IN THE HIGH COURT FOR ZANZIBAR

HOLDEN AT VUGA

CRIMINAL APPEAL NO.12 OF 2015

JECHA VUAI ALI … … APPELLANT

VERSUS

DIRECTOR OF PUBLIC PROSECUTIONS … RESPONDENT

JUDGMENT

DATE OF JUDGMENT: 29.2.2016

BEFORE: ISSA, A. A. J

The Appellant, Jecha Vuai Ali was charged with the offence of having carnal knowledge of a girl against the order of nature contrary to section 150 (a) of the Penal Act No. 6 of 2004 of the Laws of Zanzibar. The Regional Magistrate Court Mfenesini (Nassor A. Salim(RM)) convicted the appellant and sentenced him to serve seven years imprisonment and to pay to the victim compensation of Tsh 700,000. The appellant being aggrieved with the order of conviction and sentence appealed to this Court in Criminal Appeal No. 12 of 2015.

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 Saumu Ali Omar, a girl aged 15 years who is living at Kilindi Nungwi. At the material time she was living with her mother, Miza Khamis Ali. On 23.3.2013 at about 8.00 pm the victim was watching television outside her aunt's house, Mpaji Juma. The appellant went there with another person and had a bicycle. He asked her to meet him at an abandoned house at Juma Silima. The victim went there and met the accused who took her inside the house, laid her down, took off her clothes and unnaturally had carnal knowledge of her. The matter was reported to the police station and the Appellant was arrested and charged with the having carnal knowledge of a girl against the order of nature.

In this appeal the Appellant was represented by learned advocate Mr. Idi A. Hussein and the Respondent (DDPP) was represented by Mr. Mussa Kombo, learned State Attorney. The Appellant filed their amended memorandum of appeal which contained four grounds of appeal, namely:

1. That the Honourable Regional Magistrate erred in law and fact by convicting and sentencing the appellant when there is no corroborative evidence to link the appellant and the offence charged. It is the victim alone who testify on the offence being committed.

2. That the Honourable Regional Magistrate erred in law and fact by not to considering the fact that it is the duty of the prosecution to prove its case and not of the appellant.

3. That the Honourable Regional Magistrate erred in law and fact by convicting and sentencing the appellant using circumstantial evidence which is insufficient.

4. That the Honourable Regional Magistrate erred in law and fact by convicting and sentencing the appellant in a judgment which is insufficient and lacks reasons for that decision.

On the first ground of appeal Mr. Iddi took us to a book titled Evidence Text Book (1994) by William Bojezuk where on p. 40 he explained that in sexual offences there must be corroborative evidence because of the danger of the complainant fabricating the case. Further, on p. 45 of the same book he referred to the Trig case of 1963 where there was a rape case and the issue of identification was in question and the accused was acquitted because of the lack of corroborative evidence. He submitted that in this case the victim, Saumu (PW3) is the only one who testified to have been raped by the appellant. She gave that statement after being whipped by his brother. Further, no one has seen the appellant committing the act. He also cited the case of DPP V. Nuru Moh'd Gulamrasul [1998] TLR 82 which talks about being coerced to do something. The victim said that after being coerced, no one saw the appellant raping the victim. In addition he submitted that there are discripancies in the prosecution witness, for instance PW2 was told by PW4 that PW4 saw the victim and the accused together on the material time, but PW4 said he did not see them and he does not know anything. One main witness, the aunt also was not called to testify. The evidences were fabricated.

On the side of the Respondent, Mr. Mussa responded by citing the case of Bushuu Elias Domich Nyerobi & Another V. Republic [1995] TLR 97 where the Court of Appeal explained the purpose of corroboration is to confirm, or support the evidence to be sufficient, satisfactory and credible. Section 118 of the Evidence Act, Cap. 5 of the Laws of Zanzibar explains that all people are competent witnesses. He added that in our law

corroboration is not necessary, it is a matter of practice and not law. If corroboration is needed there is plenty of evidence corroborating PW3, On p. 5 of the proceedings, first paragraph PW3 said she was sodomised by the Appellant, this was corroborated by PW6 on p.8 of the proceedings where PW6 said there was penetration at her anus. Further, on p.5 PW3 explained that the accused had a bicycle and was accompanied by another person. This is corroborated by admission of the appellant on p. 10 of the proceedings. He cited the case of Rungu Juma V. Republic [1994] TLR 177 where it was decided that the testimony of a child could be corroborated by the defence of the accused. Therefore, the admission ofthe appellant that he was there on the date and time of incident and the description of PW3 are sufficient to corroborate evidence of PW3.

With respect to the second ground of appeal, the appellant's advocate submitted that in law the burdent of proof is on the prosecution and not the accused. The learned RM relied on the arguments raised by the accused. He was convicted because at the material time he was on the area where the incident took place. He argued that being there does not mean he has committed the act. The Constitution of Zanzibar in section 16 guarantees the freedom of movement of the accused. The learned RM interfered with the freedom of movement of the accused. He cited the case of Maruzuku Khamis V. Republic [1997] TLR 1 where it was held that the accused is required to raise reasonable doubt, DPP has to prove the case. He also cited the case of Kisinza Richard V. Republic [1989] TLR 143 where the Court held the standard of proof required is beyond reasonable doubt. He added that the doctor testified that the victim had no bruises. She was loose at the rear. The incident took place on 23 and the victim was sent to the doctor on 24, bruises would have been seen. PW1 also confirmed that the victim had the habit of having sex. The RM was supposed to consider these facts.

Regarding the second ground of appeal, Mr. Musssa responded by citing the case of John s/o Makolobela & Eric Juma V. Republic [2002]TLR 296 where the Court of Appeal said a person cannot be convicted just because his defence is not believed, but can be convicted on the weight of prosecution evidence which is proved beyond reasonable doubt. He submitted that the learned RM was satisfied that prosecution proved its case beyond reasonable doubt. On p. 15 of the judgment the RM find the prosecution have proved its case against the accused. The burden was on the prosecution. Appellant concentrate on p. 15 on the analysis of the defence evidence and it is not true that the burdent of proof was on the defence.

On the third ground of appeal, Mr. Idi submitted that the learned RM convicted the appellant on circumstantial evidences which are not sufficient. He cited the case of Katabe Kachochoba V. Republic [1986] TLR 170 where the Court held in circumstantial evidence there is a need of connection. Being present in the neighbourhood is not sufficient to prove the case. Mr. Mussa on the other hand responded that the

circumstantial evidence found in this case has been able to prove the case beyond reasonable doubt. He submitted that there are series of fact which are connected and led to conviction. First, there are issues of identification of the accused, PW3 said she knows the appellant well as he sent his car for repairs at her house. Secondly, there was an admission of the appellant that he was in the vicinity at that time; he had a bicycle and was together with another person. The same circumstance were explained by PW3 at p. 5 of the proceedings. All these links to establish the guilty of the accused though they are circumstantial.

On the fourth ground of appeal, Mr Idi submitted that if we look on the jugdment it is not persuasive. They are just words, no analysis, no law or case cited. The judgment had no reasoning sufficient to convict the accused. He prayed that the appeal should be allowed, conviction set aside and the appellant acquitted. Mr. Mussa responded by citing the case of Amiri Moh'd V. Republic [1994] TLR 139 where the Court of Appeal explained that every judge has its own style of writing judgment. What is essential is that ingredients of the judgment should be there. The ingredients are found in section 302 of Criminal Procedure Act. It should have points of determination, decision and reasons for decisions. All these ingredients were found in the judgment in question. On p. 15 of the judgment 3rd paragraph points of determination are clear – the victim was unnaturally known and the appeallant was there at that time. On the same page decision is found and the reasons for decision are seen. Further, on 2nd paragraph he explained that sexual offences are committed in secret and it is not easy to find eye witness. He prayed that the appeal should be dismissed and the judgment and conviction should be confirmed.

To start with the first and third ground of appeal, the learned State Attorney has correctly stipulated our position of law regarding corroboration. He said that in our law corroboration is not necessary, it is a matter of practice and not law. Section 118 of the Evidence Decree provides as follows:

> "(1) All persons shall be competent to testify unless the Court considers that they are prevented from understanding the questions put to them, or from giving rational answers to those questions, by tender years, extreme old age, disease, whether of body or mind or any other cause of the same kind.
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> (2) A person of unsound mind is not incompetent to testify unless he is prevented by reason of such unsoundness of mind from understanding the questions put to him and give rational answers to them."

Further, Sarkar on Evidence, 15th edn. Wadhwa and Company, India (1999) in page 1960 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."

Regarding corroboration Sarkar hold that 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.

Further, in Dattu Ramrao V. State Maharashtra 1997 (3) Mah LJ 452, the Supreme Court of India laid down the rule of prudence and desirability of corroboration as under:

"A child witness if found competent to depose to the facts and reliable one such evidence could be the basis of conviction. In other words even in the absence of oath the evidence of a child witness can be considered under section 118 of the Evidence Act provided that such witness is able to understand the questions and able to give rational answers thereof. The evidence of a child witness and credibility thereof would depend upon the circumstances of each case. The only precaution which the court should bear in mind while assessing the evidence of a child witness is that the witness must be a reliable one and his/her demeanour must be like any other competent witness and there is no likelihood of being tutored. There is no rule or practice that in every case the evidence of such witness be corroborated before a conviction can be allowed to stand but, however as a rule of prudence the Court always finds it desirable to have the corroboration to such evidence from other dependable evidence on record".

With the issue of sexual offences the low is crystsal clear in the Tanzania mainland as well as Zanzibar. In the case of Joseph Mapunda and Hamisi Selemani V. Republic [2003]TLR 366 the High Court of Tanzania held: "In view of the provisions of section 127 of the Evidence Act as amended by section 27 of the Sexual Offences (Special Provisions) Act 1998, 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".

In Zanzibar in 2011 the Legislature passed the Children Act No. 6 of 2011 in which section 45 provides as follows:

The position now is the person can be convicted even if the testimony is not corroborated.

Coming to the case in hand the victim is 15 years old and knows what happened to her. Further the incident took place on the evening between 7.00 and 9.00 pm and the victim was confronted by her father in the same evening and narrated that the appellant had unnaturally carnal knowledge of her. This was confirmed by the Doctor on the next day. Though no one saw the appellant defiling the victim but the circumstances clearly show that it happened on that particular evening. First, the victim could not be found when his brother looked for him where she was watching television. Further, the description of the accused on how he went to where she was watching TV match with the description of the Appellant himself. He went there with a bicycle and there was another person with him. Hence, the first ground of appeal lacks merit, the victim was a credible witness and her testimony was sufficient to convict the appellant. Further, the circumstantial evidences all are pointing to the appellant.

With respect to the second ground of appeal the Court agrees with both counsels that the burden of proof in criminal law is beyond reasonable doubt and the prosecution has the duty to prove its case beyond reasonable doubt. In this case the matter was very clear that the appellant was charged for having unnatural carnal knowledge of the victim. The main witness is the victim herself who testified to that affect and further the doctor testified that the victim was known unnaturally. These evidence are sufficient to prove a case unless there are other evidence to the contrary. In this case appellant first denied to be in the area on the material time but later changed his testimony by saying he went when he was called by Ms Mpaji. Hence, this Court agrees with the finding of the RM's Court that the prosecution succeeded to prove its case beyond reasonable doubt.

The Court further would like to caution the counsels that they are the officers of the Court and are supposed to help the Court in delivering justice and not misleading the Court. The Advocate for Appellant had submitted that the doctor testified that the victim had no bruises. She was loose at the rear. The incident took place on 23 and the victim was sent to the doctor on 24, bruises would have been seen. PW1 also confirmed that

the victim had the habit of having sex. The RM was supposed to consider these facts. When the Court looked at the testimony of the PW1, the father of the victim there is no statement of that kind that she had the habit of having sex. Further, the testimony of the doctor is contrary to what the advocate said in Court. The doctor said: “When we examine a patient we look at her both two parts front and back. We didn’t find any bruises or discharge when look at this victim at her front sexual parts. When we look at her anus we found that the muscle was loose and when you look at the anus and open a little you can see inside. We also see red colour (hyperaemic colouration) which normally occur when there is penetration at this part. The signs show us that this girl was entered in her back part of her body”. The second ground also lacks merit and is dismissed.

With respect to the fourth ground of appeal, Mr Idi submitted that the jugdment is not persuasive. They are just words, no analysis, no law or case cited. The judgment had no reasoning sufficient to convict the accused. Mr. Mussa on the other responded by citing the case of Amiri Moh’d V. Republic [1994] TLR 139 where the Court of Appeal explained that every judge has its own style of writing judgment. What is essential is that ingredients of the judgment should be there, which I totally agree. The contents of judgment is found in section 302 of Criminal Procedure Act, which provides:

> “302. (1) Every such judgment shall, except as otherwise expressly provided by this Act, be written by the presiding officer of the court in the language of the court, and shall contain the point or points for determination, the decision thereon and the reasons for the decision, and shall be dated and signed by the presiding officer in open court at the time of pronouncing it.
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> (2) in the case of a conviction the judgment shall specify the offence of which and the section of the Penal Act or other law under which the accused person is convicted and the punishment to which he is sentenced....

Lookind at the judgment in hand, It has been written by the Presiding RM and on the language of the Court, which is English. The learned RM has his own style of writing, though he did not mention so but the point of determination is whether the appellant is the one who committed the offence, the decision is seen on p. 15 where he came to the conclusion that the appellant committed the offence. The reasons for determination are also there as he based his findings on the circumstantial evidences. Futher, it was dated and signed by the Presiding RM. In addition, the judgment specify the offence on which he was convicted and also the punishment on which he sentenced the accused. Hence, this Court is of the view all contents of judgments have been present in the said judgment. Hence, the fourth ground of appeal also lacked merit, and the appeal is hereby dismissed.

It is so ordered.