

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

**CRIMINAL APPEAL NO. 18 OF 2023**

(Arising from the decision of the Regional Magistrate's Court at Vuga in Criminal Case  
No. 175 of 2021)

**OBEIDI GOLINDO SAMSON** ..... **APPELLANT**

VS

**THE DIRECTOR OF PUBLIC PROSECUTIONS ... RESPONDENT**

**JUDGEMENT OF THE COURT**

01/06/2023 & 10/08/2023

**KAZI, J.:**

This appeal arises from the decision of the Regional Court at Vuga (the trial court). The appellant seeks to challenge the conviction and sentence passed by the trial court against him.

At the trial court, the appellant, Obeidi Golindo Samson, was charged and convicted of two counts of rape contrary to section 108 (1) (2) (e) and 109 (1) of **the Penal Act** No 6 of 2018 (henceforth the Penal Act), and unnatural offence contrary to section 133 (a) of **the Penal Act**. It is important to note that the appellant was charged along with one Neema Safisha Richard (henceforth co-accused), who is not subject to this appeal. The appellant's co-accused was also charged with two offences of abduction of a girl contrary to section 113 (a)

of **the Penal Act** and aiding the offence of rape contrary to section 22 (b) of **the Penal Act**. At the conclusion of the trial, the co-accused was acquitted of both counts, and the appellant was convicted of both offences and sentenced to serve 30 years imprisonment for the offence of rape and 30 years imprisonment for the offence of unnatural offence. The sentence was ordered to run concurrently. The appellant was not satisfied hence the instant appeal.

The indictment before the trial court for the first count was to the effect that on 11<sup>th</sup> April 2021 at or about 16.00 hours at Chukwani in the West "B" District within the Urban West Region of Unguja, the appellant had carnal knowledge of ZIS (name withheld), a girl who was 16 years old.

As for the second count, it was alleged that on December 2020 at or about 10.00 hours, in the same place, the appellant had carnal knowledge of ZIC against her order of nature.

The brief facts of the case are that ZIC, the Victim, who testified at the trial court as PW4, claimed that the appellant was her lover since 2020. She contacted him through a co-accused, the appellant's in-law. On 11<sup>th</sup> April 2021, PW4 was taken by the co-accused to her house at Chukwani, where she

met the appellant. Later, the co-accused left for church, leaving PW4 and the appellant behind. PW4 told the trial court that when they were alone, the appellant asked her to have sexual intercourse, but she was afraid she might fall pregnant. The appellant then took her to his in-law's room, pushed her to the bed, removed her underpants and inserted his penis into her vagina. PW4 then went home at about 6 pm, where she met her sister PW2, who informed her what happened between her and the appellant.

Moreover, in her evidence, PW4 claimed that in December 2020 at 10 am, she went to the co-accused house, met the appellant, and had carnal knowledge with him against her order of nature. PW4 told the trial court that the co-accused and others went to the farm on this day, so she was alone at the co-accused's house with the appellant. PW1, PW4's mother, learned about PW4's relationship with the appellant on 17<sup>th</sup> October 2021 when returning home from the farm at about 5 pm. She told the trial court that she found PW4 talking on the phone. She took the PW4's phone and asked her who she was talking to, and PW4 replied that she was talking to the appellant. As she was suspicious of her, she decided to inspect PW4's school bag and found khanga, which PW4 claimed to get from the appellant. PW1, therefore, decided to go to Chukwani to confront the appellant, where she met the co-accused, who

confirmed that the appellant gave PW4 the said khanga. The following day PW1 decided to report the matter at Mazizini Police Station as she suspects that PW4 was raped. At the police, PW1 was directed to send PW4 to Mnazi Mmoja Hospital for a medical examination. On 18<sup>th</sup> April 2021, PW4 was examined at Mnazi Mmoja Hospital by PW5, Mwanaisha Bilali Ramadhan, the medical practitioner. According to PW5, when medically examined PW4, she discovered that PW4's vagina did not have a hymen and had old tears at 4, 5 and 6 o'clock. She also found PW4's anus muscles loose, which led to a gap. It was PW5's opinion that PW4's vagina and anus were penetrated since she lost her hymen and had a gap in her anus. At his testimony, PW5 tendered PF3, which was admitted as exhibit PEI. to support her findings. The investigator of this matter was WP 5000 D/CPL Karabai Sharia Hassan, PW6. He told the trial court what he did in the investigation, such as collecting witnesses' statements, interrogating the appellant and the victim, and visiting a crime scene along with his colleague F. 6312 Cpl Rafii (PW3), the victim and the appellant. After his investigation, he was satisfied that the appellant committed the offences he was accused of.

At the defence, the accused testified on oath as DW1, disassociates himself with both offences. He relied on the

defence of alibi that he notified the trial court on 3<sup>rd</sup> August 2021 before the case hearing started. He claimed that he is a water well digger working in different parts of Tanzania, such as Tanga, Dar es Salaam and Unguja. He contended that on 14<sup>th</sup> October 2020, he travelled to Tanga from Zanzibar through the Mkokotoni seaport. He went to Kipumbwi, Tanga, to dig a well. He tendered a dhow's (Zanzibar-Tanga) ticket, which was admitted as Exhibit DEI. DW1 told the trial court that he stayed in Tanga for six months, then he left Tanga on 28<sup>th</sup> March 2021 and went to Dar es Salaam by bus, known as Najim Express Company. To support his evidence, he tendered in the trial the bus ticket, which was admitted as Exhibit DE2. It was his defence that when he arrived in Dar es Salaam, he went straight to take a boat, Kilimanjaro IV of the Azam Marine where he travelled at 4:30 pm from Dar es Salaam to Zanzibar. He then tendered a Kilimanjaro IV ticket which was admitted as Exhibit DE3. DW1 testified further that on 11<sup>th</sup> April 2021 at 12:30, he travelled to Dar es Salaam by Kilimanjaro IV boat and stayed in Dar es Salaam for three days. He tendered in trial court Exhibit DE4, a Kilimanjaro IV ticket. He returned to Zanzibar on 15<sup>th</sup> April 2021 by Kilimanjaro IV, which departed at Dar es Salaam at 9:30 am. To support that, he tendered a boat ticket which was admitted as Exhibit DE5. He, therefore,

told the trial court that the allegation that he raped ZIC was untrue as he was not in Zanzibar.

Similarly, he claimed that the allegation that he had sexual intercourse with ZIC against her order of nature in December 2020 was also untrue, as he was in Tanga in the said month. DW1's alibi was supported by the co-accused, who testified as DW2. In her evidence, she told the trial court that the appellant was not in Zanzibar when the crimes were alleged to be committed.

The trial court refused to accept the appellant's defence of alibi. It was of the view that the appellant was supposed to bring witnesses he claimed to be with on the alleged dates of the commission of the crime. The trial court also was of the view that Exhibit DEI and DE2 did not disclose the time of the journey and kind of transport used and that Exhibit DE3, DE4 and DE5 had two different identification numbers, whereas DW1 claimed that he used only one identification card, which was voters ID's card, in buying the tickets. Moreover, the trial court queried why Exhibit DE4 was scratched while Exhibit DE3 and DE5 were not scratched. The trial court was, therefore, of the view that DW1 booked the ticket but did not travel because if he had travelled, all the tickets would have been torn as per the procedure of Azam Marine Co. Thus, the trial court

accorded no weight to the appellant's alibi defence. Based on the evidence given by the key witness (PW4) and the evidence presented by PW2 and PW5 together with Exhibit PEI, the trial court found that the prosecution proved beyond reasonable doubt that the appellant raped and had sexual intercourse with ZIC against her order of nature. The appellant was therefore convicted and sentenced as indicated herein earlier.

In this appeal, the appellant raised eleven grounds of appeal as follows: -

1. That, the Honorable Magistrate of the Regional Court of Zanzibar at Vuga Hon. Sara O. Hafidh - (RM) erred in law and facts in her decision by convict and sentences (*sic*) the appellant in a case where the 2<sup>nd</sup> and the assisted accused according to the charge sheet was found not guilty.
2. That, the Honorable Magistrate erred in law and facts in her decision by convict (*sic*) the appellant based on the defective charge sheet.
3. That, the Honorable Magistrate of the Regional Court erred in law and facts in her decision by convict (*sic*) the appellant without to consider (*sic*) the appellant defense.

4. That, the Honorable Magistrate erred in law and facts in her decision by convict (*sic*) the appellant based on the testimony of the witnesses which are (*sic*) contradict and contravene them self between PW1, PW2, PW4 and PW5.
5. That, the Honorable Magistrate erred in law and in fact by not assessing exhaustively the credibility of the prosecution evidence before relying on it as basis of convicting the appellant.
6. That, the Honorable Magistrate erred in law and in fact to convict and sentence the appellant in a case where the prosecution failed to prove the offences against the appellant beyond reasonable doubt.
7. That, the Honorable Magistrate erred in law and facts by reaching her decision of convict (*sic*) and sentence (*sic*) the appellant based on PF3 which was, not properly identified, tendered, not properly admitted to court, not properly signed as confirmed by the doctor.
8. That, the Honorable Magistrate erred in law and facts in her decision by convict (*sic*) and sentence (*sic*) the appellant in a case where does not specified (*sic*) when the appellant commit (*sic*) the offence of sodomized (*sic*) the victim.



9. That, the Honorable Magistrate erred in law and facts in her decision by convict (*sic*) and sentence (*sic*) the appellant on the evidence which fail (*sic*) to prove the age of the victim.
10. That, the Honorable Magistrate erred in law and facts in his decision by convict (*sic*) and sentence (*sic*) the appellant by failure to analysis (*sic*) properly the evidence adduced to the court.
11. That, the Honorable Magistrate erred in law and facts in his decision by convict (*sic*) and sentence (*sic*) the appellant based on incredible and inconsistent evidence of PW1, PW2, PW4 and PW5.

At the appeal hearing Mr. Emmanuel Samwel, learned advocate, represented the appellant, whereas Suleiman Yussuf Ali, learned State Attorney, represented the respondent, the Director of Public Prosecution (DPP). By order of the Court, the appeal was argued through written submissions.

I will start with the third ground of appeal that the trial court erred in its decision by not considering the appellant's defence. Mr. Samwel, a learned advocate, when arguing in respect of this ground, stated that the appellant filed his defence of alibi according to the law, but the trial court did not consider it,

which resulted in a miscarriage of justice. He cited **Hussein Idd and Another v Republic** [1986] TLR 166 to support his position. He then continued by stating that as the trial court failed to consider the defence case, this Court has the power to step into the trial court's shoes and reconsider it. He supported his stand with the authority of **Kaimu Said v Republic**, Criminal Appeal No. 391 of 2019 [2021] TZCA 273. He, therefore, urged the Court to analyse the evidence adduced by both sides and to come up with its findings.

Mr. Ally, learned State Attorney, opposing this ground, submitted that the trial court thoroughly considered the appellant's defence. He referred to the Court on pages 4, 5, 10, 11 and 12 of the judgement. He submitted further that the proceeding was fairly conducted, and the principle of natural justice was well observed.

The crux of the third ground is whether the trial court considered the appellant's alibi. I have revisited the trial court's judgement, and contrary to what was submitted by the appellant advocate, the trial magistrate did consider the appellant's alibi defence. However, in her analysis, she decided that the same did not carry any weight in raising doubt against the prosecution case. At this point, the question that needs to

be answered is whether the trial court's decision to reject the appellant's alibi is justifiable.

As I have narrated earlier, in dismissing the alibi defence pleaded by the appellant, the trial court initially condemned the appellant for not calling any witnesses he claimed to be with when working in different parts of Tanzania during the time the alleged crimes were committed. Then it scrutinised all boat tickets which was admitted in evidence and noticed flaws on it; for instance, the learned magistrate, in her analysis, was of the view that Exhibit DEI (dhow ticket of the captain's cooperation of Mkokotoni/Ushirika wa Manahoza Mkokotoni) dated 14<sup>th</sup> October 2020 and Exhibit DE2, (a bus ticket) dated 28<sup>th</sup> March 2021, did not show time of the journey, mode of transport and the destination. Moreover, in her analysis of Exhibit DE3 (Kilimanjaro 4 boarding card) dated 28<sup>th</sup> March 2021, Exhibit DE4 (Kilimanjaro 4 boarding card) dated 11<sup>th</sup> April 2021, and Exhibit DE5 (Kilimanjaro 4 boarding card) dated 15<sup>th</sup> April 2021, she was of the view that two tickets, Exhibit DE3 and DE5, had two different identification numbers while it was on record that the appellant used the same identification card in buying the said tickets. In her findings, the learned magistrate maintained that the appellant used two different identification cards in purchasing boat tickets contrary to his testimony. It was her

further views that Azam Marine Company tore the boarding card before one got onboard, but to her surprise, Exhibit DE4 was scratched, and the rest were not. Therefore, she got the impression that the appellant just booked the tickets but did not travel, her reasons being, as per her words, that : -

*"...if he had travelled then all tickets would have been torn as per the procedures of Azam Marine Co."*

Based on her analysis, as narrated above, the learned trial magistrate accorded no weight to the appellant's alibi and disregarded it.

On my side, I must state, with due respect, that the learned magistrate committed a gross error in disregarding the appellant's alibi based on the reasons that the appellant failed to call persons who were with him in Tanzania Mainland on the alleged dates of the commission of the crime to testify in support of his alibi. It is a settled law that an accused has no duty to disprove the prosecution's allegation, but his only duty is to raise a reasonable doubt against the prosecution case. Relatedly, the accused has no duty to prove his defence of alibi. The purpose of an alibi is only to raise a reasonable doubt towards the prosecution's case. In the case of **Mkaima**

**Mabagala vs Republic** (Criminal Appeal No. 267 of 2006) [2011] TZCA 181 (24 February 2011), the Court of Appeal of Tanzania had this to say regarding the defence of alibi: -

*"It was and it still remains to be that an accused person putting forward a defence of alibi does not assume any duty of proving it. It will be sufficient to secure an acquittal for him if the alibi raises a reasonable doubt".*

I have examined Exhibit DE1 to DE5, and with due respect, I found that the learned magistrate misguided herself in her findings. What the learned trial magistrate considered as Exhibit DE3 and DE5 bared two different identity card numbers was incorrect. Exhibit DE3, DE4, and DE5 have several details such as Book ID, Ticket Number, Date of journey, Name of the passenger and his Nationality, Name of the Vessel, Boarding Point, Destination, Time of departure, passport number/identity card number, Class, Seat Number, name of an officer who booked and printed the ticket, and the time and the date with which the ticket was booked. What I have found from all these three exhibits is that the identity card number of the appellant was not inserted on them, and the place where the passenger's passport/ID number was supposed to be recorded is blank. I have noticed that all Exhibits have a Book ID, also known as a

booking reference number. It is these booking reference numbers which the learned trial magistrate gets confused with and refers to them as the appellant's identification number.

Additionally, the trial regional magistrate was incorrect in her findings regarding what she claimed were Azam Marine procedures. Her findings on the said procedure were not supported by any evidence adduced during the trial. It is instructive that the court's judgement is always restricted to the available evidence on record rather than otherwise. The judicial officer should stay within the evidence adduced by the parties and not decide on the matters based on his personal knowledge. This position was well emphasized in **Mkaima Mabagala** (Supra) when it was held that: -

*"For a judgment of any court of justice to be held to be a reasoned one, in our respectful opinion, it ought to contain an objective evaluation of the entire evidence before it. This involves a proper consideration of the evidence for the defence which is balanced against that of the prosecution in order to find out which case among the two is more cogent. In short, such an evaluation should be a conscious process of analyzing the entire evidence dispassionately in order to form an informed*

*opinion as to its quality before a formal conclusion is arrived at".*

Therefore since there was no evidence adduced by the witnesses of either side on how Kilimanjaro boat's boarding cards are treated before boarding or afterwards, and since the prosecution side did not adduce any witness in an attempt to refute the alibi, considering the fact that they had ample time to do so, from such time the notice of alibi was lodged, the trial court should have considered that Exhibit DE3, DE4 and DE5 were genuine.

Exhibit DE1 and DE2 was rejected because they did not indicate the mode of transport, departure time and destination. Exhibit D1 is a receipt, and as correctly observed by the trial court, it doesn't show all the essential details apart from the name of the appellant, date, amount paid, signature of the receiver and the stamp of the captain's cooperation of Mkokotoni. Nevertheless, in his defence, DW1 testified that on 14<sup>th</sup> October 2020, he travelled by dhow to Dar es Salaam from Mkokotoni seaport. This Court is taking a judicial notice that Mkokotoni seaport, which was established on 1<sup>st</sup> November 2003 under the order of the then Chief Minister, is now a famous seaport which harboured various sea vessels, mostly

dhow, used by the passengers going to Tumbatu, and for importing and exporting goods to and from Dar es Salaam. It is, therefore, not expected for the dhow owners to issue tickets similar to the ones given by the ones who operate sea ferries at Malindi port. Besides, the prosecution side did not cross-examine DW1 as to his journey of 14<sup>th</sup> October 2020 to Dar es Salaam via Mkokotoni. It should be considered therefore that what he testified as the truth since it is now a settled position of the law that failure to cross-examine the adverse party's witness on a particular aspect, the party who ought to cross-examine the witness, is deemed to have taken as true, the substance of the evidence that was not cross-examined; **See Shomari Mohamed Mkwama vs Republic** (Criminal Appeal 606 of 2021) [2022] TZCA 644 (21 October 2022). Additionally, contrary to what was held by the trial court, Exhibit DE2 shows that the appellant travelled from Korogwe, Tanga to Dar es Salaam on 28<sup>th</sup> March 2021.

Based on what I have elaborated above, the trial court erred in rejecting the appellant's alibi. I am therefore satisfied that the appellant successfully raised his defence of alibi. His evidence raised doubt that he committed the offences since he was not in Zanzibar in December 2020 and 11<sup>th</sup> April 2021. As a result, it is doubtful that he committed the crime of rape and



unnatural offence in Zanzibar on the dates on which he was never in Zanzibar, contrary to what was alleged by the DPP. Therefore, the third ground of appeal has merit and is accordingly allowed.

Since the third ground of appeal is sufficient to dispose of this appeal, I find no pressing need to resolve the remaining grounds. Consequently, I allow the appeal. I hereby quash both convictions and set aside the sentences imposed on the appellant. It is ordered that the appellant be set at liberty forthwith unless he is otherwise lawfully held.

Dated at Tunguu, Zanzibar this 10<sup>th</sup> August 2023.



**G. J. KAZI**  
**JUDGE**  
**10/08/2023**