

**IN THE HIGH COURT OF ZANZIBAR**

**HOLDEN AT TUNGUU**

**CRIMINAL APPEAL NO. 90 OF 2023  
FROM CRIMINAL CASE NO. 33 OF 2022**

**JUMA ADAM RAMADHAN ..... APPELLANT**

**VERSUS**

**DIRECTOR OF PUBLIC PROSECUTIONS (DPP)..... RESPONDENT**


**JUDGMENT**

**Dated 18<sup>th</sup> day of April, 2024  
BEFORE: K. SHAMTE J.**

The Appellant, Juma Adam Ramadhan was charged before Regional Magistrate Court, Mahonda (Mcha Omar Hamza (RM)) with one count having carnal knowledge with animal (a cow) contrary to section 133 (b) of the Penal Act No. 6 of 2018. The Appellant was sentenced to twenty years imprisonment in the Education Centre for the offence of unnatural offence. The particulars are that on the 10<sup>th</sup> day of June 2021 at around 7.30 a.m. at Mahonda, Northern Region Unguja the Appellant had carnal knowledge of an animal namely, a black cow bares shades of colour white at her stomach, the cow is the property of Mohamed Enzi Omar. Aggrieved with the decision of the trial court, the Appellant appealed to this Court.

At the hearing of appeal, the Appellant was represented by Counsel Rajab Abdallah Rajab whereas the Respondent (DPP) was represented by Mr. Issa Salim, learned State Attorney. In the Memorandum of Appeal, the Appellant has raised nine grounds. When he was called upon to argue on this appeal, Counsel Rajab merges grounds 1 and 3 and withdrawal grounds 2, 3 and 9, which are conveniently condensed into four as follows:

1. That, the Regional Court erred in law and fact by convicting and sentencing the Appellant based upon weak, unreliable implausible, contradictory and incredible evidence adduced by the prosecution witness before the trial Court.
2. That, the Regional Magistrate erred in law and fact by convicting and sentencing the Appellant basing upon the defective charge sheet.



3. That, the Regional Magistrate Court erred in law and fact in imposing excessive sentence.
4. That the Regional Magistrate Court erred in law and fact in failing to consider the strong defence of the Appellant, hence the entire judgment became nullity.

On the first ground, Counsel Rajab in his submission to his grounds of appeal expressed the evidence of PW1 (Mohamed Enzi Omar), PW2 (Mohamed Abdallah Hassan) and PW3 (Rajab Haji Ame) are weak to convict the Appellant. He submitted that PW1 in his testimony, there was doubtful if it is true that he witnessed that the Appellant had canal knowledge with that cow.

He submitted that, PW3 reportedly discovered the Appellant in the custody of PW3 and PW1. While testifying, PW3 did not directly observe the Appellant engaging in canal knowledge with a cow, but he did hear a loud voice (mayowe) seeking assistance and subsequently ran towards the source of the sound. PW2, who was also present, heard the same voice and run to that place.

Counsel Rajab noted that the contradiction weakens the prosecution's case, and the root of the matter lies in determining who witnessed the Appellant committing the offence. He cited the Court of Appeal case **DPP V. Juma Chuwa Abdallah & Seif Mussa Mzee Babu Ndevu**, Criminal Appeal No. 85 of 2018, on page 13, which considers the law of contradiction and inconsistency as material. However, Counsel Rajab argued that the RM failed to assess whether these inconsistencies were minor or they fall under the root of the case.

He referred the evidence of Jamal Amir Haidar, Veterinary Officer (PW6), and viewed that the evidence presented is lacking in strength, particularly since he failed to collect samples from the accused as part of his testimony. As an expert, it was expected that he would provide a DNA or RNA test to confirm that the sperm found in the cow's vagina belonged to the accused, who is the Appellant in this case. He added that the issue of scrubs and friction which was found to that cow has to be proved on whether they have developed on that day or otherwise. As an expert, his evidence based on the change of colour, scratch on the vagina's cow and sperms found do not prove the commission of offence.

Another question raised in this ground is the submission of PW1 in trial court that he found the Appellant has pulled off his trousers and having

canal knowledge with a cow. The learned Counsel submitted that this statement is too general to prove the case. He added that it is the duty of the prosecution to lead their witness in producing evidence.

He concludes the first ground by highlighting the inconsistency in the action of taking two pictures of the same cow on different dates, specifically on 10<sup>th</sup> June, 2021, and 12<sup>th</sup> June 2021. He pointed out that there is no explanation as to why the cow was not photographed on the same day, considering that the cow in question was already dead. He emphasized that it is the responsibility of the prosecution to eliminate any doubts in the case. In addition, the images proved that they were taken on different days, casting doubt on whether the cow referred to by PW1 is the same cow he was complaining about.

Regarding the second ground of the defective charge, Counsel Rajab argued that the purpose of a charge sheet is to inform the accused of the crime he is facing and to enable him to prepare his defence. He contended that there are defects in the charge sheet, and that there is a lack of specific details regarding the cow in question. Therefore, he argued that the particulars of the charge sheet were not clear enough to allow him to effectively prepare his client's defence.

On the third ground, the Appellant's Counsel submitted that the sentence was excessive and not legal, in comparison to the jurisdiction of the trial court. The Counsel has referred to section 7 of the Criminal Procedures Act (CPA) No. 7 of 2018, which empowers a Regional Magistrate to grant a sentence not exceeding fourteen years. Therefore, Counsel Rajab requested the sentence be nullified.

Regarding the fourth ground, the Counsel Rajab also submitted that the defence of the accused was not given due consideration. In the trial court proceedings on page 5, it was noted that the accused (DW1) did not plead guilty, and PW1 and others took off his trousers and beat him. However, no one cross-examined this matter.

He added that it is possible that the trousers, which were claimed to be half-torn during the commission of the offense, were taken off by PW1 to convict the accused. He referred the case of **Shaibu Hussein Shehe V. DPP** Criminal Appeal No. 38 of 2020, and the case of **Hassan Mohamed Ngoya V. R** Appeal No. 134 of 2012 which discusses the credibility of evidence. He finally prays this court to allow this appeal unless the Appellant faced with another lawful order.

Mr. Issa Salim, the learned Senior State Attorney (SSA), on his part did not support the appeal. On the first ground he submitted that the conviction of the appellant was properly founded on the strength of the credible evidence of the victims in terms of section 133(b) of CPA. On being prompted by the Court, the Respondent (SSA) acknowledged that the trial magistrate had adhered to the law and had properly investigated the matter, and that the testimonies of PW1, PW2 and PW3 were reliable and trustworthy.

Despite this, SSA Issa maintained that the testimony of PW1 was supported by the documentary evidence of the doctor, which indicated that the Appellant had committed the offence and engaged in sexual relations with an animal. As per page 3 of the proceedings, paragraph 6, PW1 had witnessed the Appellant committing the offence. In the SSA Issa's view, the offence had been committed and PW1 had not acted alone; he had called for assistance when the Appellant was fleeing.

Additionally, PW2 and PW3 had corroborated PW1's testimony, as stated on page 5, 1<sup>st</sup> paragraph, where they had heard the PW1's pleas for help and they had found the Appellant who claimed to commit offence. Furthermore, PW3, as mentioned on page 6, 3<sup>rd</sup> paragraph, had heard the commotion and had gone to assist PW1, ultimately apprehending the Appellant. In his view, these facts proved that the elements of the crime had been satisfied.

In relation to the issue of inconsistency, the accused asserted that there is no contradiction, and it seems that it does not pertain to the essence of the offense. The contradiction will be confined to the substantial facts of the case. The act of sexual intercourse has been confirmed by PW1 as an eyewitness, and he informed the court that he witnessed the accused engaging in sexual activity with the assistance of PW2 and PW3. The veterinary practitioner has testified that there was a person who was engaging in sexual activity with an animal, namely a cow, and that person has been identified as the Appellant.

The Senior State Attorney argued that the evidence provided is trustworthy and reliable, and that the discovery of animal dung in the accused's stomach does not pertain to the essence of the offense. Therefore, this circumstance does not impact the commission of the offense. The SSA Issa referred to the case of **Mohamed Haji Ali V. DPP**, Criminal Appeal No. 225 of 2018, on pages 9-11, which states that contradiction affects the essence of the offense, and this case has observed that normal discrepancies do not erode the credibility of the case.

Concluding the first ground, SSA Issa argued that the offence was clearly proved beyond a reasonable doubt, as established by section 133(b) of the Penal Act No. 6 of 2018. The prosecution did not rely solely on the evidence of PW1, but rather, corroborated evidence from PW2 and PW3 was also presented. Furthermore, the PW6's testimony provided additional support, as the anatomical and physiological differences between humans and animals were taken into account, and the sperm found was determined to have originated from a human rather than an animal.

Regarding the issue of defective charge sheet, the learned State Attorney argued that the charge sheet, as outlined in sections 167 to 175 of the CPA and the Second Schedule, provides guidelines for the format and content of a charge sheet, including the name of the person charged and the offense committed. The charge sheet is considered defective only if it refers to issues that affect the evidence presented. the learned State Attorney submitted that the charge sheet was not defective and that it was sufficient for the defence.

The third ground is concerned with the excessive sentence, it was submitted that section 7 of CPA, as cited by Counsel Rajab, is a general provision. It applies to offences for which the law does not specifically provide a conviction or punishment. This is different from section 133(b), which provides for a specific punishment.

He was further added that, because the punishment imposed was lower than what is provided for in the law, this court should use its inherent jurisdiction and sentence the Appellant to thirty years.

In relation to fourth ground SSA Issa argued that the RM was not erred in considering the evidence presented by the witnesses. SSA Issa cited two cases in support of this argument; **Christian s/o Kale and Rwekaza s/o Bernard V. R.** [1992] TLR 302 (CA), in which the court stated that an accused person should not be convicted solely on the strength or weakness of the defense, but on the basis of strong evidence. Another case cited was **Hussein Iddi & Another V. R** (1986) TLR 167, in which the court held that it is a direct misconception for the RM to rely on evidence and arrive at a conclusion without considering the defence evidence.

SSA Issa added that the Appellant's strong defence was considered by the RM on pages 38 and 39 of the judgment, and the court analyzed the evidence and sentenced the Appellant on pages 38-39 of the court proceedings. RM was urged to take into account the Appellant's defence

and find that the prosecution's evidence was firm, consistent, and corroborative. The Appellant confirmed that he was arrested by PW1, PW2, and PW3, and that he did, in fact, commit an unnatural offence with PW1's cow. SSA Issa prayed that this appeal be dismissed.

In Counsel Rajab's reply to the court, he requested that the appeal be allowed and the Appellant be acquitted. He argued that there is a contradiction in the evidence, as the Appellant was found with cow dung despite being the root of the offence. Furthermore, there was no scientific test to prove the Appellant's sperm.

Regarding the charge sheet, Counsel Rajab stated that it should have been more specific in its details about the offense. The evidence showed a cow with a white patch on its stomach, but this was not mentioned in the charge sheet. As a result, the trial was deemed unfair due to the defective charge sheet.

In response to the Appellant defence, Counsel Rajab pointed out that there was no cross-examination or refusal to answer the action of removing the Appellant's trousers (DW1). Additionally, the defence was not given the right to be heard. Therefore, he prayed for the appeal to be allowed and the Appellant to be discharged unless there is another lawful cause.

In assessing this appeal, the court is tasked with examining both legal and factual matters. The Court is enjoined to analyze the evidence and make its own independent findings, bearing in mind that it is the trial Court that had the advantage of seeing the demeanour of the witnesses. When considering the appeal, the court has identified four key issues that are crucial to this appeal.

- (a) the court erred in the assessment of the evidence,
- (b) is there any consideration of Appellant's defence,
- (c) if the charge sheet was defective,
- (d) the sentence was excessive.

The first issue before the Court is whether the court erred in **the assessment of the evidence** as to entitle the Court to interfere with their finding of facts. To answer this question, I find it pertinent to first revisit the evidence upon which the Appellant's conviction was founded. On this issue, I first refer the case of **Shabani Daudi V. Republic** Criminal Appeal No. 28 of 2000 (unreported) the Court held that: "...the credibility of a witness is the monopoly of the trial court but only in so far as the demeanor is concerned."

The Court in this case has determined in two other ways; one, when assessing the coherence of the testimony of that witness; and two, when the testimony of that witness is considered in relation with the evidence of other witnesses, including the accused.

As often stated, it is common knowledge that in any trial, evidence is forthcoming from witnesses who directly or circumstantially witnessed the incident taking place, provided that they may be found to be credible - See the cases of **Hamisi Makarai V. Republic**, Criminal Appeal No. 518 of 2015, CAT, **Esio Nyomoielo & 2 Others V. Republic**, Criminal Appeal No. 49 of 1995, CAT.

On the basis of the above, it is clear that the law testifying in a case to which they directly or circumstantially witnessed the incident taking place, what is important in the witness's testimony is the credibility and reliability of PW1's evidence. Apart from the evidence of the complainant that the Appellant had canal knowledge with a cow, there is no one who saw the Appellant committed the offence.

In **P Taray V. Republic**, Criminal Appeal No. 216 of 1994 (unreported); the Court stated that: "We wish to say at the outset that it is of course, not the law that whenever relatives testify to any event they should not be believed unless there is also evidence of a non-relative corroborating their story." In this appeal the veracity of the story of PW1, PW2 and PW3 must be considered and gauged judiciously. It may be necessary, in given circumstances, for a trial magistrate to indicate his awareness of the possibility of people having a common interest to promote and serve.

While the possibility that PW2 and PW3 who heard voices (walisikia mayowe) may choose to team up and untruthfully promote a certain version of events, it must be born in mind (that), the evidence of each of them must be considered on merit as should also the totality of the story told by them. When this Court looked at the testimonies of these witnesses, it finds that these witnesses did not contribute much on the evidence against the accused.

My concern in this appeal is with testimonies of PW1, PW 2 and PW 3, who have demonstrated the discrepancies in their evidence. These pieces of evidence lacked corroboration. Corroboration was defined in **Makame Junedi Mwinyi V. SMZ** [2000] TLR 455 to simply mean independent evidence which supports or confirms as true the principal evidence.

With respect to this ground, I agree with counsel Rajab. It is true that in his evidence PW1 stated how he saw the Appellant and he was looking at him when he commit the offence, but I am not satisfied that the Appellant was found red-handed at 7.30 a.m humping a cow. There is no sufficient and overwhelming evidence to the effect that he had carnal knowledge with a cow. In **Ally Manono V. Republic** (Criminal Appeal 242 of 2007) [2010] TZCA 22 (26 February 2010), it was held that in a case such as this one, proper identification of an accused person is crucial in proving a criminal charge. It is important to ensure that any possibility of mistaken identity is eliminated before a conviction can safely lie.

Further it was stated in **Raymond Francis V. Republic** (1994) TLR 100; that it is elementary that in a criminal case where determination depends essentially on identification, evidence on conditions favouring a correct identification is of the utmost importance.

I conclude on the evidence of PW1, that the evidence of PW1 was taken in contravention standards set put in the Court in **Waziri Amani V. Republic**, 1980 TRL 250. It follows therefore no court should act on evidence on visual; identification unless all possibilities of mistaken identity are eliminated and the court fully satisfied that the evidence before it is absolutely watertight. I take note that PW1 evidence did not support the conviction of the Appellant because the identification of PW1 did not meet the requirements.

As regard to material inconsistency between PW1 evidence and PW6, veterinary report Exhibit (PE3) which shows that the general condition of cow, I am not prepared to accept and elevate their evidence as credible and reliable. On the basis of that finding, I agree with Counsel Rajab that the evidence of PW1 was worthless and not reliable evidence. In the circumstances, this ground is not well founded.

Important for consideration is the evidence of PW6 Veterinary officer. As pointed out before, who medically examined the cow. His evidence shall be proved in expert way as the sperm found are true related to the accused. In **Makame Junedi Mwinyi V. SMZ** (supra) it was ruled that expert evidence is admissible in cases where specialized knowledge is required.

In this issue, I also determine Veterinary Officer's examination, by observing the photograph produced as PE1 and PE2. Principally, the colour of the cow is black but it also does bear shades of colour white, the PE2 shows the cow vagina but could not reflect the full picture of the cow in

question. It raises a question as to whether the cow vagina produced as PE2 is really related to that cow. Upon examination, the officer established that the vagina of the cow was pressed by item which is hard and which is able to produce sperm. He could not know what caused the swelling of the cow birth canal really related to the Appellants sperm.

Moreover, the contradictions in the statement of PW5 5682 DT Coplo Asma, that on 10<sup>th</sup> June 2021 took a picture of the cow at part of the vagina and again on 12<sup>th</sup> June 2021 she took a full picture of the cow, but could not prove if the pictures reflect the same cow. Referring the case of **Horombo Elikaria V. Republic** (Criminal Appeal 50 of 2005) [2009] TZCA 40 (27 November 2009), the court stated that in criminal proceedings, it is the responsibility of the prosecution to establish the case against the accused individual beyond a reasonable doubt. Section 150 of the Evidence Act No. 9 of 2016 also provides that the court should determine the demeanor, competence, and credibility of the witness.

The Appellant has disputed his identification, arguing that he was not present at the scene. However, according to PW1, the Appellant was running and PW1 has decided to raise his voice to ask for support. The Appellant claims that he found PW1, PW2 and PW3, and one of them had a bicycle, which raises the question of how someone could run and assist another with a bicycle. Nonetheless, the Court noted that PW2 and PW3 testified that they ran away to assist PW1, and no one identified having a bicycle at that time.

With respect to the ground on **strong defence** of the Appellant (DW1) and Adam Ramadhan, the father of the accused (DW2), the testimony shows that there was misunderstanding between the accused and PW1, PW2 and PW3, page 27 of court proceedings referred.

There is nothing useful in cross-examining DW1 from reiterating that he did commit the offence. The Appellant provide a defence at the trial and when questioned by the trial court he said that he had quarrel with the complainant. At its judgment, the trial Court stated that the Appellant's defence was outweighed by the cogent and robust evidence of the seven prosecution witnesses which established beyond doubt that the Appellant commits the offence.

Regarding the ground that the conviction was based on **defective charge sheet**, the complaint in the ground of appeal Counsel Rajab readily conceded that the charge did not disclose the elements of the offence. He

was quick to point out, however, that this did not occasion a failure of justice because the evidence on record has to establish the offence in question. Refer Court's decision in **Mussa Mwaikunda V. Republic**, Criminal Appeal No. 174 of 2006 (unreported). So, the failure to disclose the important ingredient of the offence in the charge sheet was not fatal in this appeal, because it was curable under Section 164 and 167 of the CPA; and, after all, the Appellant was not prejudiced in any way because he knew the nature of the case against him.

On the issue of **excessive sentence**, the Appellant e conceded that the court convicted him based on PW1, PW2 and PW3 evidence who were called as a prosecution witness. PW1 when testified states that he found the accused having carnal knowledge with a cow. The Appellant did not have his trousers on and he added....

*"Pia tulimkuta ng'ombe huyo anatoka manii kwenye uke wake mdogo (kumani). Tulipomkamata huyo kijana tumemkuta sehemu ya nyonga yake kuna mavi ya ng'ombe"*

*"We also found the cow ejaculating from its small vagina (kumani). Upon apprehending the accused, we observed cow dung residue on his hip."*

[Translation is mine]

PW3 when testified states that:

*"tulimkuta akiwa tumbo wazi, sehemu ya tumboni kwake ana mavi ya ngo'mbe"*

*"We discovered him with an open stomach, and part of his stomach had cow dung."* [Translation is mine]

PW1, PW2 and PW3 went to the police station complained that the Appellant had carnal knowledge with cow of PW1. F. 2927 Sgt Loid later took statements and summoned the Veterinary Officer. He did not go to the scene to see the circumstances of the area. It is, of course, for the prosecution to prove the guilt of an accused person beyond a reasonable doubt before convicting and sentencing the accused person.

Whether there is reason to disturb the sentence meted out by the trial Court. The Court considers that the circumstance of committing offence is not enough to prove the commission of offence. The trial court relied on the evidence of a single witness for identification which was not positive. In **Abdalla Wendo V. Republic** (1953) 20 E.A.C.A 166, **Roria V. Republic** (1967) EA 57, the Court is required to look at other evidence pointing to guilt of the accused.



PW1 was the only eye witness and that the rest of the evidence was hearsay and circumstantial. When PW1 testified to have seen him having carnal knowledge of a cow, there was no prove of distance on where he was to prove the ability to see the accused. Importantly, the investigation officer (PW7) has proved that the place that was a hidden bush is not easily accessible and visible to everyone. In a bush with numerous trees, there is one significant tree where the cow was tied up and obstructed; nothing on visibility has been proved in this case.

The Court also considers that there was medical evidence by the Veterinary Officer who confirmed that the cow was violently penetrated. The Court agrees that the Officer did not analyse that the sperm found on cow are the Appellant's sperms. The Court has also taken note of the fact that the PW1, PW2 and PW3, all well known to the Appellant confirmed that there had a dispute and they threatened him to revenge.

It is suggested that PW1 explicitly state that he found the Appellant's penis was inside the cow's vagina, but he did not instead describe the position in which the Appellant was situated during the act. A cow's vagina is on the back side of the cow and hence for any penetration to happen, one must be standing on the back side.

From the evidence adduced at the trial Court, contents of the grounds of Appeal and the submissions by parties, the following issues arise for determination whether there is sufficient evidence to convict the Appellant.

Having said the foregoing, I am satisfied that there is no sufficient evidence to warrant the Appellant's conviction. I, therefore allow the appeal, quash the conviction. Pursuant to the aforementioned reasons, the following orders are hereby ordered:

- (a) The appeal is allowed, and the conviction verdict delivered by the lower court is nullified.
- (b) In general, the entire conviction and sentence of 20 years are deemed unlawful and be set aside.
- (c) The Appellant is to be immediately released, provided that there are no legal grounds for detaining him.

It is so ordered.

  
**KHADIJA SHAMTE MZEE**  
**JUDGE**

**Dated at Zanzibar this 18<sup>th</sup> April 2024.**