IN THE HIGH COURT OF TANZANIA

(DAR ES SALAAM SUB DISTRICT REGISTRY)

AT DAR ES SALAAM

CRIMINAL APPEAL NO. 109 OF 2022

(*Originating from decision of the District Court of Temeke at Temeke in Criminal Case No. 65 of 2019 before Hon. C.M. MADILI- RM, dated 11th December, 2020)*

KHAMIS RAPHAEL MHINA.....APPELLANT

VERSUS

THE REPUBLIC.....RESPONDENT

JUDGMENT

Date of last Order: 12th December, 2022

Date of Judgment: 24th February, 2023

E.E. KAKOLAKI, J.

The appellant here in Khamisi Raphael Mhina, stood charged before the District Court of Temeke at Temeke with two counts namely; Incest by Males; contrary to section 158 (1) (a) of the Penal Code [Cap 16 R.E 2019 and Impregnating a School Girl; contrary to section 60 (a) (3) of the Education Act, [CAP 353 R.E 2002] as amended by section 22(3) of the Written Laws (Miscellaneous amendment) Act No.4 of 2016. It was alleged in the first count that, on diverse dates between June, 2017 and February 2019 at Mbagala Kiburungwa area within Temeke District in Dar es Salaam

region, the appellant did have prohibited sexual intercourse with one AH (name withheld) a girl of 15 years old who to his knowledge is his daughter. On the second count, it was alleged that, on same dates and place the appellant did impregnate one AH, a student of Mbande Secondary School.

Appellant flatly denied his charges. However, after full trial before the trial court, the appellant was found guilty and convicted on both count as charged and consequently sentenced to the mandatory sentence of 30 years for each count, the sentence that was ordered to run concurrently. Discontented with both conviction and sentence, the appellant challenges the decision through six (6) grounds of appeal summarised thus:

1. That the trial magistrate erred in law and fact to ignore the importance of evidence of DNA test in order to prove the veracity of Pw1's story.
2. The trial magistrate erred in law and fact in convicting the appellant relying on incredible evidence of PW1, the victim.
3. There is material discrepancies in the evidence of PW2, PW3 and PW6.
4. Trial court's failure to consider defence evidence.
5. Trial magistrate's failure to append signature immediately after plea taking.
6. That prosecution case was not proved beyond reasonable doubt.

In consequence thereof, the appellant prays this court to allow his appeal, quash conviction, set aside the sentence and release him from prison.

When this appeal was called on for hearing, the appellant prayed to proceed by way of written submission, the prayer which was conceded by the respondent and cordially granted by the Court by scheduling the filing orders which were followed religiously. The appellant proceeded unrepresented while the respondent represented by Mr. Hezron Mwasimba, learned Senior State Attorney.

In his submission appellant consolidated the 1st,2nd and 3rd grounds of appeal and argued the rest separately, while in his side the respondent joined ground No.3, 4 and 5 grounds of appeal and argued the rest separately. In addressing the grounds of appeal, I find it pleasing and just to respond to each ground of appeal if need be.

Supporting the first ground of appeal it was appellant's contention that, the trial magistrate failed to make adverse inference for prosecutions failure to conduct DNA test as ordered by the court at pages 19 and 20 of the typed proceedings. Appellant was of the view that, DNA test would bring forth material evidence in proving prosecution case as at the time of hearing the baby allegedly born after commission of offence was already born. According

to him, the omission casts doubt on the prosecution case for not submitting such important evidence which could support the truthfulness of PW1 (the victim). To bolsters his stance, he cited to the Court the case of **Daudi Rashid Vs. R**, Criminal Appeal No. 97 of 2020 (unreported) at page 11 paragraph 2 to page 12. Responding to this ground of appeal, Mr. Mwasimba admitted that, it is true DNA test evidence was not brought in court. He however took the view that, DNA test neither proves the offence of incest by male nor does it do to offence of impregnating a school girl. According to him, what matters is the credibility of prosecution witnesses to the alleged offence. He cited some passages from the proceedings, trying to prove that appellant was the victim's father. In winding up his submission he contended that, the trial magistrate strongly believed the evidence of the PW1 to be credible hence was justified to convict the appellant on both counts. He referred the court to the case of **Goodluck Kyando Vs. R**, [2006] TLR 363, stressing that, every witness is entitled to credence.

In rejoinder appellant maintained that, the prosecution's failure to tender in court such vital evidence of DNA examination report casted doubt on the prosecution case and prejudiced the appellant on the basis that the case was poorly investigated.

Having considered the rival submission by the parties, and upon perusal of trial courts record, it is my finding that, the court on 17/09/2020 ordered the appellant, the victim and the child to attend DNA laboratory to conduct DNA test. However, the same was not conducted and the record is barren of the reasons as to why the same was not conducted. Therefore, I subscribe to appellant submission that, the DNA test was not conducted and its report tendered. However, I differ with him on the contention that, the case could not be proved without DNA test. The reasons I am so holding is that, such test would not have establish an offence of incest by male. I therefore agree with Mr. Mwasimba's contention that, in cases of this nature, the only evidence bearing relevancy is that of prosecution witnesses especially the victim and credibility of their testimonies. Any medical tests on the accused part as contended by the appellant, is of no significance in cases such of incest by male for not proving sexual penetration, hence appellant's clamors is baseless. This ground of appeal lacks merit and I dismissed it.

On the second ground of appeal, it was appellant contention that, the PW1's evidence was so unmoved for casting doubt on the credibility and truthfulness of her evidence as she delayed to reveal the said story to any of her relative. In response, it was Mr. Mwasimba submission that, the trial

magistrate believed in prosecution witnesses who were consistence and credible, having taken into consideration the principle in sexual offences that, victim's evidence is so vital in proving the related offence. He referred the court to the case of **Selemani Makumba Vs. R**, Criminal Appeal No. 94 of 1999 (CAT), and **Mawazo Anyandwile Mwaikwaja Vs. DPP,** Criminal Appeal No. 455 of 2017 at page 20. He added that, the said evidence by PW1 is corroborated by that of PW6 at page 37 -39 of the typed proceedings, indicating the circumstances under which in several occasion PW6 found the appellant in fragirento de licto having sex with PW1. It was his prayer that the 2nd ground be dismissed.

In a short rejoinder appellant attacked Respondent's submission to the effect that PW6 found him having sex which his daughter. He contended that, if PW6's story is true, what steps then did he take?. In his view, PW6's evidence was full of bias and cooked story against him for the reasons best known to herself, while inviting the Court to find merit in this ground.

I have taken time to peruse the trial court's records in respect of the complaint raised on this ground as well as considering the rivalry submission by both parties. It is worth of note that, it is settled principle of law that, every witness is entitled to credence and must be believed and his testimony

accepted and accorded weight unless there are good and cogent reasons for not believing a witness. See the case of **Goodluck Kyando** (supra).

The appellant contention is that, the victim PW1 delayed to reveal the story to any relative thus casting doubt on credibility and truthfulness of her evidence. Looking at the record, especially at page 15, it is evident to this Court the victim was warned not to tell anyone such ruthless sexual exploitation, but later on she explained it to her aunt (Mama mkubwa). Apart from that, at page 16, the records paints in clear colour the evidence that, after discovery of appellant's illegal sexual exploitation of PW1, they tried unsuccessful at first to settle the dispute. To let PW1 speak for himself it is imperative I quote her evidence from page 16 of the typed proceedings:

> *"My parents settled the dispute when I was in Form one I started visiting my father's house with escort of my sister ..."*

With the above cogent evidence, I find appellant's allegations that, the victim did not report the incident is without basis and I discount it hence this ground is destitute of merit.

On the third ground it was appellant contentions that PW1's evidence is discrepant to that of PW2, PW3 and PW6 as it materially contradict in the manner the crime was said to be committed. He was of the view that,

evidentially, the evidence of PW1, PW2, PW3 and PW6 was improbable/implausible and contradictory the omission which renders their evidence valueless. He cited the case of **Aloyce Maridadi vs R,** Criminal Appeal No. 208 of 2016 (unreported)

According to him, if the evidence of PW1, PW2, PW3, and PW6 will be disregarded, the remaining prosecution evidence is insufficient, weak and unreliable to ground the appellant's conviction as their evidence was not of an eye but hearsay which is weak in law.

Responding to this ground of appeal, Mr. Mwasimba's submission was to the effect that, PW2 is a police officer who issued PW1 with a PF3, PW3 is Jamila Athuman, PW1's mother and PW6 is the appellant's wife who suspected the unusual behavior of her husband that made her believe that he had made love with his daughter at their matrimonial bed. In his view, the trial court considered such evidence by the prosecution side basing on the credibility of the prosecution evidence and found the same credible as per the case of **Goodluck Kyando**. He referred the court to page 3-8 of the typed proceedings and submitted that, it is obvious the trial court appreciated such credible evidence to reach her conclusion. In rejoinder appellant had nothing useful to add on this ground apart from reiterating her earlier stance.

I have dispassionately considered the fighting arguments by the parties on this ground. As alluded to above, it is a trite law that, every witness is entitled to credence and must be believed and his testimony accepted unless there are cogent and good reasons for not believing him/her such as the fact that, the witness has given improbable or implausible evidence or evidence has been materially contradicted by another witness. See the cases of **Goodluck Kyando** (supra) and **Mathias Bundala Vs. R,** Criminal Appeal No 62 of 2004.

In his submission the appellant never demonstrated to the court the alleged contradictory evidence rendering the prosecution witnesses incredible and unreliable. That aside, PW1 and PW2 was not relied by the Court to base appellant's conviction save for that of PW2 who confirmed the fact that PW1 was pregnant and that she had never had sexual affairs with another man. The only evidence which was relied much by the trial court was that of PW6, victim's stepmother and appellant's wife, whose evidence was straight forward corroborating PW1's version, as demonstrated at pages 37 to 38 of the typed proceeding which I find it useful to quote:

> *We also lived with Asma Hamisi daughter Asma is a child of another woman I found him with his daughter at around 12*

nights, he told her twende ukooge, he took her to the bath room…He told her to undress herself and ordered her to sit on the floor while naked ad covered her with a bed sheet, her father also joined her under a bed sheet but he was in a short trouser I heard a girl raising voice, baba sitaki! I asked what was the problem! I told them njooni mfanye mambo yenu sebleni but when I ameed he took of the bed sheet. I found him naked I left.

…I found my bed very rough, my husband in a towel and his daughter going to take birth covered in Khanga…

In totality, I entertain no doubt that, the above evidence corroborates PW1's evidence in proving that appellant was indeed having prohibited sexual affairs with his daughter as it does not contradict PW1's evidence at all. Thus this ground is also wanting in merit and I dismiss it.

I will now jump to the 5th ground where the appellant's contention is that the trial magistrate did not append his signature after the plea taking in order to show the appropriacy of the procedure and authenticity in recording the court proceedings. He contended that, the provisions of section 210 (1)(a) of the Criminal Procedure Act, is coached in mandatory terms and failure of the trial magistrate to comply with it fatal and vitiates the whole proceedings

and the judgment composed there on. He prayed the court to allow this ground on its merit.

In rebuttal, it was Mr. Mwasimba's contention that, going through the record it is not true that signature was not appended. According to him the records of 16th October, 2019 at page 2 of the typed proceedings a signature was appended. He was of the view that, even if there was an omission still could not have occasioned miscarriage of justice as the same is curable under section 169 of the CPA, [Cap 20 R.E 2022].

I have carefully perused the lower courts records, which reflect genuinely what transpired in court. It is the law that, court record is a serious document representing what actually transpired in court hence cannot easily be impeached. It was held in the case of **Halfani Sudi Vs. Abieza Chichili**, [1998] TLR 527 that:

> *(ii)A court record is a serious document It should not be lightly impeached.*
>
> *(ii) There is always a presumption that a court record accurately represents what happened in court.*

Looking at the trial court record in this matter, especially the handwritten one, I think this ground need not detain this Court much as it is

conspicuously seen that, the trial magistrate signed the records after plea. Therefore, this ground is also bound to fail.

Last for consideration is the 4th and 6th grounds of appeal where the appellant's contention is that the defence evidence was not considered and that the case was not proved beyond reasonable doubt. In these grounds it was appellants submission that, the trial magistrate failed to render a critical, objective and conjunctive evaluation, analysis, assessment and sufficiently consider the defence case, the omission which resulted into serious error amounting to miscarriage of justice and as such constituted a mistrial. In his view, failure to make proper evaluation analysis, weighing and considering the defence evidence renders the trial court judgment defective in substance as the omission deny the appellant a fair trial. To cement his argument, he cited the case of **Hussein Iddi and Another Vs. R** (1986) TLR 166, and **Mkaima Mabagala Vs. R,** Criminal Appeal No. 267 of 2006 (CAT-unreported) both stressing on the importance of considering defence evidence.

On the 6th ground it was the appellant's submission that, the prosecution has failed to prove its case beyond reasonable doubt as per requirement of section 3(2) (a) of the Evidence Act, [Cap 6 R.E 2019]. He also cited the

court's decision in the case of **Joseph John Makune Vs. R** (1986) TLR at page 44 to 49, articulating prosecutions duty to prove its case against the accused.

In rebuttal, Mr. Mwasimba contended that, the defence evidence was well analyzed at page 10 of the judgment. He maintained that the trial court was right to convict him, and the case by the prosecution side was proved beyond the shadow of doubts.

It is uncontroverted fact that appellant was charged with the offence of Incest by males which is an offence provided for under section 158 (1) and (2) of the Penal Code, and Impregnating a School Girl, contrary to section 60 (a) (3) of the Education Act, [CAP 353 R.E 2002] as amended by section 22(3) of the Written Laws (Miscellaneous) amendment Act No.4 of 2016. Section 158 (1) and (2) of the Penal Code provides:

> *"(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 age of less than eighteen years, to imprisonment for a term of not less than thirty years. (2) It is immaterial that the sexual intercourse was had with the consent of the woman."*

From the above exposition of the law, it is clear to me that an involvement in a prohibited sexual intercourse, and knowledge of the relationship by the accused person constitute key ingredients of the offence of incest. This position of the law was cemented by the Court of Appeal in **Festo Mgimwa v. Republic**, CAT-Criminal Appeal No. 378 of 2016 (unreported), at page 9 when held thus:

> *"In a charge of incest by males, the prosecution must prove that the accused knew the female as his grandmother, daughter, sister or mother at the time of sexual intercourse."*

In the present case, the prosecution sufficiently proved that the appellant had carnal knowledge of PW1 while knowing that she is her daughter, the act that resulted into impregnating her own daughter as even the appellant does not dispute to be biological father of PW1. The testimonies of PW1, and PW6 laid bare truth on how the appellant indulged in sexual intercourse with the victims on different occasions. The prosecution's testimony demonstrated above, coupled with the appellant's undeniable knowledge that PW1 is his own daughter, shows that appellant was under a prohibited relationship which would not allow him indulging in any sexual relations with PW1. In my considered view, the totality of this testimony succeeded in

proving the appellant's liability beyond reasonable doubt, and I find no reason to doubt or reverse the trial court's findings. This ground also is destitute of merit, thus the same is dismissed.

I have also taken time to peruse the trial courts records in respect of the contention that the trial court did not consider the defense evidence. It is the law that in criminal cases the accused does not have to prove his innocence but rather to raise doubt on prosecution evidence. On my perusal of the record, especially page 8 of the impugned judgment appellant, I find appellant's defence was well considered and the trial magistrate was of the firm view that, the same did not raise any doubt to the prosecution case. Apart from denying the involvement in the commission of the crime the appellant alleges that, her daughter had unusually condition of running and loosing conscious and that the same might be caused by a person who sexually abused her. That evidence did not raise any doubt on prosecution case, as even that suspected person was never mentioned by him (appellant).

That said and done, it is my findings that, this appeal lacks merit and it is hereby dismissed in its entirety.

It is so ordered

Dated at Dar es Salaam this 24th February, 2023

E. E. KAKOLAKI

JUDGE

24/02/2023.

The Judgment has been delivered at Dar es Salaam today 24th day of February, 2023 in the presence of the appellant in person, Ms. Fidesta Uiso, State Attorney for the respondent and Ms. Tumaini Kisanga, Court clerk.

Right of Appeal explained.

E. E. KAKOLAKI
JUDGE
24/02/2023.