**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA**

**IN THE SUB REGISTRY OF MANYARA**

**AT BABATI**

**CRIMINAL APPEAL NO. 95 OF 2023**

*(Originating from Criminal Case No. 122 of 2022 in the District Court of Simanjiro at Orkesmet)*

**SAID MOHAMED.....APPELLANT**

**VERSUS**

**THE REPUBLIC.....RESPONDENT**

# JUDGMENT

*8TH February & 15th March, 2024*

***Kahyoza, J.:***

**Said Mohamed,** the appellant, was charged and convicted with the offence of incest by male. After convicting **Said Mohamed,** the trial court sentenced him to serve 30 years' imprisonment. Aggrieved, **Said Mohamed** appealed contending the trial court abandoned its duty to evaluate the evidence as a result it arrived at a wrong and unfair decision; and that, the prosecution failed to prove its case.

The prosecution alleged that between September and October, 2022 **Said Mohamed** had sexual intercourse with his daughter, who shall be referred to as YY or the victim disguise her identity. He rebuffed to commit the offence. The prosecution summoned four witnesses who were the victim

(**Pw1**), Thomas Teliphod Majwala (**Pw2**), the doctor, WP6572 Tusajigwe (**Pw3**) and Rose E. Matemba (**Pw4**) and tendered a P.F.3 exhibit P1. The appellant defended himself on oath and did not call any witness. As the record bears testimony, the appellant after taking oath resolved to keep mum. He told the trial court that he had nothing to say.

This Court being the first appellate court its duty is to re-evaluate the evidence to find out whether the prosecution proved the appellant guilty beyond reasonable doubt. See **Cheyunga Samson @ Nyambare vrs. R.**, Criminal Appeal No. 510 of 2019 [2021] TZCA 607 (25 October 2021).

A brief background is that; indisputably the appellant is the victim's father. It is not disputed that the victim was 11 old years, a standard V pupil at Landanai primary school. These facts were recorded during the preliminary hearing as undisputed facts, thus there was no need to prove them. Section 192(4) of the **Criminal Procedure Act**, [Cap.20 R.E.2022] ( the CPA) provides that facts admitted during the preliminary hearing are deemed proved and no evidence shall be tendered to prove them. It provides that-

> *"(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.* "

The appellant's advocate complained that the prosecution did not prove the victim's age or the relationship between the appellant and the victim. The compliant was baseless that it was not in dispute that the victim was 11 years old and the appellant's daughter. Thus, there was no requirement to prove those facts.

The prosecution arraigned **Said Mohamed,** the appellant, before the 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's evidence is that; the appellant had sexual intercourse with the victim his daughter four times. The victim gave evidence after promising to tell the truth that on the first time she had sex with the appellant, the found her mopping the house, he lifted her and took her to the children's room. He undressed her skin-tight and under wear, applied saliva to her private parts and forced his "dudu" into her private parts. She testified that the appellant told her not to divulge to anyone, he whipped her with his clothes and told

her to take bath. She bathed and to went her grandmother's [Rose E. Matemba (**Pw4**)] work place.

On a second time, she narrated that the appellant found her mopping the house, he took her on the bed, undressed her, applied saliva to her private parts and inserted his "dudu" into her private parts. He warned her not tell anyone. A third time, she narrated that, while she was sleeping in the afternoon, the appellant entered the room, undressed her, inserted his "dudu" into her private parts. He also warned her no to speak out. A fourth time, she recited that, just after she undressed her gown to take bath, the appellant lifted her and took her to the bed, undressed her underwear, applied saliva to her private parts and inserted his "dudu". She decided to go to her grandmother's work place and informed her what happened.

The victim's grandmother, Rose E. Matemba (**Pw4**) informed the victim's uncle Amri. Then, the matter was reported to police. Rose E. Matemba (**Pw4**) confirmed that in October, the victim went to her work place angry and when she inquired what had happened the victim told her that the appellant touched her and that she yelled and the appellant left her alone. Rose E. Matemba (**Pw4**) deposed that the victim told her that the appellant had done that four times.

Thomas Teliphod Majwala (**Pw2**), the doctor, confirmed that the victim was penetrated as she was not a virgin. He deposed that the victim had no bruises or blood on the outer part of her private parts but her private parts had bad odour. He tendered a P.F.3 as exhibit P1.

The appellant after taking oath told the court that he had nothing to tell the court.

***Did the prosecution prove the appellant guilty beyond reasonable doubt?***

The appellant enjoyed the services of two advocates; Ms. Upendo Msuya and Jackson Msuya while Mr. Bizmana, state attorney appeared for the respondent. The appellant is charged with the offence of incest by male contrary to section 158(1)(a) of **the Penal Code**. Section 158(1)(a) of **the Penal Code**, provides that-

> *"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."*

By its nature, the offence of incest by male has two elements which the prosecution is bound to prove; **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. There is no dispute the victim is the appellant's daughter. The appellant admitted during the preliminary hearing that, the victim is his biological daughter and that the victim was 11 years old and Std. V pupil. Thus, the only dispute is whether the appellant had carnal knowledge with the victim, his daughter.

There are several settled principles in relation to sexual offences; one, 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, and in **Selemani Hassani v. Republic** (Criminal Appeal No. 203 of 2021) [2022] TZCA 127 (22 March 2022); Two, that, much as the evidence of the victim is the best evidence, the trial court should scrutinize that evidence to find out whether the victim was the witness of truth. See **Akwino Malata vs**

**Republic** (Criminal Appeal No. 438 of 2019) [2021] TZCA 506 (21 September 2021), where the Court of Appeal observed thus-

> *"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."***

The appellant's advocate raised several complaints of them touched the question the legality of the victim's evidence which is key evidence in sexual offence, as pointed out above. I resolved to commence with that issue.

**Was the victim's evidence recorded in compliance with section 127(2) of the Evidence Act, [Cap. 6. R.E. 2022]?**

The appellant's advocates contended that trial court was under section 127(2) of the Evidence Act, required to find out if the victim, a child of tender age, appreciated the meaning and nature of oath or if she did not, the court was required to ensure the child promises to tell the truth. He submitted that the victim did not promise to tell truth but the court recorded its promise to tell the truth. He referred the court to the cases of **Geofrey Wilson v R.**, Cr. Appeal. No. 168/2018 published on www.Tanzlii.org website as [2019] TZCA 108, and **Nasri Ahmend Hassan v. R,** HC Criminal Appeal No.

243/2020. He argued that the magistrate erred not to record the victim's promise to tell the truth in his own words instead of paraphrasing as he did. He prayed the court to uphold this grounds of appeal and expunge the victim's evidence.

The State Attorney opposed the contention that the victim did not promise to tell the truth. He submitted that the victim promised to tell the truth and the court recorded the victim's promise. He concluded that since the court was not testifying it would not have promised to tell the truth.

It is evident from the record that the court did not write the victim's promise in her own words. It merely reported what happened. I will reproduce the trial court's proceedings for sake of clarity. The trial court recorded the following-

> *"**Pw5**: YY, 11 yrs, pupil, Landanai, Islamic.*
> ***Court**: Promise to tell the truth don't understand the obligation of oath"*

The Court of Appeal in **Geofrey Wilson v R.**, (supra) insisted on the requirement for a child of tender age who does not understand the nature of oath to promise to tell. The Court of Appeal held that-

> *"to our understanding the provision as amended provides for two conditions; one, it allows the child of tender age to give evidence without oath or affirmation; two, before giving evidence, such a child*

*is mandatorily required to promise to tell the truth to the Court and not tell lies."*

It is also true that this Court in **Nasri Ahmend Hassan v. R,** (Supra) held that it was a procedural mishap for the trial court not to record the witness' promise in her own words. The Court of Appeal in **John Mkorongo James vs R.** (Criminal Appeal 498 of 2020) [2022] TZCA 111 (11 March 2022) observed that-

*"It is recommended that the promise to the court under section 127 (2) of the Evidence Act should be in direct speech and complete."*

In **John Mkorongo James vs R.** (supra) the Court of Appeal decided not to act on the evidence of the victim because it was marred irregularities; **one**, that it was recorded in reported speech; and **two**, that the promise was not complete as the witness only promised to tell the truth and she did not promise not tell lies. In the present case, the victim's promise was recorded in reported speech and it was also not complete as the victim never promised not tell lies. As to the completeness or otherwise of the promise under section 127(2) the Court of Appeal in **Mathayo Laurance William Mollel vs R.,** (Criminal Appeal No. 53 of 2020) [2023] TZCA 52 (20 February 2023) held that if a witness of tender age promises to tell truth but the

witness does not promise not tell lies, the promise is complete. A promise to tell the truth comprises a promise not tell lies. It held thus-

> *"We respectfully think that if a child of tender age is not to testify on oath or affirmation, a preliminary test on whether he knew and understands the meaning of oath may be dispensed with. The appellant also argued that the child witnesses' promise was incomplete for promising only to tell the truth and omitted to undertake not to tell lies. We find difficulties in agreeing with him. We understand the legislature used the words "promise to tell the truth to the court and not to tell lies". **We think tautology is evident in the phrase, for, in our view, 'to tell the truth" simply means "not to tell lies". So, a person who promises to tell the truth is in effect promising not to tell lies.** The tautology in the subsection is, in our opinion, a drafting inadvertency. We thus find no substance in the first ground of appeal and dismiss it." (Emphasis added)*

The remaining question is whether it is fatal to record the promise under section 127(2) of the Evidence Act in a reported speech as the trial court did in the instant case. In the Court of Appeal decision in **John Mkorongo James vs R.** (supra) and in the High Court decision in **Nasri Ahmend Hassan v. R,** HC (supra), the courts believed that the irregularity of recording the promise in reported speech was fatal. I read and read the decision of the Court of Appeal in **John Mkorongo James vs R.** (supra),

and got an impression that, the Court of Appeal did not pronounce itself that recording of the promise under section 127(2) in a reported speech was fatal irregularity. It recommended or ordered that the promise ought to be recorded in direct speech and it must be complete. It observed that *"It is recommended that the promise to the court under section 127 (2) of the Evidence Act* ***should be in direct speech*** *and complete."*

I am alive of the fact that this Court has held in several cases, including **Nasri Ahmend Hassan v. R,** HC (supra) and **Clement Paskal @ Mawe vs R.,** (Criminal Appeal No. 31 of 2023) [2023] TZHC 20507 (18 August 2023) that recording the statement in indirect speech was fatal irregularity. I beg to differ with that position, the law requires the witness of tender age to promise to tell the truth and not tell lies. The promise to tell the truth is not the witness' evidence. The law requires the evidence to be recorded in direct speech. The Court of Appeal in **John Mkorongo James vs R.** (supra) directed how the promise ought to be recorded. Thus, failure to record the promise under section 127(2) of the Evidence Act in direct speech is irregularity, but since the court's record shows that the witness made a promise, the error or irregularity is curable under section 388 of the **CPA**. I

find no merit in the appellant's complaint that the victim's evidence was recorded in violation of section 127(2) of the Evidence Act.

**Were the contradictions in the prosecution's evidence fundamental?**

The appellant's advocates complained that the prosecution's witnesses gave contradictory evidence. They pointed the first set of contradictions as between the victim who deposed that she was raped four times and the doctor, Thomas Teliphod Majwala (**Pw2**)'s evidence that, the victim told him that she was raped more than four times. Another set of contradictions was pointed out to be between the evidence of the victim and that of Rose E. Matemba (**Pw4**). The victim deposed that the appellant raped her on the fourth time but Rose E. Matemba (**Pw4**) deposed that the victim told her that the appellant touched and after she yelled the appellant went away. The appellant's advocate submitted that the appellant did not rape the victim according to the evidence of Rose E. Matemba (**Pw4**).

There is no dispute that contradictions pointed out by the appellant's advocate do exist in the prosecution's evidence. It is trite law that due to frailty of human memory and if the discrepancies are on details, the Court may overlook such discrepancies. See the decision of the Court of Appeal in

**John Gilikola v. R.,** Criminal Appeal No. 31 of 1999 (unreported), **Dickson Elia Nsamba Shapwata v. R.,** Criminal Appeal No. 92 of 2007 (unreported) and that of the High Court in **Evarist Kachembeho & Others v. R** [1978] LRT n. 70. In **Evarist Kachembeho & Others v. R** the Court observed that-

> *"Human recollection is not infallible. A witness is not expected to be right in minute details when retelling his story".*

The contradictions raised by the defence are minor they can be ignored. They do not go to the root of the matter. To begin with the contradictions between the victim and the doctor was as to the number of times the appellant had had sexual intercourse with the victim is as to the details. It is not as to whether appellant had sex with the victim or not but it about how many times the appellant had sex with the victim. It is immaterial whether the appellant had had sexual intercourses with the victim four times or more than four times. What matters is whether the appellant penetrated the victim's private parts using his manhood, even if, he slightly penetrated her, that evidence was enough to prove the offence.

As to the contradictions that between the victim's evidence and that of Rose E. Matemba (**Pw4**), I find the same to be minor. Rose E. Matemba (**Pw4**)'s evidence was that the victim told her that the appellant touched her

and that after she yelled the appellant went aware. It is true that Rose E. Matemba (**Pw4**)'s evidence suggested that the appellant did not have sexual intercourse with the victim on that day. The contradictions do exist as pointed out, however reading the whole evidence of Rose E. Matemba (**Pw4**), it is evident that after Rose E. Matemba (**Pw4**) remained with the victim, after Mary left them, the victim disclosed to Rose E. Matemba (**Pw4**) what the appellant had done to her. The victim told Rose E. Matemba (**Pw4**) that the appellant had done something to her and that it was the fourth time. I will reproduce Rose E. Matemba (**Pw4**)'s evidence as follows-

> *"I told her why she was angry she [started] crying and told me that her father was "touching her" she yelled and he left her alone. I asked her what he wanted to do, she said he wanted to bad thing to her after she yelled he left her alone. I went outside and asked Maria to go ask his (sic) father what happened when Maria went to ask her,* ***she further told me that it was the fourth time and her father told her that if she says he will kill her.***"

I am of the view that there is something hidden in the evidence of Rose E. Matemba (**Pw4**). It is not clear as to what the victim told her. I am of the impression that Rose E. Matemba (**Pw4**) was not the witness who told the court whole truth. I am unable to believe that the victim told Rose E. Matemba (**Pw4**) the appellant touched her four times and threatened her

not disclose that he touched her. All in all, the evidence of Rose E. Matemba (**Pw4**) was hearsay, thus, it had less value than the victim's evidence. Reading Rose E. Matemba (**Pw4**)'s evidence it seems that the appellant was her son. Her evidence was that the victim was her granddaughter and that on Saturday she is always left at home to clean the house and Said Mohamed, the appellant is always in his room. Thus, Rose E. Matemba (**Pw4**) had reason not disclose the whole evidence to save her son from criminal liability.

I do not find merit in the contention that the contradictions in the prosecution's evidence weakened its case.

**Did the prosecution's failure to tender DNA evidence to link the appellant and the victim fatal?**

The appellant's advocate complained that the prosecution did not prove the appellant guilty for its failure to tender DNA evidence to link the appellant with the commission of the offence. Mr. Bizman, the state attorney, replied that the DNA test was not a legal requirement to establish the offence of rape.

Indeed, the law does not require DNA evidence to prove the offence of rape though DNA test would be vital evidence to bridge the gap in the

prosecution evidence if, tendered. The Court of Appeal had had an occasion to discuss the prosecution's failure to tender DNA evidence and its impact in sexual offences. In **Cristopher Kandidius @ Albino vs R.,** (Criminal Appeal 394 of 2015) [2016] TZCA 196 (13 December 2016), the Court of Appeal observed that, the absence of medical evidence to support the fact of rape is not decisive as the fact of rape can be proved by the oral evidence of a victim of rape or by circumstantial evidence. It stated that-

> *"There is no doubt in our minds that DNA can, and should fill the evidential gaps in sexual offences in Tanzania. In its decision, the Court of Appeal Kenya [**Evans Wamalwa Simiyu v Republic** (supra)] while underscoring the important role which the DNA evidence can play to forensically link an accused person to the offence; it was quick to restate that other oral evidence can, even without the DNA evidence, still prove the offence: "[19] Another issue for consideration is the contention by the appellant that the trial Court failed to order a DNA test on him contrary to Section 36 of the Sexual Offences Act which evidence could have exonerated him. In **AML v Republic** 2012 eKLR (Mombasa), this Court upheld the view that: 'The fact of rape or defilement is not proved by way of a DNA test but by way of evidence. ' [20] This was further affirmed in **Kassim AH v Republic** Cr Appeal No. 84 of 2005 (Mombasa) (unreported) where this Court stated that: 'The absence of medical evidence to support the fact of rape is not decisive as the*

*fact of rape can be proved by the oral evidence of a victim of rape or by circumstantial evidence. '*

I am of the settled view that, the prosecution would have easily proved the appellant guilty if, it had tendered the DNA evidence but its absence does not lead to the conclusion that prosecution did not prove the appellant guilty. It is settled, as pointed out above that, the evidence of the victim of sexual offence is decisive in determining whether the accused committed the offence. In the present case, the victim was consistent and her evidence showed that the appellant had had canal knowledge with her four times. She explained what happened with clarity on every encounter. I find no reason to disbelieve her. The appellant did not cross-examine her or give explanation in his defence, which would have pinched holes in victim's evidence. Like the trial court, I find that, the victim was credible and her evidence sufficient to ground a conviction.

There was a complaint that the trial court convicted the appellant on the weakness of the appellant's defence. I am not able to buy that argument. The victim's evidence was strong to ground the appellant's conviction. The victim testified against her father. She had no reason to lie.

In in the end, I find that, the appellant was properly convicted and the sentence imposed was in accordance with the law. I find no merit in the

appellant's appeal. Consequently, I dismiss it in its entirety. I uphold the appellant's conviction and sentence.

**Dated** at Babati this 15th day of **March**, 2024.

I order accordingly.

**J. R. Kahyoza**

**Judge**

**Court:** Judgment delivered in the presence of the appellant, the appellant's advocate, Ms. Jackline Leoole and Ms. Ester Malima, State attorney for the Respondent. B/C Ombeni (RMA) present.

**J. R. Kahyoza**
**Judge**
**15/03/2024**

**Court:** Right to appeal explained.

**J. R. Kahyoza**
**15/03/2024**