

IN THE HIGH COURT OF ZANZIBAR

AT TUNGUU

CRIMINAL APPEAL No. 06 OF 2023

(Appeal from the Criminal Case No. 105 of 2022 of the Regional Magistrate Court for Zanzibar at Vuga, Hon. Simai, RM)

SULEIMAN SALUM MOH'D.....APPELLANT

VERSUS

DIRECTOR OF PUBLIC PROSECUTIONS.....RESPONDENT

JUDGMENT

03rd July & 18th September, 2023

A. I. S. Suwedi, J

This appeal originated from event happened between unknown date in January and 19th day of February, 2022 when the appellant abducted two children and ended by committing sexual offences against them. Eventually, he was arraigned before the Regional Magistrate's Court for Zanzibar at Vuga with Unnatural Offence contrary to section 133(a) of the Penal Act, No. 6 of 2018; two offences of Abduction of Girls contrary to section 113 (1) (a) (supra) and the offence of Indecent Assault contrary to section 114 (1) (supra).

For the Unnatural offence, it was stated that in between the unknown date of January and 19/02/2022 at about 10:00am at Amani, in the Urban District, within the Urban West Region of Unguja, the appellant had carnal knowledge against the order of nature of **Khan** (name for the purpose of this judgment only), a girl of 8 years. He also without lawful cause took **Khan** who is under the parental care and who is not married from Amani Wazee School to broken cars place at Amani.

Similarly, the appellant on the same unknown date, same time and place the appellant indecently assaulted **Hum** (name for the purpose of this judgment only), a girl of 6 years by touching his penis to her front private parts where before that doing, the appellant without lawful cause also took **Hum** who is under the parental care and who is not married from Amani Wazee School to broken cars place at Amani.

The trial Court at the end did not find the appellant guilty of the 2 counts of abduction but he was convicted with unnatural offence and the offence of indecent assault and has been sentenced to serve 14 years imprisonment and 25 years imprisonment respectively, the sentence which was ordered to run concurrently. Besides, the appellant ordered to pay TZS

300,000/- to each victim as compensation under section 314 of the Criminal Procedure Act, 7/2018 for psychological suffering.

Aggrieved by that decision, the appellant lodged 3 grounds but he abandoned ground 2 and remained with the following two grounds as:

1. Kwamba, Mh. Hakimu wa Mkoa Vuga alikosea kisheria kwa kuzingatia ushahidi dhaifu wenye utata, usio wa kweli na ambao haujajitosheleza kuitwa ushahidi uliotolewa na upande wa mashtaka kwa PW1, PW2, PW3 na PW4.
2. Kwamba, Mh. Hakimu wa Mkoa Vuga alikosea kisheria kwa kutozingatia hati mbovu ya mashtaka iliowasilishwa na upande wa mashtaka.

On the hearing day, the appellant was under the legal service of the learned Counsels Omar Sheha and Hasina Ali Said and the respondent appeared through Mr. Annuwar Saadun, learned Senior State Attorney.

Submitting ground one of appeal, Mr Sheha stated that the evidence adduced by respondent during the trial was weak and contradictory. Both **Khan** and **Hum** (**PW1** & **PW2** respectively) said the incident happened during school break (recess) but 19/02/2022, the day stated in the charge sheet was Sunday. **PW1** said incident occurred 3 times but the charge sheet stated only 2 incidents. **PW1** and **PW2** said they went out through a small opening at the fence but the School Security Guard was not called to testify about the small opening if it really exist bear in mind that they are

not allowed to go out during school hours. Another issue emphasised is the failure of **PW3** not state a person who informed her and that she was never called to testify. Besides, **PW3** did not remember the date she received a phone call from Police.

Furthermore, PW4 gave false testimony for the reason that she said the complainant was **Jokha**, a person who was not called as witness. Also, there are 2 victims but only 1 PF3 was brought before the trial Court. Counsel Sheha further commented on the area of the scene, old broken cars vis-à-vis long grasses while the place is behind the school and there is a bakery. According to him, it is not possible for the bakery to be surrounded by long grasses. Again, the evidence of **PW4** is contradicting the evidence of **PW5** which signifies that the evidence was not true.

He concluded ground one by remarking the difference from the date of the incident and the date victim was taken to Hospital and he cited an unreported case of **Daudi Anthony Mzuka v. R**, Criminal Appeal No. 297 of 2021 at page 18.

Counsel Sheha's argument in relation to the above second ground is connected to the charge sheet not to state exact date of the occurrence. Failure to state precise date made the charge sheet to be defective as the

appellant might be curtailed his right if he intended to rely on the defence of alibi. Much more, failure to indicate the date means that the charge was not proved and he strengthened his argument by the decision of case of **Mayala Njigailele v. R**, Criminal Appeal No. 490 of 2015 (unreported) from page 6 to 9. He finally urged me to allow the appeal and hence to quash the judgement and decree of the trial Court.

Replying, Mr Saadun started to submit ground two and he cited a case of **DPP v. Yussuf Mohammed Yussuf**, Criminal Appeal No. 331 of 2014 (unreported) that the Court of Appeal dismissed the appeal for the failure to prove the time stated within the charge sheet. The charge sheet in the case subject to that appeal just stated between this date and this date, but the issue was neither witness said between those dates stated. This is not in the current appeal, the dates provided in the current charge sheet proved by **PW1** and **PW2**.

In respect with ground one, Mr Saadun commenced on the point of unknown date and he submitted that the victims are children of tender years, if you consider their age and the reward given after the commission of the crime is the source of the victims not to say forthwith. The failure to summon a Security Guard was not an issue as that witness was of no need

since **PW1** and **PW2** said no one was seeing them passing through the opening.

In respect with 19/02/2022 to be Sunday, he responded that the charge sheet did not specify exactly on 19/02 but it said between January, 2022 and 19th February, 2022 and the fact on the PF3 is baseless as no need of medical expertise to the offence of Indecent Assault. Besides, failure to call a person who informed **PW3** is also baseless since all the ingredients of the offence were proved. The best evidence to sexual offences comes from the victim and the learned trial Magistrate clearly said at page 58. He finally prayed for a dismissal order, conviction and sentence to remain intact.

Counsel Sheha rejoined by saying that the case of 2014 cited is outdate and the current one is the one he cited in his submission in-chief. **PW1** and **PW2** gave false evidence and that they are not strong witnesses. Besides, the principle that the evidence of the victims to be enough is outmoded and he finally repeated his earlier prayers.

I will straight start with the first ground, the ground that carries several small arguments. Reading the submission done, I found three issues carried within the first ground; **one**, the evidence given was false

evidence; **two**, the evidence was contradictory and **three**, the evidence was weak. To analyse and determine this ground properly I need to know the evidence adduced during trial.

The respondent's case built with 5 witnesses: **Khan (PW1)**, 8 years girl and her friend **Hum (PW2)**, 7 years girl, between January, 2022 and 19th February, 2022 while at Amani school recess "*babu chostic*" whom they identified as the appellant herein took them at about 10:00am to broken cars situated behind the school. The appellant then took out his penis and inserted into **PW1** anus while **PW2** is witnessing. After being done with **PW1**, the appellant then brushing his penis into **PW2**'s vagina. According to **PW1**, the appellant did that act 3 times on different days whereby in some days **PW1** is alone. Upon completion, the appellant gave **PW1** and **PW2** a "*chostic*" and TZS 200/- each and let them go back to school. Their evidence further shows that they are not allowed going out during school hours but they used to pass through small opening of which the Security Guard have not seen them.

The information was received to **PW1**'s mother **Mwajuma Yahya Juma (PW3)** after being called at **PW1**'s school on March, 2022. The school received a report concerning **PW2** that is being sexually abused and

the fact that they are friend the school asked **PW3** if anything felt by **PW2**. **PW3** later received a call from Ng'ambo Police Station to appear with **Khan (PW1)**. On arrival, she was given a PF3 and requested to go to Mnazi Mmoja Hospital for inspection and the result was that **PW1** was sodomised. **PW3** questioned **PW1** and she responded that "*babu chostic*" (a person who she do not know) took her with **PW2**.

The evidence by respondent revealed further that one **Jokha Halim Ali** was the one reported at Ng'ambo Police Station and the report was about her child **Hum (PW2)**. **PW4, WP 7810 D/CPL Asya** decided to look for **PW3** after **PW2** declaring that they were together with **PW1**. The PF3 was given on 27/03/2022 and the result was that **PW1** was sodomised while **PW2's** earlier shows that she was not raped. **PW4** interrogated **PW1** and she mentioned the appellant. Besides, she visited the place and found place is where broken cars were kept and the car appellant used was Z. 160 AC which was surrounded by long grasses nobody is able to see inside.

PW2 examined by **PW5, Sabrina Ali Issa**, Doctor from One Stop Centre Mnazi Mmoja Hospital and she confirmed that **PW2's** vagina is intact but her anal muscles were loosed and the PF3 was admitted as "**Ex.**

PE1". She finally advised the trial Court that the looseness caused by a blunt object penetration at her anal part.

On his side, the appellant made up his defence by 3 witnesses including him. His evidence denied to have known **PW1** and **PW2** but he admitted that he is selling "*chostic*" at Wazazi School Amani, Mahad School and Nyerere School. In January, 2022 he was at Jumbi and then Maisara for selling mangoes with his friend. On 19/02/2022, the appellant was sick at home and it is not true that he took children from school to broken cars as that day was Saturday. His evidence also shows that the school is fenced and there are JKU as Security Guards. It is not possible to take a child out of school as they are playing inside the compound during recess and he said that he do not know the place where broken cars are kept. It is through the evidence of appellant as **DW1** that the victim's mother had grudges with him as he is selling mangoes for TZS 100/- while others are selling for TZS 200/- and she told him that I will know her and few days later he was charged.

DW2 and **DW3** are appellants' business colleagues and their evidence was to the effect that they know appellant and he has no bad habit and that on 19/02/2022 was on Saturday they are not going to sell,

no school on that day. Besides, on that date the appellant and **DW1** were at Maisara selling mangoes. Both were surprised to hear the news that appellant raped as the school is fenced and no child is allowed to go out.

After summarising the evidence given I now moved to the points raised. The appellant though Counsel Sheha claimed that the witnesses gave false evidence. I have thoroughly read the evidence by the respondent and I couldn't find good and cogent reasons for not believing the witnesses. The law forbids me to disbelieve a witness if there is no ground for disbelief. In the case of **Goodluck Kyando v. R** (2006) TLR 363 at page 367 the Court of Appeal of Tanzania said:

It is trite law that every witness is entitled to credence and must be believed and his testimony accepted unless there are good and cogent reasons for not believing a witness.

Counsel Sheha tabled this doubt because 19/02/2022 was Sunday, I failed to give weight to this point so as to conclude **PW1** and **PW2** lied. The charge sheet did not say exactly on 19/02/2022 but the incident happened in unknown date between January, 2022 and 19/02/2022. Besides, Counsel Sheha also disvalued the evidence of **PW4** and he concluded that he gave false evidence. His argument was tighten by stamen of **PW4** that she was given a file for investigation purposes on

29/02/2022 and that the **Jokha Halim Ali** was the complainant but she was not called to testify. Again, I failed to give this point much weight. To me what is important is the credibility and reliability of the evidence and not the number of witness called on to testify and because **Jokha** was not called to testify I cannot say **PW4** gave false evidence. However records shows that on 24/08/2022 the accused requested to hear only 2 witnesses due to his health condition and so 2 witnesses were warned to appear on 31/08/2022, one of them was **Jokha Halim Ali**. On 31/08/2022, for another time the same 2 witnesses were warned to appear on 14/09/2022 following the adjournment prayer from the appellant. If that witness was not called at all, I would say they respondent hidden something but the fact that the witness appeared two times, I do not have anything to doubt that **Jokha** had not lodged a complaint before Ng'ambo Police Station.

Another issue connected with ground one is the issue of contradiction in the respondent evidence before the trial Court. At the very outset, I am aware of the principle that, in order the contradictions or inconsistencies in evidence by witnesses to be capable of vitiating the prosecution's case such contradictions or inconsistencies must go to the root of the case. Please see **Mohamed Said Matula v. R.** [1995] TLR 3 and **Dickson**

Elias Nsamba Shapwata & Another v. R, Criminal Appeal No. 92 of 2007.

I closely consider the submission made by Counsel Sheha that **PW1** and **PW2** are saying that incident occurred during school recess but on 19/02/2022 is Sunday and **PW3** said that on Saturday and Sunday her child is not going to school. Counsel Sheha also said that **PW1** said the act was done 3 times but the charge sheet addressed 2 incidents only. Also he connected the issue of PF3 to be taken from the Hospital on 29/02/2022 while **PW1** was given a PF3 on 27/03/2022.

Under my considered view these are not contradictions to warrant the case by the respondent to be at risk. In any case, I have read the evidence of **PW1**, **PW2**, **PW3** together with **PW4** and I found no any inconsistent between them as submitted by the appellant. What **PW4** said on PF3 is that she went to take PF3 of **PW2** and not the PF3 of **PW1**. Her evidence was:

.....I went to take PF3 of **Hum** from hospital where the doctor finding was that she was not raped. I took statement of **Hum** who confirmed that she was abused by penetrating the penis into her vagina. She told me they went together with her friend **Khan** who used to penetrate at her anal The victim mentioned

Khan, I looked for her where I found on 27/03/2022 where I gave PF3 for examination and the result shown the **Khan** was sodomised.....

The statement is very clear that the first PF3 which was followed was that of **PW2**. Because during interrogation **PW2** mentioned **PW1**, the Officer made follow up to find **PW1** who came on 27/03/2022. Hence, the point is of no weight.

Another issue grounded with ground one is the weak evidence and from the submission and rejoinder Counsel Sheha said that the principle of relying on the victim's evidence in sexual offences is out dated. With due respect I am departing from Counsel Sheha's argument and the position stated is the current position of law. Section 49 (4) of the Children's Act, No.6 of 2011 says generally on the child testimony that a Court is allowed to convict after warning itself on relying on a child testimony only. The provision says:

49 (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 fully satisfied that the child is telling the truth.

Much more, the Court is also allowed to convict in proceedings involving a sexual offence if the only independent evidence obtained is that of the child or victim of the sexual offence. Section 49 (5) says:

49(5) Notwithstanding the provisions 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 merit, notwithstanding that such evidence is not corroborated, proceed to convict for the reasons to be recorded in the proceedings, if the Court is satisfied that the child is telling nothing but the truth.

The same provision is also found under section 133 (7) of the Evidence Act, No. 9 of 2016. Additionally, case laws also say the same thing regarding to the testimony of a child victim. In **Frank Deule @ Damas v. Republic**, Criminal Appeal No. 396 of 2018 (unreported) the Court of Appeal of Tanzania repeated what have been said in **Selemani Makumba v. Republic** [2006] TLR 379 and **Edson Simon Mwombeki v. Republic**, Criminal Appeal No. 94 of 2016 (unreported). The Court said that:

Moreover, since it is settled law that medical evidence does not prove rape, **the best evidence is the credible evidence of**

the victim who is better placed to explain how she was raped and who the person responsible was. [Emphasis in Mine]

Even the case **Daudi Anthony Mzuka** cited above by Counsel Sheha himself support the argument that the best evidence is that of a child victim.

In the instant appeal, records show that the learned trial Magistrate emphasised on the weight of the **PW1's** evidence and he cited relevant provisions regarding the child witness. If **PW1** and **PW2** are the only witnesses, then under my opinion it is sufficient to warrant conviction of the appellant, bear in mind the evidence was not challenged by the appellant. **PW1** says:

..... Between January, 2022 and 19/02/2022 I was at school together with my friend **Hum**. Then come babu chostic who took me and **Hum**. It was at 10:00 at recess. He took to broken cars (Magari mabovu) situated behind of our school then Babu chostic took out his dudu (penis) and penetrating at my back (at anus) at the place I use to produce waste.....and at that time **Hum** saw me. After finished it was a turned to **Hum** who penetrated her front (showing vagina)

The same story was given by **PW2** that they went out from school during recess with her friend, **PW1** and that they went with "babu chostic" at broken cars area behind their school at Amani. "Babu chostic" started to

put penis to PW1 at back and after finishing he penetrated into her vagina. Much more, the learned trial Magistrate recorded demeanour of the witnesses (**PW1** and **PW2**). **PW1** was recorded severally to be crying while testifying and the gestures they were using, all signifies that children told nothing save for the truth. However, the trial Court did not relied on **PW1**'s testimony only he also considered other pieces of evidence brought and he specifically took the evidence of **PW1**, **PW2** and **PW5**.

On the other hand, the learned trial Magistrate also did not rely on the victims' evidence only in convicting the offence of Indecent Assault but he regarded the evidence of **PW1**, **PW2**, **PW3** and **PW4** of which I see no wrong in his analysis. I am satisfied that charges the appellant faced are proved from the evidence of **PW1** and **PW2** which was corroborated by the evidence of **PW4** who testified as follows:

.....I went to take PF3 of **Hum** from hospital where the doctor finding was that she was not raped. I took statement of **Hum** who confirmed that she was abused by penetrating the penis into her vagina. She told me they went together with her friend Khan who used to penetrate at her anal

Having said so, I see the first ground lack of merit and the same if hereby dismissed.

The second ground of appeal is about the charge sheet whereby counsel Sheha contention was on the failure to indicate the date of the commission of the offence and that made the charge sheet read over the appellant to be defective and for this he cited of case of **Mayala Njigailele**, I started to read the case supplied and unluckily I am not on counsel Sheha's side. Initially, the Court based its argument under section 132 of the Criminal Procedure Act. Cap 20 RE 2002, the provision which do not existing in the Criminal Procedure Act, No, 7 of 2018 (the Act). However, the fact that the Court of Appeal is a superior I decided to concentrate on it in order to take best practice if there will be a need to do so.

At page 4 of the case the Court of Appeal reproduced the charge sheet read over the appellant in that case which I am also replicating it for quick understanding. It is as follows:

.....

OFFENCE SECTION AND LAW: Rape contrary to section 130 (a) and 131 of the Penal Code Cap. 16 Vol. 1 of the Law of Tanzania.....

PARTICULARS OF OFFENCE: That MAYALA S/O NJIGAILELE is charged that on the lastly months 2002 at various times at Kimadaguli area within the Municipality of Shinyanga did

unlawfully several intercourses with one Restituta d/o Charles, a girl of 10 years

2ND COUNT:

OFFENCE SECTION AND LAW: Rape contrary to section 130 (a) and 131 of the Penal Code Cap. 16 Vol. 1 of the Law

PARTICULARS OF THE OFFENCE: That Mayala s/o Njigailele is charged that on the same date, time and place did unlawfully have several intercourses with one Menna d/o Charles a girl of 7 years

.....

When I read the indictment as I said, I see the difference between the cited charge sheet and the current the one at hand. The Court commented on the provisions cited that are inexistence at all and the failure to indicate the date. What I have noted, the charge sheet in the case cited is omnibus, the appellant was charged with several acts in one count. The words used "*did unlawfully several* intercourses" and "*have several intercourses*" implies that several acts included within one count and the dates stated are not so specific. What "*on the lastly months 2002*" indicates? Is it December, 2002 or November and December, 2002? The situation is not in the present appeal and I am also copying the charge read to the appellant before the trial Court that:

.....

KOSA LA KWANZA, KIFUNGU NA SHERIA:

KUMUINGILIA MTOTO WA KIKE KINYUME NA MAUMBILE:

Kinyume na kifungu cha 133 (a) cha Sheria ya Adhabu, Sheria Nam. 6 ya mwaka 2018, Sheria ya Zanzibar.

MAELEZO YA KOSA:

SULEIMAN SALUM MOH'D, baina ya mwezi Januari, 2022 tarehe isiyofahamika hadi tarehe 19/02/2022 majira ya saa 4 za asubuhi huko Amani.....

.....
.....

KOSA LA TATU, KIFUNGU NA SHERIA:

SHAMBULIO LA AIBU: Kinyume na kifungu cha 114 (1) cha Sheria ya Adhabu, Sheria Nam. 6 ya mwaka 2018, Sheria ya Zanzibar.

MAELEZO YA KOSA:

SULEIMAN SALUM MOH'D, baina ya mwezi Januari, 2022 tarehe isiyofahamika hadi tarehe 19/02/2022 majira ya saa 4 za asubuhi huko Amani.....

On this I am of the view that the charge sheet did not contravene the law. The law requires the charge to state the offence, brief particulars of the offence, the law and section of law which the offence is said to have been committed. Section 164 (1) of the Act stipulates as:

164 (1) A charge under this Act shall state the offence with which the accused is charged with brief particulars of the offence

(2) Where the law which creates the offence gives specific name, the offence may be described in the charge by that name only

(3) Where the law which creates the offence does not give it any specific name, so much of the definition of the offence must be stated as to give the accused notice of the matter which he or she is charged.

(4) The charge shall state the law and section of the law against which the offence is said to have been committed.

The requirement to state date and time is found under second schedule of the Act where there are formats of the charge sheet. Again, reading the charge sheet under my considered opinion is sufficiently to inform the appellant that between January, 2022 and 19/02/2022 committed the offences charged. The important point the dates were proved by the respondent's evidence as said in the case of **DPP v. Yussuf Mohammed** cited above by Mr. Saadun. Though, counsel Sheha depreciated that case but this is the relevant as its basis is the Laws of Zanzibar.

There is an argument that the appellant intended to rely on the defence of alibi by counsel Sheha. I have noted that point but I have failed to note any infringement on his side. Records show that on 14/09/2022 Counsel Sheha issued a notice for the alibi defence. Then in his defence,

the appellant based on 19/02/2022 that he was not at school, he was at home sick. I found this point weak as the respondent did not state exact 19/02/2022 and henceforth, the second ground is also baseless.

I am therefore holding the appeal lack of merit and the same is hereby dismissed in its entirety.

DATED at TUNGUU ZANZIBAR this 18th day of September, 2023



A. I. S. Suwedi

JUDGE

The judgment delivered in the presence of the appellant and Mr. Annuwar Saadun, Learned Senior State Attorney for the respondent. Right to appeal explained.



A. I. S. Suwedi

JUDGE

18/09/2023