IN THE COURT OF APPEAL OF TANZANIA

AT ARUSHA

(CORAM: LILA, J.A., GALEBA, J.A. And MGEYEKWA, J.A.)

CRIMINAL APPEAL NO. 12 OF 2021

ALLY S/O SHABANI @ NZIGE ..... APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

(Appeal from the decision of the High Court of Tanzania at Arusha)

(Gwae, J.)

Dated the 10th day of June, 2020

in

Criminal Appeal No. 18 of 2020

JUDGMENT OF THE COURT

9th & 23rd February, 2024

MGEYEKWA, J.A.

The appellant, Ally Shabani @ Nzige stood trial at the Resident Magistrate's Court of Arusha with incest by males contrary to section 158 (1) (a) of the Penal Code. The particulars of the offence is that on 12th May, 2017 at Themi Simba Village within Arumeru District in Arusha Region, he did have prohibited sexual intercourse with his daughter, aged 11 years. To conceal the victim's identity, we shall henceforth refer to her as 'PW1' as she so testified before the trial court.

The appellant pleaded not guilty to the charge, and the case went to full trial, in which the prosecution called five (5) witnesses. On his defence, the appellant defended himself and called two other witnesses.

From a total of five witnesses, the prosecution account was as follows: the victim who testified as PW1 was living with her parents, two siblings and other relatives in her parent's house. PW1 recalled that on 12th May, 2017, she was with her two siblings in their bedroom while her mother was not around. According to PW1, on the material day, while she was asleep, her biological father called her into his bedroom and asked her to remove a thorn from his feet. Shockingly, the appellant ordered her to undress her clothes and lie on bed. Then, he inserted his penis into her vagina. It was the testimony of PW1 that, the experience was painful. Subsequently, during the same night, PW1 headed to Kazembe (PW3) house, their neighbour to report the incident. Consequently, PW1 and PW3 reported the incident to the Hamlet Chairman one Kaisi Salim Mbwana (PW2).

The victim's evidence was flanked by Kaisi Salim Mbwana, the Village Executive Officer (PW2), he recalled that on 12th May, 2017 at 10:00 pm, he heard a knock on the door; when he opened the door he saw PW1 who

was accompanied by PW3 and his wife. PW1 was crying; she narrated what had befallen her. After that, they headed to the appellant's house and arrested him. Consequently, the appellant was taken to the Police Station and on the same night, PW1 proceeded to the hospital.

More evidence of the encounter came from Kazembe Salim Mbwana (PW3), who testified to the effect that on 12th May, 2017 at 10:00 pm, he saw PW1 who entered into his house crying, PW1 made some explicit narrations of the encounters, told PW3, what her father allegedly did to her. PW3, recalled that PW1 said that, her father asked her to remove a thorn from his leg, but astonishingly, her father ordered her to sleep with him, he placed PW1 on his bed and raped her. PW1 felt bad and decided to run way and go to PW3's house. Thereafter, PW3 and PW1 reported the incident to PW2. Subsequently, they proceeded to the scene, but the appellant was not around. After a while, he arrived and was taken to the Village Chairman. PW2 reported the incident to the police and the appellant was arrested and charged as shown above.

Mwanahamisi Issa (PW4) the victims' mother testified to the effect that, on the material day, she was at the funeral of his eldest sister. PW1 and PW3 disclosed the ordeal. In cross-examination, she admitted that, she

did not examine PW1's private parts to confirm if she was raped and did not accompany her to the hospital.

The evidence of PW1 was supported by Rehema Goduin Lema, a Clinical Officer (PW5) who recalled that on 13th May 2017, she examined the victim at Meru District Hospital and found that her vagina was reddish and had bruises. PW5 supported her evidence with the victim's PF3, which was admitted in evidence as exhibit P1.

On the other hand, the appellant, Ally Shabani who testified as DW1, denied the charge levelled against him. He recalled that, on 16th January, 2018 around 12:00 pm, the Village Chairman apprehended him and escorted him to USA -River Police Station. Later, he was arraigned in the trial court facing rape charges. It was his testimony that, in 2017, he was charged by the trial court (P. A. Kisinda - RM) on the same offence and later he was released. DW1 had two wives. He testified to the effect that PW3 had an affair with his first wife and there were grudges between him and PW3.

Adija Maulid (DW2) and Halima Issa (DW3) testified as his witnesses. DW2, the appellant's second wife recalled that, on the material day around 08:30 pm, she had dinner with the appellant at their house. Someone

awakened them late at night, and alleged that appellant has raped her daughter. DW3, recalled that she heard what had befallen PW1 and on the same day, she saw the appellant coming out from DW2's house.

As alluded to above, the trial court was convinced by the version of the prosecution witnesses. Accordingly, the appellant's defence evidence was rejected leading to his conviction and a sentence of 30 years imprisonment. Dissatisfied, the appellant unsuccessfully lodged an appeal to the High Court. Hence the instant appeal in which the appellant is desirous of demonstrating his innocence.

The appeal is predicated on five grounds of complaint, which may be paraphrased as follows; **one**, that the first appellate court erred in law by holding that the prosecution had proved their case beyond reasonable doubt; **two** that, the first appellate court erred in fact and law by failing to draw adverse inference against the prosecution for failure to call a material witness (PW3's wife). **Three** that, the first appellate court erred in law and fact by failing to weigh that there were grudges between the appellant and PW3 thus, the case against him was framed; **four** that, the first appellate Court erred in law and fact by holding that PW1, a child of tender age, had

promised to tell the truth; and **five** that, the trial court did not evaluate and accord weight to the appellant's defence of *alibi*.

At the hearing of the appeal, the appellant appeared in person, unrepresented. The respondent Republic had the services of Ms. Riziki Mahanyu, learned Senior State Attorney who co-appeared with Mses. Neema Mbwana, Eunice Makala and Tusaje Samwel, all learned State Attorneys.

When allowed to amplify on his grounds of appeal, the appellant, besides adopting the grounds of appeal contended that, the evidence against him by PW1, PW2 and PW3 was riddled with glaring contradictions and inconsistencies, thus rendering their respective testimonies unworthy of belief. He clarified that, PW1 in her testimony testified to the effect that, the appellant ordered her to remove her clothes, contrary to what PW1 told PW2 that, the appellant is the one who undressed her. Yet another contradiction is when PW1 told PW3 that, it was the appellant who put her on his bed. He continued to argue that in 2017, he was arraigned and acquitted before the same court for the same offence and same victim.

Submitting on ground four, the appellant contended that, PW1's evidence was recorded contrary to section 127 of the Evidence Act (the

EA). He clarified that the victim did not state if she woul tell the truth and not lies before the trial court. To bolster his submission, he cited the case of **John Mkorongo James v. The Republic**, Criminal Appeal No. 498 of 2020 (unreported).

It was his further submission that the trial court misdirected itself because the contents of the PF3 was not read out in court. He criticized the first appellate court for upholding the conviction while the prosecution failed to prove the case beyond reasonable doubt. He urged us to allow the appeal, quash the conviction and set aside the sentence.

On the adversary side, Ms. Makala expressed her stance at the very outset that she did not support the appeal. She opted to submit first on ground two of the appeal. She argued that PW3's wife was not a material witness because in carnally known cases, the best evidence comes from the victim, and PW1 narrated what had befallen her and proved that it was the appellant who carnally known her. Relying on section 143 of the EA and the case of **Daktari Jumanne v. The Republic**, Criminal Appeal No. 601 of 2023. [2023] TZCA 221 (4 May 2023) TanzLII, she was sure that PW3's wife was not a material witness. She contended that, PW1's evidence was

corroborated by that of PW2, PW3 and the Medical Doctor (PW5) who examined the victim and proved that she was carnally known.

With regard to the third ground of appeal, Ms. Makala disagreed with the appellant's complaints. She contended that the quarrel between the appellant and PW3 was not a cooked story because the appellant never cross-examined PW3 on that aspect. She clarified that, failure to cross examine a witness on an important matter is deemed to have accepted that matter and will be estopped from asking the trial court to disbelieve what the witness said. To reinforce her submission, she referred the Court to the case of **Daktari Jumanne** (supra).

As to the fourth ground, Ms. Makala argued that the victim promised to tell the truth, and she took an oath. She clarified that before the hearing of the prosecution case, the victim promised to tell the truth in accordance with section 127 of the EA, and the trial court proceeded to guide her to take oath. Relying again on the case of **Daktari Jumanne** (supra), she was optimistic that PW1 understood the meaning of oath, thus, taking oath and failure to promise to tell the truth is not fatal because she testified under oath.

On ground five, the learned State Attorney was brief. She simply stated that the trial court in its judgment elaborated, evaluated and accorded necessary weight to the defence of *alibi*, therefore, the appellant cannot fault the trial court. To support her contention, she referred us to page 65 of the record of appeal.

On the first ground, the learned State Attorney admitted that the PF3 was tendered and admitted at the trial court, however, the same was worthless because, as shown on page 17 of the record of appeal, its contents were not read out after it was admitted in the evidence, and the same was expunged by the first appellate court. In her view, after its expungement, there are other pieces of evidence to support the prosecution case. Expounding, she said that, PW1's evidence proved the offence of incest by male against the appellant to the hilt and her evidence was corroborated by PW5, who proved that PW1 was carnally known. She cemented that, there was no dispute that the appellant was arrested on 12th May 2017.

When the Court prompted Ms. Makala to submit on the unexplained delay to arraign the appellant in court, she elucidated that there was an unexplainable delay to arraign the appellant to the court. She exemplified

that, the incident occurred on 12th May, 2017, however, the appellant was arraigned to court on 18th January, 2018 after a lapse of six months. However, in her view, the delay was due to the ongoing investigation. On being probed by the Court, she conceded that the unexplained delay in taking steps against a suspect raised doubts.

On the strength of her submission, the learned State Attorney beckoned upon the Court to dismiss the appeal.

In his brief rejoinder, the appellant stressed that the whole case was a frame-up against him and prayed that the appeal be allowed.

Having heard and considered the submissions from either side, we have chosen to disregard all other grounds of appeal and confine our decision to grounds one that the prosecution failed to prove the case beyond reasonable doubt. We have noted that two interconnected issues arise on this ground; **one**, whether PW1 was a credible witness and **two**, whether the unexplainable delay to arraign the appellant in court was justified. In this matter, ground one suffice to dispose of this appeal for reasons that will unfold during this judgment.

We understand that this is a second appeal, where, the Court will not readily interfere with concurrent findings of the two courts below on matters of fact unless certain irregulates or violations were committed by the first appellate court in its decision. The principle was reiterated in the case of **Wankuru Mwita v. Republic**, Criminal Appeal No. 219 of 2012 (unreported). The Court stated as follows:

> *"The law is well settled that on second appeal, the Court will not readily disturb concurrent findings of facts by the trial court and first appellate court unless it can be shown that they are perverse, demonstrably wrong or clearly unreasonable or are a result of a complete misapprehension of the substance, nature or non-direction on the evidence; a violation of some principle of law or procedure or have occasioned a miscarriage of justice."*

See **Mussa Mwaikunda v. Republic** [2006] 387 and **Maganga Lushinge v. The Republic**, Criminal Appeal No. 150 of 2020 (unreported).

From the record, it is evident that the conviction of the appellant was based on the credibility of prosecution witnesses. In its decision, the first appellate court's found that the evidence of PW1 was reliable, hence

confirmed, the trial court findings and conviction upon the appellant. As alluded to above, this being a second appeal, we are alive to the principle that, the Court should rarely disturb concurrent findings of facts by the lower courts based on credibility because we did not have the advantage of seeing, hearing and assessing the demeanour of the witnesses. However, there is an exception to the rule, that the Court will interfere with any such findings, if the findings have been reached in misapprehension of facts and quality of the evidence resulting in unfair conviction or violation of some principles of law, occasioning a failure of justice. See **Wankuru Mwita** (supra) and **Jafari Mohamed v. The Republic**, Criminal Appeal No. 112 of 2006 (unreported).

The second principle is that, it is deficient for the trial court to simply state that it trusted the credibility of a witness, or is satisfied with the demeanour of a witness. The reason for its decision must be recorded as that would assist the appellate court to determine whether indeed the trial court considered the credibility of a witness. See the case of **Abraham Wilson Kaaya v. The Republic** (Criminal Appeal No. 54 of 2020) 2023] TZCA 17655 (26 September 2023) TanZLII.

More so, the credibility of a witness can also be determined by a second appellate court when examining the findings of the first appellate court by assessing the consistency of such witness. In the first place we agree with the learned State Attorney that, the question of the demeanor of PW1 was already dealt with by the learned trial magistrate, who had the advantage of observing the witness while giving her evidence in court. However, as intimated earlier, PW1's demeanor not being the only factor to assess credibility, cannot be considered in isolation to the exclusion of credibility and assessing the coherence and consistency of such witness evidence. See: **Shabani Daudi v. The Republic**, Criminal Appeal No. 28 of 200 (unreported) and **Abraham Wilson Kaaya** (supra).

Reverting to the case at hand, a lingering question is whether the victim gave a credible account on the charge of incest by male. It is evident on the record as per the evidence of PW1 that, her biological father carnally known her. PW1's evidence was corroborated by the evidence of PW2, PW3, and PW5. However, the only evidence that directly implicates the appellant is that of PW1 who was the victim in this case. From the record, the trial magistrate's assessment of PW1's credibility was influenced by only her demeanor. In his judgment, the trial magistrate summarized

the evidence on record and reached such a conclusion based on the demeanor of the victim and the evidence of the medical doctor (PW5) without testing the victim's credibility. The first appellate court on page 64 of the record of appeal found the evidence of PW1 highly credible and sufficient without testing the credibility of PW1. This Court in **Yasin Ramadhani Chang'a v. Republic** [1999] T.L.R. 489 made a general observation regarding the demeanor of a witness. It held:

> *"Demeanour is exclusively for the trial court.* ***However, demeanour is important in situation where from the totality of the evidence adduced,*** *an inference or inferences, can be made which would appear to contradict the spoken words." [Emphasis added]*

The bolded expression justifies that the assessment of the demeanor of a witness is the exclusive monopoly of the trial court. However, besides observing the witness's appearance, in resolving whether the witness is trustworthy, as alluded to above, the trial court was enjoined to associate the witness's demeanor and her evidence in order to find out if PW1 was credible. This position of the law was reiterated in the case of **Salum Ally**

v. Republic, Criminal Appeal No. 106 of 2013 (unreported), we observed that:

> *"...on whether or not any particular evidence is reliable, depends on its credibility and the weight to be attached to such evidence. We are aware that at its most basic,* ***credibility involves the issue whether the witness appears to be telling the truth as he believes it to be.*** *In essence, this entails the ability to assess whether the witness's testimony is plausible or is in harmony with the preponderance of probabilities which a practical and informed person would readily recognize as reasonable in the circumstances particularly in a particular case. The test for any credible evidence is supposed to pass, were best summarized in the case of* ***Abdallha Teje @ Malima Mabula v. Republic,*** *Criminal Appeal No. 195 of 2005 (unreported), to be:*
>
> *(i) Whether it was legally obtained;*
>
> *(ii) Whether it was credible and accurate;*
>
> *(iii) Whether it was relevant, material and competent;*
>
> *(iv) Whether it meets the standard of proof requisite in a given case, otherwise referred to as the weight of evidence or strength or believability."* [Emphasis added]

Guided by the above authorities, we now turn to consider the circumstances pertaining to the appeal before us as to whether, from the available evidence on the record, PW1 was a credible witness. In her testimony, PW1 claimed that the incident occurred on 12th May 2017 at 10:00 hours. Her father called her in his room and asked her to remove him a thorn from his leg. Surprisingly, he ordered her to undress her cloths and carnally known her. After the alleged offence, PW1 did not reveal the ordeal to her siblings; instead, at night hours, an 11-year-old girl walked out of the house alone, to report the incident to their neighbour (PW3).

Worse still, PW2, PW3 and PW4 were all informed by PW1 on what had befallen her. But surprisingly, none of them, including her biological mother (PW4) accompanied the victim of tender age who was allegedly carnally known to the hospital. PW1 in her testimony simply testified that on the same night, she proceeded to the hospital, alone, and admittedly, PW4 said that, she did not accompany her daughter to the hospital. For what had befallen PW1, it is alarming, a girl of 11 years, who was sexually molested to walk alone tardy at night, while she was in bad shape and helpless. Even more unfortunate, PW1 proceeded to go the hospital unaccompanied as if nobody was aware on what had befallen her. Stil, PW1

stayed at the hospital premises, alone, at mid- night hours until the following day when the Medical Doctor (PW5). As alluded to above, those circumstances escaped the attention of both the trial and first appellate courts.

We are aware that every witness is entitled to credence and must be believed. **See Iddi Shaban @ Amasi v. The Republic**, Criminal Appeal No. 2006 (unreported) and **Goodluck Kyando v. The Republic**, (2006) TLR 363. However, there are exceptions, where there are good and cogent reasons not believing a witness. In other words, the witness evidence should not be taken as gospel truth, but her testimony should pass the test of truthfulness. In our previous case **Mohamed Said v. the Republic**, Criminal Appeal No. 145 of 2017 (unreported), we observed that:

> *"**We think it was never intended that the word of the vlctim of the sexual offence should be taken as gospel truth but that her or his testimony should pass the test of truthfulness.** We have no doubt that justice in cases of sexual offences requires strict compliance with rules of evidence in general, and S. 127(7) of Cap. 6 in particular, and that such compliance will lead to punishing the offenders only in deserving cases."*
> [Emphasis added]

Deducing from the above excerpt, it is plain that there is no dispute that the evidence of PW1 in the case at hand was taken as gospel truth without passing the test of truthfulness. We are doubtful on whether PW1 was telling the truth. As intimated earlier, the victim's story is wanting. The lower courts below misapprehended the substance and quality of PW1's evidence which was relied upon to ground conviction against the appellant.

Another shortfall that has drawn our attention is the unexplained delay in arraigning the appellant in the court for the said offence. Our starting point will be whether the prosecution justified the delay. From the record, the charge sheet shows that the offence of incest by male occurred on 12th May, 2017. However, the appellant was arraigned at the trial court on 18th January, 2018. The charge was read over and explained to him six months after the incident, as is evident at page 1 of the record of appeal. The Court has already dealt with the state of the law related to the delay of arraigning a suspect to the court of law. See **Ramson Peter Ondile v. The Republic**, Criminal Appeal No. 84 of 2021 and **Shabani Salimu v The Republic**, Criminal Appeal No. 519 of 2021 (both unreported).

According to the appellant, he was arrested by the police officer in 2017 and discharged by the trial court (P. A. Kisinda- RM) on the same

offence and same victim. Astonishing, on 16th July 2018, he was again arrested and charged for the same offence. Going by the appellant's evidence, we think there is a need to scrutinize the charge sheet. For easy reference, we undertake to reproduce the charge sheet hereunder. It reads:

> "STATEMENT OF OFFENCE
>
> INCEST BY MALE Contrary to sections 158 (1)(a) of the Penal Code Cap. 16 [R.E 2002].
>
> PARTICULARS OF OFFENCE
>
> *Ally S/O Shabani @ Nzige on* ***12th May, 2017*** *at Themi Simba Village within Arumeru District within the City and Region of Arusha did have prohibited carnal knowledge with his daughter one S, a girl of eleven (11) years of age.*
>
> ***Signed at Arusha this 16st day of January, 2018.***"
>
> .....
>
> *STATE ATTORNEY*

Deducing from the above excerpt, it is an undisputable fact that there was no actual explanation for such a delay. In response to our inquiry about the delay, Ms. Makala made a statement from the bar that the delay was due to the ongoing investigation. However, on probing by the Court, she conceded that there was no any cogent evidence to prove her assertion.

As mentioned earlier, the charge sheet shows that the appellant was charged after a lapse of approximately six (6) months from the date when the alleged offence was committed. The unexplainable delay, which is featured in the charge sheet is linked with the appellant's defense story that he was once charged and acquitted on the same offense. It is therefore, our considered view that the delay in arraigning the appellant in court was inexcusable and unjustified. The same created a reasonable doubt in the prosecution case which the appellant claimed was framed against him. See **David Zabron @ Lusumo v The Republic**, Criminal Appeal No. 241 of 2020. In the same vein, the Court in the case of **Ramson Peter Ondile v. The Republic**, Criminal Appeal No. 84 of 2021 [2022] TZCA 608 (6th October 2022) TanzLII held that:

> ***"It is therefore our considered view that the unexplained delay to arraign the appellant in court creates doubt in the prosecution case as to whether the incident occurred as alleged".***
> [Emphasis added]

For the aforesaid reasons, it suffices to say that, the prosecution did not prove the case beyond reasonable doubt. In the circumstances, we think is unnecessary to deal with the remaining grounds of appeal.

Consequently, we allow the appeal, quash the conviction and set aside the sentence imposed on the appellant. We, accordingly, order that the appellant be set at liberty forthwith unless he is held for some other lawful cause.

Order accordingly.

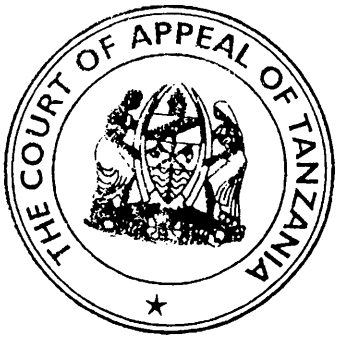
DATED at **ARUSHA** this 22nd day of February, 2024.

S. A. LILA
JUSTICE OF APPEAL

Z. N. GALEBA
JUSTICE OF APPEAL

A. Z. MGEYEKWA
JUSTICE OF APPEAL

The Judgment delivered this 23rd day of February, 2024 in the presence of Mr. Ally Shabani @ Nzige, the Appellant unrepresented, present in person and Ms. Neema Mbwana, learned State Attorney for the Respondent/Republic, is hereby certified as a true copy of the original.



D. R. LYIMO
DEPUTY REGISTRAR
COURT OF APPEAL