IN THE HIGH COURT FOR ZANZIBAR

HOLDEN AT VUGA

CRIMINAL APPEAL NO.28 OF 2017

(FROM CRIMINAL CASE NO.14 OF 2017 RM'S COURT MFENESINI)

MAULID ABDALLA JUMA .... APPELLANT

VERSUS

DIRECTOR OF PUBLIC PROSECUTIONS ... ... RESPONDENT

JUDGEMENT

BEFORE:HON. ABDUL-HAKIM A. ISSA, J

The Appellant, Maulid Abdalla Juma was charged with two counts of offence, namely: abduction of a boy contrary to section 130 (b) and defilement of a boy contrary to section 132 (1), both of the Penal Act No. 6 of 2004 of the Laws of Zanzibar. The Regional Magistrate Court, Mfenesini (Nassor A. Salim (RM)) discharged the appellant for the first count and convicted him for the second count. He sentenced the appellant to serve seven years in the Education Centre. The appellant being aggrieved with the order of conviction and sentence appealed to this Court in Criminal Appeal No. 28 of 2017.

From the evidence as established in the trial, the background giving rise to the case may be briefly stated. The victim in this case is Othman Silima Jecha, a boy aged 10 years who is living at Moga, in the North A District of Zanzibar. On 4.8.2016 at about 4.00 pm the appellant abducted Othman Silima Jecha from Moga Mibiboni and took him to Moga Kiungani where the appellant defiled the victim. The appellant was arrested and charged with the offence of abduction of a boy and defilement of a boy.

In this appeal the Appellant was represented by learned advocate, Mr. Rajab Abdalla Rajab and the Respondent (DPP) was represented by learned State Attorney, Mr. Hamad Kombo Zidikheri. The Appellant filed his memorandum of appeal which contained the following ten grounds of appeal:

1. That the Regional Magistrate Court erred in law in holding that the prosecutions proved the offence of defilement of a boy contrary to section 132 (1) of Act No. 6 of 2004.

2. That the Regional Magistrate Court erred in law in not properly complying with the provision of section 215 of Act No. 7 of 2004.

3. That the Regional Magistrate Court erred in law and in fact in admitting the production of PF3 by the prosecutor who was not a witness; hence the prosecution played dual roles.

4. That the Regional Magistrate Court in considering the evidence of PF3 which was improperly by the prosecution, the production of which the appellant was not accorded right to challenge it, hence, he appellant faced unfair trial.

5. That the Regional Magistrate Court erred in law and in fact in failure to draw adverse inference against prosecution for their failure to call and bring before the trial court material witness.

6. That, there is no proof of the age of the appellant.

7. That the Regional Magistrate Court erred in law and fact in failing to consider the strong defence of the appellant.

8. That the Regional Magistrate Court erred in law and fact in failing to consider the interest of the appellant.

9. That the Regional Magistrate Court did err in law by delivering judgement which falls short of ingredients, hence making the same a nullity.

10. Generally, the whole conviction and sentence are illegal.

The learned advocate for appellant abandoned grounds 6 and 8, and argued the remaining eight grounds. He started with 1st, 3rd and 5th grounds of appeal. He submitted that the evidences found on the proceedings are weak and could not prove the offence of defilement to the required standard. First, PW2 who was 11 years old testified without his competence being assessed by the Court, whether he is capable to testify. He said there is no finding by the Court on whether he is competent and he understands the question and can give rational answers. The proceedings do not even show the questions. There are only answers and the appellate court cannot assess. He cited the case of ***Muhamad Suleiman Hassan*** V. ***DPP***, Criminal Appeal No. 5 of 2016, where this Court on pg 16 said the witness is still regarded as an incompetent witness. Mr. Rajab prayed for the Court to find PW2 as an incompetent witness and his testimony should be discarded.

Mr. Rajab added that even if PW2 is a competent witness, his testimony is contradictory. In examination in chief he said the act was done to him four times, but later on cross-examination he said it was the first time. PW2 also said he was with Abdul, the presumption is that Abdul saw what happened, but Abdul was not called to testify. Therefore the trial court was required to draw adverse inference why material witness was not called. He cited the case of ***Aziz Abdalla*** V. ***Republic*** [1991] TLR 71 where the Court said failure to call material witness without reason; the court should draw adverse inference against the prosecution.

In addition, Mr. Rajab said there is a PF3 which was tendered under section 32 of the Evidence Act No. 9 of 2016 (pg 6 of the proceedings). He argued that the prosecutor was allowed to produce PF3 when he is not a witness; this is not proper for him to produce it. Another doctor should have been called to produce it. Further, the right to be heard is fundamental; the accused should have been given that right when PF3 was produced. In this case the appellant was not involved. The doctor was not called for cross-examination. Again he cited the case of ***Muhammad Suleiman*** (supra) where the Court on pg 7 said the failure to inform the accused about his right of cross-examination is fatal.

On the same point of PF3 Mr. Rajab added that it was not explained that the Government could not bring a witness from Moshi to testify when the offence is

serious, and a person is facing life imprisonment and the victim has been defiled. He submitted that there is a failure of justice against both the victim and the accused.

With respect to the 9th and 10th ground of appeal Mr. Rajab submitted that the judgment convicting the accused did not meet the standard of the judgement. There is a narration but there is no proper analysis in the judgement; even the defence evidence was not analysed. He said failure to consider appellant's evidence vitiates conviction. In addition to that he said the judgement should also contain the point for determination. He submitted that the judgement is illegal and the sentence is illegal.

With respect with the 2nd ground of appeal Mr. Rajab submitted that under section 215 the appellant was supposed to be informed the substance of the charge and then informed of his right. In this case the substance of the charge was not read to the appellant.

With respect to the 4th and 7th ground of appeal, Mr. Rajab submitted that they have been covered under the 1st ground of appeal. Lastly, Mr. Rajab prayed for this Court to quash the conviction and sentence and the appellant should be set free.

On the other hand, the learned State Attorney, Mr. Zidikheri opposed the appeal. he started with the 1st, 3rd, 4th, 5th and 7th grounds of appeal together. He submitted that the testimony of PW2 was correctly taken. According to section 132 of Evidence Act, which provides that every person is competent to testify if he can give rational answers. He said on pg 4 of the proceedings preliminary examination was conducted and the child was competent to testify. Regarding the case of ***Muhammad Suleiman*** (supra), he said this case should be differentiated as the witness did not know anything about oath. In this case the prosecution proves the case and the PW2 was the key witness. Penetration was proved and it was proved that the victim is the child.

With respect to the witness who was not called, he said Abdul was not a material witness. He was a young boy and because of his age could not have helped the prosecution. He submitted that this is not a fault; appellant could have called Abdul if they wanted to. The Court could also have summoned him if it wants. He cited the case of ***Isidori Patrice*** V. ***Republic,*** Criminal Appeal No. 224 of 2007 (Unrep.)

where the Court said the accused could call a material witness or the Court can do so.

With respect to the issue of PF3, Mr. Zidikheri submitted that section 213(2) of CPA said it is not necessary to call expert witness if he has given his report unless the accused asked for cross-examination of that witness. This provision goes together with section 32 of Evidence Act which allows such procedure. In this case the reason has been given that the doctor is studying for two years, and it is not easy to bring him in time. the law provides for those circumstances; otherwise it would be difficult to call some witnesses. Further, Mr. Zidikheri submitted that it is a normal practice for the DPP to produce such a report. He then asked who is the proper person to tender that evidence; a doctor who knows nothing about the case or a prosecutor who coordinated things. In addition to that Mr. Zidikheri submitted that it was true the appellant was not asked if he wanted to cross-examine the doctor, and that was an error. But he submitted that section 213 of CPA does not say it is necessary, unlike section 240 of Mainland CPA. Even in Mainland where it is not explained to the accused about his right of cross-examination, a remedy is to order a retrial.

With respect to 9th and 10th grounds of appeal. Mr. Zidikheri agreed that there is a failure on the part of the learned RM to analyse the defence of the accused. He cited the case of ***Alfeo Valentino*** V. ***Republic***, Criminal Appeal No. 92 of 2006 (Unrep.) where on pg 9-10 the Court commented about this. Even in this case, he submitted that a retrial was ordered.

With respect to the point of determination, Mr. Zidikheri submitted that they are there in the judgement. Section 302 of CPA provides what the judgement should contain. In this case the issue of whether the appellant abducted and defiled the boy. The reasons for the decision are also there. The learned RM found abduction was not proved but defilement was proved. He submitted that there is no problem with the judgement and prayed that the Court should not acquit the appellant but should order a retrial before another court.

Mr. Rajab in his reply, he submitted that retrial is not a solution taking into consideration the age of the appellant and also the interest of the victim and the appellant. He referred the International Conventions and Children's Act which provides that the Court should look on the best interest of the child. He cited the

case of Jackson Davies V. Republic, Criminal Appeal no. 127 of 2005 at pg 9 the Court of Appeal considered the best interest of the child and the fact that the prosecution can rectify the errors. He prayed that the accused should be acquitted.

This Court will start with the determination of the 1st, 3rd, 4th, 5th and 7th grounds of appeal together. Under these grounds of appeal four issues have been raised. The first issue is that PW2, the victim who was 11 years old testified without his competence being assessed by the Court whether he is capable to testify or not. Mr. Rajab argued that there is no finding by the Court on whether he is competent and he understands the question and can give rational answers. The learned state attorney, on the other hand, said if your look on the proceedings preliminary examination was conducted and the child was competent to testify. This Court went through the proceedings and it is true on pg 4 of the proceedings we do see some answers which came from PW2 and that was all. Again the learned RM on pg 11 of the judgement he said: "The following witness was the victim PW2 Othman. After voire dire test he state...." The issue is that what is seen in the proceedings sufficient in law to show the competence of the witness of tender years.

This Court has dealt with the case of "voire dire" in Zanzibar in numerous cases. To mention few: ***DPP*** V. ***Bakari Hamadi***, Criminal Appeal No. 18 of 2011, ***Muhamad Suleiman Hassan*** V. ***DPP***, Criminal Appeal No. 5 of 2016 (both unreported). The Court held that under section 118 of Evidence Decree a child is competent to testify if it can understood the question put to it and give rational answers thereto. It quoted Vepa Sarathi on Law of Evidence, 4th edn. Eastern Book Company, India (1989) on page 222 he wrote:

> ***"When a child goes into the witness box the practice is for the judge to ask a few preliminary questions of a general nature to see if the child is capable of understanding questions, give rational answers and has a rough idea of the difference between truth and false hood."***

Further, it quoted Sarkar on Evidence, 15th edn. Wadhwa and Company, India (1999) on page 1960 he wrote:

> ***"The Court is at liberty to test the capacity of a witness to depose by putting proper questions. It has to ascertain, in the best way it can, whether from the extent of his intellectual capacity and understanding, he is able to give a rational account of what he has seen or heard or done on a particular occasion. If a person of tender years or of a very advanced age can satisfy these requirements, his competency as a witness is established."***

In the case in hand we do see the answers, but there is no finding of the Court that the witness is competent to testify. This clearly shows that the procedure has not been followed to satisfy the Court that he is a competent witness. The effect of it is that the witness is still regarded as incompetent witness. In ***Khamis Samwel*** V. ***Republic*** Criminal Appeal No. 320 of 2010 (unrep.), the Court was dealing with section 127 of the Evidence Act in Mainland, which although is different with ours but the effect is the same. It held:

> ***"These are Statutory requirements, and the trial Court has no option but to do such examination and record its opinion. If this stage is omitted or if the child does not satisfy those test a trial court cannot receive the evidence of such child because then the child still remains an incompetent witness by reason of tender age as per section 127(1) of Evidence Act".***

The Court added on page 6 that:

> ***"Even if the Court did not want to show in detail how it conducted the voire dire examination on the child at least it ought to have recorded its opinion on: (1) whether she***

had sufficient intelligence; and (2) whether she understood the duty of speaking the truth".

In the case in hand this was not done; hence, the evidence of PW2 has no weight in the prosecution case. PW2 is the victim and also the main witness in this case; since his evidence is discarded the whole prosecution case crumbles. This issue is enough for the determination of this case, and there is no need to go through other grounds of appeal. But the Court feels there are three more issues which are equally important and should be determined by the Court.

The second issue is about tendering of evidence of a witness who cannot be procured, and the right of cross-examination. In this case PF3 was tendered in Court by the prosecutor as the doctor was in Moshi attending a two years course. Mr. Rajab argued that it was not proper for the prosecutor to tender such document; it should have been tendered by another doctor. Further, he argued that the right of cross-examination is fundamental and the accused should have been informed of this right.

Mr. Zidikheri on the other hand submitted that PF3 was tendered under section 213 of CPA and section 32 of Evidence Decree. He also submitted that the prosecution is the proper person to tender that document as he knows the case; the other doctor knows nothing about the case. Regarding the accused's right to be informed about his right to cross-examine the doctor he said section 213 (2) of CPA does not say it is necessary, unlike section 240 (3) of Mainland CPA.

The starting point here is section 32 of the Evidence Decree, Cap. 5 of the Laws of Zanzibar which provides:

"Statements, written or verbal, of relevant facts made by a person who is dead, or who cannot be found, or who has become incapable of giving evidence, or <u>whose attendance cannot be procured without an amount of delay or expense which under the circumstances of the case appears to the court unreasonable</u>, are

themselves relevant facts in the following cases- (emphasis supplied).

In the case at hand the doctor is studying in Moshi in Tanzania Mainland and the prosecutions used section 32, particularly the underlined part in tendering the PF3. Sarkar on Evidence, 15th edn (1999) on pg 632 commented on section 32 of Indian Evidence Act which is pari materia with our section 32. He wrote:

> ***"The mere fact that a witness lives far away (Rangoon) is no ground for receiving his statement in a letter to the plaintiff by finding that he cannot be procured without unreasonable delay or expense. But when a doctor was away in England, his report was allowed to be proved by other evidence."***

Sarkar further said:

> ***"The burden of proving that the witness was really so far away as is contemplated by the section is on the prosecution and it is a criminal burden of proof. Thus where on a trial for theft from a tourist, the judge admitted in evidence the out of court statements made by the tourist and his companion, it was held that the judge had wrongly admitted the statements since there was no evidence that the tourists were outside the UK or that it was not practicable to call them except at high expense and delay.... whether it is reasonable practicable to secure the attendance of a witness must be examined in the whole background of the case."***

The principle laid down in the above quote is very clear that the issue of tendering the statement is not as simple as taken by some legal practitioners. The prosecution

must prove beyond reasonable doubt that the witness cannot be procured without an amount of delay or expense which under the circumstances of the case appears to the court unreasonable. Mere reporting to the court that the witness is out of Zanzibar is not enough, proof must be there and it must be shown the expense needed to bring the witness and the delay which will be caused.

The court may only allow the statement if it is satisfied that the witness is out of Zanzibar and cannot be procured without the amount of delay and expense. In this case, the witness is studying in Moshi in Tanzania Mainland. The court has to assess the cost of summoning the witness to Zanzibar and the delay which may be caused. Regarding the expenses needed; fortunately in Zanzibar this expense is borne by the Court itself. Hence, it has to look in its pocket if it has the required amount and if the amount is not available when it will be available. After considering these facts, the Court then can decide to allow the tendering of the evidence or not. In the case at hand no such consideration was made by the learned RM before he allowed the tendering of PF3.

Now, let us look on the issue of who can tender the PF3 when it is allowed by the Court under section 32. PF3 is a medical report written by a medical officer after examination of the victim. Therefore, admission of medical evidence or any other expert evidence is governed by section 45 of the Evidence Decree. Sarkar on Evidence commenting on section 45 of Indian Evidence Act, which is pari materia with our section 45 of Evidence Decree on pg 862-863 said:

> "***Medical evidence, as is well settled, is a opinion evidence given by an expert and deserves respect by the Court. Such evidence cannot be brushed aside without any justifiable reason....An opinion evidence of an expert after its acceptance by the Court becomes the decision of the Court and ceases to be opinion evidence of the expert. Under the circumstances, evidence of an expert also has to be interpreted like any other evidence. In so doing the effort should be made to explain the***

same and correlated with evidence of eye-witness. It is only when that the two become irreconcilable that the question of accepting one or the other arises and not otherwise."

From this quote, it is very clear that the Court does not receive the medical evidence like PF3 just to put it in the file, but it needs to be understood what it entails. It has to be interpreted and also correlated to other evidence of the eye witnesses. The danger for the Court interpreting expert evidence without hearing out the expert concerned has been explained by Sarkar on Evidence on pg 1052. He said:

" The use of scientific evidence may lead to error if either who use them are themselves not experts or not assisted by experts to whom passage relied upon may be put.... In a charge of defamation arising out of an imputation of a drugging a man, the deputy magistrate after considering the prescription in the light of passages in the medical books, held that the treatment was not for biliary colic and that the symptoms were of arsenic poisoning. The procedure was condemned and it was observed that for a mind untrained in medicine, to attempt largely without trained assistance to ascertain why certain medicines were prescribed and what should be prescribed for biliary colic by a reference to books, is entirely unsound and valueless".

Hence, in the case at hand, a proper person to tender the PF3 under section 32 is another medical officer who is conversant on that speciality in question and who can explain to the court what was written. The prosecutor cannot do that job which only an expert is needed. Therefore, it was improper for the prosecutor to tender such evidence.

We are now, turning to section 213 (2) of the CPA, which provides:

> ***"(2) The prosecution need not call a medical officer or other expert witness who has submitted his or her report to the court if the accused person or his or her counsel does not desire to cross examine such a witness".***

This court does not agree with the view expressed by the learned State Attorney. The provision is very clear that when the expert's report has been submitted to the court, the only time the prosecution needs not call an expert witness is when the accused or his advocate has no desire to cross-examine such a witness. This means if the accused wants to cross-examine the medical officer or expert witness, the witness must be called. This also presupposes that the accused knows about his right of cross-examining the medical officer or the expert, hence, it is mandatory for the presiding magistrate to inform the unrepresented accused person about this right.

Although the wording of section 240(3) of Mainland CPA is different to section 213(2) of Zanzibar CPA quoted above, but the import is the same. The presiding magistrate must inform the accused about his right of cross-examination of the medical officer. The Court of Appeal in ***Alfeo Valentino*** V. ***Republic*** (supra) held that:

> ***"The Court has consistently held that once the medical report, as the PF3, is received in evidence, it becomes imperative on the trial court to inform the accused of his right of cross-examination. This Court held in these cases that if such a report is received in evidence without complying with the mandatory provisions of section 240(3), such a report must not be acted upon".***

The last issue is with respect to the analysis of the defence case in the judgment. Mr. Rajab argued that the judgment in question only considered the prosecution case and not the defence. This is a serious error and the whole proceeding is a nullity. Mr. Zidikheri on the other hand agreed that the learned RM failed to consider the defence case. When I read the judgment I did find the mention of the defence case

on pg 12 of the judgement where there are 7 lines which talk about the testimony of the appellant and his witness. There is no analysis of such evidence which removed the appellant from the scene of crime. Hence, this Court is satisfied that the judgment was lacking in this respect. The affect of this failure has been clearly stipulated by the Court of Appeal in ***Alfeo Valentino*** *V.* ***Republic*** Criminal Appeal No. 92 of 2006 (Unrep.) where the Court held:

> ***"... failure by a trial court to fully consider a defence of alibi, and we may add without fear of being contradicted, the defence case as a whole, is a serious error. We are of the settled mind, therefore that the trial Court fatally erred in not considering the entire defence evidence before finding the appellant guilty".***

From the errors and irregularities observed above the learned State Attorney conceded that the appellant was not informed about his right to cross-examine the doctor who filled the PF3, and also that the learned RM failed to consider and analyse the defence evidence. But he prayed that the Court should order a fresh trial before another magistrate.

This Court is reluctant to make such an order on two grounds, first a new trial will allow the prosecution to fill in gaps where errors were found during the trial. Second, it is not in the best interest of the child to undergo a new trial. The victim was defiled in 2016, which is almost two years now. The young boy has forgotten what happened to him or is trying to forget. Hence, to order a retrial is to torment the boy for the second time. The United Nations Convention on the Rights of the Child (CRC), 1989 which Tanzania has ratified under Article 3 (1) places an obligation on the Courts to give best interest of the child paramount importance in child matters. Section 3 (1) provides:

> ***"In all actions concerning children, whether undertaken by Public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best***

interest of the child shall be of primary consideration."

In complying with CRC, the Children's Act, No. 6 of 2011 has been enacted which also put a duty on the Court to observe the best interest of the child. Section 3 provides:

> ***"The Act shall be interpreted and applied so that in all matters concerning the care, protection and well being of the child, the best interest of the child concerned shall be the paramount consideration***".

The best interest of the child was explained in section 4 and it includes the following:

> ***"(l) the need to protect the child from any physical or psychological harm that may be caused by:...***
>
> ***(m) appropriate action or decision which would avoid or minimise further legal or administrative proceedings in relation to the child."***

In the light of the above, the conviction and sentence passed on the appellant by the trial court is hereby quashed and set aside. The appeal is allowed and the appellant should be set at liberty forthwith unless otherwise held for other lawful cause.

It is so ordered.

(Sgd) ABDUL-HAKIM A. ISSA

JUDGE

24/1/2018

COURT

This Judgement was delivered in chambers on this 24.1.2018 in the presence of Appellant and his advocate, Mr. Rajab A. Rajab and in the presence of Mr. Hamad Zidikheri for Respondent.

(Sgd) ABDUL-HAKIM A. ISSA

JUDGE

24/1/2018

COURT

The right of appeal is explained.

(Sgd) ABDUL-HAKIM A. ISSA

JUDGE

24/1/2018

I Certify that this is a true copy of the original.

DEPUTY REGISTRAR

HIGH COURT – ZANZIBAR

/HALLY/