

**IN THE HIGH COURT OF ZANZIBAR
AT TUNGUU**

CRIMINAL APPEAL NO. 07 OF 2023

(From Criminal Case No. 283 of 2021 of the Regional Court at Vuga)

SOUD ALI KHAMIS

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APPELLANT

VS

DIRECTOR OF PUBLIC PROSECUTION RESPONDENT

JUDGEMENT OF THE COURT

21/03/2023 & 17/05/2023

KAZI, J.:

Soud Ali Khamis, the appellant, was indicted before the Regional Court of Vuga with the two offences, namely, abduction of a girl and unnatural offence, contrary to sections 13 (1) (a), and 133 (a) of **the Penal Act** No. 6 of 2018, respectively. It was alleged that, on 07th August 2021, at 7:00 pm at Chumbuni kwa Rambo within Urban District in Urban West Region, the appellant abducted PW2, a girl of 16 years (identity withheld), while being under the custody of her parents, from her home Darajabovu to Chumbuni. It was further alleged that, on the same date at Chumbuni kwa Rambo, the appellant had carnal knowledge of PW2 against her order of nature.

The appellant pleaded not guilty to both counts. After a full trial, the trial court found the appellant guilty of the first count of abduction, and he was therefore convicted and sentenced to five years imprisonment and ordered to pay Tsh. Two Million (2,000,000) to the victim as compensation. Regarding the second count of unnatural offence, the appellant was not found guilty and acquitted. He was aggrieved with the decision of the trial Court and preferred the present appeal challenging both the conviction and sentence imposed on him.

As can be gleaned from the proceeding, a brief story behind the appellant's conviction falls from the victim alone. She testified as PW2 and was a 16 years old girl and a student when the crime was committed. At the material time, PW2 was living in Chumbuni, Darajabovu, with her parents. In her testimony, PW2 alleged that on the 07th day of August 2021 at 7:00 pm, the appellant asked her to meet him at Rambo's place, and she accepted. She went to the said place and met the appellant. Other evidence from the prosecution side came from PW'2 mother, who testified as PW1 and was unaware that PW2 met the appellant on 07th August 2021. According to her testimony, on 18th September 2021 at 1:00 am, she saw PW2 sleeping with a mobile phone, and upon interrogating her about the phone, PW2 claimed that the phone belonged to her.

PW1 also testified that he found messages from the said phone on a number saved as a brother, and that PW2 confirmed that it was the appellant's number. The investigator of the case was E. 4363 Detective Sargent Abdalla, PW3. In his testimony, he narrated the steps taken to investigate the crime, including his interrogation with witnesses, arrest of the appellant and visiting a crime scene.

In his defence, the appellant testified as DW1 denied the claim. He claimed that on the material date, he was repairing a car at Tunguu with Talib (DW3, a mechanic) and Bayuu (DW2, his neighbour) from 6:00 pm to 4:00 pm. He returned to his home around 4:30 pm, so he claimed. In their testimony, DW2, Yussuf Fom Makame, and DW3 Talib Juma Fom confirmed DW1's story that on the material date, they were together repairing a car at Tunguu from 6:00 pm to 4:00 pm.

In her judgement, the trial Magistrate found the key evidence from the prosecution side was that adduced by PW1 and PW2. Moreover, she found the evidence of PW1, PW2 and PW3 to be straightforward and proved the offence of abduction. She, therefore, convicted the appellant and sentenced him on the said count, as indicated earlier.

As I mentioned earlier, this appeal is challenging the trial Court's conviction and sentence imposed on the appellant in respect of the offence of abduction. Initially, the appeal was predicated on seven grounds of appeal, but during the hearing, which was by way of a written submission, the appellant abandoned four grounds hence the appeal is based on three (3) grounds, that:-

- 1. That, the Regional Magistrate Court erred in law and fact by convicting and sentencing the appellant based upon weak, unreliable implausible, contradictory and incredible evidence adduced by the prosecution witness before the trial Court.*
- 2. That, the Regional Magistrate Court erred in law and fact in holding that the prosecution proved one count beyond reasonable doubt while in fact it was not.*
- 3. That, the Regional Magistrate Court erred in law and fact by relying upon the evidence of PW2, the victim, who was not found competent to testify before the court.*

In this appeal, Mr. Hassan Kijogoo, learned advocate represented the appellant, and Mr. Anuar Saadun, learned state attorney, represented the respondent, DPP.

The appellant's written submissions were prepared and filed by Alex Paul, learned advocate, while the written submission in reply was drafted and filed by Mr. Suleiman Yussuf Ally, learned State Attorney from the office of the Director of the Public Prosecution, the respondent.

In his submission, the appellant conjoined the first and third grounds of appeal and argued them together. Basically, he contended that the learned trial Magistrate's determination was based on the phone and a phone call. He submitted that no phone records or printed copies of the text messages were tendered as evidence in court to establish that the appellant communicated with PW2. He further submitted that even the phone's registration number was not revealed in the prosecution case. Moreover, the appellant submitted that PW2 was not a credible witness since she never raised the alarm on her abduction on the material day and never told anyone that she met the appellant. He cited **Shaban Amiri v Republic**, Criminal Appeal No. 18 of 2007, to support his submission. Moreover, it was the learned advocate's view that, as the trial Court found PW2 not a credible witness regarding the second count of unnatural offence, what would make them believe that she didn't lie that she met the appellant on the said day? The

learned advocate submitted further that the ingredients of abduction had been stated in **Daud Kuhema v Republic**, Criminal Appeal No. 102 of 2021, that:

- 1. The accused person took away or detained the victim below the minimum age.*
- 2. The takeaway or detention was solely with the intent of having sexual intercourse with or marrying the victim by the accused or another person.*
- 3. And such action was done against the will or consent of the parents or guardians.*

It was his submission that the second ingredient was not established as from PW2's testimony, it was stated that she was taken to a 'baraza' and there was a road and people were passing going to Masjid at the material time. This is according to page 8, paragraph 3 of the proceedings and page 10, paragraph 3. The learned advocate for the appellant submitted that as the sexual act is done privately, the appellant did not intend to have sexual intercourse with the victim on the fateful day. Otherwise, he would have taken her to a different location.

Submitting on the second ground, the learned advocate averred that the prosecution has failed to prove their case beyond a reasonable doubt. He maintained that the burden of proof in criminal cases is vested upon the prosecution, as stated in **Kassim Abdallan v Republic** Criminal Appeal No. 52 Of 2020. It was his submission that failure to question and follow up on the authenticity of the communication between the appellant and the victim is unwarranted.

In response, the learned state attorney, in a similar manner, joined and argued the first and third grounds together. He submitted that the prosecution side called PW1 and PW2, who testified on everything regarding the abduction. Therefore, there were no reasons for them to tender a phone or text messages to the court as they were not at issue. Thus, it was his view that the prosecution's witnesses proved the offence beyond a reasonable doubt. The learned State Attorney then relied on section 64 of **the Evidence Act** No. 9 of 2016 that all facts must be proved by oral evidence, except the contents of document or electronic evidence. He then referred to page 8, paragraph 10 of the proceeding, where PW2 stated that "*on 07/08/2021 at 19:00 hrs, I remember Soud told me that he wanted to see me at Rambo's place I went there...*". According

to the learned state attorney, PW2's statement shows that the 'taking' took place, and it establishes the offence of abduction.

Regarding the issue of the credibility of PW2, the learned state attorney contended that how could you measure the credibility of a witness for not raising the alarm? He submitted further that PW2 did not scream because the appellant held her tight. Furthermore, the learned state attorney submitted that the testimony of PW2 on page 8 of the proceeding proves that the appellant intended to have sexual intercourse with PW2, and he did so.

Regarding the second ground, the learned state attorney maintained that the prosecution proved its case beyond a reasonable doubt.

In rejoinder, the applicant insisted that communication to lure the victim was pivotal to supporting the offence. Further, he disputed the claim that the appellant intended to have sexual intercourse with the victim on the material day as they met in a public place.

Considering the rival submissions, the only issue that needs my determination is whether this appeal has merit.

I propose to start with the second ground, in which the appellant claimed that the prosecution failed to prove the offence of abduction beyond a reasonable doubt. In confirming whether the prosecution proved the case beyond reasonable doubt and whether PW2 was a credible witness, I will discharge my duty, as the first appellate court, by re-evaluating and considering afresh relevant evidence from the witnesses, especially PW1, PW2, and PW3.

The testimony of PW1 had nothing substantive concerning the offence of abduction. From the record, PW1 just recounted how she found PW2 slept with a mobile phone at midnight on 18th September 2021 and how she interrogated the victim and sent her to Ng'ambo Police Station and Mnazimmoja Hospital. In his evidence, the criminal investigator, PW3, explained how he investigated the crime by interrogating different witnesses, visited a crime scene and making an arrest of the appellant. PW3, in his evidence, claimed that he found the appellant committed the crime, but he did not explain how he reached that conclusion. As I have stated before, the key witness, PW2, told the Court that the appellant told her that he wanted to see her on 07th August 2021 at 7:00 pm. at the Rambo's place, and she went to meet him at the said place.

I have considered the above evidence and found that they are insufficient to establish the offence of abduction. The only material witness in the offence is PW2. There was no other witness who saw the appellant abducting PW2. Moreover, PW2 did not reveal how the appellant contacted her on the material date and time and where she was when he reached her.

Furthermore, although the crime was alleged to be committed on 07th August 2021, PW2 revealed it on 18th September 2021, a month and 11 days later, after being sent to the police station and interrogated about who was sending the message on her phone.

This delay and hesitance of PW2 to name the appellant as a person who abducted her casts doubt on her

credibility; **See; Marwa Wangiti Mwita and Another vs The Republic** (Criminal Appeal 6 of 1995) [2000] TZCA 4.

That is not all, as rightly submitted by the learned advocate for the appellant, even the printout of the text message and the number of the phone, which is alleged to be the appellant's number, was not tendered in court to corroborate PW1 and PW2's story or at least to establish a link between the appellant and PW2.

I share the same view with the learned advocate that if there were any text messages between the appellant and PW2, the communication script from the mobile phone provider could have proved the communication between the appellant and the victim. Therefore, before tendering the script in evidence, the prosecution side was required to reveal the number used to send text messages to PW's phone and establish that the said number was registered with the appellant's name to corroborate PW2's evidence.

In my view, the above-explained analysis of the material prosecution witnesses' evidence shows that the prosecution side failed to establish the offence of abduction against the appellant. The evidence of the victim was lousy and implausible, and as I have underscored herein above, it has a lot to be desired. Thus, had the trial Court thoroughly analysed the evidence of PW2 as I did, I think it would have reached a similar conclusion.

Having determined the second ground in the affirmative, resolving the second and fourth ground of appeal is unproductive. Consequently, I allow the appeal. Accordingly, I quash the conviction of the appellant. The sentence of five years imprisonment and the order for compensation of Tsh

2,000,000 imposed upon him by the trial Court are set aside.
The appellant Soud Ali Khamis to be released immediately from
prison (Chuo cha Mafunzo) unless he is held for any other
lawful cause. It is so ordered.

Dated at Tunguu, Zanzibar this 17th day of May 2023.

A handwritten signature in black ink, appearing to be 'G. J. Kazi', written in a cursive style.

G. J. KAZI
JUDGE
17/05/2023