

TANZANIA / JUDGMENT

ABDALLAH MUNA vs REPUBLIC 22222222

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IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA IN THE SUB-REGISTRY OF
MANYARA AT BABATI CRIMINAL APPEAL NO. 13012 OF 2024 (Arising from Criminal Case No. 82
of 2021 District court of Babati at Babati) ABDALLAH MUNA.....
APPELLANT VERSUS REPUBLIC.....RESPONDENT

JUDGMENT

5th July & 14th August, 2024 Kahyoza, J.: Abdallah Muna, (the appellant) was charged with an offence of incest by male contrary to section 158 (1) (a) of the Penal Code (Cap. 16 R.E. 2022), and was convicted to 30 years' imprisonment. Aggrieved, Abdallah Muna, appealed to this Court raising 5 grounds, that the trial court convicted him on contradictory evidence, the prosecution did not prove its case beyond reasonable doubt, that the trial court did not analyze the evidence properly, the trial court did not abide with the law and that the trial court did not provide legal reasoning in its judgment. i Briefly, the prosecution alleged that the appellant was the victim's half-brother. The victim is a girl who was sixteen years when the offence was alleged committed. The prosecution alleged that on 25th August, 2021 at night hours, while the victim's parents were not at home, the appellant entered the victim's door and raped her. She recognized him after she lit torch before the appellant put it off. The appellant denied to have carnal knowledge with the victim. He, however, did not refute the allegation that the victim was his half-sister. The trial court believed the prosecution's case to be proved beyond reasonable doubt, hence convicted and sentenced him/the appellant. The appellant's grounds of complaint include specific and general complaint. The appellant's general complaint is that the prosecution did not prove the case beyond reasonable doubt. The general ground of complaint encompasses specific grounds of appeal. I will confine myself to the second ground of appeal, that is the general statement. It is the position of the Court of Appeal that, where an appellant raises a general ground of appeal together with specific, it is proper for the appellate court to consider the general ground of appeal only to determine the appeal. The Court of Appeal pronounced that position of the law in *Rutoyo Richard vs R.*, (Cr. Appeal 2 No. 114 of 2017), published on the website, www.tanzlii.org [2020] TZCA 298, where it stated that: - "Although we find it not to be a good practice for an appellant who has come up with specific grounds of appeal to again include such a general ground, but where it is raised as was the case in the present case, it should be considered and taken to have embraced several other grounds of grievance." Did the prosecution prove its case beyond reasonable doubt? The appellant complained that the trial court erred in law and fact to

rely on the prosecution evidence which was insufficient to prove the appellant guilty beyond reasonable doubt. At the hearing the appellant appeared in person. He did not expound the grounds of appeal so he played to rely on the petition of appeal. Mr. Bizimana, learned state attorney appeared for the Respondent. He opposed the appeal. He argued that the prosecution proved the offence the appellant was charged with. He contended that the offence of incest has two elements; one, the relationship between the appellant and the victim falls under prohibited relationship to have sexual intercourse; Two, that the appellant penetrated the victim. He argued that the relationship between the appellant and the victim was not disputed. The appellant was the victim's 3 half brother. As to the second element, Mr. Bizimana argued that the victim deposed that the appellant penetrated her. She stated that the appellant entered her room, put off clothes and penetrated her. He argued that the best evidence to prove the offence of rape is the victim's evidence. He cited the cases of *Seleman Said Hassan v. R. tanzlii* [2022] TZCA 127 and *Seleman Makumba v R.* [2006] TLR 379. He added that the offence was allegedly committed at night, thus, the prosecution had a duty to prove that the victim did properly identify the appellant. He submitted that the victim explained that she lit a touch when the appellant entered her room so she did identify him. He cited the case of *Heleniko Ndimki @ Kalegi and Another v. R., tanzlii* [2022] TCZA 404. Indeed, to prove the offence of incest by male contrary to section 158

- (1) (a) of the Penal Code, the prosecution must prove that the relationship between the victim and the accused is fall within the prohibited relationship under the law. "158(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- 4
- (a) if the female is of the age of less than eighteen years, to imprisonment for a term of not less than thirty years;
- (b) if the female is of the age of eighteen years or more, to imprisonment for a term of not less than twenty years.
- (2) It is immaterial that the sexual intercourse was had with the consent of the woman." As shown above, a male person is prohibited to have sexual intercourse with his sister. The evidence on record, which was not disputed is that the appellant was the victim's half-sister. The appellant and the victim are blood related. I have no doubt, therefore, that the law prohibited sexual intercourse between the appellant and the victim, his half-sister. The next question is whether the appellant did penetrate the victim. I will commence with the simple issue if the victim was penetrated. The victim deposed that she was penetrated. The victim's evidence that appellant entered her room put off his clothes, inserted his manhood into her private parts and slept on top of her for time. As she was bleeding, she decided to take a shower. In the morning, when her father came home, she reported the incident. The victim's father took her to police station and later to hospital. The victim's testimony that she was penetrated was supported by the evidence of Doctor Samwel Marco (Pw4). Doctor Samwel Marco (Pw4). 5 deposed that on 26.8.2021 examined the victim and found blood on her private parts. He filled the PF.3, which he tendered as Exh. PEI without objection. Exh.

Pl showed that the victim was penetrated. The appellant did not cross-examine Doctor Samwel Marco (Pw4). Given the evidence on record I find it proved that the victim was penetrated. The remaining issue is whether it is the accused person who penetrated the victim. I am alive of the principle that best evidence to prove sexual offence is that of the victim as held in *Seleman Makumba v R*

[2006] TRL 396. In the current case, the best evidence to prove whether the appellant penetrated the victim is that of the victim. The victim deposed that the appellant entered her room at night. She lit a torch and identified the appellant, her brother. She deposed that the appellant wore a red-pool-neck and a blue short trousers (jeans). She added after he entered, he undressed the victim's skin tight and underwear and took a touch from her. She shouted and her younger brothers woke up. He then took off his pair short trousers and his underwear which was blue in colour with white strips, slept on top of her and inserted his manhood into the victim's private parts. The victim described the appellant's attire. It is tempting to hold that the victim did properly identify the appellant. The appellant and the victim 6 were half-siblings, they knew each other properly. The victim deposed that she recognized the appellant, her brother as a person who raped her. It is settled that in recognition cases, instances of mistaken identity may occur. As the Court of Appeal held in *Issa S/O Mgara @ Shuka vs R.*, Criminal Appeal No. 37 of 2005 (unreported). The Court of Appeal added that in matters of identification it is not enough to look at factors favoring accurate identification. In another case of *Jaribu Abdalla vs R.*, Criminal Appeal No. 220 of 1994 (unreported), the Court of Appeal held that equally important is the credibility of witnesses because favorable conditions for identification alone are no guarantee against untruthful evidence. I have no doubt that the victim was a credible witness. In the case of *Goodluck Kyando v. R.*, Criminal Appeal No. 112 of 2020 [2006] TLR 363 stated that- "Every witness is entitled to evidence, unless his evidence is improbable or implausible or materially contradicted by the evidence of another witness. In the absence of any other contradictory denting Pw1's credibility, the trial court findings in that regard must stand". There is no any contradiction as to the identification of the appellant in the records. Having scanned the evidence on record, it is plain that the source of torch's light which enabled the victim (Pw1) to identify the 7 appellant and the trial court belied the victim (Pw1) as a credible and truthful witness as the principle that credibility is the domain of a trial court which has the opportunity of observing and hearing a witness in a witness box. I have no reason to fault her evidence. The question is whether there were favorable conditions for identifying the appellant. The offence was committed at night, to recognize the culprit, the victim deposed that she put on the torch and saw that the person who entered the room was her brother, the appellant. She described the appellant's attire. Much the victim did not explain the intensity of the torch's light but she was able to recognize the culprit's attire, which proves that the intensity of the light was sufficient to enable her to recognize her assailant. In the case of *Marwa Wangiti and another v. R.*, criminal Appeal No. 6 of 1995 [2000] TZCA4 stated that- "The ability of witness to name a suspect at the earliest opportunity is in all important assurance of his reliability, in the

same way as unexplained delay or complete failure to do so should put a prudent court to inquiry" There was yet another piece of evidence of recognition from the victim's younger brother (Pw2). He recognized the appellant as a person who raped the victim. I wish to point out that the appellant, the victim, and 8 the victim's younger brother share one parent, a mother. The victim's younger brother (Pw2) aged 11 years old testified on oath, that he recognized the appellant that night. The record does not show why the witness of tender age gave evidence on oath instead of promising to tell truth. It is silent on whether the trial court made a finding that the witness can give the evidence on oath. Section 127(2) of the Evidence Act, [Cap.6 R.E. 2022] states that- 127.- (1) Every person shall be competent to testify unless the court considers that he is incapable of understanding the questions put to him or of giving rational answers to those questions by reason of tender age, extreme old age, disease (whether of body or mind) or any other similar cause.

- (2) A child of tender age may give evidence without taking an oath or making an affirmation but shall, before giving evidence, promise to tell the truth to the court and not to tell any lies.
- (3) Notwithstanding any rule of law or practice to the contrary, but subject to the provisions of subsection (6), the evidence of a child of tender age received under subsection (2) may be acted upon by the court as material evidence corroborating the evidence of another child of tender age previously given or the evidence given by an adult which is required by law or practice to be corroborated
- (4) NA (6) NA
- (5) NA (7) NA 9 Reading, subsection (2) of section 127 of the Evidence Act, it is obvious that the child of tender age must take oath before testifying and that if he cannot take oath he should promise to tell truth not lies. The Court of Appeal considered similar facts in Issa Salum Nambaluka vs R., (Criminal Appeal No. 272 of 2018) [2020] TZCA 10 (21 February 2020) which were that a child of tender age gave evidence on oath without the trial court indicating how it made that finding. It made the following findings- "In the case at hand, PW1 gave her evidence on affirmation. The record does not reflect that she understood the nature of oath. As stated above, under the current position of the law, if the child witness does not understand the nature of oath, she or he can still give evidence without taking oath or making an affirmation but must promise to tell the truth and not to tell lies. In the circumstances therefore, we agree with both the appellant and the learned Senior State Attorney that in this case, the procedure used to take PW I's evidence contravened the provisions of s. 127 (2) of the Evidence Act. For these reasons, we allow the 2nd ground of appeal. As a result, the evidence of PW1 which was received contrary to the provisions of s. 127(2) of the Evidence Act is hereby expunged from the record." io Going by the holding of the Court of Appeal in Issa Salum Nambaluka vs R., (above) it is obvious that the evidence of the victim's younger, a child of tender age cannot be acted upon as it was given in contradiction of the law as it was. Much as section 127 of the Evidence Act is however, silent on the method of determining whether such child may be required to give evidence on oath or affirmation or not, the Court of Appeal pronounced itself on what ought to be done. In

Godfrey Wilson vs R., (Criminal Appeal 168 of 2018) [2019] TZCA 109 (6 May 2019) that- "Where a witness is a child of tender age, a trial court should at the foremost, ask few pertinent questions so as to determine whether or not the child witness understands the nature of oath. If he replies in the affirmative then he or she can proceed to give evidence on oath or affirmation depending on the religion professed by such child witness. If such child does not understand the nature of oath, he or she should, before giving evidence, be required to promise to tell the truth and not to tell lies." The only evidence of identification is that of the victim, thus, the evidence of identification is of a single witness at night. It is settled position of the law that, a court must be careful in acting on the evidence of a single witness of identification. I am alive of the provisions of section 143 of the Evidence Act that it is not the number of witnesses which matters. What matters is the credibility to be attached to a witness. The Court of Appeal in Felix Kachele and Another v R., Criminal Appeal No. 159 of 2005 (unreported) warned against the danger of acting on relying on the evidence of single witness of identification to convict. It stated- "a court cannot be said to be satisfied that the single witness was telling the truth where circumstances show that although the witness might be testifying honestly on what they believe is the truth; yet they might be mistaken." In the present case, the victim gave the description of the appellant, her brother. In the case of Cosmas Chalamila v. R. Criminal Appeal No. 6 of 2010 stated that- "It is now settled that a witness who alleged to have identified a suspect at the scene of crime or to give a detailed description of such suspect to a person whom he first reports a matter to him or her but such person is arrested, the description should be on attire worn by suspect, his appearance, height, colour and or any special mark on the body of such suspect". She described the appellant's attire that he wore a red-pool-neck and "short blue pair of trousers". Not that but also, she prescribed the colour of the appellant's underwear that it was blue with white strips. The victim could give such a description only when the circumstances of identification were 12 favorable. The Court of Appeal for Eastern Africa in R v. Mohamed bin Allui (1947) 9 EACA72 held that- "In every case in which there is a question as to the identity of the accused, the fact of there having been a description given and the terms of that description are matters of the highest importance of which evidence ought always to be given, first of all, of course by the person or persons who gave the description..." I have no doubt that the identification is correct and reliable, the victim knew very well the appellant his brother, they were very close to each other during the sexual intercourse and time passed together. The appellant denied to commit the offence but it is on record that he was arrested while hiding. The appellant's act of hiding from home after his sister, the victim, was carnally known does not connote his innocence. The appellant complained that the court relied on contradictory evidence. The appellant did not expound on this ground of appeal. I reviewed the evidence on record which shows that the prosecution had six witnesses including the victim herself. I did not find any contradiction except regarding time when the offence took place. The victim deposed that the appellant raped her at 09:00am and the victim's younger brother testified that it happened on 23:00hrs I am of the position that the contradiction is 13 minor it can be ignored. The contradiction as to the time of commission of the offence does not go to the root of the offence. Both

witnesses agree that the appellant entered the room when they were asleep, thus, it was at night, further, they gave similar evidence as to what the appellant did after he entered the room and how he dressed up. It is trite law that contradictions in a criminal trial are inevitable what matters is whether the contradiction to the root of the trial. In *Lusungu Duwe v R* CAT Criminal Appeal No.76 of 2014, the Court of Appeal made the following observation- "Contradictions by any particular witness or among witnesses cannot be escaped or avoided in any particular case. However, in considering the nature, number and impact of contradictions, it must always be remembered that witnesses do not always make a blow by blow mental recording of an incidence. As such contradictions should not be evaluated without placing them in their proper context in an endeavor to determine their gravity, meaning whether or not they go to the root of the matter or rather corrode the credibility of a party's case. I do not find merit in the appellant's complaint that he was convicted on contradictory evidence. I dismiss the complaint. 14 The appellant complained that the trial court did not evaluate properly his evidence. The appellant's defence was that he had no sexual intercourse with the victim and that he was not arrested at the scene of crime also that the matter was not reported to the village leader. I wish to state that there is no legal requirement to report the matter to the village leader, thus, it is not fatal where the matter is not reported to such leaders. The judgment of the trial court shows that the appellant's defence was considered but was not found worthwhile. It is one thing to consider the evidence and another thing to give credence to such evidence. It is a settled law that the accused's story does not have to be believed, but only to raise reasonable doubts on part of the prosecution as it was held in the case of *Maruzuku Hamis v R*. [1997] TLR 1 HC at Mwanza. It held that; "An accused's story does not have to be believed. He is only required to raise reasonable doubts, that is to say, his explanation must be within the compass the possible in human terms" The appellant failed to raise reasonable doubts in the prosecution case, thus it is not true that his defence was not considered. In addition, this Court being the first appeal its duty is to re-evaluate the evidence. I considered the appellant's defence that he did not have sexual intercourse with the victim and that he was not found at the scene of the crime. The prosecution's 15 evidence came from the victim who is the appellant's half-sister. She deposed that he carnally knew her and she identified him. It is on record that the appellant was staying within the same area but in different hats with the victim. The appellant disappeared after the victim was carnally known. One would have expected that the appellant would have been actively involved to find his sister's assailant to the contrary he went hiding. I do not find that the appellant was innocent. Having re-considered the appellant's evidence, I support the trial court's conclusion that the appellant's defence did not raise a reasonable doubt in the prosecution's case. For that reason, I find no merit in the appellant's complaint that his defence was not considered. The appellant complained that the trial court did not consider the law. He did not explain which law was not observed. I was unable to find the appellant's bases of complaint. The trial court complied with section 230 (3) and section 210 of Criminal Procedure Act, [Cap. 20 R.E. 2022]. I have already pronounced myself regarding section 127(2) of Evidence Act, that the trial court did not comply and expunged the victim's young brother's evidence. 16 Lastly, the appellant

complained that the trial court did not give legal reasoning in the judgment. The record shows that the trial court considered the provision of the law and case laws in the judgment as there is nowhere under section 312 of CPA which specify number of reasons for the judgement rather it only require the trial magistrate to give reasons for his judgement. The records of the judgement reflect provisions and case laws relied by the trial magistrate to convict the appellant. I find no merit in the complaint. In the end, I find no merit in the appeal. The victim had carnal knowledge with a person she identified as the appellant. The relationship between the appellant and the victim was prohibited relationship to have sexual intercourse. The appellant was the victim's half-brother as the share one parent, the mother. For that reason, the appellant committed the offence of incest by male contrary to section 158 (1) (a) of the Penal Code [Cap. 16 R.E. 2019, now 2022]. Consequently, I uphold the appellant's conviction and the sentence of thirty years' imprisonment. I dismiss the appeal in its entirety. I order accordingly. Dated at Babati this 14th dayAof August, 2024 17 John R. Kahyoza Judge Court: Judgment delivered in the presence of the appellant and Mr. Bizimana, State Attorney for the respondent. B/C. Ms. Fatina (RMA) present. Right of further appeal explained. John R. Kahyoza Judge

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