IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

IN THE SUB REGISTRY OF MANYARA

AT BABATI

CRIMINAL APPEAL NO. 70 OF 2023

(Originating from Criminal Case No. 12 of 2022 in the District Court of Kiteto at Kibaya)

JACKSON NAIKO.....APPELLANT

VERSUS

THE REPUBLIC.....RESPONDENT

JUDGMENT

21st November, 2023 & 16th February, 2024

Kahyoza, J.:

Jackson Naiko, the appellant, was prosecuted in the district of Kiteto at Kibaya for an offence of incest by male. The prosecution alleged that Jackson had sexual intercourse with his daughter on 25.12.2021, who shall be referred as XX or the victim disguise her identity. He denied to commit the offence. After full trial, the court found him guilty, convicted him and sentenced him to served 30 years' imprisonment and pay compensation of Tzs. 1,000,000/- to the victim. The appellant contends that the prosecution did not prove him guilty beyond reasonable doubt. He prayed to be acquitted and released from prison. The respondent's state attorney took a position that the prosecution proved the appellant guilty beyond reasonable doubt. He prayed the conviction and sentence to be upheld.

There is only one issue whether the prosecution proved the appellant guilty beyond reasonable doubt.

A brief background is that; the prosecution arraigned **Jackson Naiko,** the appellant, before Kiteto district court charged with the offence of incest by male contrary to section 158 (1) (a) of **the Penal Code**, [Cap 16 R.E.2019]. The prosecution alleged that on 25th day of December, 2021 at Ndaleta village within Kiteto district in Manyara region, **Jackson Naiko,** the appellant, did have sexual intercourse with his daughter, named XX, a pupil of Ndaleta Primary School aged 17 years.

The facts as could garnered from the prosecution's evidence is that; XX is the appellant's daughter. According to XX, the appellant had two wives, her mother and Tausi Yassin, her step mother (**Pw3**). The victim and her family were staying with their father at Babati and their step mother was living at Ndaleta. They later moved to stay at Ndaleta and her mother separated with the appellant and went to live alone at Arusha. The victim narrated that her ordeal commenced after her parents separated. The appellant told the victim that he was going to make her bear her mother's responsibilities. At first, the victim stated that she stayed with, her three blood sisters, her step mother and her four step siblings in the same house. Her father harassed them i.e her siblings and her step mother. In December,

2019, according to the victim's step mother (**Pw3**), the appellant harassed her, abused and threw her out of the main house. She moved to the back house (the kitchen) where she spent a night.

After the victim's step mother moved to the back house, the appellant would go to the village get drunk, come back home at night, go to the room where his daughters were sleeping, lit a torch, select one them, take her to his room and rape her. The victim deposed that the appellant raped her for the first time in 2017 when he was in Std. seven. The victim narrated how she felt when she met the appellant sexually for the first time. She deposed that the appellant abused her several times. She testified that "***The accused has done this to me more than ten times***". She deposed that she told her step mother nothing happened and she even reported to the village executive officer who simply warned the accused person.

She also narrated what happened when the appellant abused her sexually for the last time. She said that the last time the appellant had sexual intercourse with her was on 25.12.2021, which was a Christmas night. She deposed, while crying as recorded by the trial court, that they, who are the victim, her three sisters (Zawadi, Stella and Elizabeth) and the appellant, went to farm. It was on Friday when they went to farm and stayed there until Saturday. On Saturday, the appellant ordered her three sisters (Zawadi,

Stella and Elizabeth) to go back home. He remained behind with the victim. At night, the victim entered the hut and slept. Later, the appellant entered the hut naked, undressed the victim ravished her. After he finished, they moved that night back home.

The victim narrated how the matter came to be exposed. She deposed that on 10.1.2022, Lecordia, their step mother's sister visited her sister and spent a night in the girls' room. The appellant came back at night, drank, went to his daughters' room, picked and pulled Stella to his room. Stella cried resisting the appellant's act. Leorkadia went, the victim went out too and slept the night outside. The following morning, Leorkadia reported the incident to the village chairman. They went to report to police station and went to the hospital for examination.

The appellant gave his account on oath by making a general denial. He deposed that *"Betty is my daughter, I did not rape her, I can't do such a sin of having sexual intercourse with my children."*

Did the prosecution prove the appellant guilty beyond reasonable doubt?

It was against the background narrated above, the trial convicted the appellant with the offence of incest and sentenced as shown above. The appellant's ground of appeal is that the prosecution did not prove the offence

beyond reasonable doubt. I wish to state that, the offence of incest by male is committed by proving; **one**, that the victim is the accused person's daughter, granddaughter, mother or sister; and **two**, that the accused person had sexual intercourse with the victim. It is not matter whether the victim of sexual abuse consented. For sake of clarity I reproduce section 158(1)(a) of **the Penal Code**, which provides-

> *"158.-(1) Any male person who has prohibited sexual intercourse with a female person, who is to his knowledge his granddaughter, daughter, sister or mother, commits the offence of incest, and is liable on conviction-*
>
> *(a) if the female is of the age of less than eighteen years, to imprisonment for a term of not less than thirty years;*
>
> *(b) if the female is of the age of eighteen years or more, to imprisonment for a term of not less than twenty years.*
>
> *(2) It is immaterial that the sexual intercourse was had with the consent of the woman.*
>
> *(3) A male person who attempts to commit an offence under this section is guilty of an offence."*

The prosecution tendered sufficient evidence that the XX, the victim is the appellant's daughter and the appellant himself admitted that XX is his biological daughter. Thus, the law prohibited the appellant to have sexual

intercourse with the victim. The only contested issue is whether the appellant had carnal knowledge with XX, his daughter on 25.12.2021 as alleged.

At the hearing, Mr. Joseph Mwita Mniko, Advocate appeared for the appellant and submitted forcefully that the prosecution did not prove his client guilty for the following reasons; **one**, that while it was stated on the charge that the incident took place on the 25/12/2021 there was no evidence to support the allegation. He added that the prosecution failed to amend the charge to correspondent to the evidence. Failure to do so was fatal. To support his position, cited **the DPP vrs. Godfey Michael Mwanvongo**, Criminal Appeal No. 116 of 2020 and **Ghati Magaigwa Kihore vrs The Republic**, Criminal Appeal No. 18 of 2020.

The respondent's state attorney replied that there was evidence to establish the allegation in the charge sheet. The state attorney added that, the alleged contradictions and the variance between the charge and the evidence, were non-existent; the charge provides that the incident occurred on 25/12/2021 and so was the testimony of the victim (**Pw1**).

The state attorney submitted that the victim testified the appellant started abusing her sexually when in 2017 when she was in (Std. VII) standard seven and did so several times. She narrated that, the last time the

appellant had had sexual intercourse with her was on 25.12.2021. The state attorney prayed the court to uphold the conviction and the sentence.

In his short rejoinder, Mr. Mniko submitted that the contradictions were prejudicial, since the charge and the evidence were at variance. To support his argument, he cited the decision, **Shaban Amani Kitambi v. R.**, Criminal Appeal No.253 of 2020 [2022] TZHC 10947 (29 July 2022). As to the issue of penetration, he argued that the fact that the hymen of the victim was not intact does not prove that it was tempered with by the appellant's penetration, as it was observed "evidence of penetration". On failure to object exhibit, he argued that the conviction cannot be procured based on the weakness of accused's case, rather the strong prosecution's case, citing the rule in **John Roth @ Mtungi v. R.**, Criminal Appeal No. 130 of 2012 [2023] TZHC 17293 (16 May 2023).

I will commence by stating the obvious that, it is settled law that the first appellate court is charged with a duty to re-evaluate or review the evidence. See **Cheyunga Samson @ Nyambare vrs. R.**, Criminal Appeal No. 510 of 2019 [2021] TZCA 607 (25 October 2021).

It is also trite law, as submitted, that in sexual offences the best evidence is that of the victim, as per this Court's decision in **Selemani Makumba v. R** [2006] T.L.R. 379, the case of **Selemani Hassani v.**

Republic (Criminal Appeal No. 203 of 2021) [2022] TZCA 127 (22 March 2022) and **Hamis Kahilfan Daud v. R**., Criminal Appeal No. 231/2009. It is also settled that the evidence of the victim of sexual offences should not be taken as a biblical truth it must be subjected to scrutiny to test the witness' credibility. See the **Mohamed Said v. R**., Cr. Appeal No. 145/2017 and **Akwino Malata vs Republic** (Criminal Appeal No. 438 of 2019) [2021] TZCA 506 (21 September 2021)**.** The Court of Appeal in the latter case had this to say-

> *"This is a principle of law to the effect that the evidence of sexual offence has to come from the victim* ***and if the court is satisfied that the victim is telling the truth it can convict without requiring any corroborative evidence."***

It is also trite law that the silence of a rape victim or her failure to disclose her misfortune to the authorities without loss of material time does not prove that her charge is baseless and fabricated as held by the Court of Appeal in **Selemani Hassani v. R.**, (supra). The Court of Appeal held that-

> *"We think that while it can apply fairly unrestrictedly in respect of, say, cases involving property offences, it will not apply with equal force in cases concerning sexual offences where immaturity of the*

victim, death threats or shame associated with such offences may dissuade the victim from reporting the matter with promptitude..... The silence of a rape victim or her failure to disclose her misfortune to the authorities without loss of material time does not prove that her charge is baseless and fabricated."

The obvious stated, I wish to indicated that, the victim deposed, at times crying as shown in the trial court record, that the appellant raped her. She deposed that the appellant raped her more than ten times. She deposed that-

"***The accused has done this to me more than ten times".***

She gave a detailed account of the first and the last incidents the appellant raped her. She narrated the first encounter as follows-

"He ordered me to remove my clothes but I refused, he removed my clothes by force, skirt, shirt and my underwear and then he removed his clothes and remained naked. He then took his penis and insert the same into my vagina. I started crying because it was painful, and a lot of blood came out, he then left me. And I went back to sleep with others"

The last encounter of her being sexually abused by the appellant was, as the victim evidence, on 25.12.2021. She gave the details of the incident. She cried while testifying as shown in the record. Her evidence on oath as

she was seventeen years old. She deposed how she went to farm with her three sisters and the appellant on Friday and spent a night at the farm. On Saturday, the appellant ordered her three sisters to return home and remained behind with her (the victim) at the farm where they were to spend a night. At night, on 25.12.2021, she called it the Christmas night, the appellant undressed her forcefully and raped her.

As stated above the best evidence of sexual offences comes from the victim. I do not see in the circumstances narrated, there would be any other witness apart from the victim.

I examined at the evidence Tausi Yassin, the victim's step-mother (**Pw3**) and found that she confirmed that the appellant was raping her daughters. Elizabeth (**Pw4**), one the appellant's daughter testified that she witnessed the appellant raping her sisters, Stella and Betty and that she had also fell a victim. It is on record that the victim was raped on 25.12.2021 and went to hospital on 11.1.2022 when Dr. Archimedes Mpemba (**Pw4[5])** examined her. Dr. Archimedes Mpemba (**Pw4[5]**) gave evidence that, the victim's hymen was not intact but he did not see anything else. It is not surprising that Dr. Archimedes Mpemba (**Pw4[5])'s** evidence did not corroborate the victim's evidence as time had passed from the day the victim was raped to the date he examined her.

In addition, the evidence of the appellant's wife, the victim's step-mother (**Pw2**), could not have supported the victim's evidence as she did not go the farm together with the victim, her three sisters and the appellant. The evidence of the victim's sisters, who went to farm with her together with the appellant, could not corroborate the victim's evidence that the appellant raped her as they returned home at the appellant's order, leaving the appellant and the victim at the farm. Thus, the only evidence is that of the victim. The law is clear that, it is the evidence of the victim of sexual offence which is the best and vital in proving the offence.

It is settled law that the court can convict on the uncorroborated evidence of the victim of sexual offence if, it believes that the victim told nothing but the truth. In the present case, I find ample and uncontradicted evidence that the appellant was sexually abusing his own daughters. The victim testified that the victim harassed, beat, and threatened them if they reported the appellant's criminal acts. Tausi Yassin, the victim's step mother (**Pw3**) confirmed that the appellant raped her children and harassed not only his children but also, she was the victim of the appellant's harassment and beating, that she vacated the main house and started leaving in the back house. Elizabeth (**Pw4**), the victim's sister confirmed the harassment

and that the appellant raped her too. She also witnessed the appellant raping her sister.

The Law of Evidence provides that the accused person's wife is a competent witness against her husband as the latter was charged with the offence under Chapter XV of the **Penal Code**.

The appellant's defence was just a general denial. Considering the appellant's general denial against the strong prosecution evidence, I am of the view that his defence was too weak to pinch holes in the prosecution evidence. I am of the firm view that the victim, her step mother, Tausi Yassin (**Pw3**), and the victim's sister, Elizabeth (**Pw4**), were credible witnesses. There is nothing to suggest that they were telling lies. It is therefore established that the appellant abused his daughters on several occasions.

The only question is whether there is evidence to establish that the appellant raped the victim on 25.12.2021. The appellant's evidence submitted that there was no such evidence to prove that the appellant raped the victim on 25.12.2021. With due respect, the appellant's advocate misconstrued the evidence. The victim narrated in detail how the appellant raped her and described it the last time the accused raped her. As already shown, the victim gave details, on how it happened. She explained why it was the last encounter the appellant raped her. She explained that on

10.1.2022, their step mother's sister paid a visit to Tausi Yassin (**Pw3**), her step mother. At night, she went to sleep in the daughters' room. That night, the appellant, who was drunk, went to his daughters' room, picked and pulled Stella to his room. Stella cried resisting the appellant's act. Tausi Yassin (**Pw3**)'s sister did not stomach went out the house and on the following day, she complained to the village chairman and the matter to police. The matter sparked.

I have already stated and I wish to repeat, that I have no reason to discredit the victim. I am of the considered view that, the appellant raped the victim on 25.12.2021 and there is credible evidence from the victim herself to prove that. The victim delayed to report the incident of rape to police, in fact she did not report until when her stepmother's sister took them to police. It is settled that a delay to name the suspect weakens the victim's reliability. See the case of **Marwa Wanqiti Mwita and Another vs Republic** [2002] TLR,39, where the Court of appeal held that-

> *"The ability to name the suspect at the earliest opportunity is an important assurance of his liability."*

In rape cases, it is settled that, silence of a rape victim or her failure to disclose her misfortune to the authorities without loss of material time

does not prove that her charge is baseless and fabricated. See the Court of Appeal judgment in **Selemani Hassani vs R.,** (supra).

I decided to consider, whether the appellant was properly recognized since the offence having been committed at night. The victim testified that at night she entered the hut at the farm and slept. The appellant remained outside. Later, the appellant entered in the hut. She saw him naked and rape her. She did not describe the intensity of the light. However, she deposed that after the appellant finished raping her, he told her to commence their journey back home. They started walking back home and reached their home that very night. This piece of evidence proved beyond doubt that it was the appellant who raped her. I wish to produce the victim's evidence as follows-

> *"At night time, he slept outside while I slept inside the farm hut. He came in at night, I woke up and saw him already naked, he removed my clothes by force and also remained naked, he took his penis and insert the same into my vagina and raped me, then he told me lets go back home. We started going back home. It was still night. We got home the same night, I don't know what time it was and I went to sleep with my sisters."*

The appellant's advocate submitted that there were contradictions as to when the offence was committed. I am of the views that given the

evidence on record, the victim's evidence is clear and consisted. She deposed that the appellant raped her more than ten times but when it came to what she called the last incident of raped, she narrated in detail what happened. There is no prosecution witness who gave evidence regarding what happened on 25.12.2021. They testified as to what happened pre-and post 25.12.2021. I am not persuaded that there were contradictions.

The appellant's advocate submitted that the trial court never scrutinised fully on the reliability or credibility of witnesses, citing the rule in **Hamis Halfan Dauda vrs. R.,** Criminal Appeal No. 231 of 2009 [2020] TZCA 182.

I am unable to share the appellant's advocate's view that the trial magistrate did not securitize the evidence. She did and did so in detail she considered the appellant's defence and the appellant's failure to cross-examine. She considered the evidence of the prosecution and ruled out that it was credible, straight forward, and considered whether the prosecution had proved that the appellant penetrated the victim. I cannot fault the trial magistrate.

Even if, the trial magistrate had failed securitize the evidence, the failure is not fatal as this Court being the first appellate court one of its duties is to re-evaluate the evidence. I have re-evaluate the evidence to establish

whether the prosecution proved the appellant guilty. With due respect to the appellant's advocate, I find no merit in the complaint.

Did the magistrate consider extraneous matters?

The appellant's advocate submitted that the trial magistrate considered extraneous matters in her judgment, facts not pleaded, pointing at the date (11/01/2022) which was indicated at page 1 of the impugned judgment. He prayed the indulgence of this Court to nullify the proceedings, allow the appeal and set aside the sentence meted out.

The state attorney replied that, the magistrate did not infringed any law by including extraneous fact and that the appellant's advocate did not offer explanation as to how the appellant was prejudiced by inclusion of extraneous facts. She beseeched the court to dismiss the ground of appeal. The appellant's advocate.

I examined the judgment and found that is true that the magistrate included facts not part of the charged sheet or from the evidence that-

> *"The Judgment as the Court reproduced that it was alleged by prosecution side that on 11th day of January 2022, at about 00:30hrs the appellant did have sexual intercourse with his daughter contrary to the law."*

The fact that the trial magistrate included facts as to the charged sheet which were not part of the case under consideration is not fatal. The appellant had several cases before the same magistrate, but in Criminal Case No 12 /2022, he was charged with an offence of incest by male, the particulars of the offence were different from what the magistrates stated. The fact that the trial magistrate reproduced facts different from the charge sheet did not prejudice the appellant. The court read the proper charge and particulars to the accused and he knew the charge against him. Not only but also, the prosecution led evidence to prove the charge and not what the trial magistrate stated in her judgment. The appellant did not suffer any injustice from the error committed by the trial magistrate. Thus, the error is curable under section 388 of the CPA. Section 388 provides that-

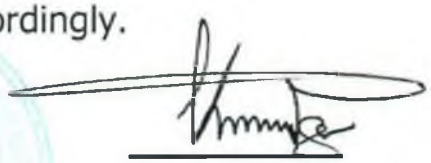
> ***388***. *Subject to the provisions of section 387,* ***no finding sentence or order made or passed by a court of competent jurisdiction shall be reversed or altered on appeal or revision on account of any error****, omission or irregularity in the complaint, summons, warrant, charge, proclamation, order,* ***judgment*** *or in any inquiry or other proceedings under this Act; save that where on appeal or revision,* ***the court is satisfied that such error, omission or irregularity has in fact occasioned a failure of justice,*** *the court may order a retrial or make such other order as it may consider just and equitable.*

I find no merit in the second ground of appeal and dismiss it.

In the upshot, I find the appeal meritless as the prosecution proved the appellant guilty beyond reasonable doubt. Consequently, I dismiss the appeal in its entirety. I uphold the appellant's conviction and sentence.

Dated at Babati this 16th day of **February**, 2024.

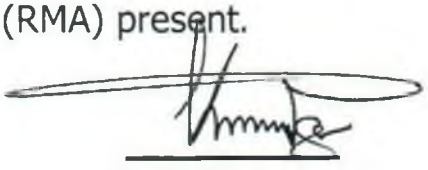
I order accordingly.



J. R. Kahyoza

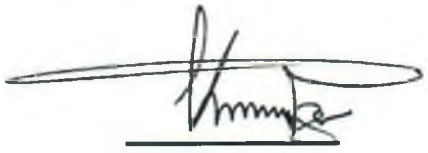
Judge

Court: Judgment delivered in the presence of the appellant, the appellant's advocate, Mr. Mniko and Ms. Rose Kayumbo, the State Attorney for the respondent. B/C Fatina (RMA) present.



J. R. Kahyoza
Judge
16/02/2024

Court: Right to appeal explained.



J. R. Kahyoza
Judge
16/02/2024