IN THE COURT OF APPEAL OF TANZANIA
AT DODOMA

(CORAM: KWARIKO, J.A., LEVIRA, J.A., And KENTE, J.A.)

CRIMINAL APPEAL NO. 326 OF 2021

KANAKU KIDARI..... APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

(Appeal from the Judgment of the Resident Magistrate's Court of Dodoma at Dodoma)

(Dudu, PRM Ext. Jur.)

dated the 15th day of June, 2021
in
Extended Jurisdiction Criminal Appeal No. 11 of 2021

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JUDGMENT OF THE COURT

24th April & 4th May, 2023

KWARIKO, J.A.:

This is a second appeal in which the appellant Kanaku Kidari who was aggrieved by the decision of the Court of Resident Magistrate of Dodoma Extended Jurisdiction (the first appellate court) which dismissed his appeal against the decision of the District Court of Kondoa (the trial court) is appealing against that decision. Before the trial court, the appellant was charged with the offence of incest by males contrary to section 158 (1) (a) of the Penal Code [CAP 16 R.E. 2019]. The particulars of the offence were that on 13th June, 2020 at Paranga Village in Chemba District within Dodoma Region, the appellant had sexual intercourse with

his sister aged 13 years, whom we shall refer by the acronym 'FK', the victim or PW1 to protect her identity. The appellant denied the charge but, in the end, he was convicted and sentenced to imprisonment of thirty years.

At the trial, the prosecution case was built upon evidence of a total of seven witnesses and one documentary exhibit. The material facts of the case as can be deduced from the evidence of those witnesses are as follows: The appellant and the victim are siblings sharing a father but different mothers. Their father had already died at the time of the incident. On the material date, the victim who testified as PW1 had gone to pick vegetables at a pond and was in the company of one Hassan Said (PW4). While there, the appellant appeared and asked whether she had knowledge if any person was present at home. PW1 answered that there was nobody at home after which the appellant asked her to accompany him there. However, before they reached home, the appellant forced her into the bush, pushed her down, undressed her pants and had sexual intercourse with her. According to PW1, though she felt pain, she failed to raise an alarm since the appellant had grabbed her neck.

Thereafter, PW1 went home and informed her grandmother/neighbour one Hadija Ally (PW2) who inspected her and

found blood in her vagina. PW1's mother 'MY' (PW3) and step father 'JL' (PW5) (names disguised to protect the identity of the victim), were informed of the incident and subsequently reported it to the Village Executive Officer and later to the Police Station. PW1 was taken to Chambalo Dispensary where Dr. Admon M. Chiwanga (PW6) examined her. According to PW6's testimony, PW1's vagina had bruises, there was no blood or sperms but he concluded that there was penetration. His findings were posted in the PF3 which was admitted in evidence as exhibit P1.

The appellant was the only witness in his defence. He denied the allegations and testified that on the material day he was at the home of his aunt, one Toloda at Endakidengu hamlet. He left there at 9:00 am and went to his uncle's home to assist him with some chores. He slept at his uncle's home but later was arrested by a militiaman. The appellant went on to account that on 8th June, 2020, he saw PW1 and PW3 grazing cattle in his father's farm and stopped them but PW3 claimed that the farm belonged to her husband. This led to a quarrel between them, which was reported to elders and later, PW3 apologized. Surprisingly, he was arrested on 13th June, 2020 for the present allegations.

At the end, the trial court found that the prosecution case was proved beyond reasonable doubt against the appellant, entered conviction and sentenced him as indicated earlier. Aggrieved by that decision, the appellant lodged an appeal in the High Court of Tanzania at Dodoma. However, by an order dated 9th April, 2021, in terms of section 45 (2) of the Magistrates' Act [CAP 11 R.E. 2019], the High Court transferred the appeal to the Court of Resident Magistrate of Dodoma at Dodoma to be heard and determined by Dudu, Principal Resident Magistrate with Extended Jurisdiction. The appeal was found unmerited and was consequently dismissed.

Before this Court, the appellant raised a total of seven grounds of complaint which we have paraphrased as follows: **one,** that the charge was incurably defective as the evidence on record did not prove the particulars of the offence that the appellant and the victim are blood relatives; **two,** the appellant's defence evidence was not considered; **three,** the prosecution evidence was from the same family members; **four,** the case against the appellant was framed due to a land dispute between the appellant and the victim's mother; **five,** the evidence of the medical doctor was not properly analysed; **six,** the prosecution evidence lacked corroboration as the victim's underpants were not tendered in

evidence; and **seven,** the charged offence was not proved beyond reasonable doubt.

At the hearing of the appeal, the appellant appeared in person, unrepresented, whereas the respondent Republic had the services of Ms. Catherine Gwaltu, learned Principal State Attorney assisted by Mses. Grace Mpaliti and Sarah Anesius, both learned State Attorneys.

In his submission in support of the appeal, the appellant adopted his grounds without further clarification and paved way for the respondent to reply, while reserving his right to rejoin where necessary.

On the other hand, Ms. Mpaliti argued the appeal for the respondent and she started by declaring that they were not supporting the appeal. As regards the first ground, the learned State Attorney contended that the charge was not defective since the evidence by PW1 and PW3 was to the effect that the appellant is a brother to the victim as they share the same father. She continued that the appellant did not cross-examine PW3 on his relationship with the victim which means her evidence was the truth. The learned counsel referred us to the decision of the Court in the case of **Amos Jackson v. Republic,** Criminal Appeal No. 439 of 2018 (unreported) which observed that failure to cross-examine a witness on important matter signifies the truth of the witness's evidence. Ms. Mpaliti

wound up this ground by contending that the offence of incest by male was established.

The appellant's complaint in the second ground is that his defence was not considered. Responding, the learned State Attorney argued that this complaint has no merit because the trial court at page 54 of the record of appeal and the first appellate court at page 82 did consider the appellant's defence and found it unmerited.

In the third ground, the appellant has complained that the two courts below erred in law to believe the prosecution evidence from members of the same family. Opposing this ground, Ms. Mpaliti argued that apart from PW1, PW3 and PW5 who were members of the same family, there was evidence from non-family members, namely; PW2, PW4, PW6 and PW7. She added that there is no law which prohibits family members from testifying in a case which they have knowledge. She buttressed her contention with the decision of the Court in the case of **Edward Nzabuga v. Republic,** Criminal Appeal No. 136 of 2008 (unreported).

The appellant's complaint in the fourth ground of appeal is that this case was framed against him for the reason of the land dispute between him and the victim's mother (PW3). It was the respondent's contention in

this ground that, had there been a truth in this complaint, the appellant would have raised it by way of cross-examination when PW3 was testifying. The learned State Attorney argued further that, even if there was such dispute, in his defence, the appellant had said that the same was already settled before the local area leaders.

That the medical doctor's evidence was not analysed forms the bone of contention in the appellant's fifth ground of appeal. In response to this claim, the learned State Attorney argued that the duty of the medical doctor (PW6) was to establish if the victim was sexually assaulted, which duty was performed and well reported and in effect. That, PW3 did not testify on the identity of the victim's assailant. She further contended that the best evidence in a sexual offence is from the victim of the offence where PW1 well explained the appellant's involvement in the commission of the offence.

The appellant's complaint in the sixth ground is that the prosecution evidence was not corroborated, for instance by production in evidence of the victim's underpants. Challenging this ground, Ms. Mpaliti argued that the non-tendering in evidence of the underpants was not an issue before the trial court. She contended that the crucial issue was whether the victim was sexually assaulted.

The last ground is whether the prosecution case was proved beyond reasonable doubt. The learned State Attorney argued that the prosecution case was sufficiently proved since there was proof that the appellant and the victims are siblings sharing the same father. That the victim who was the best witness established that it was the appellant who collected her from the place where she was picking vegetables on pretence to go home but raped her on the way, and she mentioned him to PW2 soon after she got home.

The appellant was very brief in his rejoinder submission. He denied to have committed the offence and queired that, apart from PW1, there was no any other witness of the alleged incident. He implored us to allow his appeal.

Having considered the submissions from the parties, we are now ready to deliberate on the grounds of appeal. Beginning with the first ground, we think what the appellant meant is that the prosecution evidence did not prove the particulars of the offence alleging that the victim is his blood sister rather than the defectiveness of the charge. We have considered this ground and we are in agreement with the respondent that the complaint has no merit. This is because the particulars of the offence were proved by the prosecution evidence. PW1 testified that the

appellant is her brother sharing their father who is deceased. This evidence was supported by PW1's mother, PW3 who was also the appellant's step mother. PW2, a neighbour to PW1 and PW3 was of the same testimony together with PW3's husband, PW5. As correctly argued by Ms. Mpaliti, the appellant did not cross-examine PW3 or any of the witnesses who testified that he was the victim's brother from the same father. This connotes that the witnesses testified the truth. Faced with an akin situation in the case of **Nyerere Nyague v. Republic,** Criminal Appeal No. 67 of 2010 (unreported), the Court observed that:

> *"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."*

[See also **Amos Jackson** (supra)].

Not only the evidence from the prosecution, but also in his defence, the appellant testified at page 27 of the record of appeal as follows:

> *"I know Mwajuma is the mother of Fatuma. Fatuma is my young[er] sister we share the same father who is deceased by now. Mwajuma Yamadei is my step mother as she was the wife of my deceased father."*

With the foregoing analysis, the first ground of appeal fails.

In the second ground, we are in agreement with the respondent's counsel that the two courts below considered the appellant's defence. First by the trial court at page 54 of the record of appeal and the first appellate court at page 82. Mainly, in his defence, the appellant complained that the allegations were framed against him because of the land dispute between him and PW3. Both courts were rightly at one that this defence was an afterthought as the appellant did not cross-examine PW3 on the alleged land dispute. This ground also fails.

Regarding the complaint in the third ground, we are at one with the respondent that the prosecution evidence comprised also non-family members like PW2, PW4, PW6 and PW7. Nonetheless, there is no law which prohibits family members from giving evidence in a case but rather what matters is their credibility. In the cited case of **Edward Nzabuga** (supra), when the Court encountered a similar complaint, it observed thus:

> *"At any rate, even if they were relatives there is no law in this country barring near relatives from testifying on an event they witnessed or saw. It is no wonder therefore, that* ***section 143 of the Evidence Act*** *(CAP 6 R.E. 2002) (now CAP 6 R.E. 2022) does not put a limit on a number of witnesses required for the proof of any fact. What*

matters in a criminal trial is the weight or credibility to be attached to the evidence of the witnesses before grounding a conviction."

Therefore, in the light of the above stated position, this ground fails.

In the fourth ground, we are in all fours with the respondent that, if at all the appellant believed that the case was framed against him due to the land dispute between him and PW3, this matter must have been raised during the trial, specifically when PW3 gave her evidence. Failure by the appellant to cross-examine PW3 on the alleged land dispute, it means that there was no such matter and PW3's evidence remained to be an established fact. See the case of **Nyerere Nyague** (supra). After all, as correctly argued by the respondent, the appellant said in his defence that the land matter was resolved before the local area leaders. This ground too has no merit.

The appellant's complaint in the fifth ground is that the evidence of the medical doctor (PW6) was not analysed. Again, we are in agreement with the learned State Attorney's submission that, importantly, PW6 was called upon to give evidence on what he found when he examined the victim following the alleged incident. In his evidence, he said that, upon examination, he found bruises in the victim's vagina, there was no blood or sperms and concluded that the vagina had been penetrated. This

evidence was analysed by the trial court at pages 46 to 47 of the record of appeal and the first appellate court at page 91. It is our further view that, PW6 was not called upon to testify on who had committed the alleged sexual offence. This ground is barren of merit.

The complaint by the appellant in the sixth ground is that the prosecution evidence was not corroborated. He gave an example of non-production in evidence of the victim's underpants. On our part, we agree with the respondent's contention that the issue before the trial court was not the victim's underpants. The issue was whether the victim was sexually assaulted and whether the appellant was the perpetrator. If we may add, there is no evidence to show that the underpants had been collected by the police to form part of exhibits or it had any incriminating matters in connection with the alleged sexual act. Generally, the direct evidence was given by the victim and corroborated by PW6 in case of her being sexually assaulted and circumstantially supported by PW4 who saw the appellant collecting her from the pond where the two were picking vegetables. This ground also flops.

We now come to the last ground as to whether the prosecution case was proved as required in law. It is trite law that the best evidence in a sexual offence comes from the victim (**Seleman Makumba v. Republic**

[2006] T.L.R. 379). In the case at hand, PW1 sufficiently proved that the appellant with whom she shares the father took her from the area where she was picking vegetables on the pretence that they were heading home but instead raped her. This evidence was circumstantially supported by PW4, who was together with PW1 and witnessed the appellant whom he knew to be her brother taking her away. She reported the incident to PW2 soon after she reached home. The appellant said in evidence that he had no grudges with PW2. The appellant did not front any reason as to why PW1 would have implicated him with this serious allegation. His defence that the case was framed due to a land dispute between him and the victim's mother, PW3 has failed as we have already shown earlier. PW2, PW3 and PW5 all testified that the appellant and the victim are brother and sister, respectively sharing the same father who is now deceased.

As to whether the victim was sexually assaulted, her evidence was corroborated by PW2 who said she found blood in her vagina soon after she reported the incident and PW6 who medically examined her and found bruises in her vagina, signifying penetration. In totality, the prosecution case has proved that the appellant and the victim are blood relatives sharing the same father. It has also proved that the appellant sexually assaulted the victim. We are therefore settled in mind that the offence of

incest by male against the appellant was proved beyond reasonable doubt. This ground is also rejected.

In the event, we find the appeal without merit and we hereby dismiss it in its entirety.

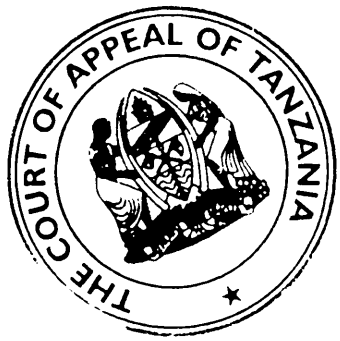
DATED at **DODOMA** this 3rd day of May, 2023.

M. A. KWARIKO
JUSTICE OF APPEAL

M. C. LEVIRA
JUSTICE OF APPEAL

P. M. KENTE
JUSTICE OF APPEAL

The Judgment delivered on 4th day of May, 2023 in the presence of the appellant in person and Ms. Sara Anesius, learned State Attorney for the respondent, is hereby certified as a true copy of the original.



S. P. MWAISEJE
DEPUTY REGISTRAR
COUTY OF APPEAL