IN THE HIGH COURT OF ZANZIBAR

HOLDEN AT TUNGUU

CRIMINAL APPEAL NO. 13 OF 2024

(FROM CRIMINAL CASE NO. 23 OF 2021 RM'S COURT MAHONDA)

MUDATHIR HAJI AME ..... APPELLANT

versus

DIRECTOR OF PUBLIC PROSECUTIONS ..... RESPONDENT

JUDGMENT

21/08/2024 & 10/10/2024

Ibrahim, J.

The Appellant was charged with two offences at the Regional Magistrate's Court Mahonda. The first count was rape contrary to section 108 (1) and (2) (e) and section 109 (1) of the Penal Act No. 6 of 2018. It was alleged that on the 22nd of January 2021 at 10.00 a.m. at Kiombamvua in the North B District in the North Region of Unguja the accused Mudathir Haji Ame had carnal knowledge of a girl (the name is withheld) or herein the victim. The second count was abduction of a girl contrary to section 113 (1) (a) of the Penal Act No. 6 of 2018. With respect to the second count, it was alleged that on the 22nd January 2021 at 10.00 a.m. at Kiombamvua in the North B District in the North Region of Unguja the accused Mudathir Haji Ame unlawfully took to his house an unmarried fourteen-year-old girl (the victim) out of the custody of her parents against the will of the parents.

The accused was convicted of both offences and on the 7th of January 2022 he was sentenced to serve imprisonment for the period of five years for each of the offences and it was ordered that the punishments would run concurrently.

The convict filed this appeal against the whole judgment. He filed four grounds of the appeal. First, that the case against the appellant was not established beyond reasonable doubt. Second, that the learned magistrate erred in law and fact by failing to consider the defence of the accused person. Third, that the magistrate erred in law by admitting the PF3 contrary to the requirement of law. Fourth, that the learned magistrate erred in law by denying the accused person his fundamental right to be heard.

At the hearing of the appeal, the Appellant Mudathir Haji Ame was legally represented by the learned advocates Mr. Azam Adam Abbas and Mr. Othman Ali Hamad. On the other side, the learned Principal State Attorney Mr. Said Ali Said appeared for the Respondent Director of Public Prosecutions.

Submitting on the first ground of appeal, Mr. Azam Adam Abbas stated that the charges against the Respondent were not proved beyond reasonable doubt. He stated that at page 5 of the proceeding there was a mention of names Hassanat and Muhaimina by the victim when she testified as PW1; those two persons were with the victim on the day and at the place of the event. However, Mr. Azam Adam Abbas stated that those two persons were never brought to testify. Also, the victim did not narrate where were Hassanat and Muhaimina when the offences were committed. Mr. Azam Adam Abbas added that PW2 who is the mother of the victim said nothing about Hassanat and Muhaimina in her testimony. According to Mr. Azam Adam Abbas, that was the first doubt in the case. He said that the second doubt is on the absence of *voir dire* test. He submitted that the test was not conducted before the taking of the evidence of the victim who was 15 years girl. He invited the court to refer to the case of **Suwed Andrew Suwed versus Director of Public Prosecutions** Criminal Appeal No. 22 of 2022 of the High Court of Zanzibar (unreported) in which it was held at page 17 that the omission of *voir dire* test was fatal and the evidence received was declared invalid.

On the second ground of appeal, this was on the failure to consider the defence evidence. Mr. Azam Adam Abbas told the court that the learned magistrate only reproduced the defence evidence at page 6 of the judgment. He stated that there was no analysis of defence evidence which led the court to its conclusions and the decision; and that was contrary to the law. Mr. Azam Adam Abbas supported this ground of appeal by citing the case of **Hamid Rajab Khamis versus DPP** Criminal Appeal No. 30 of 2022 of the High Court of Zanzibar (unreported) in which there was a summary of defence evidence but there was neither analysis nor evaluation and therefore the conviction was quashed and the appellant in that appeal was set free.

Mr. Azam Adam Abbas submitted the third ground of appeal that the PF3 had been admitted by the trial court contrary to the law His concern was that the PF3 was relied on without being read out in court. He pointed out that at page 14 of the proceeding it is seen that the reading out of the document was not done. He based his argument on the decision of the Court of Appeal of Tanzania in **Robinson Mwanjisi & Three Others versus Republic** [2003] T.L.R. 218. He stated that the PF3 was cleared for admission; it was admitted; but there is no record that it was read out after the admission.

The fourth which was the last ground of appeal was that the accused person was not given the right to cross examine the victim who testified as PW1. Mr. Azam Adam Abbas stated that the omission was contrary to section 12 (6) (a) of the Constitution of Zanzibar of 1984 which guarantees the right to be heard. He was of the view that their client was not given the right to be heard which is a constitutional right. He prayed that the conviction should be quashed, the sentence should be set aside and the Appellant should be released from Chuo cha Mafunzo.

Responding to the four grounds of appeal, the learned Principal State Attorney (PSA) Mr. Said Ali Said he prayed that the court should uphold the conviction and it should disallow the appeal.

On the first ground of appeal, he opined that Hassanat and Muhaimina were not brought to testify because they were not material witnesses to prove any of the two

counts in the case namely rape and abduction. The learned PSA submitted that the victim testified as indicated at page 5 of the proceeding that "... so we remain only me and Mudathir ...". The learned PSA supported his answer by the decision of the Court of Appeal of Tanzania at Mbeya in Criminal Appeal No. 73 of 2021 between **Gerson Geteni versus Republic** (unreported) at page 10 where it was held that failure to call a witness is fatal if the witness is a material witness to the case. Mr. Said Ali Said submitted that those two persons were not material witnesses; they could add nothing in the case in proving the two counts.

The PSA asserted that the case was proved beyond reasonable doubt because the records show that the victim identified the accused who was the neighbour and boyfriend. The PSA emphasized that this is seen in the testimony of the victim PW1 at page 5 and page 6. Also, the testimony of PW2 who is the mother of the victim was very strong; the said mother found the accused and the victim in bed naked; and the accused did not cross examine PW2. On top of that, PSA Said Ali Said stated that the testimony of PW2 was corroborated by Sgt Said PW4, Chausiku PW5, and Sheha of Shehia PW7. Again, PSA Said proclaimed that all of those witnesses were not cross examined by the accused who is now the Appellant. Mr. Said Ali Said commented that it implies that the accused did not dispute their testimonies and therefore the prosecution evidence was never shaken by cross examination.

In relation to the absence of *voir dire* test, the learned PSA submitted that according to the law there was no need of conducting a *voir dire* test because PW1 was above 14 years as it was testified by PW2 (the mother) and PW1 herself (the victim). Indeed, the learned PSA pointed out that the *voir dire* test is conducted to a child of tender years and the provisions of section 133 (6) of the Evidence Act No. 9 of 2016 define a child of tender years to mean a child whose apparent age is not more than fourteen years. Mr. Said Ali Said stressed that all of those factors lead to the conclusion that the offence was established beyond reasonable doubt and for that matter this first ground of appeal has no merit; it should be disallowed by the court.

On the second ground of appeal, the learned PSA Mr. Said Ali Said conceded with no hesitation that it was true that the trial magistrate only reproduced in the judgment the defence evidence without making any analysis or evaluation of that evidence. He, therefore, requested this court which is the first appellate court to step into the shoes of the trial court to evaluate the defence evidence and to come up with its own conclusions. He said that the suggestion is in accordance with the case of **D. R. Pandya versus Republic** [1957] E.A. 336. Furthermore, the learned PSA opined that the defence evidence had not raised any reasonable doubt to the prosecution evidence.

The third ground of appeal is on the admission of the PF3. The Principal State Attorney Mr. said Ali Said submitted that the PF3 was properly admitted as it is seen at page 15 and 16 of the proceeding. He said that the PF3 was cleared and admitted as exhibit PE1 and that its contents were read out in court. He submitted that it seems that the learned advocate for the Appellant was expecting to be written in the proceeding the exact words which say "the PF3 was read out in court". The learned PSA explained that the contents of the PF3 were read out by proving those contents of the PF3 and the witness PW3 (Mussa Khamis Kombo, doctor) was the only prosecution witness who was cross examined by the accused. Nevertheless, Mr. Said Ali Said submitted that if the court is of the opinion that it was necessary to be written on the record that the PF3 was read out in court, he considers the omission to do that is curable by expunging the whole testimony of PW3 and relying only on the testimony of PW1 herself and other witnesses who provided very strong circumstantial evidence.

On the denial of the fundamental right (the right to be heard) as the fourth ground of appeal, the learned PSA Mr. Said Ali Said submitted that on record there was a re-examination of PW1. He stated that in normal circumstances a re-examination of a witness comes after a cross examination of the witness; therefore, he assumed that there was a clerical problem or typing error that can be checked by the court by perusing in the original court file of the case. The learned PSA submitted that if the court file does not indicate the record of the cross examination, it is the irregularity of the trial magistrate and not the denial of the constitutional right as it has been alleged by Mr. Azam Adam Abbas the advocate for the Appellant. The PSA insisted that the right

to cross examine all prosecution witnesses was granted (whether utilized or not) except that the record does not include the cross examination of PW1. Moreover, the learned PSA stated that the accused who is now the Appellant was given the right to defend himself and bringing his witnesses as it is obvious at page 34 to page 36 of the proceeding; all of these confirm that the accused was given a fair trial and the right to be heard, he added. He concluded that if the record shows otherwise, then it amounts to a minor irregularity and not the denial of the right to be heard. Mr. Said Ali Said was of the view that this ground of appeal is not meritorious and it should not be allowed by the court.

Finally, the PSA submitted on the sentence. He stated that the punishment of imprisonment for five years for the offence of rape and the imprisonment for five years for the offence of abduction which run concurrently are too lenient and were not given according to the law. He submitted that the sentence which is too lenient or too excessive has to be enhanced or reduced respectively by an appellate court. This is supported by the case of **Omary Juma Lwambo versus The Republic** Court of Appeal of Tanzania at Dar es salaam, Criminal Appeal No. 176 of 2020. The learned PSA Mr. Said Ali Said prayed that the court should intervene by imposing the sentence according to the law, more particularly in accordance with section 109 (1) of the Penal Act No. 6 of 2018. He stated that the law has prescribed the punishment of life imprisonment or the imprisonment of not less than thirty years for the offence of rape together with the compensation for the victim. The PSA added that the offence of abduction attracts the punishment of imprisonment for a term of ten years under section 113 (1) of the Penal Act No. 6 of 2018. He submitted that the punishment imposed by the trial court was illegal and it disregarded a compensation. He prayed that the court should interfere by passing the appropriate legal sentence according to the provisions of the law.

The learned advocate Mr. Azam Adam Abbas for the Appellant made a rejoinder by saying that the case of **Gerson Geteni versus Republic** cited by the learned PSA is distinguishable because the crime scene in this case is quite different from the one in that case. He explained that in the present case Hassanat and Muhaimina did enter the

Appellant's house together with the victim; the PW2 did neither explain nor show where were Hassanat and Muhaimina when she found the accused and the victim in bed naked. Mr. Azam Adam Abbas emphasized that the prosecution was obliged to show how these two persons disappeared. He described that in **Gerson Geteni versus Republic** case the witness who was not brought to testify was not an eye witness but the witness with hearsay evidence.

Mr. Azam Adam Abbas appreciated the adrnission by the learned PSA of the lack of analysis of defence evidence in the judgment of the trial court. However, he differs from the PSA on the consequences of the absence of analysis of defence evidence. According to the advocate for the Appellant, the lack of evaluation and analysis of defence evidence meant the absence of fair hearing. He pointed out that in one case by the Court of Appeal of Tanzania the appeal was allowed for that matter (**Godfrey Richard versus Republic**, Criminal Appeal No. 365 of 2008). He asserted that there was no fair trial in the present case at the Regional Magistrate's Court and therefore this ground of appeal deserves to be allowed.

On the admission of the PF3, the learned advocate Mr. Azam Adam Abbas simply concurred with the learned PSA that if the admission of it was contrary to the requirements of the law of evidence hence it should be expunged from the record and the court should not consider that evidence at all.

On the lack of the right to be heard, Mr. Azam Adam Abbas retorted that the PSA has just given a presumption or hypothesis which has to be checked and verified by the court in the original case file of the court. On the Appellant's side, he stated that they believe that the cross examination was not there in the record of the proceeding because it was not done and they also believe that if it was done it could have changed the outcome of the case at the trial court. Ultimately, Mr. Azam Adam Abbas rest the matter to the court for its own perusal and checking in the original court file. He stated that if it was not done then it was a fatal omission which entitles the allowance of this appeal.

Mr. Azam Adam Abbas prayed that if the conviction is sustained by this appeal the sentence should remain the same because they believe that in imposing the punishment the trial court gave a great thought on the mitigating factors. All in all, he prayed that the appeal should be allowed, the sentence should be set aside and the Appellant should be released from Chuo cha Mafunzo.

In this appeal, the court later on requested the learned advocates of both parties to address the court on the transfer of the case file from one magistrate to another. This is because in composing the judgment the court found that the case started before Hon. Makame Khamis (RM) who received the evidence of PW1, PW2 and PW3. Secondly, the case continued before Hon. Subeti (RM) who took the evidence of PW4, PW5 and PW6 but no explanation was given on the record for the transfer of case file from Hon. Makame Khamis (RM) to Hon. Subeti (RM). Thirdly, the case was heard by Hon. Yahya U. Yahya who heard the testimonies of PW7, DW1, DW2 and DW3; it was Hon. Yahya U. Yahya who wrote and delivered the judgment in the case. The reason for the change of magistrate from Hon. Subeti to Hon. Yahya U. Yahya was given at page 25 of the proceeding; it was the transfer of Hon. Subeti from that court. The transfer was done by Hon. Magendo; it is likely that he was the magistrate in charge. This court wanted to know from the parties the legal consequence of the irregularity of not recording the reason of transfer of the case file from Hon. Makame Khamis (RM) to Hon. Subeti (RM).

The learned advocate Mr. Azam Adam Abbas for the Appellant referred, on one hand, to sections 95 and 201 of the Criminal Procedure Act No. 7 of 2018 and, on another hand, to the case of **Khelef Bakar Hogo versus Director of Public Prosecutions** Criminal Appeal No. 17 of 2020 of the High Court of Zanzibar and the case of **Adam Pili Juma versus Pili Sheha Pili** Civil Appeal No. 83 of 2017of the High Court of Zanzibar. He only described it as a miscarriage of justice which necessitates the quashing of the entire proceeding and a retrial. In the alternative, Mr. Azam Adam Abbas proposed the release of the Appellant because he has been under custody since the 7th July 2022 and he has served almost half of the punishment of five years imprisonment for each of the offence.

The learned PSA Mr. Said Ali Said stated that section 204 (1) of the Criminal Procedure Act No. 7 of 2018 has no express requirement which demands that the successor magistrate to record the reason why the court case file has come to him or her. He elaborated that the repealed criminal procedure law of 2004 had a lot of conditions which have not been re-enacted in the new Criminal Procedure Act No. 7 of 2018. He pointed out that the conclusion of this issue in the case of **Khelef Bakar Hogo versus Director of Public Prosecutions** at page 3 was that the provision relates to section 214 (1) of the Criminal Procedure Act of 1985 of Mainland Tanzania which is not applicable in Zanzibar.

Furthermore, Mr. Said Ali Said cited the decision of the Court of Appeal of Tanzania at Dodoma in **Tumaini Jonas versus The Republic** Criminal Appeal No. 337 of 2020 when it was held that the reasons for retrial in case of violation of section 214 (1) of CPA Mainland Tanzania are (i) the conviction is vitiated by the non-compliance with section 214 (1) of the CPA (ii) the appellant must have been materially prejudiced by the conviction. Mr. Said Ali Said submitted that the learned advocate Mr. Azam Adam Abbas for the Appellant has failed to show how the Appellant was prejudiced and what injustice was caused to him to trigger the quashing of the conviction and the making of the order of retrial. In his view, the court should consider it as a minor error which is curable under section 381 (1) of the Criminal Procedure Act No. 7 of 2018 because there was no failure of justice. He added that the new jurisprudence focuses on substantive justice as overriding principle instead of old principles based on technicalities.

Therefore, in this appeal we have to decide whether errors, omissions or irregularities that have been pointed out by the Appellant (in his grounds of appeal) and by the court (*suo motu*) vitiated the conviction; and whether the charges were proved beyond reasonable doubt.

I commence by saying that the fourth ground of appeal has no merit. The Appellant was not denied of his fundamental right of cross-examining the victim when the victim testified as PW1. I checked the court case file and I found the cross examination was

there in the original manuscript of the proceeding written by the trial magistrate. It was the omission made by the typist who skipped to type the cross examination proceeding.

The third ground of appeal on the admission of PF3 is also not meritorious. It is true that it was not written in the proceeding that the PF3 was read over aloud in the court during the trial but it is clearly evident in the record of the proceeding that the contents of the PF3 were proved in court by the medical expert Mussa Khamis Bakar who testified as PW3. After being admitted as exhibit PE1 the contents of the PF3 were proved by the author of that document who was PW3. This court is of the view that there was no fault on the side of the trial court in the admission of the PF3.

On the second ground of appeal, we concur with the Appellant that the trial court neither analyzed nor evaluated the defence evidence to see whether it raised any doubt on the prosecution evidence. What the trial court did was only to reproduce the defence evidence at page 5 of the judgment. In our opinion, it is a great error or omission that vitiates the conviction. As the first appellate court, we see no need to step into the shoes of the trial court to analyze and evaluate the defence as we were requested by the learned PSA. The reasons for our decline to do so will be manifest hereinafter.

On the first ground of appeal which submitted that the charges were not proved beyond reasonable doubt because of lack of explanation of whereabouts of Hassanat and Muhaimina during the commission of the offence of rape and the lack of *voir dire* to the witness PW1, there are three things that can be said on this ground of appeal.

First, the conducting of *voir dire* was not legally necessary due to the fact that when PW1 testified in the trial court on the 12th of April 2021 she was already fifteen years old. It was proved in the trial that the victim who was also the witness PW1 was born on the 16th of February 2006. Hence, it was correctly said by the learned PSA that *voir dire* is conducted when a witness is a child whose apparent age is not more than fourteen years in accordance with section 133 (6) of the Evidence Act No. 9 of 2016. This is to say that *voir dire* was not legally necessary to PW1.

Second, Hassanat and Muhaimina were not eye witnesses to the offence of rape because the victim testified that they remained only two: the victim and the Appellant.

Therefore, they were not material witnesses; their whereabouts during the commission of the offence is not known and their evidence could only be circumstantial; and section 150 of the Evidence Act No. 9 of 2016 provides that no particular number of witnesses shall in any case be required for the proof of any fact; at best, the court may only draw adverse inference for those two persons not being brought to testify.

Third, the judgment only focused on the offence of rape and it ignored the second count which was on the offence of abduction. Much attention was paid on the first count on the offence rape and its constituent ingredients. The Appellant was convicted of abduction without any analysis and evaluation of evidence in connection with that offence. For instance, for the offence of abduction it was never proved that the victim was unmarried girl. It was an empty conviction without any proof by evidence.

On the question of transfer of case file, in accordance to section 95 of the Criminal Procedure Act No. 7 of 2018, a transfer must be directed by the magistrate in charge of a relevant subordinate court. The transfer of the case file from Hon. Makame Khamis (RM) to Hon. Subeti (RM) had no explanation. It is unknown whether it was directed by the magistrate in charge or not. The reason for the transfer is also unknown because it was not documented in the record of proceeding. The transfer of case files must be done according to the law for the purpose of maintaining the integrity of the judiciary and for avoiding the possibility of magistrates to grab files in which they have an interest. It is obvious that this file was not properly transferred from Hon. Makame Khamis to Hon. Subeti (RM).

It is therefore correct to say that errors, omissions and irregularities that have been discussed vitiated the convictions entered by the trial court. For that matter, the prosecution has not established the charges to the required standard of proof. In consequence, for the reasons which I have explained the court quashes the convictions entered by the Regional Magistrate's Court against the Appellant; and it also sets aside the sentences passed against the Appellant.

The court hesitates to order a retrial since it will occasion injustice to the Appellant who has been in custody in Chuo cha Mafunzo for long time and has served almost half of

the illegal sentences imposed by the trial court and bearing in mind the age of the Appellant. Instead, the court orders the immediate release of the Appellant from Chuo cha Mafunzo. It is so ordered.

(Sgd) IBRAHIM M. IBRAHIM

JUDGE

10/10/2024

COURT

The judgment was delivered in court in the presence of the Appellant and his advocate Mr. Azam Adam Abbas and the respondent principal state Attorney Mr. Annuar Khamis Sardum for the DPP.

(Sgd) IBRAHIM M. IBRAHIM

JUDGE

10/10/2024

COURT

The right of appeal to the CAT was explained to the parties.

(Sgd) IBRAHIM M. IBRAHIM

JUDGE

10/10/2024

I certify that this is a true copy of the original

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REGISTRAR HIGH COURT

ZANZIBAR