IN THE HIGH COURT FOR ZANZIBAR

HOLDEN AT CHAKE-CHAKE

CRIMINAL APPEAL NO.08 OF 2018

(FROM CRIMINAL CASE NO.20 OF 2015 RM COURT, CHAKE-CHAKE)

OMAR HAJI ALI … … APPELLANT

VERSUS

DIRECTOR OF PUBLIC PROSECUTIONS … … RESPONDENT

JUDGMENT

The Appellant, Omar Haji Ali was charged with two counts of rape contrary to section 125 (1) and (2) and 126 (1) of the Penal Act No. 6 of 2004 of the Laws of Zanzibar. The Regional Magistrate Court, Chake-Chake (Hussein M. Hussein (RM)) convicted the appellant for the offence of rape and sentenced him to serve 7 years in the Education Centre. The Appellant was aggrieved by that decision and appealed to this Court in Criminal Appeal No. 05 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 Salma Mussa Suleiman a 12 years old girl who at the time of the incident was living with the Appellant and her aunt at Ndooni, Uweleni within Mkoani District in the Southern Region of Pemba. On 28th and 29th May 2015 at midnight the Appellant is alleged to have left his room which he was sleeping with victim's aunt and went to the victim's room. He took off the victim's clothes and after undressing himself he covered the victim's mouth with his hand and had carnal knowledge of her. The victim reported the matter to her mother who visited her on 6.6.2015 and the matter was reported to the police. The Appellant was charged with the offence of rape.

In this appeal the Appellant was represented by learned advocate, Mr. Ali Hamad Mbarouk and the Respondent (DPP) was represented by learned State Attorney, Mr.

Seif Moh'd Khamis. The Appellant filed his petition of appeal which contained one ground of appeal, which reads:

1. That the Honourable Learned Magistrate misdirected himself by convicting the appellant since the prosecution failed to prove the case beyond reasonable doubt.

The Appellant's advocate, Mr. Ali submitted that the DPP failed to prove their case beyond reasonable doubt. One of the doubt is that there was uncorroborated evidence. There were five witnesses who testified and the RM find the evidence was corroborated but at the end he said it was uncorroborated. He submitted that he agrees that it was uncorroborated as there was no eye-witness. The RM took the victim's evidence alone as the truth and did not warn himself against depending solely on the evidence of the victim. He submitted that failure to do that created doubts on the case. He cited the case of **Awesu Othman Faki V. DPP**, Criminal Appeal No. 15 of 2004 (Unrep.) on pg 10 the judge said the RM should warn himself of the danger of using uncorroborated evidence.

Secondly, he submitted that there is doubt on the issue of identification; according to the law identification should be unmistaken and should leave no doubt. He cited the case of **Horombo Elikaria V. Republic**, Criminal Appeal No. 50 of 2005 (Unrep.) which talks about this issue. He added that if we look on the main case we will find that the evidence is insufficient to make identification. On pg 49 the RM refers to the case of **Said Charly Scania V. Republic**, Criminal Appeal No. 69 of 2005 (Unrep.) but he failed to refer to the testimony of the victim. On pg 8 the victim explained that it was night but she recognised the Appellant because the light was on. The RM was supposed to go further and find out what kind of light (electricity or others), which bulb was used and of what voltage. Further, the victim did not explain the length of time the Appellant was with the victim.

Thirdly, Mr. Ali submitted that there were also contradictions on the witnesses brought. All witnesses except PW4 said the victim was 12 years old, but PW4 said she was 14 and he tendered the birth certificate. The doctor also said she was 12 and tendered the birth certificate. Another contradiction is that PW1 and PW2 said they heard about the incident on 6.6.2015 while the alleged offence was committed on 28th and 29th May 2015. This means 10 days have lapsed. PW4 said the

information was received after 9 days. Further, PW3 said the house had three rooms while PW4 said there are two rooms. Even worse PW4 said the Appellant was not responsible for rape.

Fourthly, Mr. Ali submitted that the length of time from the commission of offence and filing of the case brings doubt. PW1 and PW2 filed their complaints after 10 days. The doctor did her examination on 16.6.2015 (pg 22 of the proceedings) which is 20 days after the commission of rape. He submitted that the consequence of delay is that it creates doubts, which are unacceptable. He cited the case of **Simon Abonyo V. Republic**, Criminal Appeal No. 144 of 2005, and said on pg 7-8 the Court doubted the examination made after 72 hours, how about 20 days which is the case in hand. Further, the doctor tendered copy of the PF3 and not original (pg 23 of the proceedings). The copy was supposed to be certified which was not the case. Hence, it should not have been admitted. In addition to that PW1 and PW3 said the house was incomplete; hence, there is a possibility of another person entering the house since there was no door. This brings doubt that there was no electricity since the house was incomplete. Further, Mr. Ali submitted that the rape was committed when the victim was asleep, so how did she knew what was happening.

Lastly, Mr. Ali submitted that the RM was bias as he added things that were not mentioned in the case. He said no witness said the victim was pregnant, but the RM on pg 53 said the victim was pregnant. Further, rape was committed twice, but the RM said three times. He prayed that this appeal should be allowed and the Appellant be set free.

The learned State Attorney, on the other hand, opposed the appeal. He submitted that the learned advocate for Appellant touched three issues, namely: identification, inconsistencies of the witnesses and corroboration. With respect to the corroboration, he submitted the parents said the victim was 12 years old while PW4 said she was 14 years old. He said the birth certificate was tendered which showed the victim was under 18 and it was a statutory rape. He added that the Children's Act provides that the testimony of a child need not be corroborated (s. 49(2)). The Court can Act on that evidence after being satisfied that the child can speak the truth and can give evidence either on oath or not. He cited the case of **Joseph Mapunda & Khamis Suleiman V. Republic** [2003] TLR 366 where the Court said evidence of a

child does not need corroboration. Regarding the issue of the RM warning himself, he submitted that it is not necessary to be seen in the proceedings; warning is seen in the voire dire test and the court must be satisfied. He added that corroboration is there; PW5 made examination of the victim and found the victim had sex (pg 8 and 9 of the proceedings). He submitted that this ground is baseless.

With respect to the issue of admission of PF3, the learned state attorney submitted that it was proper since PW5 was the one who filled the PF3 and can explain about the content of PF3. Further, he said this issue should have been raised during the trial. He added that the RM's Court is the proper court to assess the credibility and demeanour of PW3. This Court cannot do that; he cited the case of **Marco s/o Gervas V. Republic** [2002] TLR 27 where the Court explained the role of appellate Court in evaluating the evidence. With respect to the issue of PW4 exonerating the Appellant, he submitted that PW4 is an investigator while the victim is the eye-witness. The investigator is just collecting facts and what he says is a hearsay. He cannot prove anything in the case of rape. He said section 60 of Evidence Decree clarify who should testify. PW3 saw and feel the rape being committed.

With respect to the inconsistency on the house being incomplete. He said the victims knows the Appellant; hence it is not necessary that all what was stated in **Said Charly case** should happen. In this case the victim said she identified the Appellant because there was light. The Appellant is married to the victim's aunt and she knows him very well. There is no possibility of another person entering the house. Regarding whether the victim was asleep or not, he said the victim on pg 8 explained clearly what was done to her which means she was awake.

Regarding the discrepancies of time of reporting the incident; he submitted that PW1 and PW2 said they got the information on 6.6.2015. The victim did not report as she was scared and was told not to tell anybody. Therefore, it was not easy to be known earlier. He added that even the doctor was able to say what he found on the victim even after the lapse of time. He added that the parents reported the incident the same day they found out, if there was delay it was caused by the police. With respect to the issue of time the Appellant was together with the victim, he submitted that the victim is a child and is not expected to mention the time they were together. Therefore, her explanation is sufficient.

With respect to the issue of bias, the learned state attorney submitted that we should look on the charge and the evidence and the reasons for the decision. The RM on pg 55 said he is satisfied that rape has been committed and he analysed the ingredients of the offence. He said the accused has to give evidence which is believed by a reasonable person even if it is not believed by the Court. The Appellant has just denied committing the offence. The Appellant could have called his wife to prove he did not commit the offence; but she was not called. He cited the case of **John s/o Makolobela Kulwa V. Republic** [2002] TLR 296 where the Court held that a person is not convicted because of the weakness of the defence, but for the strength of the prosecution case. He submitted that in this case all evidences are pointing to the Appellant. He prayed for the Court to increase the punishment as the offences of this nature are increasing in the society.

Mr. Ali in his reply submitted that warning must come from the analysis when the judgment is written. On the issue of inconsistencies he submitted that the DPP was supposed to lead the victim. He added that in the case of **Awesu Othman Faki**, the Court said the RM does not have to go further than what was said by expert (pg. 11-12). Lastly, he submitted that the burden of proof is on the prosecution and the Appellant was not required to call his wife as a witness. He prayed for the appeal to be allowed and the Appellant to be set free.

In determining this appeal this Court will start with the issue of the uncorroborated evidence of the victim of tender years. The learned advocate for Appellant argued that since the evidence was not corroborated and the RM did not warn himself on the danger of convicting the accused on such evidence, then the prosecution failed to prove its case beyond reasonable doubt.

Starting with the issue of corroboration; Sarkar on Evidence, 15th edn. Wadhwa and Company, India (1999) in page 1960 wrote: in Indian Acts there is no provision regarding corroboration and the evidence is made admissible whether corroborated or not. Once there is admissible evidence court can act upon it. It is a sound rule in practice not to act on the uncorroborated evidence of a child, whether sworned or unsworned but, this is a rule of prudence and not of law".

In Rameswar Kalyan Singh's Case A. 1952 SC 54 Vivian Bose J. Observed:

> "The true rule is that in every case of this type the rule about the advisability of corroboration should be present to the mind of the judge. The rule, which according to the cases has hardened into one of law, is not that corroboration is essential before there can be a conviction but that the necessity of corroboration, as a matter of prudence, except where circumstances make it safe to dispense with it, must be present to the mind of the judge before a conviction without corroboration can be sustained. There is no rule of practice that there must in every case be corroboration before a conviction can be allowed to stand.

The position in India is the same as in Zanzibar, a child witness is competent to depose if is able to understand the questions and able to give rational answers thereof. Further, there is no requirement that there should be corroboration. This position is now clear after the enactment of the Children Act No. 6 of 2011 where section 49 (5) provides:

> "(5) Notwithstanding the provision of this section, where in any criminal proceedings involving a sexual offence the only independent evidence is that of the child or victim of the sexual offence, the court shall receive the evidence and may after assessing the credibility of the child or victim of sexual offence, on its own merits, notwithstanding that each evidence is not corroborated, proceed to convict for reason to be recorded in the proceedings, if the court satisfies that child is telling nothing but the truth".

This position has also been incorporated in the new Evidence Act, 2016. Section 118 has been amended and subsection (7) is similar to subsection (5) above. The position in Mainland is not different as held in **Joseph Mapunda & Khamis Suleiman V. Republic** [2003] TLR 366 (HC) where the Court said: "the criterion now in sexual offences is more on the credibility of the victim of the offence and the Court can act on the uncorroborated testimony of a single witness if it is satisfied that the witness is telling nothing but the truth".

On the issue of RM not warning himself; Section 49(4) of the Children Act No. 6 of 2011 clarified the matter. It provides:

> "(4) Notwithstanding any rule of law or practice to the contrary, where evidence received by virtue of subsection (2) of this section is given on behalf of the prosecution and is not corroborated by any other material evidence in support of it implicating the accused, the court may, after warning itself, act on that evidence to convict the accused if it is truly satisfied that the child is telling the truth".

This provision lays down a requirement that the Court should warn itself about the evidence before the Court and should convict the accused only after being satisfied that the child is telling nothing but the truth. In this case, the learned RM did not warn himself as he was of the view that the testimony of the victim was corroborated by the doctor who testified as PW5. The learned RM on pg 48 of the judgment wrote: "these evidences of PW3 and PW5 made no doubt and no difficulties for the Magistrate in holding that PW3 (victim) was raped." This Court agrees with the learned RM that the doctor corroborates the issue of rape. Therefore, this Court finds the first issue raised by the Appellant's advocate lack merit and is dismissed.

The second issue deals with identification; the learned advocate for Appellant argued that the Appellant was not identified properly. He said on pg 8 the victim explained that it was night but she recognised the Appellant because the light was on. The RM was supposed to go further and find out what kind of light (electricity or others), which bulb was used and of what voltage. Further, the victim did not explain the length of time the Appellant was with the victim.

Our laws are very clear regarding issues of identification. There are various guidelines laid down in case law. In **Rashid Ally V. Republic** [1987] TLR 97 it was held in order to justify a conviction solely on evidence of identification such evidence must be water tight, the description and the terms of that descriptions on identification of the accused are matters of the highest importance of which evidence ought always be given. Further, in the case of **Shiku Salehe V. Republic** [1987] TLR 193 the Court of Appeal held that before basing a conviction solely on evidence of visual identification such evidence must remove all possibilities of mistaken identity and the Court must be satisfied that the conviction is water tight. In this case the Court cited the case of **Waziri Amani V. Republic** [1980] TLR 250 where the Court of Appeal advised as follows:

> “ Although no hard and fast rules can be laid down as to the manner a trial judge should determine question of identity, it seems clear to us that he could not be said to have properly resolved the issue unless there is shown on the record a careful and considered analysis of all surrounding circumstances of the crime being tried. We would for example, expect to find in the record questions such the following posed and resolved by him: the time the witness had the accused under observation, the distance at which he observed him, the conditions in which such observation occurred for instance, whether it was day or night, whether there was good or poor light at the scene, and further whether the witness know or had seen the accused before or not”.

Looking at the proceedings and judgment of the trial Court, it is true that not all answers came out in the proceedings, but in the sexual offences the answers to some of the question are very obvious. For instance, the issue of proximity is very clear, the nature of the offence requires zero distance, and the victim explained clearly what happened. Further, the issue of time did not come out of the victim’s testimony, but the nature of the offence is the one which requires time probably not less than five minutes. Further, in this case the rape was committed in two different days which clears the doubts.

On the issue of lighting, the victim explained that the light was on, but it was not mentioned what kind of light and the intensity of the light. Let assume even if the light was poor the victim was raped by a person whom she knows very well. It was the husband of her aunt and they were living in the same house. In addition the rape was committed on two different days but by the same person and it was after midnight. Further, although the house was incomplete, but the records shows it has rooms and rooms has doors. The Appellant opened the door which was not locked and entered the victim’s room. This Court is of the view that on the nature of the circumstances there is no mistaken identification. The Appellant was rightly identified by the victim. Therefore, this issue is also dismissed for lack of merit.

The third issue is about contradictions on the evidence before the trial court. Mr. Ali submitted that there were contradictions on the testimonies of the witnesses. All witnesses except PW4 said the victim was 12 years old, but PW4 said she was 14

and he tendered the birth certificate. The doctor also said she was 12 and tendered the birth certificate.

The Court of Appeal in **Dickson Elia Nsamba Shapwata and Another V. Republic**, Criminal Appeal No. 92 of 2007 (Unrep.) the Court of Appeal laid down guidelines in dealing with contradictions. In this case the Court quoted with the approval the authors of Sarkar, The law of Evidence, 16th edition, 2007 as follows:

> "Normal discrepancies in evidence are those due to normal errors of observation, normal errors of memory due to lapse of time, due to mental disposition such as shock and horror at the time of occurrence and those are always there however honest and truthful a witness may be. Material discrepancies are those which are not expected to a normal person. Courts have to label the category to which a discrepancy may be categorized. While normal discrepancies do not corrode the credibility of a parties case, material discrepancies do."

Now, the question is does these contradiction went to the root of the case or they were minor. With respect to the first it is true all witnesses said the victim was 12 years old except PW4, the investigator. This discrepancy is very minor as the witnesses were father, mother and doctor who did examined the victim; they affirmed that the victim was 12 years old. The investigator did not add anything on the evidence before the Court, he only narrated what he heard from other witnesses which are hearsay. With respect to the birth certificate which was tendered in Court, this Court failed to find the copy of that birth certificate. But it is satisfied that the three witnesses were credible and proved that the victim was 12 years old.

Another contradiction mentioned by Mr. Ali is that PW1 and PW2 said they heard about the incident on 6.6.2015 while the alleged offence was committed on 28th and 29th May 2015. This means 10 days have lapsed. PW4 said the information was received after 9 days. Further, PW3 said the house had three rooms while PW4 said there are two rooms. Unfortunately, PW1 and PW2 in their testimonies mentioned date, which is 6.6.2015 they did mention the number of days. The 10 days was mentioned by the learned advocate, which is a wrong calculation; from 29.5.2015 to 6.6.2016 is a total of 8 days. The 9 days calculation made by PW4, the investigator is also wrong. Furthermore, the investigator testified that he received the file for

investigation on 19.6.2015 and he miscalculated the dates. All these discrepancies are minor and did not go to the root of the case. The Court of Appeal in **Demitriv Kosya Kov and another** V. **SMZ** Criminal Appeal No. 1 of 2002 (unrep.) had similar findings. It said:

> "We agree that there may be well be some discrepancies in their evidence regarding the reckoning of time or the door through which the appellants entered the house. After all it is not unusual that in the course of normal life witnesses to the same incident give description of the incident variously. What is important is the essence of the matter and not the fine minor details. The incident took place in 1997 and they were testifying in 1999. So, variations or discrepancies of this nature are a common phenomenon in such cases. We think that such variations and discrepancies were, but minor, they did not go to the root of the evidence".

Regarding the issue of the number of rooms, this Court went through the hand written proceedings and did not find the contradictions both PW3 and PW4 testified that there are two rooms in that house. What appeared in the typed proceedings is a typing error.

Lastly, Mr. Ali submitted that the length of time taken from the commission of offence and the examination of the victim made by the doctor brings doubt. He said PW1 and PW2 filed their complaints after 10 days. The doctor did her examination on 16.6.2015 (pg 22 of the proceedings) which is 20 days after the commission of rape. This Court again looked at the hand written proceedings and did not find that delay; what is seen on page 22 of the typed proceeding is a typing error. The victim was examined on 6.6.2015 on the same day the matter was reported to the police. This is also seen in the PF3 which was tendered in Court. It is submitted that there was no delay and the learned advocate was misled by the error on the records.

The learned advocate also raised an issue that the doctor tendered a copy of the PF3 and not original (pg 23 of the proceedings). He added that if he was tendering the copy; that copy was supposed to be certified which was not the case. Hence, it should not have been admitted. The learned state attorney, on the other hand, submitted that the admission was proper since PW5 was the one who filled the PF3 and can explain about the content of PF3. Looking at the pg 23 of the proceedings

the PF3 was admitted under section 65 (1) (c) of the Evidence Decree, Cap. 5 of the Laws of Zanzibar because the original has been destroyed or lost.

Looking at the PF3 which has been tendered in Court; it is a photocopy of the original which falls under section 63 (b) of the Evidence Decree. It is a copy made from the original by mechanical process, which ensure the accuracy of the copy. This being the fact the PF3 is admissible under section 65 (1) (c) read together with subsection (2) which provides that in cases (a), (c) and (d) of subsection (1) any secondary evidence of the contents of the document is admissible. It is not correct to say that it requires certification. Certification is required for document falling under section 65 (4) of Evidence Decree which are documents explained under subsection (e) and (f) of section 65 (1). Therefore, this issue also lacks merit and is dismissed.

The last issue raised by Mr. Ali is the one dealing with the question of bias; the learned RM has been accused of being bias as he added things that were not mentioned in the case. For instance, on pg 53 he said the victim was pregnant while no witness said the victim was pregnant. Further, the offence of rape was committed twice in two different days, but the RM said three times. This Court found these statements written by the learned RM were not supported by evidence and testimonies of witnesses. There is no witness who said the victim was pregnant; even the doctor, PW5 testified that the victim took a pregnancy test and it was negative. Similarly, on the issue of rape the charge-sheet as well as the testimonies of the witnesses were to the effect that the victim was raped twice; 28th and 29th of May 2015.

Hence, the observations made by the learned RM were not called for and are not necessary at all. Any observation is supposed to be supported by evidence, but does this means he was bias. This Court does not think so, in order to prove bias more evidence are required. This was an irregularity, which the Court found it to be minor and did not affect the charge the accused was facing, which was rape.

In the upshot all the issues raised in this ground of appeal are dismissed, and the Court believes the prosecution succeeded to prove the case beyond reasonable doubt. Hence, this appeal is dismissed. But this Court observed one error in the judgment; the Appellant was charged with two counts of offence, and was asked to plea on each count as seen on pg 1 of the proceedings. Further, after the hearing of

the prosecution witnesses the learned RM (Khamis A. Simai) found the Appellant has a case to answer on each count. But the judgment composed by Hussein M. Hussein (RM) who took over from Khamis A. Simai who withdrew himself from the hearing of the case referred to only one charge of rape but combined the dates (pg 41 of the proceedings). Hence, at the end the Appellant was convicted of the charge of rape (pg 55 of the proceedings). It is submitted that this is an error on the part of the learned Magistrate, Hussein M. Hussein. It is a trite law that the accused person should be convicted or acquitted on each count of offence appearing in the charge-sheet. Hence, the file is returned to the learned RM to rectify the error by dealing with both counts of offences in accordance with the law.

It is so ordered.