the accused

to the hospital is not one of the ingredient of the offence hence any omission or contradiction if any does not dent prosecution case as the ingredients of the offence under section 154(1)(a) of the Penal Code are the biological relationship between the victim and accused and age of the victim for determination of sentence. It was her argument that, in this case the offence was proved beyond reasonable doubt against the appellant as PW1 in her evidence at page 8 of the typed proceedings made herself clear on how the appellant who is her father carnally known her, the blood relationship which is also not denied by the appellant when defending himself as seen at page 28 of the typed proceedings. Further to that, PW1's evidence (victim) on being carnally known by the appellant is corroborated by her mother's evidence (PW4) who informed the Court to have once witnessed commission of the offence and that, she is the one who notified the village authority for assistance the result of which the appellant was arrested and charged. According to her the witnesses' ability to name the suspect at the earliest possible time is an assurance of their reliability. She relied on the case of **Ajili Ajili @ Ismail Vs. R**, Criminal Appeal No. 505 of 2016 (CAT) to fortify her submission. Additionally she submitted, there is also another piece of evidence of PW2 and the PF3 annexure P1 admitted without objection, which

further corroborates evidence of PW1 and PW4. With all that evidence she submitted the prosecution proved its case beyond all reasonable doubt.

As to the contention of absence of evidence on the exact dates in which the offence was committed, she submitted the charge clearly discloses it was on divers dates which were established by prosecution witnesses and if any variance she argued the same does not go to the root of the matter as it was held in the case of **Dickson Elia Msamba Shapwata Vs. R**, Criminal Appeal No. 92 of 2007 (CAT) Tanzlii that, the court's duty is to decide whether the inconsistencies or contradiction are major or minor and whether they go to the root of the matter, as normal discrepancies in evidence are those which are due to normal errors of observation, normal errors of memory due to lapse of time, due to mental disposition such as shock and horror at the time of occurrence of the offence, which are always there however honest and truthful a witness may be. Normal discrepancies she insisted do not corrode credibility of prosecution's case but material discrepancies do. In this case she argued, the victim could not remember the dates in which the offence was committed to her given the shock and psychological torture she underwent for all that time. Thus. it was enough

to explain the circumstances under which the same occurred, Ms. Cosmas stressed and so submitted.

Lastly is on the complaint of double jeopardy in which Ms. Cosmas submitted in reply that, there is no proof to such assertion as in the first charge in which appellant was acquitted the offence was rape committed in 2018 while in the present matter is Incest which was committed between 2021 to 2022. She therefore prayed the Court to find the appeal is devoid of merit and proceed to dismiss it.

As regard to the alleged contradictions on the victim's age she countered, there was no contradiction at all since the victim herself confirmed it to the court the evidence which was corroborated by evidence of her mother PW4. According to her as held in the case of **Sumitu Abdallah** (supra) age could be proved by victim or his/her mother and other persons and documents which fact in this case was proved by both PW1 and PW4. As to the contention that victim's hymen was intact with bruises she recounted, it is not true as at page 14 of the proceedings PW2 said after his observation that he concluded the victim had no hymen and there was no seamen in the vagina as the victim had taken bath by then, thus there was no

contradictions at all, he a call to the court to dismiss the appeal for want of merit.

In his rejoinder Mr. Njiti had nothing material to contradict the respondent's reply submission apart from reiterating his submission in chief and the prayer to have the appeal allowed by quashing appellant's conviction and set aside his sentence while setting him at liberty.

I have dispassionately considered the fighting submission by the parties and took time to peruse the impugned judgment as well as the trial court proceedings in a bid to disentangle parties from their legal fight on the major issue as to whether or not evidence on record was sufficient to prove the offence of Incest by Male.

In doing so I proposing start with the 2nd and 3rd grounds of appeal referring to the credibility of prosecution witnesses and the alleged contradictions, the order which was also taken by Mr. Njiti in his submission. The settled law is that, where there is inconsistencies on the adduced evidence or where the same is contradicted, it cannot be relied on to base conviction. See the case of **Awadhi Abdrahaman Waziri** (supra). And that, where the testimonies by witnesses contain inconsistences and contradiction, as rightly stated by

Mr. Njiti the court has a duty to address and try to resolve them where possible, else the Court has to decide whether they are minor or go to the root of the case. See the case of **Mohamed Said Matula V. R**, (1995) TLR 3 (CAT) and **John Glikola Vs. R**, Criminal Appeal No. 31 of 1999 (CAT-unreported).

In this matter having revisited the evidence on record I do not find any material contradictions and inconsistencies going to the root of the case as Mr. Njiti would like this court to believe. I note in his argument to establish existence of the alleged contradictions and inconsistencies in the prosecution evidence the learned advocate Mr. Njiti relied on the impugned judgment instead of making references to the lower court typed proceedings where prosecution witnesses' evidence is found. With due respect to him I think he was wrong to so do as the judgment carries summary of evidence and its analysis unlike the proceedings which gives a clear picture of the whole witnesses' evidence. Had he referred himself to such typed proceedings, I am certainly sure he would not have contended the way he did that, there was material contradictions and inconsistencies in the testimonies of prosecution witnesses.

To start with the assertion on contradiction of prosecution witnesses as to who took the victim PW1 to the hospital, I find the same to be unfounded as the evidence of PW2 (the doctor) who examined PW1 corroborated with that of PW5 at pages 12 and 21 of the typed proceedings respectively is so clear that it is PW5 the investigator who took the said PW1 to the hospital for examination. As regard to the dates of commission of the alleged offence, parties are at one that the charge sheet reads it was between the year 2021 and November, 2022. It is Mr. Njiti's argument that while PW4 alleges it was committed in May, 2022, the social welfare officer (PW3) says it was on 1/11/2022 while the doctor (PW2) testified to the contrary that it was in November, 2022. I have scanned the evidence of all these three prosecution witnesses in the typed proceedings. With due respect to Mr. Njiti I am unable to see the contended contradictions since PW4 when mentioning May, 2022 was referring to one of the incident when she witnessed the appellant inserting his penis into their daughter's vagina before she hit him with the stick while PW1 fleeing from him. According to her that was not the only incident as she remembers in 2021 the appellant penetrated (raped) her (PW1) once, as it is the incident in which the victim reported to her to have been sexually known by her father while at home, when she (PW4) was at

the farm. As to PW3 she never testified in her evidence that PW1 was raped on 01/11/2022 rather said was the day when she received information from the Regional Social welfare officer of PW1 being sexually abused by her father whereby on the next day of 02/11/2022, she reported it to the village chairman and they both joined efforts to pursue the matter as a result the victim was taken to police and issued with the PF3 before she underwent medical examination while the appellant being arrested to face his charges. And regarding the alleged doctor's contradiction in his evidence (PW2) regarding the date of commission of an offence, it is also not true that he mentioned the date as to when the offence was committed rather the date when he examined PW1 and found she had lost her hymen though no seamen were seen in her vagina due to the fact that the patient had already taken birth. With that evidence I do not find how the alleged evidence of PW4, PW3 and PW2 contradicted each other as alleged by Mr. Njiti.

Next is on the age of the victim which fact as stated by both counsel is pivotal in establishing the offence that faced the appellant especially on the sentence to be imposed to the offender as the issue of consent is immaterial given the nature of the offence which prohibits sexual relationship to blood related persons like father and daughters, mother and son and grandsons

and daughters. Age is mandatory in proving statutory rape under the Penal Code. See the cases of **Abdul Athuman Vs. R**, [2004] TLR 151 and **Simitu abdallah** (supra). That, notwithstanding, in this matter I find there was no contradiction over PW1's age since the same can be established by the victim, his/her parents, guardian, doctor or birth certificates. See the cases of **Adrea Francis Vs. R**, Criminal Appeal No. 173 of 2014 (CAT-unreported). PW1 in her testimony informed the court that she was 11 years old at the time of testifying, the fact which is corroborated by the doctor (PW2) who confirmed she was 11 years old when examined her. I do not find how the evidence of PW3 the social welfare officer and the investigator PW5 could have in anyway contradicted evidence of PW1 and PW2 on victim's age as alleged by Mr. Njiti since they are not amongst the persons who can prove age of the victim as per the case of **Adrea Francis** (supra).

Lastly is on credibility of PW2's evidence when allegedly stated the victim (PW1) was sexually known by his father on 1/11/2022 and he examined the victim on 05/11/2022, five (5) days passed when she had already taken bath and that, the victim had her hymen intact with bruises only while in fact it ought to be raptured. Having glanced at his evidence I find no reality in Mr. Njiti's assertion since the witness never stated that the incident occurred on

01/11/2022 rather testified on the date and time he examined the victim to be 05/11/2022 at about 10:15 hours. It is also not true that he said the victim had her hymen intact as claimed by Mr. Njiti as when cross examined by the accused is reported to have stated PW1 lost her hymen plus the shape of her vagina, that led him to conclude she was penetrated though discovered there was no seamen in it since she had already taken bath. With that testimony I find the allegation of inconsistencies of his evidence does not feature in this case. In totality I find the 2nd and 3rd grounds of appeal by the appellant without merit and dismiss them.

As to whether there was sufficient evidence to prove the offence of Incest by Male as raised above, the existing principles of law are that, in every criminal case the onus of proof lies on the prosecution and the stand of proof as per sections 3(2)(a) and 110(1) and (2) and 111 of the Evidence Act, [Cap. 06 R.E 2022] is that of beyond reasonable doubt as the accused does not have to prove his innocence but rather raise doubt that dents prosecution case since for conviction is based on the strength of prosecution case and not on the weakness of defence. See the cases of **Mohamed Said Matula Vs. R** [1995] T.L.R. 3 (CA), **Nathaniel Alphonce Mapunda and Benjamin Mapunda Vs. R** [2006] TLR 395, **Aburaham Daniel v. R**,

Criminal Appeal No. 6 of 2007and **Mohamed Haruna @ Mtopeni and Another Vs. R**, Criminal Appeal No. 259 of 2007, (both CAT-unreported). Further to that, it is trite law that, the best evidence in sexual offences comes from the victim her/himself. See the cases of **Seleman Makumba Vs. R** (2006) TLR 149 and **Fahadi Khalifa Vs. R**, Criminal Appeal No. 573 of 2020 (CAT) Tanzlii. It is also settled law that, the evidence of a child of tender age in sexual offence can be relied upon by the court to ground conviction of an accused person even without corroboration after assessment of such evidence to the Court's satisfaction that it contains nothing but the truth. See section 127(6) of the Evidence Act and the case of **Fahadi Khalifa** (supra).

Applying the above stated principles to the circumstances of this case, there is evidence of PW1 as seen at page 8 of the typed proceedings to the effect that, her father whom she identified in court, on the date and month she could not remember while at home took her to the bedroom and undressed her clothes on bed with her mouth covered before he also undressed his trousers and took out his penis and inserted it in her vagina while warning her not to disclose that secret/fact otherwise he would kill her. In her words she said and I quote from page 8 of the proceedings:

"My father covered my mouth and took me to the bed, he undressed my clothes, then he took out his "dudu akaweka kwenye uchi wangu alafu akasema hivi ukisema nitakuchinja."

She went of testifying that, the second time which was October at 12 hours and that, in both incidents they were at home and her mother was at the farm and that she feeling very bad "nilikuwa najisikia vibaya" and decided to inform her mother and later on taken by catholic sisters for her safety where she stays up to the time of giving her testimony. This witness also disclosed was she taken to hospital at Kondoa. When cross-examined by the appellant I note the witness was firm in her answer when stated that, on the incident date she found the appellant at home and it was around 12 noon. On account of that evidence like the trial court I am satisfied this witness remained a credible one as her evidence was never contradicted nor shaken and she was able to prove the charge against the appellant in that he was his father the fact which he does not dispute and that, she had her vagina penetrated by him on the dates and months she could not remember. I so find as her failure to mention the date and year does not render her evidence incredible given the fact that, she was a child of 11 years old only when testifying and that, the time that had lapsed since the last date of commission of the offence hence loss of memory particularly on the date and month would be expected from her. See also the

case of **Kavula William and Another Vs. R**, Criminal Appeal No. 119 of 2020 (CAT-unreported).

PW1's evidence is corroborated by that of PW2 and exhibit P1 proving that she had her vagina penetrated as well as evidence of her mother PW4 whom she reported to, the abuse by her father more than once. It is also PW4 who divulged the information to the relevant authority the result of which PW3 was directed to make a follow up hence the whole incident came to light leading to arrest and charging of the appellant.

It was appellant's defence in his evidence (DW1) that, he had long standing misunderstanding with the victim's mother (Pw4) who allegedly concocted the accusations of raping his own daughter as he could not have engaged in sexual relationship with his own blood daughter. He said, that was so purposely done by her as her family wanted to unlawful dispossess him of his family land which is belonging to his father. Like the trial Court I am not convinced that, this defence dented the strong prosecution case. The reasons I am so holding is not far-fetched as **one**, if true the appellant would have cross examined both PW1 and PW4 on that fact of framing a case against him and the alleged misunderstanding based on farm dispute. This in my humble opinion was a vital evidence to be extracted from these two witnesses to support his defence but

he failed to do so. It is trite law that failure to cross examine a witness on important matters in the case is an admission of what is testified by the said witness. See the cases of **Nyerere Nyague Vs. R,** Criminal Appeal No. 67 of 2010, **Jaspini s/o Daniel @Sizakwe Vs. DPP,** Criminal No. 519 of 2019 (both CAT-Unreported) and **Hatari Masharubu @Babu Ayubu Vs. R,** Criminal appeal No. 590 of 2017[2021]TZCA 41 www.tanzlii.org/tz/judgment. Similarly even DW2 whose evidence was intended to corroborate DW1's defence never stated anything either of the allegations that were facing him or the misunderstanding that allegedly existed between the appellant and PW3 that could have resulted into PW3 framing him up in these serious allegations. In totally this Court is satisfied that there was sufficient evidence to prove the charges of Incest by Male against the appellant. The 1st and 4th grounds of appeal therefore crumble as I find no any reason to fault trial court's findings.

Lastly is the 5th ground on double jeopardy which after perusal of the charge sheet, the evidence adduced and the judgment of the District Court of Kondoa at Kondoa in Criminal Case No. 342 of 2018, I think the same need not detain much this Court. Double jeopardy is defined by the **Blacks Law Dictionary**, by Bryan. A. Garner 8th Ed at Page 1489 to mean:

"The fact of being prosecuted or sentenced twice for substantially the same offence."

Basing on the above definition for the rule of double jeopardy to be invoked the accused must have **first**, been prosecuted, convicted and sentenced of any criminal offence, **second**, charged or prosecuted and or sentenced for the second time with substantially the same offence. In this matter there is not dispute as per the judgment in Criminal Case No. 342 of 2018 before the District Court of Kondoa was prosecuted and acquitted of the offence of Rape, Contrary to section 130(1)(2)(e) and 131(3) of the Penal Code. The victim involved and the place where the offence was committed no doubt is the same as the ones in the present matter. It is however noted that, the time in which the offence is alleged to have been committed do differ as in the former case it was on 19/11/2018 while in the present case it is alleged to be between 2021 to November, 2022. Similarly, the offences that faced him and the sections under which they were preferred also differ as in the former case was charged of rape, contrary to 130(1),(2)(e) and 131(3) of the Penal Code while in the present case is Incest by Male under section 158(1)(a) of the Penal Code. The ingredients of the two offences also do differ materially. Whereas in the first charge of Rape of the child the

ingredients are penetration, age and identification of the person who committed the offence, in the Incest by male is penetration, blood relationship and identification of accused person. By comparison it cannot be said therefore that the offence in the second charge is substantially the same to the offence in the first charged since the same differ in ingredients and were committed at different times/period. In view of the above indifferences on the ingredients of the offence and analysis of evidence, I find the appellant does not qualify to enjoy the rule of double jeopardy in his favour for failure to meet the two conditions above named. The 5th ground of appeal is devoid of merit and it fails.

In view of the above stated reasons, I find the appeal is devoid of merit and proceed to dismiss it in its entirety.

It is so ordered.

Dated at Dodoma this 31st May, 2024.

E. E. KAKOLAKI
JUGDE
31/05/2024.

Court: The Judgment has been delivered at Dodoma today on 31st day of May, 2024, in the presence of the appellant in person and his advocate Mr. Lucius Njiti, Ms. Rachel Cosmas, State Attorney for the respondent and Ms. Veradina Matikila, Court clerk.

Right of appeal explained.

E. E. KAKOLAKI
JUGDE
31/05/2024.