IN THE COURT OF APPEAL OF TANZANIA

AT MUSOMA

(CORAM: WAMBALI, J.A., KITUSI, J.A. And MASHAKA, J.A.)

CRIMINAL APPEAL NO. 516 OF 2019

CHORA S/O SAMSON @ KIBERITI ..... APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

(Appeal from the judgment of the High Court of Tanzania at Musoma)

(Kahyoza, J.)

Dated the 27th day of September, 2019
in
Criminal Appeal No. 50 of 2019

JUDGMENT OF THE COURT

25th October & 1st November, 2021

KITUSI, J.A.:

This appeal originates from a decision of the High Court sitting on appeal from a decision of the District Court in a case of rape, but not the usual type. This is because, although the appellant was charged under the normal provisions of section 130(1) and (2) (b) and 131(1) of the Penal Code, for having sexual intercourse with a woman without her consent, it was alleged that the woman he had sexual intercourse with on 26/12/2017 at Burunga village in Serengeti District, was his

own mother. We shall henceforth refer to the woman simply as the victim or PW1.

The main story tellers for the prosecution's case were PW1, aged 65 years, and an 80 – year old woman known as Nyambura Kiberiti (PW2), who introduced herself in court as sister to the appellant's father, therefore his aunt. PW1 testified that she is a mother of eight children, and the appellant, aged 27, is her last born, with whom she lived in her house at Burunga village. According to the undisputed evidence, that is the village PW2 also lived in.

On 26/12/2017 at around 21:00 hours PW1, clad in a "kitenge", was in the kitchen cooking. Suddenly, she said, the appellant pushed the door open, entered the kitchen and had sex with her by force. PW1 raised alarm to seek help from people, about the same time as PW2 was proceeding home passing by PW1's home. Given the position in which she was at the moment, PW2 heard the alarm, and went to PW1's house and she saw the appellant escape. PW1 told PW2 that the appellant had been raping her before he fled.

On 27/12/2017 in the morning, PW1 feeling sick, sent for the village sub-chairman to go to her home to attend to a problem. The village sub-chairman one Nyakweli Nyamse (PW4), went to PW1's home

where he was told of the events of the previous night that had been committed by the appellant. He decided to go in search for the fugitive who, it was said, had gone into hiding in a mining village known as Park Nyigoti.

PW4 had the appellant apprehended at that mining village and handed over to the Police at Mugumu District station, where he was interrogated by D/Sgt Titus (PW5). According to PW5, the appellant admitted being PW1's son but denied raping her. There was also evidence of David Samwel Nyanokwe (PW3), a Medical Officer who examined PW1 on 4/1/2018, that he detected that her vagina was swollen and bruised. The trial court admitted the PF3 with the above findings as exhibit P.E 1.

In defence, the appellant did not seek to challenge the witnesses for the prosecution, rather he told his own story of how, from 27/12/2017 to 3/1/2018, he had continued to live his normal life, working as a casual labourer during the day and retiring home for the night. Going by his defence, his arrest on 3/1/2018, came as a surprise to him because, he said, he had done nothing wrong. He further said that he did not cross examine PW1 on her testimony because he could not impeach his own mother.

The District Court found PW1 a credible witness who could not tell a lie against the appellant, her own son. Therefore, on the evidence of PW1, PW2, PW4 and PW5, the trial court concluded that the old woman had been raped, and raped by none other than the appellant. It sentenced the appellant to imprisonment for 30 years

On appeal to the High Court, the appellant faulted the trial court's decision for finding PW2 and PW4 as credible witnesses while their evidence was hearsay; for the Medical Officer concluding that PW1 had been raped while he did not detect sperms in her vagina; for not questioning the delay of PW1 in submitting herself for medical examination and; for not resolving the issue of visual identification of the perpetrator of the offence. In his oral address to the High Court, the appellant raised, for the first time, the contention that PW1 was not his biological mother, but a step mother with whom he had a conflict over land left by his parents. And added that PW1 and her divorced daughters had concocted the rape case only to get rid of him.

After discussing at length the difference between rape and incest by male, and whether the charge preferred against the appellant should have been incest by male or rape, the learned High Court judge settled for rape, and concluded that the appellant had been rightly charged,

convicted and sentenced. Aggrieved with that decision, the appellant has preferred this appeal to the Court.

There are six grounds of appeal on the basis of which we shall determine this appeal. Intentionally avoiding to reproduce the grounds of appeal in their complex nature, the six grounds of appeal when paraphrased are to the following effect: -

1. *Since proof of penetration as required by section 130(4) of the Penal Code was not established by PW1 or PW3 or the PF3, there was no proof of rape.*
2. *The conviction based on PW1's testimony was bad because she did not pass out as credible.*
3. *The medical findings found on the PF3 had no scientific justification so they were unreliable.*
4. *The trial court did not consider the appellant's defence.*
5. *The prosecution failed to establish by evidence the time and place of the alleged rape as well as the condition in which PW1 was before the rape.*
6. *The Court did not resolve the question of visual identification in an unfavourable condition.*

Hearing proceeded in the presence of the appellant who was linked by video from Musoma Prison. The appellant did no better than adopt the grounds of appeal. Even after the State Attorney had submitted in support of the conviction and sentence, the appellant merely asked us to do justice by considering those grounds of appeal. The respondent Republic had the services of Mr. Kainunura Anesius, learned Senior State Attorney, Mr. Moses Mafuru and Frank Nchanila, both learned State Attorneys. It was Mr. Nchanila who addressed us.

Before he could make his formal address, we asked Mr. Nchanila to address us on the statement that the learned High Court judge made in his judgment, on the distinction between rape and incest. The statement of the learned judge goes as follows: -

> *"In the instant case, it makes no difference whether the appellant was charged under section 130 (1) and (2) (b) or under section 158 both of the Penal Code because the elements are the same, it was alleged that the appellant had carnal knowledge with a woman without her consent and that woman happened to be his mother. Even if the proper section would have been section 158 of the Penal Code, I would hold that there was no miscarriage of justice. Both offences have similar ingredients, the appellant's defence depicts that he knew the nature*

of the offence he was facing and made a defence. He was not by any means prejudiced by being charged under section 130 (1) and (2) (b). Not only that, but the punishment is similar for both offences."

Addressing us on the issue we raised *suo mottu*, the learned State Attorney submitted that the intention of the legislature in enacting the provisions of section 158 of the Penal Code which create the offence of incest by male, was to criminalize sexual relationships between people of opposite sex belonging to the same lineage as defined under that provision. Under section 158 of the Penal Code, he submitted, an offence of incest by male is committed irrespective of whether or not there is consent from the woman. Mr. Nchanila pointed out that under such circumstances, the ingredients of incest by male are different from those of rape, and that the sentences are also different. The appellant had nothing to say on this issue.

With respect, we agree with the learned State Attorney that whereas consent is an element in cases of rape involving adult victims, as in this case, it is irrelevant in cases of incest by male where the intention, as rightly submitted by Mr. Nchanila, is to prohibit sexual relationships between people of same blood even if they consent. Obviously, it means that some cases of incest by male may qualify to

be rape where sexual intercourse with a prohibited partner is obtained without consent of the female. The two offences also carry different sentences, as rightly pointed out by Mr. Nchanila, because the minimum punishment for rape of a female of the age above 18 years, under section 130 (1) and (2) (b) and 131 (1) of the Penal Code, is 30 years imprisonment, while the minimum punishment for incest by male committed against a female of above 18 years is, under section 158 (1) (b) of the Penal Code, 20 years imprisonment.

Therefore, as we have demonstrated above, although both in rape and incest there is sexual intercourse involving a man and a woman, the other ingredients are different. However, we agree with the learned judge of the High Court that it was correct in this case to proceed against the appellant under the provisions of section 130 (1) and (2) (b) and 131 (1) of the Penal Code, because it was alleged that he had carnal knowledge of a woman without her consent.

Turning to the substantive grounds of appeal, Mr. Nchanila readily conceded to ground 3 that challenges the admissibility of the PF3 which was tendered by the public prosecutor. Citing the case of **Athumani Almas Rajabu vs Republic,** Criminal Appeal No. 416 of 2019 (unreported), the learned State Attorney prayed that we expunge the

PF3 because, he said, the role of a prosecutor does not extend to tendering documents which is supposed to be done by witnesses in a case. We have no hesitation in going along with Mr. Nchanila on both the principle that public prosecutors are not competent to tender exhibits in cases which they prosecute, and on the consequences that we should therefore expunge the PF3 tendered in that style. There are many other decisions on this point which prove Mr. Nchanila's argument right. See also **DPP vs Festo Emmanuel Msongaleli and Another,** Criminal Appeal No. 62 of 2017 and **Willy Kintinyi @ Marwa vs Republic,** Criminal Appeal No. 511 of 2019 (both unreported). We thus expunge the PF3, which was tendered as exhibit PE 1.

Next, Mr. Nchanila argued grounds 1 and 2 together. The learned State Attorney was of the view, and we agree, that the two grounds address a common complaint. That is, the trial court and the first appellate court should not have acted on medical findings and on PW1's testimony to conclude that rape had been committed against PW1. The complaint was based on the assertion that the PF3 lacked scientific analysis, and that PW1 was not credible. The learned State Attorney submitted that much as we cannot make reference to the PF3 any longer having expunged it, we are still entitled to consider the oral

testimony of PW3. The learned State Attorney cited the decision of the Court in the case of **Jacob Mayani vs Republic,** Criminal Appeal No. 558 of 2016 (unreported) to support his argument. In our deliberation on this point, we take note that the law on this is now settled, that a witness whose oral evidence refers to the contents of a document he prepared or has knowledge of, may still have his evidence considered even if the document has been expunged. There is also the case of **Chrizant John vs Republic,** Criminal Appeal No. 313 of 2015 (unreported), to support that position. We agree with Mr. Nchanila, so we shall consider the oral evidence of PW3.

That means, we shall consider the evidence of PW1, PW2, and PW4, including the oral evidence of PW3, in relation to the issue whether or not PW1 was raped.

Mr. Nchanila submitted that PW1 testified that the appellant raped her and she divulged that information to PW2 who arrived at the scene of the alleged crime immediately as the appellant was escaping. In addition, PW1 reported the matter to the village sub chairman (PW4), on the following morning. Mr. Nchanila submitted that the immediate disclosure of the commission of the offence and mentioning the culprit at the earliest possible time, is an assurance to PW1's

credibility. He cited the case of **Marwa Wangiti Mwita and Another vs Republic** [2002] TLR 39. Further that the testimonies of PW2, PW3 and PW4 rendered support to PW1's evidence that she was raped.

In dealing with ground 4 that faulted the two courts below for not considering the defence case, Mr. Nchanila submitted that the trial court considered it at page 4 of its judgment or page 56 of the record of appeal. With regard to the complaint of lack of proof of visual identification featuring as grounds 5 and 6, the learned State Attorney submitted that the evidence of PW1 and PW2 in relation to the appellant's identity was rather evidence of recognition and there was no possibility of mistake. The case of **Makende Simon vs Republic,** Criminal Appeal No. 412 of 2017 (unreported) was cited by him.

Mr. Nchanila prayed for dismissal of this appeal.

Responding to the foregoing submissions, the appellant prayed for justice to be done to him. He raised, again, the contention that PW1 is his step mother whose mission is to drive him out of the house, a fact he raised at the District Court but his complaint fell on a deaf ear.

To do justice is our duty, and we shall start by considering grounds 1 and 2 of appeal, whether the evidence adduced by the

prosecution proves that PW1 was raped. At this point we wish to recall that PW1's testimony that she was raped, was not contradicted by way of cross-examination by the appellant. And that later during the appellant's defence when the prosecution put a question to him why he did not impeach PW1's testimony by way of cross examinations, he explained that he could not have impeached his own mother.

We think the cherished principle in **Goodluck Kyando vs Republic** [2006] TLR 263 that every witness is entitled to credence, becomes all the more sacred when the evidence of such a witness goes unimpeached. The appellant's defence, which we are satisfied was considered by the trial court as argued by Mr. Nchanila, that there was bad blood between him and PW1, was an afterthought which he had not earlier hinted on by way cross-examination. We have to reiterate the position in **Nyerere Nyague vs Republic,** Criminal Appeal No.67 of 2010 (unreported) on what it entails for a person not to cross examine a witness on an important point. We said: -

> *" As a matter of principle a party who fails to cross examine a witness on a certain matter is deemed to have accepted that matter and will be estopped from asking the trial court to disbelieve what the witness said".*

Previously, in a scenario like this, where an accused person plays seek and hide, we have held it unacceptable, because the accused's theme of defence should be known early so as to enable the prosecution know it beforehand. We have held so in the case of **DPP vs Ngusa Keleja @ Mtangi and Another,** Criminal Appeal No. 276 of 2017, in which we cited our earlier decision in **John Madata vs Republic,** Criminal Appeal No. 453 of 2017 (both unreported).

For those reasons, we endorse PW1 as a credible witness, not forgetting the fact that she reported the incident to PW4, a village leader, within a short time of her being able to do so. The evidence of PW2 who arrived at the scene immediately and that of PW3 and PW4 support the story of PW1. It is our finding that there was evidence that PW1 had been raped, and therefore the complaints in grounds 1 and 2, that there was no such evidence have no merits, and stand dismissed.

As for the identity of the perpetrator of the rape, a complaint in grounds 5 and 6, we go along with the learned State Attorney in that there was no possibility of PW1 and PW2 mistaking the appellant for anyone else. We need not determine whether PW1 is the appellant's biological mother or not, because that is not relevant in determining whether or not rape was committed against her. But we think the

appellant's proposition that we should take the story of PW1 and PW2 as a fabricated one, is to ask us to stretch our imaginations to strange levels.

When we assess the credibility of PW1 and PW2 within the context of human realities, we are increasingly of the view that they are truthful witnesses and it is very unlikely that they could fabricate the case. Invariably, the Court said the same in the case of **Mathias Bundala vs Republic,** Criminal Appeal No. 62 OF 2004 (unreported) that: -

> *"In our considered judgment if a witness is not an infant and has normal mental capacity as were PW1 Massawe, PW2 Amani, PW3 Ngasa and PW5 Lazaro, the primary measure of his/her credibility is whether his or her testimony is probable or improbable when judged by the common experience of mankind."*

We are inclined to take the same approach in respect of PW1 and PW2. We find it highly improbable that such elderly women would concoct a story, in which one fakes as a victim of rape committed by her own son, and the other, an aunt to the suspect, supports that story.

As for the appellant's belated allegation that PW1 fabricated the story so as to get rid of him, we consider it a shot in the dark too.

While an attempt has been made by the appellant to discredit PW1 by saying she is not his biological mother, nothing has been said by him to discredit PW2 who is his aunt. About the appellant's story, we would only repeat what the Court said in **Mwita Kigombe Mwita and Another vs Republic,** Criminal Appeal No. 63 of 2001 (unreported) that: -

> *"We think that PW1 was attempting to tell a very improbable story badly. It is out of the ordinary for a normal human being who was aware that his/her spouse was about to be killed soon by a known person not to take preventive measures and instead kept over that life-threatening information to herself instead of at least cautioning the deceased about it..."*

Similarly, in our case, it does not appeal to logic that the appellant would withhold relevant information that would exonerate him from serious allegations of rape of his own mother or step mother, made by the said mother or step mother and supported by his aunt. The appellant's suggestion that he kept the truth of the matter to himself all this time because of respect for his mother, contradicts his subsequent assertion that the woman is, after all, not his biological mother. Instead, we think the appellant's silence presupposed

acceptance of PW1's evidence which he later tried to discredit by telling an imaginary bad story badly. We conclude that the appellant's defence did not raise any reasonable doubt to the prosecution case, as rightly concluded by the two courts below.

In conclusion, all grounds of appeal, except ground 3 which was conceded to by the learned State Attorney, have no merit, rendering the appeal devoid of merit. We dismiss it in its entirety.

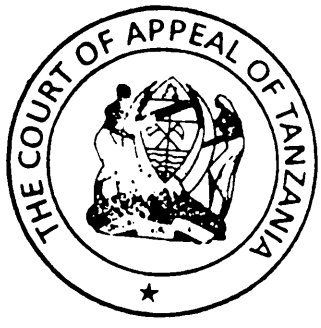
DATED at **MUSOMA** this 29th day of October, 2021

F. L. K. WAMBALI
JUSTICE OF APPEAL

I. P. KITUSI
JUSTICE OF APPEAL

L. L. MASHAKA
JUSTICE OF APPEAL

The Judgment delivered this 1st day of November, 2021 in the Presence of Mr. Frank Nchanila, learned State Attorney for the Respondent/Republic linked though video conference and the Appellant appeared remotely via Video link from Musoma Prison is hereby certified as a true copy of the original.



F. A. MTARANIA
DEPUTY REGISTRAR
COURT OF APPEAL