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

**MBEYA SUB- REGISTRY**

**AT MBEYA**

**CRIMINAL APPEAL No. 153 OF 2023**

(*Originating from, the Resident Magistrates' Court of Songwe at Vwawa, Criminal Case No. 17 of 2023*)

**BAHATI S/O ERASTO MWANJA.....APPELLANT**

**VERSUS**

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

**JUDGMENT**

*27th October & 14th November, 2023*

**MPAZE, J.:**

Bahati Erasto Mwanja, the appellant and identified biological father of XYZ (name withheld for the protection of the alleged victim's dignity), was brought before the Resident Magistrates' Court of Songwe. He was charged with three counts of incest by male, under section 158(1)(a) of the Penal Code [Cap 16, R.E. 2022].

The first count alleged that on an unspecified date in December 2022, in the Vwawa area within Mbozi District in Songwe Region, Bahati Erasto Mwanja engaged in prohibited sexual intercourse with XYZ, a 15-

year-old girl, whom he knew to be his biological daughter.

The details of the second count are as follows: on an unspecified date in February 2023, in the Vwawa area within Mbozi District in Songwe Region, Bahati Erasto Mwanja allegedly engaged in prohibited sexual intercourse with XYZ, a 15-year-old girl, whom he knew to be his biological daughter.

The third count alleges that on the 12th day of May 2023, in the Ichenjezya area within the Mbozi District in Songwe Region, Bahati Erasto Mwanja again engaged in prohibited sexual intercourse with XYZ, a 15-year-old girl, whom he knew to be his biological daughter.

After a thorough examination of the arguments presented by both parties, the trial Resident Magistrate concluded that the appellant was guilty on all three counts. Subsequently, the appellant was convicted and sentenced to 30 years imprisonment. (I will revisit this sentence later).

Dissatisfied with both the conviction and the imposed sentence, the appellant filed this appeal, raising objections to the trial Resident Magistrate's decision on the following grounds:

1. That the trial court erred in law and facts by deciding the case based on the evidence of PW2 only who was not a credible witness hence wrongly convicted and sentenced the appellant.
2. That the trial court erred in law and facts by entering conviction

and sentence against the appellant while the case was not proved on the standard required in criminal cases.

3. That the trial court erred in law and facts by basing its decision on mere allegations which was not proved hence wrongly convicting and sentencing the appellant.
4. That the trial court erred in law and facts for deciding the case based on the evidence of PW2 only who admitted to having been telling lies hence unjustifiably convicted and sentenced the appellant.

Relying on the enumerated grounds of appeal, the appellant earnestly implored this court to grant the appeal, reverse the conviction, and nullify the imposed sentence.

During the hearing of this appeal, Mr. Isack Chingilile, a learned advocate provided legal representation for the appellant. Conversely, Ms. Prostista Paul, a learned state attorney, represented the respondent/Republic.

In presenting the appeal, Mr. Chingilile consolidated arguments for grounds one and two, as well as grounds three and four.

Beginning with grounds one and two, Mr. Chingilile contended that the trial court's conviction and sentencing of the appellant were flawed, primarily due to the reliance on the testimony of PW2, a witness he

deemed not credible. Additionally, Mr. Chingilile argued that the trial court erroneously leaned on the precedent set in the case of **Twalaha Ali Hassan v. Republic** (Criminal Appeal No 127 of 2019), asserting that the court had mistakenly emphasized that the true evidence of rape must originate from the victim.

Mr. Chingilile asserted his awareness of the legal standpoint that the most reliable evidence in sexual offences, particularly rape cases, typically emanates from the victim. However, he emphasized that before the court places reliance on such evidence, it is imperative to scrutinize the credibility of the witness.

In support of this argument, he referred to the case of **Mohamed Said v. Republic** (Criminal Appeal No. 145 of 2017), published on the website www.tanzlii.org [2019] TZCA 252. This case underscored the significance of applying a litmus test to assess the credibility of the witness before the court can legitimately rely on the victim's testimony.

Counsel argued that had the trial court diligently considered the credibility of PW2, it would not have convicted the appellant. He pointed to page 11 of the typed proceedings, highlighting a crucial moment during PW2's cross-examination where she admitted to speaking falsehoods on multiple occasions. He emphasized that in light of PW2's acknowledgement of dishonesty, it was incumbent upon the trial court to

rigorously examine the veracity of the witness's statements, questioning the reliability of her testimony.

Mr. Chingilile continued his submission by pointing out that during PW2's testimony regarding the first count, which pertains to the incident in December 2022, PW2 stated that she was summoned by the appellant to go to Mwenge Primary School, where the alleged offence took place. He highlighted a significant flaw in this evidence, arguing that it lacked crucial details regarding the method employed by the appellant to call PW2.

Furthermore, Mr. Chingilile emphasized the omission of information about the presence of other individuals at the school, leaving uncertainties about whether the situation involved just PW2 and the appellant.

Mr. Chingilile highlighted a contradiction between the testimonies of PW2 and PW1 regarding how PW1 went to the appellant's workplace in December 2022. While PW2 claimed she was called by the appellant, PW1 asserted that she was the one who sent PW2 to collect money from the appellant.

Continuing his submission, Mr. Chingilile pointed out the inconsistency in PW2's testimony, referring to page 9 of the typed proceedings. On this page, PW2 stated that she did not disclose the incident to anyone because the appellant had threatened to kill her if she

revealed it. However, on page 10 PW2 contradicted herself by saying she never reported the incident anywhere since the appellant had asked her not to tell anyone.

Mr Chingilile raised a crucial question, asserting that there was ambiguity regarding whether PW2 refrained from reporting the incident because of threats from the appellant or because she was requested not to by the appellant. According to him, this discrepancy alone warranted a thorough examination of the credibility of PW2's testimony. In concluding his arguments for grounds one and two, Mr. Chingilile contended that the entire case appeared to be fabricated. He attributed this perception to the conflicts between the appellant and PW1, who is the appellant's wife.

Moving on to grounds two and three, Mr. Chingilile criticized the trial court's decision to convict and sentence the appellant for offences that were not proven beyond a reasonable doubt. He stressed that the prosecution bears the responsibility of establishing their case beyond a reasonable doubt, a duty that they failed to fulfil in this case.

Mr. Chingilile contended that the case lacked proof beyond a reasonable doubt, highlighting several contradictions in the prosecution's evidence. **Firstly,** PW2 contradicted herself, initially citing threats from the appellant as the reason for not reporting the incident, and later claiming she failed to report at the appellant's request. **Secondly,** PW1's

statement conflicted with PW2's regarding how PW2 went to collect money from the appellant. **Thirdly,** discrepancies emerged concerning the dates and circumstances of the alleged incidents, with PW1's not sleeping at night. **Lastly,** the timeline of the hospital visit presented a disparity, as PW1 testified to a visit on 16th May 2023, while PW3, the medical doctor, indicated that PW2 accompanied by PW1, was received at the hospital on 26th March 2023.

In addition to the aforementioned contradictions, the appellant's counsel challenged the prosecution's case on the grounds of insufficient proof, citing the failure to summon crucial witnesses, including the child allegedly sleeping in the sitting room. Furthermore, he argued that PW1 did not testify to witnessing the appellant engaging in sexual intercourse with PW2 on 15th May 2023. Additionally, he highlighted the inadequacy in PW3's examination of PW1, asserting a failure to establish evidence of penetration caused by a male organ in the case of PW2. He underscored the importance of proving penetration in sexual offences.

In conclusion, he earnestly implored this court to determine that the case was fabricated, urging it to grant the appeal and overturn both the conviction and the imposed sentence on the appellant.

On the other hand, Ms. Paul vehemently opposed the appeal, asserting that the case was proven beyond a reasonable doubt. She

maintained that PW2 was a credible witness, contending that her admission to speaking lies during cross-examination did not negate the truthfulness of the evidence she presented. Ms. Paul emphasized that, during reexamination, PW2 explicitly affirmed that in court, she speaks only the truth and not lies, reinforcing the credibility of her testimony.

Regarding the contention that PW1 did not specify how she was called by the appellant, Ms. Paul argued that on page 6 of the typed proceedings, PW2 openly stated that she was summoned by the appellant to collect money. Ms. Paul asserted that how PW1 was called was not a crucial issue; rather, the focal point was that PW2 went to collect money and, during that encounter had sexual intercourse with the appellant.

Addressing the argument that PW1 did not specify whether there were people around at school or not, Ms. Paul contended that this omission does not undermine the commission of the offence. She underscored that the nature of the offence inherently occurs in privacy.

Concerning PW2's alleged inconsistency in her testimony, Ms. Paul asserted that there were no contradictions. She explained that the statements about not reporting anywhere because the appellant threatened to kill her and not reporting anywhere as per the appellant's request essentially conveyed the same meaning, indicating a consistent rationale for not reporting.

Ms. Paul countered the appellant's assertion that the case was fabricated by PW1, stating that this claim lacks merit. She pointed out that during cross-examination, PW1 was not questioned about any conflict with the appellant. Moreover, Ms. Paul emphasized that the alleged sexual abuse complainant is PW2, not PW1. Ms. Paul argued that if there were indeed conflicts, they were not between PW2 and the appellant.

Ms. Paul urged the court to recognize that assessing the credibility of a witness falls within the jurisdiction of the trial court and asserted that PW2 was indeed a credible witness. To support this claim, she referenced the case of **Seleman Makumba v. Republic** [2006] TLR 379.

Addressing the complaint that the prosecution failed to prove the case beyond a reasonable doubt, Ms. Paul contended that the prosecution had successfully established its case beyond a reasonable doubt. Regarding the mentioned contradictions, Ms. Paul asserted that there were no substantial contradictions, and any minor discrepancies, if present, did not undermine the core of the case.

In response to the argument that the prosecution failed to call crucial witnesses, Ms. Paul asserted that the number of witnesses is not determinative; rather, it is the weight of the evidence that matters. She highlighted that the witnesses who did testify successfully established the prosecution's case beyond a reasonable doubt.

Considering the argument that PW3 did not prove penetration, Ms. Paul maintained that penetration had indeed been established. Regarding the discrepancy in the date on which PW3 claimed to have attended to PW2, Ms. Paul suggested that it was an inadvertent error or slip of the tongue. Based on these points, the state attorney urged the court to dismiss the appeal and uphold both the conviction and sentence handed down by the trial court.

In his rejoinder, Mr. Chingilile reiterated his previous arguments, emphasizing that the guilt of the accused person hinges on the strength of the prosecution's evidence rather than the weakness of the defence. He maintained that the prosecution had not met the required standard of proof, and he earnestly prayed for the appeal to be granted, leading to the release of the appellant.

Upon careful examination of the grounds of appeal, it is evident that they converge on a single pivotal question; whether the prosecution successfully proved its case beyond a reasonable doubt. The appellant's counsel criticizes the trial court for allegedly neglecting to recognize the lack of credibility in PW2's testimony and the failure to establish the offence of rape. Additionally, the appellant's counsel points out perceived inconsistencies in the prosecution's evidence and criticizes the prosecution for not calling key witnesses.

Conversely, the Republic contends that the case was indeed proven beyond a reasonable doubt. The resolution of this fundamental question forms the crux of the appeal.

I concur with the perspectives presented by both the appellant's advocate and the respondent's state attorney, acknowledging the paramount importance of the prosecutrix testimony in cases involving sexual offences. Furthermore, I share Mr. Chingilile's argument that, before the court can base a conviction on the victim's evidence, it must diligently assess the veracity and credibility of such testimony.

This court holds the view that the trial court, being in the best position to assess the credibility of the witness, plays a crucial role in determining the veracity of the evidence presented. However, this being the first appellate court, is committed to a thorough reconsideration of the evidence presented during the trial in rendering a decision on this appeal.

Considering the nature of the offence with which the appellant is charged, which is incest by a male, the prosecution bears the responsibility of proving the following elements: (i) The appellant is the father of XYZ, (ii) XYZ is below the age of 18, (iii) There was penetration involved, and (iv) The appellant is the one who committed the offence against PW2.

Examining the evidence on record reveals an undisputed fact that XYZ is the daughter of the appellant and is under 18 years of age. The crux of the dispute lies in whether XYZ experienced penetration and, if affirmative, whether the appellant engaged in carnal knowledge with her.

It is established legal doctrine that, in sexual offences, the primary and most crucial evidence is that of the victim, as outlined in section 127(7) of the Tanzania Evidence Act [Cap, 6 R.E 2022]. This legal standpoint was reaffirmed in the case of **Seleman Makumba v. Republic** (*supra*).

In the present case, the appellant is accused of committing the offences of incest by a male on three occasions: in December, 2022 February, 2023 and 12th May 2023. In her testimony, PW2 provided explicit details of the alleged sexual encounters with the appellant. PW2's stated as follows

> '... *In December 2022 my father summoned me to school to pick up money for usage at home. I did go to school at about 16:00hrs there was rainfall while at school he gave me money and asked me to wait for the rain to stop. Then he asked me to follow him so he can cleanse my body to remove misfortunes (kutoa mikosi), he thus asks me to take off all my clothes, he did take off his clothes and also asks me to lie down and he inserted his penis to my vagina. He knows me carnally for a while then he gave me water to wash my vagina...I did not tell anybody since my father told me that if I*

*reported anywhere, he would kill me.*

*On February 2023 during the night he came to my room and asked for sex again thus he knew me carnally and moved away...On 12th May, 2023 he came again to my room he awakened me he was naked as usual he was asking for sex, then we had sexual intercourse then he turned back to his room. On 15th May, 2023 accused came he asked for sex I refused since I was in my menstrual period when he so torch light on the roof he ran quickly outside.'*

PW3 asserted that she conducted an examination of PW2 on 26th March, 2023 and noted the absence of an intact hymen. She documented her findings in PF3, explicitly remarking "no hymen" among other details. However, it's noteworthy that the date provided by PW3 for the examination is contested by the appellant's counsel, who argues that it contradicts the date stated by PW1. The resolution of this discrepancy will be addressed in the analysis of the complaint regarding contradictions in the evidence, as raised by the appellant's counsel, to avoid unnecessary repetition.

It is evident from the testimony of PW2 and the findings presented by PW3 that penetration is asserted. In the case of **Seleman Makumba** (*supra*), this is what was stated;

'*True evidence of rape has to come from the victim if an adult that there was penetration and no consent and in case of any other*

*women where consent is irrelevant that there was penetration'*

Based on the presented evidence, this court is content that penetration has been sufficiently established, meeting the required legal standard. The appellant's contention that penetration was not adequately proven due to PW3's alleged failure to specify the cause of penetration is deemed unfounded. This is particularly because PW2, in her testimony, unequivocally stated that a male organ was the cause of the penetration into her vagina.

The issue at hand pertains to whether the appellant is responsible for the alleged acts of penetration against PW2. In her testimony, PW2 asserted that the appellant raped her on multiple occasions, specifically in December 2022, February 2023, and 12th May, 2023. Notably, PW2 did not report these incidents promptly, citing the appellant's threats of harm if she disclosed the events.

In his defence, the appellant refuted the accusations, asserting that the case was concocted due to a personal conflict with his wife (PW1).

In response to the concerns raised about contradictions in the evidence presented by PW1 and PW2 regarding how PW2 collected money from the appellant in December 2022, and the disparity between PW1 and PW3 regarding the date of PW1's examination at the hospital, I contend that these discrepancies do not strike at the core of the case. I will

elaborate on this rationale.

In the context of this appeal, the evidentiary focus revolves around the assertion that in December 2022, PW2 visited the appellant to collect money. On how did she arrived whether directed by PW1 or summoned by the appellant does not rule out PW2 arrived at the working place of the appellant and had sexual intercourse with her.

Likewise, the disparity in dates provided by PW1 and PW3 regarding the examination of PW2 is elucidated by the PF3, admitted as Exhibit P1 without objection. The PF3 indicates that PW2 was attended to and examined on 16th May, 2023 by PW3. It is important to note that documentary evidence holds precedence over oral accounts.

It is well established in legal precedent that not every contradiction will undermine the prosecution's case it is only when the essence of the evidence is contradictory that such a scenario arises. This principle is evident in the case of **Said Ally Ismail v. Republic** (Criminal Appeal No. 241 of 2008), published on the website www.tanzlii.org [2009] TZCA 8.

Hence, as long as the evidence provided by different witnesses does not significantly differ or contradict material particulars, any observed contradictions, if present, are deemed minor and do not pose a fatal detriment to the prosecution case.

The credibility of PW2 was also contested by the appellant, who argued that inconsistencies existed in her testimony. Specifically, PW2 mentioned that the appellant warned her not to disclose the information to anyone under the threat of harm, yet simultaneously asserted that she refrained from sharing the details as per the appellant's request. Additionally, during cross-examination, PW2 admitted she occasionally tells lies.

The court found no substantial inconsistency in PW2's responses that would cast doubt on her credibility. As previously noted, the distinction between whether she was asked or threatened to maintain confidentiality does not significantly alter the meaning of her testimony. Additionally, while PW2 conceded to occasionally uttering falsehoods, it is crucial to understand that her admission during cross-examination doesn't automatically discredit her entire testimony. During reexamination, she explicitly affirmed the accuracy of her statements in court, clarifying that her response to a particularly tricky question in cross-examination did not compromise the integrity of her substantive testimony.

Regarding the complaints about the prosecution's failure to summon crucial witnesses, such as the child sleeping in the sitting room, it is important to note that established legal principles maintain that there is no fixed number of witnesses necessary to substantiate a case. This is

supported by Section 143 of the Tanzania Evidence Act [Cap 6 R.E 2022].

Certainly, the decisive factor in determining the guilt or innocence of an accused individual lies not in the quantity of witnesses but in the credibility and weight of the evidence presented. This principle is underscored by the precedent set in the case of **Bakari Hamis Linq'ambe v. Republic**, Criminal Appeal No. 161 of 2014(unreported). In this case, the court had this to say;

> *'It suffices to state here that the law is long settled that there is no particular number of witnesses required to prove a case (section 143 of Tanzania Evidence Act, Cap 6). A court of law could convict an accused person relying on the evidence of a single witness if it believes in his credibility, competence and demeanour'*

Again, in the case of Abdallah Kondo v. Republic, Criminal Appeal No. 322 of 2015, the Court stated;

> *'...it is the prosecution which has the right to choose which witnesses to call to give evidence in support of the charge. Such witnesses must be those who can establish the responsibility of the appellant in the commission of the offence'*

Adhering to the legal principles established by the cited authorities, it is evident that the prosecution appropriately exercised its right by presenting material witnesses to support their case. The decision not to call the child who was sleeping in the sitting room is deemed

inconsequential, as it would have, at best, provided corroborative evidence.

As previously stated, in cases of rape, the primary and most compelling evidence typically arises from the victim's testimony. Therefore, the prosecution's case remains robust, and the failure to call the mentioned child as a witness does not significantly impact its strength, given the central importance of the victim's account.

The aforementioned ground of appeal lacks a valid foundation and is deemed unsuccessful. Furthermore, another ground posited by the appellant asserts that the prosecution failed to establish its case beyond a reasonable doubt.

In this case, the testimony of PW2, which remained credible and steadfast, conclusively demonstrated the occurrence of the four essential elements. This substantiated the commission of the offence of incest by the male involved, with the appellant identified as the perpetrator. Having thoroughly considered these aspects, I find no merit in the appeal and, as such, proceed to dismiss it.

I now turn to address the issue of the sentence imposed by the trial court. The trial court issued an omnibus sentence, which was deemed improper. When the appellant was found guilty and convicted on all three charges, the trial magistrate should have rendered a distinct sentence for

each count. In light of this being the first appeal, this court will assume the responsibility of sentencing the appellant as follows:

1. On the first count, the convicted person is sentenced to serve 30 years imprisonment.
2. On the second count, the convicted person is sentenced to serve 30 years imprisonment
3. On the third count, the convicted person is sentenced to serve 30 years imprisonment.

These sentences are to run concurrently.

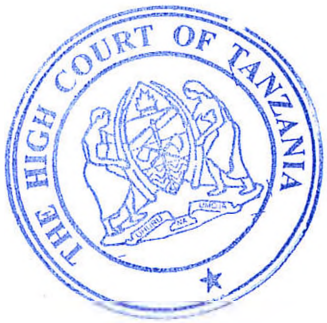
It is hereby ordered.

**Dated** at **Mbeya** this 14th November, 2023.

**M.B. MPAZE**
**JUDGE**

**Court:** Judgment delivered in the presence of the appellant in person and Ms. Imelda Aluko Public Prosecutor this 14th day of November, 2023.

Right of Appeal fully explained.




**M.B. MPAZE**
**JUDGE**
**14/11/2023**