IN THE HIGH COURT OF ZANZIBAR

AT TUNGUU

CRIMINAL APPEAL NO 93 OF 2023

JUMA MOHAMMED JUMA..... APPELLANT

VERSUS

DIRECTOR OF PUBLIC PROSECUTIONS..... RESPONDENT

(Appeal from the decision of the Regional Court of Zanzibar, at Vuga, Dated the 29th day of March, 2023

(Hon. S. O. Hafidh RM)

In

Criminal Case No. 4 of 2022)

JUDGEMENT OF THE COURT

28th Feb, & 26th March, 2024
H S.K. Tetere J.:

In this Appeal, the appellant, **JUMA MOHAMMED JUMA**, was charged before the Regional Court of Zanzibar, at Vuga with two counts, namely; unnatural offence and abduction of girl contrary to section 133 (a) and section 113 (1) (a) all of Penal Act No. 6 of 2018 respectively. The particulars of the offence in the 1st count were that, the appellant on

unknown date and day of September 2021 at or about 16:30 hours at Fuoni, in West "B" District within the urban West Region of Unguja had carnal knowledge against the order of nature of a girl one **"Nana"** (name withheld to hide her identity), aged 10 years old.

In the 2nd count it was alleged that, the appellant on unknown date and day of September 2021 at or about 16:00 hours at Fuoni in the West "B" District within the urban West Region of Unguja, took an unmarried girl one **"Nana"** aged 10 years old who was under custody of her parents from Fuoni to school's house against the will of her parents.

The appellant pleaded not guilty to all counts. As a consequence, the case proceeded to a full trial. At the conclusion of the trial, the appellant was found guilty on both counts, convicted and sentenced to thirty (30) years imprisonment on first count and ten (10) years for the second count which were ordered to run concurrently. In addition, he was ordered to pay compensation to the victim with the sum of Tanzania Shillings One Million only (Tsh1,000,000/=) pursuant to section 314 of the Criminal Procedure Act No. 7 of 2018. Aggrieved, by the conviction and sentence of the trial court, hence he appeals to this court.

The background facts of the case were fully and clearly set out by the trial court, but I find that it is necessary to recap them, very briefly, as they are relevant to this appeal. Same goes as follows: On unknown date and day of September 2021, the **"Nana"** in other words PW3 while she was with her schoolmates at school, she was called by the appellant. Thereafter, the appellant took her to school's house. The appellant told her to take off her skirt and underpants and sodomized her by penetrating his manhood into her anus. After being satisfied, the appellant ordered the victim to put on her clothes and offered the victim 2000/= with a warning of being slaughtered if she opened up her mouth. The victim didn't reveal to any one on what actually happened to her. The fact that PW3 was sodomized came to be known by her Aunt PW1 on 13/10/2021 when she found PW3 with the sum of 4000/=. When she was interrogated to where she got the money, she said from a man whom she didn't know his name but knew the place where he stayed. From there, PW1 reported the matter to Fuoni Police station where PF3 form was issued by PW2 for medical examination.

After obtaining a PF3 from Fuoni Police Station, PW3 was taken to Mnazi Mmoja Hospital for medical examination. At the hospital PW3 was

attended by one Nasreen Ayoub Daud PW4. According to PW4, a medical examination revealed that the Victim PW3 had old healed tear and anal gap. PW4 tendered the PF3 in evidence as exhibit PE1. The police who investigated the case E3720 D/S Moh'd narrated how he conducted his investigation including visiting the crime scene.

In his defense, the appellant who testified on oath as DW1 along with his two witnesses to exonerate himself from the offence he was facing. He raised a defense of Alibi that on alleged date and day he was in Tanga. He said, he went Tanga on 17th August 2021 and while there on 2 September 2021, he celebrated his second marriage rites with DW3. He came back to Zanzibar on 20 October 2021, together with DW3 and went to Bumbwini village. After two days, he went to Kwarara where his first wife DW2 resides. He stayed there for two weeks. Later he went back to Bumbwini to his second wife and returned again to Tanga. He also said that, he never stayed in any other place except Bumbwini and Kwarara. He was arrested on the month of December 2021 while he was in Tanga.

Nevertheless, at the height of the trial, the learned Trial Magistrate was fully satisfied that the prosecution proved the case against the

appellant to the hilt. Consequently, He was convicted and sentenced as indicated earlier.

Before this court, the appellant filed memorandum of appeal containing lists of nine (9) grounds of complaints. Having closely examined them, they can be conveniently paraphrased as follow: - **One**, the charge is at variance with the evidence adduced at the trial court. **Two**, the case for the prosecution was not prove against the Appellant beyond reasonable doubt. **Three**, the appellant was convicted based on defective charge sheet. **Four**, the appellant was convicted relied on the testimony of PW1, PW2, PW3 and PW4 whose Evidence was not credible. **Five**, relied on the medical report of PW4 whose professional skills was not established. **Six**, erred when rejected the alibi evidence. **Seven,** convicted the appellant on the evidence based on probability. **Eight**, there was no identification parade to confirm the identity of the Appellant. **Nine**, failure to observe that the case against to the appellant was hastily and poorly investigated.

At the hearing of the appeal, Mr. Ussi Khamis Haji who teamed up with Mr. Omar Mzee, both learned advocates, represented the appellant.

On the adversary side, Mr. Ahmed Mohammed learned State Attorney represented the respondent, Republic.

When given the floor to argue the grounds of appeal, Mr. Omar abandoned ground 3 of appeal and proceeded to argue grounds 1, 2, 4 and 8 and left grounds 6, 7 and 9 to be argued by learned counsel Ussi.

Submitting in support of the first ground, counsel Omar, started that the charge is at variance with the evidence given at the trial court. He went on to submit that, the appellant was charged for two accounts. One is rape and the other is abduction contrary to section 133 (a) and Section 113 (1) (a) both of the Penal act. He said, according to the particular of the charge sheet, the incident took place on September 2021 but during the trial, the evidence of PW1 at page 4 of proceeding indicated that the date of the incident is on 13/10/2021. He also urged that PW1 testimony at page 7 of the proceeding shown that **"Nana"** PW3 was found with 4000/= on 13/10/2024. He also added that, according to the evidence of the victim (PW3) the date of the incident happened on 9/10/2021 and the other date is unknown.

Mr. Omar argued further that PW3 evidence indicated that the offence was committed three time and the day the victim was found with 4000/= was the second day. He argued that if 9/10/2021 was the first time and 13/10/2021 was the second time then when will be the third time? He asked. He argued that the prosecution had a duty to prove the offence was committed on the alleged date as provided in the charge sheet. To support his point, he cited the case of ***Abel Masikiti Vs Republic, Criminal Appeal No. 24 of 2015, CAT (Unreported)*** at page 8, where it was held that when there is any variance or uncertainty of the dates, then the charge must be amended and if that was not done the accused need to be acquitted. He also cited the case of ***Ally Petro Vs Republic, Criminal Appeal No. 74 of 2020, HCD (Unreported)*** where it was insisted that the accused must know the nature of the charge facing him. Counsel Omar was on the view that since the date of which the offence was committed is unknown and the evidence given at the trial court did not support the same, that affected the prosecution case. He therefore prayed this court to sustain first aground of appeal and the appellant be acquitted.

Submitting on the 2nd and 8 grounds jointly, the complaint was that the case of prosecution was not proven beyond reasonable doubt. In this

ground, the complaint was a contradiction that according to the evidence of PW1 and PW4 the medical examination at Mnazi Mmoja hospital was conducted on 13/10/2021 while the victim (PW3) testimony indicated that the examination took place on 9/10/2021. He stressed that according to these witnesses it is not known who is peaking the truth.

Also, another contradiction raised was on the amount of money found to the victim on 13/10/2021. Counsel Omar referred, this court on page 7 of typed proceeding where evidence of PW1 revealed that Tsh 4000/= was found to the victim possession while PW2 at page 12 of proceeding indicated that the amount was Tsh 2000/=.

Another contradiction raised at ground 4 of appeal regarding the name of the victim. It was submitted that the evidence of PW1, PW2, PW3 and PW4 differed in mentioning the victim's name as provided in the charge sheet. The differences indicated here is on the name of the victim's father. He said, according to PW1's evidence the victim father's name is **Bahija Hussein** while the victim testimony at page 14 of proceeding mentioned her father's name as **Bahya Hassan Bwashehe** and at page 15 during examination in chief mentioned **Bhya Hassani**. PW4's evidence

indicated that the father's name as **Bahyi Hussein**. Basing on that account, Counsel Omar contended that the above differences raised serious doubts to know the real name of victim mentioned in the charge sheet.

Further complaint raised was on the identification of parade to confirm the identity of the appellant. Counsel Omar doubted PW2 for failure to conduct identification of parade. He said that to conduct identification of parade is mandatory requirement under section 45 - (1) & (2) of Criminal Procedure Act No. 7 of 2018. He argued that it is not certain still to know if the appellant is the real suspect of the offence.

Regarding the fifth ground of appeal, this time, Mr. Ussi Khamis, the learned counsel for appellant, defaulted the trial court when it relied on the medical report of PW4 whose professional skills was not established. He contended that section 49 of Evidence Act No. 9 of 2016 provided that when a court relied on a point of science or art, that person is known as expert. He argued that PW4 testified in court as a doctor with decree and one year working experience but she didn't explain her decree was for how many years and what she really study for. He stressed that it is not known

still whether she is a doctor of animal, human being or plaints but the trial court in its judgment referred PW4 as a medical practitioner, a qualification which was not mentioned by PW4 herself. He said that those words come from Trial Magistrate. He therefore, concluded that PW4 was not skilled and cannot give medical evidence to the situation of the victim.

On six and seven grounds of appeal, Mr. Ussi, submitted that the trial court erred in law when it rejected the Alibi evidence. He argued that appellant at early stage informed the trial court that his evidence will be based on alibi defense. He went on to submit that the Appellant the alleged date of the commission of the offence he was in Tanga to celebrate his marriage rites. The same evidence was supported by DW2 and DW3. He argued that this evidence was not challenged and not contradicted but was ignored by the trial court. He said that was a great danger to the court side as the circumstances demand the benefits of doubts to the appellant. He further argued that the trial court didn't consider the Alibi defense with no reason, it simply ignores it and the same convicted the appellant on the ground of probability. To bolster his point, he cited the case of **Abel Masikiti Vs The Republic, (Supra),** where it was observed that failure to consider the defense is fatal and the same vitiates the conviction.

On the last nine ground of appeal, Mr. Ussi, defaulted trial court for failure to observe that the case against appellant was poorly and hastily investigated. He argued that the evidence of PW3 shown that she was with her colleagues during the school hours and saw her with the money. He said, failure to call these schoolmates to testify the charge raised serious doubts as the material witness was not called to testify. He also discredits the investigator of police who failed to go to Tanga to prove the presence of the appellant during the month of September. He therefore prayed the court to find that the prosecution failed to prove the case beyond reasonable doubts. In a result, the appeal be allowed and the appellant be acquitted forthwith.

Responding to the arguments made by the appellant's counsel in support of the first ground of appeal, Mr. Ahmed Mohamed, the learned state attorney strongly resisted the appeal. He submitted that the problem to remember the date of which the offence was committed to a victim who is a child is a minor discrepancy taking consideration the lapse of the time. He said, the PW3 is a child of 10 years old, thus she cannot remember everything. He further argued that the remedy for the discrepancy of date of commission of the offence is to amend the charge and not to dismiss the

charge. He added that the discrepancy to the offence would amount to the dismissal but that was not the case. He stressed his argument with reference of page 15 of the proceeding where the victim explained how she was brought into school house and sodomized. To weight his argument his cited the case of ***Suleiman Makumba Vs Republic (2006) TLR 379***, where it was observed that the best evidence in sexual offences comes from the victim. He also referred this court to section 133 (7) of the evidence act No. 9 of 2016.

In reply, to second ground of appeal, Mr. Ahmed argued that the variances indicated by appellant's counsel didn't go to the root and the same did not indicate if the element of the offence was not proved.

Regarding the issue of identification of parade, he contended that the evidence shown that PW3 met three times with the appellant. Basing on that reason, there was no need to conduct identification of parade because the victim knows the appellant. He further argued that PW1 testimony proved the visual identification of the appellant. Thus, it is the opinion of the prosecution side, in those circumstance the identification of

parade was not required. To weight his point, he cited the case of ***The Republic Vs XC 7535 PC Venus Mbuta (2002) TLR 48.***

Regarding the four grounds, Mr. Ahmed admitted that the name of the victim appeared in the charge sheet and the name mentioned by some witnesses differ. However, he said, PW1 and PW2 mentioned victim's name correctly. Also at page 13, the victim mentioned her name properly. The variances of the name started at page 14 of typed proceeding. It was his submission that those defects of the victim's name raised are human and typing error that cannot vitiate the proceedings.

Reply to five ground of appeal, Mr. Ahmed referred this court to section 62 paragraph (d) of Evidence Act No. 9 of 2016 that require the court to take judicial notice on certain professionals. He said, PW4 at page 24 of proceeding introduced her duty of doing investigation to the victim brought to hospital. Also, at page 26 of the proceeding, PW4 received PF3 of sexual offence. These were enough evidence to prove that PW4 was a doctor of a human being.

Response to six and seven grounds of appeal which were argued together, in these grounds, the complaint was on rejection of defense of

Alibi. Mr. Ahmed submitted that the marriage certificate which was tendered and admitted as exhibit DE1 was contrary to section 190 - (2) of Criminal Procedure Act No. 7 of 2018. He said, it was admitted that alibi notice was issued in advance. What was disputed is that particular of Alibi was not produced. He argued that marriage certificate was not enough to prove that the Appellant was in Tanga as the same was not a Travel document.

Moreover, Mr. Ahmed submitted further that the duty of the prosecutions in criminal case is to prove the case beyond reasonable doubts. He said, in the present case, the trial court didn't convict the appellant based on the ground of probability instead the conviction against the appellant based on the evidence of prosecutions.

Reply to the nine grounds of appeal, it was submitted by Mr. Ahmed, the learned state attorney that the investigation of the present case was properly conducted. He said, PW2 followed all the process of investigation including taking explanation, visit the scene of crime and issuing of PF3. He said, section 150 of evidence act provided no particular number of witnesses needed to prove the charge. He therefore, prayed all

grounds of appeal submitted herein shouldn't be considered as the evidence adduced at trial court was strong enough to convict the appellant. Thus, he prayed the court to sustain the finding of the trial court.

In rejoinder, Mr. Ussi, the learned counsel for appellant insisted that the date of commission of offence found in the charge sheet is different with evidence adduced by the witnesses and retaliated what was submitted earlier on. Finally, he prayed the appellant's ground of appeal to be sustained as prayed in the petition of appeal.

That marked the end of the submissions for both parties. I have carefully securitized the records of proceedings, grounds of appeal and parties' submission. Having done so, I have chosen to confine my determination of this appeal based on the second grounds of appeal that is whether the prosecution proved the case against the appellant beyond reasonable doubt. The reason behind to that is because the same ground is connected with the rest of the remaining grounds of appeal.

In resolving the above issue, I find it appropriate to begin with the settle principle of law that the best evidence in sexual offence come from the victim. The leading authority to the above principle is ***Suleiman***

Makumba's case (Supra). The decision of that case was supported by Court by Court of Appeal in its numerous decisions including the cases of ***Fahari Khalifa Vs Republic,*** (2022) TZCA 574 (9 May 2022) Tanzlii, ***Amir Rashid Vs Republic*** (2020) TZCA 1806 (7 October 2020) Tanzlii, ***Nasibu Ramadhani Vs Republic*** (2019) TZCA 389 (8 November 2019) Tanzlii and ***Julius Kandonga Vs Republic*** (2019) TZCA 398 (4 November 2019) Tanzlii. (all unreported) just to mention the few.

It is also settled law that the evidence of a child of tender age in sexual offence can be relied upon without corroboration after assessment of such evidence by the court to ground conviction of an accused person. This is in terms of section 133 (7) of the Evidence Act, No. 9 of 2016.; it reads:

> *"Notwithstanding the preceding provisions of this section, where in criminal proceedings involving sexual offence the only independent evidence is that of a child of tender age or a victim of sexual offence, the court shall receive the evidence, and may after assessing the credibility of the evidence of the child of tender age or the victim of sexual offence, as the case may be, on its own merits,*

notwithstanding that such evidence is not corroborated, proceed to convict, if for reasons to be recorded in the proceedings, the court is satisfied that the child of tender age or the victim of sexual offence is telling nothing but the truth."

However, it is also settled law that the evidence of single eye witness needs to be credible. If the evidence is not credible it cannot be relied upon to ground a conviction, even when the crime is a sexual. See the case of ***Majaliwa Ihemo Vs Republic***, (2021) TZCA 304(15 July 2021) Tanzlii.

From the above cited authority, it's evident that if the prosecution case was to succeed in proving what happened on the fateful day, the evidence had to come from PW3, the victim.

In the present appeal, the Appellant raised several pieces of evidence to doubts the finding of the trial court. These include the followings: -

Firstly, the complaint was on the variance of the charge and evidence adduced at the trial. The prosecution witness PW3 gave her

evidence that the offence was committed on 9/10/2021 while the charge sheet shows the offence was committed on September 2021. The record of trial court does not show that there was other witness who proved that the offence was committed on September 2021. It only PW3 who mentioned 9/10/2021. It also in record that PW1 on 13/10/2021 found PW3 with the sum of 4000/= after she was informed by the victim's schoolmate and it was the same date she was sent to hospital for medical examination. for clarity, I think it pertinent to reproduce the charge under which the appellant was arraigned:

FIRST COUNT

Unnatural Offence *C/S 133 (a) of the Penal Act No. 6 of 2018 of the laws of Zanzibar.*

PARTICULARS OF OFFENCE

JUMA MOHAMED JUMA*, on the* ***month of September 2021*** *at or about 16:30 hours at Fuoni in the west "B" District within the Urban West Region of Unguja had carnal knowledge against the order of nature of one* ***"Nana",*** *a girl of 10 years old which is contrary to the laws.*

SECOND COUNT

Abduction of Girl C/S 113 (1) (a) of the Penal Act No. 6 of 2018 of the laws of Zanzibar.

PARTICULARS OF OFFENCE

***JUMA MOHAMED JUMA**, on the **month of September 2021** at about 16:00 hours at Fuoni in the west "B" District within the Urban West Region of Unguja unlawfully takes one **"Nana"**, a girl of 10 years old* who was under custody of her parents from Fuoni to school's house against the will of her parents"

Noting the particulars of the offence in the above cited charge, there is no dispute that the date, month and year in which the offence is claimed to be committed is on September 2021. The evidence adduced at the trial court revealed the offence is committed on 9/10/2021.The record of proceedings also does not show that there was any time the prosecution amended the charge sheet.

Section 219-(1) of Criminal Procedure Act No. 7 of 2018 is a curing section for defective charges. It confers power to the trial court to allow amendment of the charges to meet the needful circumstances of the case. The said section reads: -

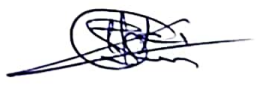
"Where, at any stage of a trial before the close of the case for the prosecution, it appears to the court that the charge is defective, either in substance or form, the court may make such order for the alteration of the charge either by way of amendment of the charge or by the substitution or addition of

a new charge as the court thinks necessary to meet the circumstances of the case"

This means that the prosecution having noted the variance in the date of the commission of the offence, the charge sheet and evidence of the victim and other witnesses, they had to amend the charge. This was possible before the conclusion of the trial if the prosecution had sought leave of the trial court to amend the charge in terms of section 219 - (1) of the CPA. In the event, this was not done, it follows that, the charge remained defective throughout the pendency of the proceedings. This vitiated the trial rendering the proceedings and judgment of the court below to be a nullity.

In the case of **Abel Masikiti Vs The Republic, (Supra),** cited by the Appellant's counsel, the Court of Appeal at page 8-9 had this to say: -

"In a number of cases in the past, this Court has held that it is incumbent upon the Republic to lead evidence showing that the offence was committed on the date alleged in the charge sheet, which the accused was expected and required to answer. If there is any variance or uncertainty in the dates, then the charge must be amended in terms of section 234 of



the CPA. If this is not done the preferred charge will remain unproved, and the accused shall be entitled to an acquittal."

The section 234 of CPA cited above is Para material of section 219-(1) of Criminal Procedure Act No. 7 of 2018, law of Zanzibar. See also the case of ***Hussein Ramadhani Vs Republic*** (2016) TZCAT 195 (April, 2016) Tanzlii,

In the light of the above cited authorities, in this particular case the omission to amend the charge not only occasioned a miscarriage of justice but also it rendered the prosecution case not proved at the required standard. Since the charge is the foundation of any criminal case, the prosecutions require to take reasonable precautions while framing the charge and prosecuting criminal case.

Since the determination of the said ground of complaint is sufficient to dispose the appeal, ordinarily I could have ended here and shouldn't have bothered to look into other evidential matters. However, I should do so in the light of what raised by the Appellant's counsel in relation for the failure by prosecution to call schoolmate as a material witness.

It was argument of Mr. Ahmed, the learned state attorney that under the law, there is no particular number of witnesses needs to prove the charge. The evidence at page 15 of the typed proceeding indicated that PW3 was called by the appellant while was together with her schoolmate. The evidence also revealed that PW1 found the victim with 4000/= after she was informed by her school mate. It is also in record that PW1 and PW3 went together to school's house where the appellant alleged to lives and they were notified that three people are living therein including the appellant. It is the view of this court that the schoolmate and people living in school's house where the offence was alleged to have been committed are material witness to be called to testify in court. Their testimony was necessary to connect the appellant with the charged offences. These witnesses were not called. Is in my opinion fatal to the prosecutions.

The position of law is that, failure to call a witness who is in a better position to explain some missing links in the prosecution case justify an adverse inference against the prosecution. In the case of ***Boniface Kundakira Tarino Vs The Republic***, (2011) TZCA 194 (October 2011) Tanzlii, it was observed as follow: -

"It is thus now settled that, where a witness who is in better position to explain some missing links in the party's case, is not called without sufficient reason being shown by the party, an adverse inference may be drawn against that party, even if such inference is only permissible."

See also the case of ***Ahamad Salum Hassan @ Chinga Vs The Republic*** (2023) TZCA 44 (22 February 2023). The weaknesses pointed out herein above raise reasonable doubts of the prosecution case which should be applied in favour of the appellant as the law requires.

In view of the foregoing discussions, therefore, I find the appeal with merit and allow it. Consequently, I quash the conviction and set aside the sentences. I further order release of the appellant **Juma Mohammed Juma** from prison unless he is held therein for another lawful purpose.

It is accordingly ordered.

DATED at **ZANZIBAR** this 26th day of March, 2024.

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HAJI. S. K. TETERE
JUDGE