IN THE HIGH COURT FOR ZANZIBAR

HOLDEN AT VUGA

CRIMINAL APPEAL NO. 15 OF 2004

FROM ORIGINAL SENTENCE IN CASE NO. 85 OF 2003 OF RM'S VUGA - ZANZIBAR

AWESU OTHMAN FAKI ----- APPELLANT

V E R S U S

DIRECTOR OF PUBLIC
PROSECUTION - ZANZIBAR ----- RESPONDENT

J U D G E M E N T

MBAROUK, J.

The appellant by the name of Awesu Othman Faki was convicted by the Regional Magistrate's Court, Vuga, Zanzibar of the offences of Abduction, Contrary to section 123 (a) of the Penal Decree, cap. 13 of the Revised Laws of Zanzibar as amended by Act No. 7 of 1998 and the offence of Defilement, Contrary to Section 125 (1) of the Penal Decree, Cap. 13 of the Revised Laws of Zanzibar as amended by Act No. 7 of 1998. as for the first count, the appellant was sentenced to one and half years, whereas for the second count, he was sentenced to three years in Educational centre without corporal punishment. The trial Magistrate ordered the sentence to be served jointly.

After having being aggrieved by the decision of the Regional Magistrate's Court, the appellant has appealed to this Court. In this appeal, the appellant was represented by Mr. Uhuru H. Khalfan, learned advocate and the Respondent Director of Public Prosecution was represented by Mr. Mudrikat Kiobya, learned State Attorney.

Mr. Uhuru filed four grounds of appeal, namely:-

1. That the Honorable Regional Magistrate erred in Law and facts to convict the Appellant despite the failure of the prosecution to prove its case against the Appellant beyond reasonable doubts.
2. That the Honorable Regional Magistrate erred in Law and facts by basing his judgment on the contradicting testimonies of PW.1 and PW.2 hence convicted the Appellant on the same.

3. That the Honorable Regional Magistrate erred in Law and facts by turning himself as expert witness by including facts and opinion in his judgment which did not appear in the testimony of PW.3 and convict the Appellant basing on the same.

4. That the Honorable Regional Magistrate erred in Law and facts to hold in his judgment that the evidence PW.1 is supported by that of PW.3 while there is no evidence at PW.3's testimony supporting the evidence of PW.1 hence convict the Appellant basing the same.

According to the prosecutions case before the trial court was that on 17/02/2003 between 8.00 p.m and 9.30 p.m at Nyarugusu area in the Urban Region of Unguja Island, unlawfully the appellant abducted Asha Nahoda Khamis a girl aged 14 years, unmarried who was under the care of her parents and sent her to the residence of the appellant's brother. The Prosecution also alleged that on the same day, time and place the appellants defined Asha Nahoda Khamis aged 14 yrs.

At the hearing Khamis, Mr. Uhuru, Advocate for the appellant started submitting their first ground of appeal by contending that there is no sufficient evidence brought by the prosecution to prove that PW.1 has been abducted and defiled by the appellant. He went further by pointing out that the only direct evidence relied by the trial Magistrate was that of PW.1, however that evidence comprised of very serious doubts.

In his analysis for those doubts Mr. Uhuru started by pointing out

That according to PW.1's testimony it appears that she was with her relatives at Nyarugusu football ground when she was asked by her relatives to look for some juice, and on her way she met the appellant. Mr. Uhuru contended that those relatives were very important to be summoned for the purpose of connecting the testimony of PW.1 but those relatives of PW.1 were not called as witness by the Prosecution.

In pointing out another doubts, Mr. Uhuru said that there is no witness who has seen the appellant to be with PW.1 and entering the appellant's brother's bedroom where she has alleged to have been abducted and defiled by the appellant.

Pointing out more doubts, Mr. Uhuru said that it is the prosecution's testimony that the house upon PW.1 was sent by the appellant was occupied by other people and not the appellant alone. He said the event occurred at early night hours between 20.00p.m and 21.00 p.m, and it is believed that the house at that particular time is occupied by the family and the alleged offences could not have happened without the knowledge and information of the members of the family who occupied the premise, Mr. Uhuru strengthened his argument by saying that it is very doubtful that such an event could have occurred in the appellant's brother's bedroom at that particular time. He said no number of the family was called or questioned by the prosecution to get the real picture of the situation

upon which the alleged event could have occurred. Furthermore he added by saying that there was no explanation on the physical appearance and disruption of the house and the room where the alleged offences have occurred.

Another doubt raised by Mr. Uhuru rested in the testimony of PW.4 who was an investigator, where Mr. Uhuru said the testimony of PW.4 showed that he went to the area where the event occurred but he did not has access to the room where the event had happened because it was locked and other living rooms were open. However Mr. Uhuru argued that it has not been put clear whether PW.4 went with PW.1 or the appellant/accused or he went alone.

In concretizing his a argument, Mr. Uhuru said that the evidence of PW.1 is not sufficient to prove the Commission of the offence by the appellant against her. In his analysis to this point, Mr. Uhuru said in sexual offences cases, the Magistrate is required before convicting the accused to warn himself as to the danger of relying the victims evidence only without being corroborated. He then cited a case of Shiku Salehe .R [1998] TLR 193 where it was held that:

> " *in sexual offences, the Court should warn itself of the dangers of acting on uncorroborated testimony of the complainant and having done so the*

Court may convict if it is satisfied that

them victims evidence is time".

Mr. Uhuru then continued by saying that the evidence of PW.2 (the mother of PW.1) has not corroborated the evidence of is a hearsay. He gave the example of the testimony of PW.2 at the time when she told the court that she was told that her daughter went to the appellants house, however she has not mentioned the name of such a person.

Furthermore, Mr. Uhuru told this Court that the trial courts proceeding shows that PW.2 went to call Bi. Amina, however she was not called as a witness by the prosecution whereas she was a very important witness.

Also he said that the prosecution opted to call PW.1 and PW.2 who are relations, hence not competent because there is a possibility for then to help the appellant should be convicted on the alleged commission of the offences. He also pointed out the analysis of the evidence done by the trial Magistrate is different from what the witnesses PW.1 and PW.2 have testified.

Mr. Uhuru also pointed out further that there is no where in the testimony of PW.3 who was an expert a Doctor where it has shown that PW.1 was seat to her

(PW.3) when and by whom, and there is no proper findig in such examination made, because her testimony is silent on who has been examined and when.

Mr. Uhuru ended his submission of the 1st ground by submitting that the duty to prove a case is that of the prosecution to prove their case beyond reasonable doubt. Such a duty should not be shifted to the accused person. He said the trial Magistrate has relied his judgment on the weakness of the defence case which is wrong. Hence he concluded by saying that under those circumstances the prosecution has filed to prove their case beyond reasonable doubt as required by the Law. He then cited a case of Jonas Nkize V.R [1992] TLR 213 where it was held that the burden of proving the charge against the accused is on the prosecution.

As for their second ground of appeal Mr. Uhuru submitted that there were serious contradiction between the testimonies of PW.1 and that of PW.2. He started by pointing out those contradictions by saying that PW.1 testified that the event occurred on 19/01/2003 whereas PW.2 told the court that the event occurred on 17/02/2003 which is a contradiction appeared in the testimonies of those two witnesses. However, that contradiction was later on cleared after being found that it coast just typical mistake which led to the confusion of dates.

Another condition pointed out by Mr. Uhuru is that PW.1 told the trial court that her mother went to look for her at the place where juice was sold whereas PW.2 told the court that she went to look PW.1 at Riziki'z house.

In his continuation of pointing out contradictions, Mr. Uhuru said that PW.1 testified in Court that when her mother came at the place, the door was locked, but PW.2 testified that when she reached the appellant's house, the appellant opened the door and she pushed the door but she did not managed.

He ended his submission for the second ground by arguing that these are serious contradictions and the Magistrate has relied the same in convicting the appellant. He stressed that it is very surprising that the two witnesses i.e. Pw.1 and PW.2 were together and giving different stories on matters appearing before them.

In his argument for the third ground of appeal, Mr. Uhuru contended that the testimony of PW.3 does not show the proper finding of her examination of it was done at all. In evidencing what he has submitted Mr. Uhuru told this court that in the PW.3's testimony she said that "Kizinda kimechanika" left and right and that is all what she produced in court as her finding. He said that there is no where in her testimony where it had been shown that PW.1 have never had sexual intercourse before the day of the event, and the trial magistrate relied the evidence of PW.1 with the finding of PW.3 meaning that since PW.1 had never made sexual intercourse before the doubt of the event and came to a conclusion

that it is the appellant who did that. This has been evidenced in the judgment where the trial Magistrate said that he is in support with the testimony of PW. 3.

Because of that, Mr. Uhuru submitted that the trial Magistrate became an expert because he said has not been said by PW.3. The Magistrate was not supposed to go further what have been said by the expert witness (Doctor).

As to their last ground, Mr. Uhuru Advocate for the Appellant submitted exactly from what he submitted in his analysis for the third ground, that there is no where in the PW.3's testimony where it has been shown that she has examined PW.1 and no proper finding on how she examined the victim and how that the remaining evidence of PW.1 and other witnesses does not establish that the appellant is the one who has defiled PW.1. Under those circumstances Mr. Uhuru submitted that the evidence of PW.1 is not supported evith that of PW.3 and there is no evidence in PW.3's testimony supporting the evidence of PW.1.

On the other hand instead of replying to what have been argued by Mr. Uhuru, Advocate for the Appellant, Mr. Kiobya the State Attorney who represented the respondent prayed to raise a preliminary objection – point of law but his objection was over rulled and the court ordered him to proceed reply to what have been submitted by the Advocate for the Appellant.

In his reply to the 1st ground of appeal, Mr. Kiobya pointed out that there is sufficient evidence on record which the trial Magistrate based on convicting the appellant. However, Mr. Kiobya pointed out that minor contradictions raised by his learned friend Mr. Uhuru does not go to the root of the matter in interfering with the finding of the conviction. He said that those contradictions are curable under section 367 (a) of the Criminal Procedure Act No. 7 of 2004. However when this Court had a chance to look at the section referred by Mr. Kiobya it has learnt that there is no section 367 (a) but there is 367 (1) – (3) of the Criminal Procedure Act No. 7 of 2004 and its sub title is "Power to take additional evidence". It might be that Mr. Kiobya has confused the sections.

Mr. Kiobya went further by submitting that this learned friend has argued that the relations of PW.1 have not been called as witnesses while they were together at Nyarugusu football grounds, but Mr. Kiobya said that what have been testified by PW.1 and PW. 2 suffices to prove that case against the appellant.

In concerning his argument of the number of witnesses to prove the case, Mr. Kiobya pointed out that section 174 of the Evidence Decree has kept no particular number of witnesses to prove the case. Hence he said that there was no need to call the relatives of PW.1 at the time when two prosecution witnesses i.e. PW.1 and PW.2 have already proved the issue. The appellant could have called those other witnesses if he liked, as per the directives give by the court of

Appeal in a case of *Moses Muhagama Lawrence Vs S.M.Z* in Criminal Appeal Case No. 7 of 2001 (unreported).

In his reply to the point raised by Mr. Uhuru that the house was occupied by other relations but at the time when the offence has been committed there was no one, Mr. Kiobya reacted by saying that that was why the appellant took that advance of abducting PW.1.

As on the issue that in sexual offences the evidence of PW.1 has to be corroborated as it has been said in the case of Shiku Salehe, Mr. Kiobya agreed that that is a position of the Law if there is no corroboration, but he said in their case there was a lot of corroboration between PW. 1 and PW.2, hence this case is different from that of Shiku Salehe.

As for the reply for ground No.2 concerning contradictions, Mr. Kiobya started by pointing out that contradiction on the dates where PW.1 said it was 19/01/2005, where as PW.2 said that it was February, 2003, was the problem of typing mistake. Then after checking the original record, this Court confirmed that it was true that it was a typing mistake.

In reply to another contradiction concerning the statement that PW. 1 said that PW.2 went to took at her at the place where juice was sold, whereas PW.2 said

that she went to look at PW.1 at Riziki's house, Mr. Kiobya responded by saying that this contradiction can be harmonized by using reasoning, at the time PW.1 left at home PW.2 was not there and when she came back she was told that she (PW.1) has gone to look at the Television. After all, Mr. Kiobya commented that this contradiction is very mild and had nothing to do with the evidence.

As to the contradiction concerning the issue of meeting the appellant with PW.2, Mr. Kiobya said that there was no contradiction because as said by PW. 2, she did pushed the door but she did not managed, hence that was the real situation with no contradiction.

In his reply to the point that the only witnesses called at the trial court were relatives of the victim (PW.1), Mr. Kiobya responded by saying that there is no Law which bar the relations not to give their evidence in a case, however what is important is the credibility of the witnesses. Whereas in this case, the trial Magistrate looked at the demeanor of those witnesses and after having no problem with them, hence he allowed them to testify.

Mr. Kiobya went further by arguing that the trial Magistrate did not relied on the evidence of the defence to prove their case, but what he was doing was analysis his decision on the defence of alibi raised by the appellant/accused and he referred the case of Ali Saleh Msuko V.R. [1980] TLT 1.

In reply to ground No. 3, Mr. Kiobya commented that it has no merits at all, because PW.1 was not cross examined on whether she had sexual intercourse before that act or not, hence that can not be raised, therefore when PW.3 said that "Kizinda kimechanika" this means that she was putting her expert evidence.

Finally in reply to the last ground of appeal, Mr. Kiobya pointed out that so long as PW.3 was not cross examined by the accused himself, hence what have been said by PW.3 remains as it appears in the proceedings.

Mr. Kiobya then prayed fir this appeal to be dismissed in its entirety and the conviction and sentence to remain as they are.

In his reply to what have been submitted by Mr. Kiobya, Mr. Uhuru started by saying that he still maintains that those contradictions which he has pointed out earlier are not minor, they were serious and can not be cured under section 367 (a) of the Criminal Procedure Act No. 7 of 2004. Mr. Uhuru stressed that it was the duty of the Prosecution to prove their case beyond reasonable doubt and once there is any doubt such benefit of doubt is to be given to the accused person.

As on the issue that the evidence of PW.1 and PW.2 was enough, Mr. Uhuru replied by saying that it was not enough to prove the case because since there

was a doubt on whether PW.1 was at Nyarugusu Football ground or at Riziki's house, hence the calling of one among the persons who were with PW.1 was necessary. He said even though he concedes that there is no specific number for the prosecution to call witnesses to prove their case, but under the circumstances of this case it was necessary for the prosecution to call those persons as witnesses.

As for the case of Moses Muhagama cited by his learned friend, Mr. Uhuru argued that the facts are different from the facts of their case. Mr. Uhuru contended that their argument is on the point that non of the Persons with PW.1 was called to testify. He said in the cited case of Moses Muhagama one among the Police was called and testified, but other witnesses were not called. Whereas in this case Mr. Uhuru said that they are complaining about the victim and not the accused person as it has appeared in the cited case of Moses Muhagama.

On the issue whether there was any person in the house where the event has occurred, Mr. Uhuru said they still maintain that such an event cannot occur while the house is occupied by several people and all the persons have access to the house and even the room which the alleged offence have been committed is occupied by the appellant and his brother. He went on further by contending

that the prosecution evidence is silent on that issue at the time when the prosecution are not supposed to assume as his learned friend did.

Concerning the issue of corroboration of PW.1 and PW.2's evidence, Mr. Uhuru said that he still maintain that there was no corroboration, where as the prosecution's evidence showed that PW.2 had not witnessed the events. Also he said that PW.2 did not see PW.1 with the appellant in the appellant's house and the testimonies of PW.1 and PW.2 are contradicting. That is why there was a need to call be Amina to corroborate the evidence of these two witnesses, but the prosecution did not called her.

Mr. Uhuru contended further that they do not dispute that the relatives are reliable and credible but under the circumstances of this case it is their submission they are not credible. This is because the testimonies of the prosecution witnesses contain a lot of contradictions, and there was no reason why those witnesses should differ in their testimonies at the time when they have seen the events.

Mr. Uhuru also continued to maintain that the magistrate based his evaluation in his judgment on the defence case rather than the prosecution case, and the said magistrate did not relied his judgment on the alibi.

After completing his reaction to what have been said by his learned friend to the first ground, he then went to react on what have been replied by his learned friend to the second ground by maintaining that there were contradictions except that of duties and such contradictions are not minor, since all the witnesses were there and have evidenced all what have happened.

Mr. Uhuru then combined the third and fourth ground by submitting that the Ho, trial Magistrate was reasoning the evidence of PW.3 and he kept himself as an expert to the evidence.

Lastly, Mr. Uhuru pointed out that as shown in the record, there is no finding at all made by PW.3 establishing that she examined PW.1 at what time and was sent by whom at her. He went on further by saying that there is no name mentioned in PW.3's testimony that PW.1 was sent to her, hence such an evidence is not supporting by evidence of PW.1.

He finished by praying that their appeal be allowed and conviction to quashed.

After examining and analyzing what have been submitted by both counsels in this appeal let me now go deeper in looking at each among the grounds of appeal submitted by the appellant.

As for the 1st ground which says that the Honorable Regional Magistrate erred in Law and facts to convict the Appellant despite the failure of the prosecution to prove its case against the Appellant beyond reasonable doubt, what I can say is that it is a general rule in Criminal prosecution that the onus of proving the charge against the accused beyond reasonable doubt lies on the prosecution, and whenever there is a slight element of doubts, hence that benefit is given to the accused person.

In his submission, Mr. Uhuru, Advocate for the Appellant pointed out several defects which gives rise to insufficient evidence brought by the prosecution to prove that PW.1 has been abducted and defiled by the appellant. Whereas among those defects is that there was no witness who has directly seen the appellant with PW.1 entering the appellant house let alone the appellant's brother bedroom. The only direct evidence relied by the prosecution was that of PW.1. As Mr. Uhuru pointed out in sexual offences case the court before convicting the accused, the Magistrate is required to warn himself as to the danger of relying the victim's evidence alone without being corroborate. This view is supported by a case of Shiku Salehe V.R. [1987] TLR 193 where it was held that:

" *in sexual offences, the court should warn itself of the dangerous*

of acting on uncorroborated testimony
of the complaint and having done so
the court may convict if it is satisfied
that the victims evidence is true". "

On this point I concur with Mr. Uhuru that the evidence of PW.2 has not corroborated the evidence of PW.1 because most of her evidence was not reliable and some of it was a hearsay. As to the point of hearsay, the record of proceedings at the trial courts shows that PW.2 did testified that and I quote.

" *I was told that Asha was still*
watching TV. "

Hence as far as it has been established that the evidence of PW.2 has not corroborated the evidence of PW.1, hence I again concur with Mr. Uhuru that it was not proper for the trial Magistrate to rely on the PW. 1's evidence alone. This court agrees that this is one among the defects in this case.

On the point of not calling the relatives who were with PW.1 at Nyarugusu football ground or Bi Amina who was at one time with PW.2, I have the opinion that as far as section 134 of the evidence Decree has said that "no particular number of witnesses shall in any case be required for the proof of any fact,"

hence the prosecution are not supposed to be forced to submit extra or other witnesses as far as it was their own duty to evaluate the situation in proving their case.

Apart from the contractions which appeared concerning dates which have been cleared out after checking the original hand written proceedings, there was a contradiction of the testimonies of PW.1 and that of PW.2, where there was a time when PW.1 testified that her mother (Pw.2) weat to look for her at the place where juice was sold whereas PW.2 told the court that she weat to look. PW.1 at Riziki's house. Another contradiction pointed out by Mr. Uhuru was that PW.1 told the court that when her mother i.e. PW.2 came at the place the door was locked, but PW.2 told the court that when she reached the appellant's house, the appellant opened the door and she pushed the door but she did not managed.

I am not in agreement with Mr. Kiobya when he said that those were minor contradictions do not go to the root of the matter to interfere with the finding of the conviction, and those contradictions are curable under section 367 (a) of the Criminal Procedure Act, No. 7 of 2004. the fact is that as I have said earlier there is no section 367 (a) but there is section 367 (1) – (3) of the Criminal Procedure Act No. 7 of 2004 and it sub-title is "Power to take additional

evidence" which is not relevant to our situation. As per the case of Jonas Nkize V.R [1992] TLR 213 where we have been reminded that, and I quote;

> " *the general rule in Criminal prosecution that the onus of proving the charge against the accused beyond reasonable doubt lies on the prosecution, is part of our Law, and forgetting or ignoring it is unforgivable, and is a peril not worth taking." (underlining is mine)*

This means that as far as the prosecution has the onus of proving the charge against the accused beyond reasonable doubt, hence there is no way the prosecution where they can claim that the contradiction which gives rise to doubts were minor. A minor contradiction or doubt is to be taken to the benefit of the accused person. Hence as far as this court is not aware of the charges of the general rule in Criminal prosecution concerning the burden of proving the charge against the accused that it has now been shifted from the prosecution, hence I concur with Mr. Uhuru, Advocate for Appellant that with the establishment of those contradictions which has led to the existence of the doubts, hence such a benefit of doubt is to be given to the appellant.

The above analysis have combined the 1st and 2nd ground of Appeal, hence let us now examine ground No. 3 and 4. As for ground No. 3, I concur with Mr. Uhuru, Advocate for the appellant when he said that the Honorable Regional Magistrate erred in Law and facts by including facts and opinion in his judgment which did not appear in the testimony of PW.3 and convict the Appellant on the same. This can be evidenced at p.19 of the judgment where the trial Magistrate said:

> " *So if PW.1 had any sexual intercourse before the material day then PW.3 would have wrote that 'Kizinda hakipo' then the whole issue would have been different.* "

The trial Magistrate is not supposed to go further in analyzing the issue which has already been analyzed by an expert or a Doctor other wise as Mr. Uhuru has submitted the Magistrate would be said to turn himself as an expert. What the Magistrate is required to do is just to take the testimony of an expert or a doctor with care and without putting his opinion, because he is not an expert in that particular field of study. Doing otherwise will cause difficulties of turning himself as an expert witness which is wrong.

As for ground No. 4 in this appeal, I again concur with Mr. Uhuru in the sense that there is no where in PW.3's testimony showing that she has examined PW.1 and there is no proper finding in her testimony showing how she reached the conclusion as shown in the PF 3. As an expert on a Doctor, PW.3 was supposed to shoe clearly from the beginning when the victim PW.1 was brought before her and explain how she attended her, how she examined her and lastly how she has arrived to the conclusion which has appeared in PF 3. An expert witness is not being called to produce the document or PF. 3 alone but he/she has to tell the court how he/she has examined the victim and how he/she has arrived to the conclusion from his/her expert knowledge.

I do not agree with Mr. Kiobya when he said that so long as PW.3 was not cross examined by the accused himself, hence what have been said by PW.3 stands as it appears in the proceedings. The reason of my dis agreement with Mr. Kiobya is that the prosecution should not rely on the weakness of the defence to prove their case. If is the duty of the prosecution side to prove their case beyond reasonable doubt.

In this case the testimony of PW.3 raises doubts because of its weakness as it has been shown above, and at the same time the remaining evidence of PW. 1 and other witnesses do not establish that the appellant is the one who has defiled PW.1, hence under those circumstances this shows clearly that the

prosecution side has failed to prove their case beyond the reasonable doubt as required by the Law.

In the up short, from what have been stated herein above, it follows that this appeal succeeds and I allow it accordingly, judgment and conviction against the appellant is quashed and sentence is set aside.

Lastly, the appellant is to be released forth with from the education centre unless he is held in connection with a lawful cause.

Appeal allowed.

Sgd: Mbarouk S. Mbarouk

Judge

This judgment has been delivered today 27/12/2004 in open Court, in the presence of Mr. Uhuru, Advocate for the Appellant, also the Appellant was there and Mr. Kiobya, the State Attorney who represented the DPP for the Respondent was there too.

Sgd: Mbarouk S. Mbarouk

Judge

Right of Appeal has been explained to the aggrieved party.

Sgd: Mbarouk S. Mbarouk

Judge

27/12/2004

I hereby certify that this is true copy of the Original.

Sgd. ABRAHAM MWAMPASHI

REGISTRAR

HIGH COURT

Z A N Z I B A R.

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