

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA  
IRINGA SUB - REGISTRY  
AT IRINGA**

**CRIMINAL APPEAL NO. 8781 OF 2024**  
(Arising from the District Court of Kilolo at Kilolo  
Original Criminal Case No. 50 of 2023)

**DAMAS MLIMAKIFI ..... APPELLANT**  
**VERSUS**  
**THE REPUBLIC ..... RESPONDENT**

**JUDGMENT**

*Date of last Order: 21/06/2024*  
*Date of Judgement: 28/06/2024*

**LALTAIKA, J.**

The Appellant herein **DAMAS MLIMAKIFI @ Damas Mlimilavangi Kivamba**, was arraigned in the District Court of Kilolo at Kilolo charged with one count of Incest by Male c/s 158(1)(a) of the Penal Code Cap 16 RE 2022. The victim was 10 years and a biological daughter to the appellant. He was convicted as charged and sentenced to thirty years imprisonment. Dissatisfied, he has appealed to this court on 9 grounds. Irrespective of a

few grammatical and typographical errors, I take the liberty to reproduce them for ease of reference and record keeping purposes as hereunder:

1. *That, the learned trial magistrate erred both in law and fact to convict and sentence basing on poor identification of the appellant since the said incident took place at nighttime.*
2. *That, the learned trial Magistrate erred in law and fact to convict and sentencing the appellant by relying on the evidence of the victim who failed to mention the exact date when the said incident happened.*
3. *That, the learned trial Magistrate wrongly convicted and sentence the appellant relying on PW1 (victim) evidence which was contradiction itself when she said that her father used to reside to mama Tuma's house for a long time and use to come at home during morning time she still said that her father raped her at night. This creates doubts (see (PW1 evidence at page 7 and 8 of the typed proceedings).*
4. *That, the learned trial Magistrate erred in law and fact to convict and sentenced the appellant relying on PW1 (victim) evidence without considering that her evidence creates doubt when she said that it was the second time but she did not tell her mother why she did not tell her when and how she was raped at the first time regarding the fact that both parents and neighbours were there.*
5. *That, the learned trial Magistrate erred in law and fact to convict and sentenced the appellant relying on the contradictory and uncorroborated evidence adduced by PW1 and PW2 since the fact that PW1 testified that she cried loudly, and her mother came and found her father in her bedroom. Hence this evidence was not corroborated by her mother. (see both the evidence of PW1 at page 8 and PW2 at 10 of the typed proceeding).*
6. *That, the learned trial Magistrate erred in law and fact to convict and sentencing the appellant by relying on PW3 and PW4 evidence as independent witnesses without considering that their evidence lacks written documents*

*supporting the same. Thus, their evidence lacks evidential values since it's a mere hearsay evidence.*

- 7. That, the learned trial Magistrate erred in law and fact to convict and sentencing the appellant without considering that the ingredients of rape were not proved in the victim's vaginal by PW5 (DOCTOR) since the fact that the mere absence of hymen is not sufficient proof of penetration.*
- 8. That, the learned trial Magistrate erred in law to admit the cautioned statement as exhibit without considering that the same was recorded contrary to the law.*
- 9. That, the prosecution side failed totally to prove the case against the appellant beyond reasonable and meaningful doubts.*

When the appeal was called on for hearing on the 21<sup>st</sup> day of June 2024, the appellant appeared in person, unrepresented. The respondent Republic, on the other hand, appeared through **Mr. Sauli Makori**, learned State Attorney.

Not being learned in law, the appellant did not have anything substantial to add to his petition of appeal. He asked that the learned lawyer be permitted to respond to his grounds of appeal while reserving his right to a rejoinder.

Taking up the podium, Mr. Makori announced that he objected the appeal. He argued the 1st, 2nd, 3rd, 4th, 5th, 6th, and 7th grounds conjointly, stating that the complaint was on the credibility of the victim's evidence and how it was corroborated.

Mr. Makori noted that the victim had clearly stated how the appellant, her own father, raped her. She testified as PW1, and on page 7, she identified her father in court, stating that the appellant used to insert his "dudu" in her private parts at least twice. She was afraid of telling her mother because she feared being beaten. On the second day, the appellant entered the victim's room and started sexually assaulting her again. The victim screamed, and her mother rushed in, finding the appellant in the room. The victim disclosed that her father was raping her. The matter was reported to the village authorities, who arrested and interrogated him. He confessed, claiming that he had a strange feeling that only subsided after sexually assaulting his daughter. The victim was taken to the hospital, and PW5, as recorded on page 18, confirmed that the victim had been penetrated and tendered a PF3.

Mr. Makori emphasized that the victim's identification of her father and the appellant's confession before village authorities left no gap in the prosecution's case. He cited the case of Frank Kinambo v. DPP Crim Appeal No 47 of 2019 CAT, which stated that in all sexual offences, the victim is the best witness. He also referenced **Godi Klasenegala v. Republic** Criminal

Appeal No 10 of 2008, where the Court emphasized that the evidence of all other witnesses is merely corroborative.

He argued that the appellant's confession before the village authorities was given freely, citing **Chamuriho Kirenge @ Chumriho Julius v. Republic** Crim Appeal No 597 of 2017, CAT Mwanza (Unreported), where the CAT indicated that an oral confession given freely could be used against the accused. Mr. Makori believed that the confession was freely given, as there was no conflict between the appellant and his wife or the village leaders.

Mr. Makori noted that the victim was 10 years old, and the complaint that the victim failed to mention the exact date was baseless because she was a child of tender age. He also pointed out that the appellant's evidence did not suggest a possibility for his daughter to make false accusations. Even PW2, the wife of the appellant and mother of the victim, tried to conceal the truth because she feared her husband would be jailed for 30 years, leaving them without support. This showed she was ready to protect her husband. The village authorities indicated that the informer did not disclose their identity, and Mr. Makori strongly believed this should be considered unique, referencing **Wambura Kigingira v. Republic** Crim Appeal No 301 of 2018.

Regarding the complaint that PW3 and PW4, village leaders, did not record the confession, Mr. Makori argued that these leaders had no mandate to record statements and that their oral evidence was sufficient, as recorded on pages 13, 14, and 16. He prayed for the dismissal of the 1st to 7th grounds for lack of merit.

On the 8th ground, Mr. Makori addressed the complaint that the cautioned statement was recorded contrary to law. He stated that F.5184 SGT Godfrey Mapalala, who recorded the statement, testified on pages 24 to 26 about how he received the appellant, interrogated him, and recorded the statement, which was then tendered as exhibit P2 and read aloud. This statement corroborated the evidence of PW3 and PW4. He argued that if the court found the statement was wrongly recorded, it could expunge it and still find sufficient evidence to ground a conviction. He believed the remaining evidence was sufficient and prayed for the dismissal of this ground.

On the final ground, Mr. Makori addressed the general complaint that the prosecution case was not proved beyond reasonable doubt. He noted that the appellant was charged with incest by a male, and there was no doubt that the victim was 10 years old and the appellant's biological

daughter. He emphasized that the law prohibits sexual relations among blood relatives and argued that the appellant's attempt to invoke witchcraft was unhelpful. He prayed for the dismissal of this ground of appeal, the entire appeal, and for the judgment of the trial court to be upheld.

The Appellant, on his part, stated that on September 25, 2023, at 1:00 PM, he was tired after eating when village authorities came and commanded him to follow them to the office. Upon arrival, he was told that he had carnal knowledge of his own daughter, which left him dumbfounded. He asked the authorities when the incident occurred, but they had no answer. His wife denied the accusation. On the same day, he was taken to the police station, where he denied the offence. Although he was beaten, he did not mention it in court.

The Appellant mentioned that he is married to two wives, Harieth Mpagike and Aneth Nyamba. The mother of the victim is Harieth, his first wife, and he claimed not to have been at her place that day. On the 14th day, which was a Tuesday, he was taken to Mbigiri and locked up for 10 days. On October 4th, he was arraigned in court, and after a month, he was sentenced to 30 years in jail. He expressed his dissatisfaction with the judgment.

The Appellant revealed that he has 11 children in total, with the victim being the fifth from his first wife. He also has three grandchildren. He worked as a peasant and kept some cows. He had been married to his wife for about 25 years and is now 53 years old. He and his second wife tried to figure out who the perpetrator might have been, considering that it was night, and the door was easy to push. Additionally, he frequently quarreled with the VEO, and he cried a lot.

**I have dispassionately considered the rival submissions** in the light of the grounds of appeal. Apparently, the Appellant has raised multiple grounds of appeal, primarily challenging the credibility of the evidence presented by the prosecution, procedural irregularities, and the harshness of the sentence imposed by the trial court.

The Appellant contends that the trial court erred in convicting him based on the uncorroborated evidence of the victim, who was his biological daughter. The Appellant further argues that the trial court failed to properly evaluate the evidence and give due consideration to the inconsistencies and contradictions in the testimonies of the prosecution witnesses. Additionally, the Appellant claims that he was not given a fair trial as he was not properly informed of his rights during the trial process.



Respondent's Arguments opposed the appeal, arguing that the prosecution had sufficiently proved the case beyond reasonable doubt. The Respondent maintained that the victim's testimony was credible and corroborated by other evidence, including medical evidence. Furthermore, the Respondent argued that the procedural irregularities cited by the Appellant were minor and did not prejudice the Appellant's right to a fair trial.

The victim, a child of tender age, testified that the Appellant, her father, had raped her on multiple occasions. Her testimony was detailed and consistent with the events described. The trial court found her to be a credible witness. In sexual offence cases, the testimony of the victim is crucial and can be sufficient to ground a conviction if found credible (see **Frank Kinambo v. DPP** Crim Appeal No. 47 of 2019 CAT).

The victim's testimony was corroborated by medical evidence presented by PW5, who confirmed that the victim had been sexually penetrated. Furthermore, the Appellant's confession before the village authorities, although oral, was given freely and in the presence of independent witnesses, as noted in the case of **Chamuriho Kirenge @ Chumriho Julius v. Republic** Crim Appeal No. 597 of 2017 CAT Mwanza.

The Appellant raised concerns about procedural irregularities during the trial, particularly regarding his right to recall witnesses after the amendment of the charge. While it is a legal requirement under section 234(2)(b) of the Criminal Procedure Act Cap 20 RE 2022 to inform the accused of this right, the failure to do so must be assessed in the context of whether it caused any prejudice to the Appellant. In this case, the procedural oversight did not prejudice the Appellant's ability to defend himself, nor did it impact the fairness of the trial.

After carefully considering the grounds of appeal, the submissions by both parties, and the entire record of the trial court, this Court finds that the prosecution proved the case against the Appellant beyond reasonable doubt. The victim's testimony was credible, corroborated by medical evidence, and supported by the Appellant's own confession. The procedural irregularities cited by the Appellant did not amount to a miscarriage of justice or prejudice his right to a fair trial.

It is unfortunate that the appellant although as he recounted, he "cried a lot" when he was arrested and even during the hearing of this appeal, he appeared deeply sad and reflective, the evidence adduced by the prosecution is overwhelming.

In the upshot, I hereby dismiss the appeal in its entirety. The conviction and sentence of the trial court are hereby upheld.

It is so ordered.



*E.I. Laltaika*

**E.I. LALTAIKA  
JUDGE  
28.06.2024**

**Court**

This judgement is delivered under my hand and the seal of this court this 28<sup>th</sup> day of June 2024 in the presence of Mr. Sauli Makori, learned State Attorney for the Respondent and the Appellant who has appeared in person, unrepresented.



*E.I. Laltaika*

**E.I. LALTAIKA  
JUDGE  
28.06.2024**

**Court**

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



*E.I. Laltaika*

**E.I. LALTAIKA  
JUDGE  
28.06.2024**