IN THE HIGH COURT OF ZANZIBAR

AT TUNGUU

CRIMINAL APPEAL No. 65 OF 2022

(Appeal from the Criminal Case No. 85 of 2022 of the Regional Magistrate Court for Zanzibar at Vuga, Hon. Simai, RM)

MVITA KHATIB MVITA……....APPELLANT

VERSUS

DIRECTOR OF PUBLIC PROSECUTIONS.....……RESPONDENT

JUDGMENT

19th March, 2024

A. I. S. Suwedi, J

The appeal lodged with 5 grounds of grievances as follows:

1. Kwamba, Hakimu wa Mahkama ya Mkoa amekosea kisheria na kiushahidi kwa kumpata na hatia mrufani kwa kuukubali ushahidi wa kusikia wa PW2.
2. Kwamba, Hakimu wa Mkoa amekosea kisheria na kiushahidi kwa kumpata na hatia mrufani kwa kuukubali ushahidi unaogongana.
3. Kwamba, Hakimu wa Mkoa amekosea kisheria na kiushahidi kwa kumpata na hatia mrufani kwa ushahidi uliojaa shaka.
4. Kwamba, Hakimu wa Mkoa amekosea kisheria na kiushahidi kwa kumpata na hatia mrufani kwa kukubali ushahidi wa kupanga na kula njama.
5. Kwamba, Hakimu wa Mkoa amekosea kisheria na kiushahidi kwa kushindwa kuuchambua ushahidi wa upande wa utetezi.

All 5 grounds are talking about evidence adduced by the PW2 that the evidence was hear say one, that the evidence contains contradictions and

doubts, that the evidence adduced was cooked and that the learned trial Magistrate did not consider the appellant's evidence. Hence, the sole purpose of this judgment is to ascertain whether the evidence given by the PW2 was hear say evidence? Whether the evidence contains contradictions and doubts? Whether the evidence was cooked? Whether the learned trial Magistrate did not consider the appellant's evidence? For quick and better under standing, I better start with the records to see what happened before the trial Court.

The appellant before the trial Court arraigned with the offence of abduction contrary to section 113 (1) of the Penal Act, No. 6 of 2018 and the offence of Defilement of a Boy contrary to section 115 (1) (supra). It has been stated that on 05/03/2022 at about 15:00 hours at Mtoni Kijundu, in the West "A" District and Urban West Region of Unguja, the appellant took **Hum** (a name for this judgment only), a boy of 7 years and he is under custody of his parents, form his house to the bush at Mtoni Kijundu without consent of such parents.

With regard to the second count, it has been alleged that on the same date between 15:00 hours and 16:00 hours at Mtoni Kijundu, in the West "A" District and Urban West Region of Unguja, the appellant had a carnal knowledge of **Hum**.

The trial Court satisfied with the evidence given and the appellant was convicted accordingly and sentence to serve 10 years imprisonment for the 1st count and 14 years imprisonment for the 2nd count, sentences that have been ordered to run concurrently.

Since all the reasons touched the evidence supplied by the respondent, it is better to observe so as to determine the truthfulness of the allegations tabled before this Court. The evidence by the respondent that said to established the two offences charged has been given by 4 witnesses. The story started on 05/03/2022 at 15:00 hours while PWI (**Hum**), a boy of 8 years old was playing with other kids near appellant's house. The appellant called him to help searching for medicine at the bush. Having reached there, the appellant told PW1 to remove his trouser and he did so his trouser, took his cheche (penis) and penetrated to PW's anus. According to PW1, they were alone at bust at the time the act was committed. Upon completion, the appellant gave PW1 TZS 300 while on the way back to his home.

The evidence also shows that the act was committed 2 times and an attempt was made to commit on the third time but PW1 refused to go with the appellant. PW1 did not disclose the act as appellant told him not to tell anyone. The tale came to be know after PW2 (PW1's father) was told by his wife who was informed by her neighbour on 15/04/2022. PW2 immediately interrogate PW1 who confirmed to have been defile by the appellant, a

person who is well known as he live 2 houses from PW2's house. PW2 reported a matter to Police, PF3 was given to Mnazi mmoja Hospital. PW4 examined PW1 and she confirmed that PW1's anal muscles were loose and so there was evidence of penetration. The PF3 tendered to form part o fthe respondent's evidence. Lastly, the evidence shows that PW4 was given a file on 22/04/2022 for investigation purposes. He interviewed witnesses including PW1 who gave descriptions of the scene of crime which they found to be as stated by the child. The place was Mtoni Kijundu within the Government forest.

On the other hand, the case by the appellant made up by 3 witnesses. His evidence was that he was confined on 14/04/2022 by Community Polices at 19:30 hours for theft. He was taken to Police after being beaten by those Community Polices. He was detained for a month without being told the offence and his relatives took a bail for him. He was notified to go to Court and before the Court he came to knew that he was charged with abduction and defilement, the offences which he never committed. Appellant as DW1 testified that he was accused of the offences following the hatred of single person, and PW1's parents were persuaded to say so. DW1 further pleaded alibi by saying that on material day he was at Kidoti Kituoni, the place he is working at the auto puncture. He prayed at Mtoni Kijundu and then went to Kidoti at 08:00 hours to 17:00 hours.

Appellant also in his evidence raised doubt that the wife of PW2 did not testify. The act was committed on 05/03/2022 but the report and examination done 0n 14/04/2022 and the investigator given received the file on 24/04/2022. The story by the appellant as DW1 was supported by the evidence of DW2 who said that he was together with the appellant on 05/03/2022 at Kidoti and they worked together until 17:00 hours. The same story given by DW2 was given by DW3 that he is working with the appellant and DW2 at Kidoti and on 05/03/2022 they are at their working station from 08:00 to 17:00 hours.

Having seen the evidence given by the parties, I will look directly to the grounds of this appeal lodged and the submission made. Before this Court, the appellant legally represented by the learned counsel Emmanuel John and the respondent appeared through Mr. Annuwar Saadun, learned Principal State Attorney.

Straightly, I start by looking at the evidence of PW2, whether the evidence given by him was hear say evidence? Legally, evidence given before the Court must be direct as said by section 65 (1) of the Evidence Act, No. 9 of 2016 as correctly stated by Counsel John and so generally hear say evidence is not admissible. Counsel John in submitting this ground stated that Bi Cheupe who gave the information to the PW1' s parents was not called to

testify. According to him learned trial Magistrate erred in accepting the evidence of PW2.

Mr Saadun on his side said that the evidence of PW2 was not hear say evidence as he was directly informed by the PW1 himself and so his evidence can not be at risk as said in the case of **Amos Kabota v. R** (2014) TLR 25. The fact that PW2 was competent witness under section 133 of the Evidence Act (supra) no need of calling bi Cheupe.

I read the evidence of PW2 line by line and I honestly failed to see any element of hear say evidence. In **Subramaniam v. Public Prosecutor** [1956] 1 W.L.R. 965 (P.C.) at 970, The Privy Council characterized the hearsay rule as follows:

> Evidence of a statement made to a witness by a person who is not himself called as a witness may or may not be hearsay. It is hearsay and inadmissible when the object of the evidence is to establish the truth of what is contained in the statement. It is not hearsay and is admissible when it is proposed to establish by the evidence, not the truth of the statement, but the fact that it was made. The fact that the statement was made, quite apart from its truth, is frequently relevant in considering the mental state and conduct thereafter of the witness or of some other person in whose presence the statement was made.

From my understanding for the quotation is that for an evidence to be termed as hearsay evidence, the rule is that a statement given in proceedings about something other than that by the person who directly perceived it is

inadmissible. For quick reference, I am reproducing the part of the evidence of PW2 within the records of the appeal that is claimed to be hearsay:

> …… When I went back home I found **Hum**'s mom was harshly, I asked her what happened. She told me that Khadija's father, Mvita Kombo (accused person) was taken to Police Station for allegation that he sodomized the child and being told by bi Cheupe one among the children who had been sodomized is my son **Hum**.

The evidence of PW2 did not last here, if this evidence had ended here then I would directly agree with the appellant that the evidence is only a hear say and that would have fallen with the ambit of the **Subramaniam's** case. PW2 continued from there as:

> Having received that information I called Hum and asking him if truly that Mvita had sodomized him. He then admitted that it's truly had been sodomized by Mvita and receiving that I took him to the Police Station where I had been given PF3 to go to mnazimmoja for examination. On arrival at Hospital the child was examined and being discovered he was defile then we went back to Police Station to send result of examionation.
>
> ……..

The previous part of PW2's evidence was just an introductory part and then continued with the sequences of activities he personally did. When PW2 was crossed examined by the appellant during trial he responded one of the question as:

> …….I came to testify the hearsay evidence. What you heard is truth……..

In fact when I measure the statement with the evidence he gave, I am not convinced that the statement was meant that way. The evidence given by PW2 is direct one as required by the law.

The appellant also complained that the evidence given by the respondent contains contradictions and doubts in his second and third grounds of appeal. Counsel John in his submission directed this Court to the evidence of PW1 and PW3. PW1 said he was defiled on 05/03/2022 but PW3 examined him on 15/04/2022 and she failed to say the duration of when the incident happened. She just said that there was penetration and muscles were loose.

Mr Saadun on his side there was no any contradictions between the evidence of PW1 and PW3. PW1 is a victim who testified on the date of the occurrence which was 05/03/2022 and PW3 was an expert who gave the opinion to the trial Court and she testified on the date she received a child which is 15/04/2022.

Without much ado, I am in agreement with Mr. Saadun that there was no any contradictions between the evidence of PW1 and PW2. Each witness testified on what seen of done. The act committed on 05/03/2022 and the child was taken to Police and Hospital on 15/04/2022. This is because a child did not disclose the fact promptly, he explained the incident after being asked by his father and regarding his age I am hesitating to disvalue his evidence

for the reason that a child of the PW1's age is easy to be deceived and forbidden to say anything done against him and he kept silent.

On the side of doubt, though counsel John failed to explained the doubt found within the evidence but the appellant himself raised one within the third ground that PW3 failed to say which exactly object was used to penetrate PW1 at page 13. Again, I read at page 13 when PW3 was crossed examined by the appellant replied as:

> ……. I found the loose of anal muscles that cause by penetration of blunt object such as penis. I did not know exactly object used to inserts at the victim anal…….

PW3 testified as an expert which her role before the Court is to provide expert opinion and not else. PW3 was not present at the occurrence, she has given evidence of her expertise after examining PW1. At the end, it is upon the Court whether to accept the expert's opinion or not and so it is not the expert's duty to say exactly what had penetrated the child victim. Hence, the doubt raised by the appellant has no meaning in law.

Now I jump to the forth ground to see if the evidence given by the respondent was really planned as claimed by the appellant. Counsel John in his submission commented on 40 days' delay for PW1 to be examined. PW1 said the offence was committed on 05/03/2022 but PW3 examined PW1 on 15/04/2022 and no reason was given as to why they took 40 days. He strengthened his argument by citing a case of **Daudi Anthony Mzuka v. R**,

Criminal Appeal No. 297 of 2021 (unreported) at page 18 whereby the Court denied the PF3 for the reason that examination conducted after 72 hours. In the instant case delay was 40 days but the trial Court admitted it.

In respect with the fourth ground, Mr Saadun conceded that the time was long between the incident and the examination by PW3, but the reason was given within the evidence of the respondent. PW1 said clearly that the appellant gave him TZS 300 and he told him not to tell anyone. The trial Magistrate touched this point at page 21 of the judgement and finally he urged me to see the delay as non fatal.

With regard to this ground, I foremost weighed the point vis-à-vis the submission made and I have noted two things. One evidence was cooked and two is about late check up for PW1. I will start with the point of evidence by the prosecution was planned. This is not a matter of wasting much time as the law requires any witness in the earlier stage to be believed unless otherwise there are other reason to prove otherwise, please see **Goodluck Kyando v. R** (2006) TLR 363.

I read the entire evidence adduced by the respondent before the trial Court, I have failed to see even one shred to disbelieve the evidence given was not true and it was a cooked one. I thus, hesitating to fault the learned trial Magistrate in believing the witnesses. On the other hand, PW1's

examination done late and no reason was given by PW3, this is the argument by the appellant. Initially, with the circumstances of the instant case, PW3 had no duty to give reason of the delay as the delay was out of her control. I am of the view that, a witness who has a duty to give opinion to the Court, and has been given a sample for investigation or like this one a child was sent for examination and the task has been done late, such witness is duty bound to supply reason for the delay.

In the instant case, records show that PW1 did not report the incident after the happening on 05/03/2022 until the information sent to his parents. From there PW2 asked him and he narrated the story and immediately PW2 took action to report to Police and sent PW1 to Hospital on 15/04/2022. The delay occurred in this case caused by the failure of PW1 to report the happening. But as I said earlier that PW1 is a child, and with his age, it is easy to be deceived and prohibited to say anything done to him. I thus, see this ground to have no merit.

Lastly, the appellant claimed that the learned trial Magistrate did not consider the his evidence. Counsel John in submitting this ground, he said that the trial Court did not consider the evidence given by the appellant and he quoted a High Court case of **Shimbi Shija v. R**, Criminal Appeal No. 68 of 2019 (unreported) at page 22. counsel John further said that PW1 was playing with other kids but no other child was called to testify.

Mr Saadun on his side responded that the trial Court did consider the evidence of both sides and the analysis done with regard to both sides testimonies. Finally the trial Court satisfied that the two offences were proved beyond reasonable doubt.

However, counsel John rejoined by saying that the Honourable trial Magistrate just summarised the evidence but no analysis was done.

The appellant's evidence as reproduced earlier herein started on the day the Community Police followed him to his house for theft allegation. With regard to this accusation, appellant relied on alibi evidence that he was not at Mtoni Kijundu on material time but he was at Kidoti from 08:00 hours to 17:00 and the other two witnesses also came to say the same thing.

I read the judgment of the trial Court exhaustively to observe the truthfulness of the claim. The trial Magistrate apart from summarising the evidence of both sides from page 3 to page 9, he also analysed it. With regard to the appellant's evidence, despite the fact that no notice was issued by the appellant, the learned trial Magistrate analysed it clearly from 16. Records show that:

> On the other hand, the accused in his defence relied on defence of alibi alleging that at the day he left at his house early in the morning and went to the job where he reached at 08:00 hours where he worked up to 17:00 hours……..

> In this case, there is no doubt that the accused did not give notice or furnish the particular before the closing of the prosecution's case as required……., but the question is it fatal?…….
> In light of the view above, I finds it prudent as matter of right to acknowledges the accused alibi defence however having looked at the prosecution evidence specifically of that one of PW1 find that the accused was well identified at the scene of the crime by PW1 hence his alibi defence has no weight at all.

Having arrived at that point, the trial Court cited a case of **Lengai Ole Sabaya & 2 others v. DPP,** Criminal Appeal No. 129 of 2021 (unreported) which says that defence of alibi dies a natural death if the accused person was identified at the scene of crime. The position the trial Magistrate reached, can not be doubted, he analysed well and gave reason as to why the evidence of alibi can not be relied. Henceforth, this ground is also seem baseless.

Finally, on the submission made, counsel John prayed for the appeal to be allowed and the appellant to be set free, the prayer which was objected by the respondent. Mr Saadun urged me to dismiss the appeal though he requested me to see the sentence given with regard to second count of Defilement. Counsel John strongly objected the prayer and urged me to quash the conviction and sentence.

Eventually, I have read section 115 (1) which the appellant charged with in the second count and it says:

> **115**.-(1) A person who carnally knows any boy is guilty of an offence and is liable to imprisonment for life.

In this regard, the learned trial Magistrate committed no error since his powers under section 7 (a) of the Criminal Procedure Act, No 7 of 2018 (CPA) is to sentence for a term not exceeding 14 years. The language used under section 115 vests the discretion of the Court to sentence until life imprisonment. There is no minimum sentence and so the Regional Magistrate can not exceeds 14 years in the absence of the minimum sentence.

I also observed section 115 (2) of the Penal Act that penalises and provides punishment to a person attempt to commit defilement of a boy that:

> (2) A person who attempts to have carnal knowledge of any boy is guilty of an offence and is liable to imprisonment for a term not less than thirty years.

Situation under subsection (2) is different to that of the offence of defilement under subsection (1). The wording under subsection (2), the trial Court has no option save for sentencing 30 years as the provision laid down the minimum sentence. How the seriousness of the attempt to commit defilement should prevail the commission of the offence? This is something that really needs to be looked at.

The Court of Appeal of Tanzania in **Hamad Bakari Moh'd v. DPP**, Criminal Appeal No. 145 of 2014 (unreported) had this to say with effect to the situation like the one at hand:

> It therefore follows as the night follows day that given the severity of the penalty for attempting to commit the offence, the High Court Judge should have taken inspiration from section 132(2).

The brief fact of the quoted case is that the appellant **Hamad Bakari Mohamed** was charged with the offence of defiling a boy contrary to section 132(1) of the Penal Act, Act No. 6 of 2004 of the Laws of Zanzibar. He was found not guilty by the Regional Magistrate's Court at Vuga and was acquitted. The DPP was dissatisfied with the decision, appealed to the High Court and the same succeeded. The decision of the Regional Magistrate's Court was set aside and the appellant was convicted of the offence of defilement of a boy contrary to section 132(1) of the Penal Act and was sentenced to fifteen (15) years imprisonment and was ordered to pay compensation of TZS 500,000/- The appellant being dissatisfied with that decision appealed before the Court of Appeal of Tanzania.

The Court of Appeal in this case interfered with the sentence of 15 years after taking into consideration the penalty provided under section 132(2) of attempted to defile a boy which was 25 years and after a close look of seriousness of the offence of defilement of boys as provided for under Section 132(1), the Court said:

> The High Court Judge has metted out a very lenient sentence in the circumstances as the offence attracts a maximum penalty of life imprisonment.

Finally, the Court dismissed the appeal but substitute the sentence of fifteen (15) years imprisonment with that of thirty (30) years imprisonment.

From the facts adduced, what I wish to be noted here is that the provisions (section 132 (1) (2)) used are now similar section 115 (1) (2) of the CPA following the enactment of the new Penal Act, No. 6 of 2018. Besides, section 115 (1) has not fixed a minimum sentence for the offence of defilement of boys just as it was under the repealed law (Penal Act, No. 6 of 2004). The only difference in the face of the provisions is the sentence under 132 (2) which was 25 years and the current 115 (2) is 30 years. I thus, find myself into no other option apart from following the Court of Appeal guideline set.

Therefore, from the reason given, I am hereby dismissing the appeal for lack of merit and substitute the sentence of fourteen years (14) years imprisonment given in the second count with that of thirty five (35) years imprisonment to run concurrently with a sentence given in the first count. e

DATED at TUNGUU ZANZIBAR this 19th day of March, 2024

A. I. S. Suwedi

JUDGE