

IN THE HIGH COURT OF ZANZIBAR  
HELD AT TUNGUU  
CRIMINAL APPEAL NO.10 OF 2023  
(From Criminal Case No.6 of 2022 of the Regional Court Vuga)  
BETWEEN  
OMAR KHAMIS OMAR.....APPELLANT  
VERSUS  
D.P. P .....RESPONDENT

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JUDGMENT

18<sup>th</sup> March & 24<sup>th</sup> April, 2024

M.A.M. SHEIN, J.

The appellant, OMAR KHAMIS OMAR was charged in Criminal Case No. 06 of 2022 of the Regional Court at Vuga with the three counts namely, Abduction of girl under section 113 (1) (a), Rape under section 108 (1) (2) (e) and 109 and offence under section 133 (a) of the Penal Act No. 6 of 2018 laws of Zanzibar.

It is alleged on the first count that, on 30<sup>th</sup> day of November, 2022 about 19:00hrs at Mtoni Kidatu within West 'A' District in the Urban West Region of Unguja, the appellant unlawful did take unmarried girl of 13 years of age from her parent at Mtoni Kidatu to his house located at Mtoni against the will of her parent.

And on the second offence it was stated in the particulars of the offence that on the aforementioned above date and place about 22:00hrs the appellant had sexual intercourse with a girl of 13 years old.

The third count, it was alleged that on 30<sup>th</sup> day of November, 2022 about 22:00hrs at Mtoni Kidatu within West 'A' District in the Urban West Region of Unguja, the appellant had carnally knowledge with a girl of 13 years against the order of nature.

The appellant pleaded not guilty to his offence at the trial court and in proving it the prosecution paraded four (4) witnesses. These includes the Victim (PW1), Ms. Hamida Haji Makame (PW2), Detective Mohamed E 7456 (PW3) and Mrs. Mwanaisha Bilal Ramadhan (PW4), the only exhibit tendered before court based on the evidence was PF3 (Exh. PE1). At the hearing the prosecution was duly managed by Mr. Ayoub Nassor represented the DPP and, In the case of the appellant, he was represented by the learned advocate Mr. Omar Sheha.

After full hearing of the case from the trial court, the appellant was found not guilty for the second offence, he was convicted and sentence for the first and third counts and given a sentence for the first count to served ten years (10) imprisonment and for the third offence he was sentenced to serve fourteen years (14) imprisonment and the sentences shall run concurrently.

The appellant was aggrieved by the decision of the trial court and lodged in this court the petition of appeal comprising six grounds to challenge both conviction and sentence imposed to him. He filed petition of appeal which can be summarized as follows: -

1. That the Magistrate erred in law and facts that the victim demanded to be taken and passed in front of the people if it is true, why the victim did not shout for help.
2. That the Magistrate erred in law and facts that the victim when claimed the act was done, she did not sleep all night, that the appellant's house is surrounded by others houses, if it is true that the act was done, why did she not ask for help from the good neighbors.
3. That the Magistrate erred in law and facts when he agreed to the false statement of the victim that "the following morning he took me to daladala station", the appellant must pass on the way, if it is true that she was subjected to that act, why did not she ask for help.
4. That the Regional court Magistrate at Vuga erred in law and facts when he admits the victim's false testimony that at passengers' station, she tried to ask

for help without success because at station Mtoni Kidatu it is a crowded station, if someone asks for help, then she must be helped, the victim lied.

5. That the trial court magistrate erred in law and fact when he admits with the evidence of medical practices where the victim was taken to the doctor early, she is not a virgin nor has sperm been found in her vagina. If the victim were to be harmed the doctor was supposed to show the victim consequences.
6. That the trial court magistrate erred in law and fact, when the magistrate made a mistake when he ignored the right of the accused to be sent to the area of scene, that the witness (PW4) E 2264 gave false statement.

As according to the grounds of petition of appeal above the appellant pray to court for the followings order: -

1. The appeal should be allowed.
2. The court to quash the conviction and set aside the sentence from the Regional Court.
3. The appellant to be released from education Centre forthwith.
4. The court to order any other relief which deem fit to the appellant.

When this appeal came for hearing, the appellant had no representative and represented himself in court. On other side of the prosecution, it was represented by a senior State Attorney Mr. Ayoub Nassor and Mrs. Safia Selembe for representing Dpp.

The appellant submit that he lodged this appeal because he dissatisfied with the decision given to the trial court which was delivered by Hon: Simai (RM). He explained that he is asking for his grounds of appeal to be adopt first and he also had other things to say that the trial court magistrate was erred in law and fact due to the witnesses PW1, PW2, and PW3 were admitted that the victim was taken to the police by a good person, but that person was not brought to court to give evidence.

That the appellant went on to say that the trial court magistrate erred in law and facts because according to the testimony of PW1 and PW2 who said the victim was sent to

his aunt, and when the victim's mother in her statement explained that the victim was sent to her uncle. The appellant told to court that these are two different statements that needed to be analyzed by the court.

Lastly, the appellant explained to court to order his appeal to be allowed, he submit his appeal.

On reply this appeal, the prosecution's side, the state attorney Mr. Ayoub Nassor on behalf of the Dpp, has said that they oppose this appeal and replied that the reply of petition of appeal be adopted. He said the grounds of appeal no.1 and 4 are consolidated and said that when the victim was taken, they were the only friends of the appellant. Mr. Ayoub said that these are found on pages 7 and 9 of the proceeding. Therefore, the victim could not get any help considering it was night and the victim is a child of 13 years. Mr. Ayoub said that due to the victim not being able to shout because it was night, she decided to sleep with the appellant all night.

In response to the fifth ground of appeal Mr. Ayoub explained that the appellant at trial court was not convicted with the second offence because the victim was found to be a virgin. Therefore, the appellant was not guilty of the offence of rape. the respondent explained that the issue of visiting to the area of scene of the incident has no basis since it is mentioned in the records that they went with the detective of this case who is PW4.

The learned state attorney Mr. Ayoub submit that on the additional argument of the appellant regarding the discrepancy between the statement of PW1 and PW2 about the places where the victim was sent, that the victim started to aunty place and later went to his uncle, he said there is no discrepancy in the description between the two witnesses.

Lastly, the respondent prayed to this court the appeal should not be allowed and the judgment, conviction and sentences should remain as they are and this appeal should be dismissed because it lacks criteria.

In addition the appellant said that there are many people at daladala station at Mtoni Kidatu, so the victim could not help. He also said that the trial court magistrate was not analyze well the victim's explanation of being sent to his aunt and then went to his uncle.

The appellant finally, he asks the court to look at the evidence of the trial court and re-analyze once again and he prayed to the court to set aside the convictions and sentence of the trial court and finally the appellant to be released.

In determining this appeal, I would like to start by answer the first and third grounds of appeal which are in one argument that touches the victim when she could be taken and passed in front of the many people, and to take the victim to the passenger car station (Daladala). The issue to determined here first if there are contradictions as raised by the appellant, what is the solution of this issue. To appreciate more, it is good to look at the victim's evidence and to analyzed once again and to observed if there is a defect for looking the evidence. The Victim PWI on page 6, 7 and 8 of the typed proceedings explains:

"On 30<sup>th</sup> day of November, 2021 at about 19:00hrs my mother told me to go to my 'haloo' since she had nothing to eat, I went to 'haloo' to Mwanakwerekwe at morning on the second day when I want to come back, I did not have money for transport. Hence at 17:00 I went to brother at Kibanda Maiti to take money for transport. I took daladala at Bububu and conductor asked me where I dropped, I told him I dropped at Kijichi, it was 18:00hrs, when I dropped from the car, I mate with so many people, then I mate with that person (pointing the accused) who told me I should sleep with him, he told me he loves me, I could deny and he said he could not leave me. He passed at his friend, while every person said 'Shemeji huyo' and then he took to his house. He opened the door and I was looking for him he was touching my body then he told me he wants to do massage.

He uplifted my clothes I was wearing gauni and hijab he removed my underwear and then he penetrated his penis at my vagina and anus. The following morning, he took me to the passenger station (daladala station) and dropped me, were one woman saw him dropping me and asked me, who was that, I told her what happened then they decided to take me to police station.

In being able to observed the evidence of the Victim above, I have discovered the following things: -

**First,** On the above evidence of PWI, as according to her explanation, it is observed by the court that the victim is not the first time to meet with appellant, it shows that the victim is an experienced person to the appellant, this shows when she said in her explanation 'he told me he loves me' and when they pass in front of boda-boda drivers she was praised.

It is true that in connection with the appellant's argument it seems that the appellant and the victim took each other in a more peaceful situation and not in situation that had created chaos that these two people do not know each other, and then even people started praising him.

From the evidence of the victim above, she would have been treated with hostility and be deceived, the people who were present at the daladala station would have intervened in this matter, seeing that there is a conflict between people who do not know each other.

**Second,** when she said he took her and everyone called "shemeji huyo" this explanation is enough to show that these people know each other, but when she was taken to the place of scene of the crime, she was unable to say anything and the proof of this is when she said that was undressed and she remained silent. It is seen in his statement that even when the act done by the appellant, the victim did not show any pain and said that she did not know how long it was done, this is seen in page 7 of the typed proceedings. So, it appears that the victim is sexual experienced.

**Third**, in the trial court (RM) has failed to realized and analyzed the issue of credible witness which is important in being able to know the accused's misconduct. In the case of **Shaban Daudi v. Republic, Criminal Appeal No. 28 of 2000** and in the case of **Pascal Yoya Maganga v. R, Criminal Appeal No. 248 of 2017** (Both Unreported). It was held that: -

*"Credibility of a witness is a monopoly of the trial court but only in so far as the demeanor is concerned. The credibility of a witness can be determined in two ways, one, when assessing the coherence of the testimony of that witness, two, when the testimony is considered in relation to the evidence of other witnesses, including that of the accused person. In those two occasions, the credibility if a witness can be determined even by a second appellate court when examining the findings of the first appellate court".*

In the present appeal, the Victim failed to show the demeanor that she was taken by deception, as according to the victim's statement, she said that when she arrived in the room, the appellant opened the door and she was looking for him, the appellant was touching the victim body and want to do massage to her, the victim explained further that he uplifted her clothes and remove her underwear and vest then the appellant penetrated his male organ at the victim vagina and anal. I know that the single eye witness evidence taken in this case and the best evidence is that of the victim as it is in the case of **Selemani Makumba v. R, 2006 TLR 379**. But, in this appeal there is doubt about the charge of the appellant concerned for the offence of carnally knowledge against the order of nature. If you look the charge sheet, it reads that the victim was carnally knowledge against the order of nature by the appellant on 30.11.2012 about 22:00 at night. The victim statement it goes against the charge sheet that the victim said what she remembers was being sent by mother to her 'haloo' on 30.11.2021 about 19:00hrs at night, the victim has failed to prove the event occurred at

particular time about 22:00hrs in the night, and according to her statement it against the charge sheet.

In looking the process of completing the investigation of this case, it shows that on 13.12.2021 PW3 who is E 7456 D/Sgt Mohamed has received the file and worked on it. On the part of the investigation, shows that the detective E 7456 totally failed to conduct the investigation of this case in proper manner, due to the failure to fulfill the objectives of the evidence for the witnesses who could have been called in court, they would have succeeded in washing the doubt of this case. According to this case, three important witnesses have been left where detective Mohamed failed to work from them. Those witnesses are Uncle of the Victim, brother of the victim and the woman whom they named the victim herself when she saw her in the morning at Daladala station.

The doubt of this case seems that the victim was a traitor and she not entitled to credence and her testimony to be accepted is doubtful because she has completely failed to explain the event and its reality as it happened as well as giving the time and place of scene.

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. See the case of **Goodluck Kyando v. Republic, Criminal Appeal No. 118 of 2003**. In this appeal, there is a good and cogent reason for the doubt and believing the testimony of the victim that she was raped by the appellant for considering the time and place when the incident occurred. In the case of **Mohamed Said v. Republic, Criminal Appeal No. 145 of 2017 CAT**, Iringa it was held that; *"Words of the victim of sexual offence should not be taken as a gospel truth, but her/his testimony should pass the test of truthfulness."*

In this appeal, the fact that the victim was with the appellant at the place of the incident needs further evidence as far as carnally knowledge against the order of nature cases is concerned. Therefore, in answering the first and third raised issue, the victim



herself was not a credible witness as the evidence she adduced before the trial court was not sufficient to mount conviction of the appellant. See the case of **Alex Nyambeho @ Fanta and Another v. R**, Criminal Appeal No. 309 of 2013, see also the case of **Shabani Daudi v. R**, Criminal Appeal No. 28 of 2000 and the case of **Majaliwa Ithemo v. The Republic, Criminal Appeal No. 197 of 2020**.

Coming to the 2<sup>nd</sup>, 4<sup>th</sup> and 6<sup>th</sup> issues, it is a settled principle of law that the onus of proof in criminal case lies on the prosecution and such proof must be beyond reasonable doubt, this elucidated in the case of **Nyangwisi Nyangwisi v Republic, (Criminal Appeal No. 243/2020), [2022] TZCA 337**, and the case of **Jonas Nkize v. Republic [1992] TLR**. It was observed that, there is no conviction that shall be entered on a weak defence but upon proof of the case beyond reasonable doubts.

From the Evidence law book Sarkar's 18<sup>th</sup> Edition M.C, Sarkar, S.C and P.C Sarkar, published by Lexis Nexis states as follows on page 1896;

"The burden of proving a fact rest on the party who substantially asserts the affirmative of the issue and not upon the party who denies it, for negative is incapable of proof. It is ancient rule founded on consideration of good sense and should not be departed from without strong reasons until such burden is discharge the other party is not required to be called upon prove his case. The court has to examine to whether the person upon whom the burden lies has been able to discharged his burden. Until he arrives at such conclusion, he cannot proceed on the basis of the weakness of the other party..."

In looking the offence of abduction, this court has seen that not a single witness showed the elements or ingredients of the abduction, how the victim was abducted. The offence of abduction is an auxiliary act, not punishable by itself, but made criminal only when it is committed with one or other intents mentioned in section 113 (1) (a) of Act No. 6 of 2018. The crime of abduction must be committed when the suspect has the intention to commit a crime, but for the victim of this case, it is her explanation that she had voluntarily agreed that they were able to hold hands and went to the appellant house while she was cheered by boda-boda drivers and calling her 'Shemeji huyo'. The

trial court magistrate has said that the testimony of PW1 and PW2 the court was found that the prosecution has proven the offence of abduction against the accused. Due to the existing charge of the appellant, this offence has failed to proven because the time that was stated in the facts of the victim bring doubts, but even the trial court has failed to show the ingredients of the offence of abduction clearly. The argument of taking the victim without the will of her parents seems to have no validity since the victim left their home with the permission to be sent to his uncle, and that permission came from the victim's mother. But the information contained in the charge sheet that the appellant abducted the victim from the area of Mtoni Kidatu that statement contradicts with the victim's facts. Since this is the first appellate court does not see the need to analyze and evaluate the evidence of the trial court which does not exist, the trial court magistrate convicted the appellant for the first count for which the evidence that does not have ingredients of the offence. Therefore, the appellant's conviction is invalid.

At this juncture, I am left in dilemma that was the victim is telling the truth and has not distorted his evidence. I am saying this because it appears on page no. 24 of the proceedings, the doctor (PW4) says that he does not know if the victim is experienced or not on this part doctor has doubtful in his explanation, he was not present direct evidence, on his part of the victim, she showed that her demeanor not having afraid or worried, including showing that she was in pain or was a very shy person, that trial court has not recorded any part of the demeanor of the victim, this also seems that the victim is a person who has experience. Due to the reasons, I explained, this clearly shows that the 2<sup>nd</sup>, 4<sup>th</sup>, and 6 grounds of this appeal have been supported.

In this appeal, the records reveal that the evidence adduced before the trial court by the victim required corroboration which would be shown to other prosecution witnesses that the victim was abducted as well as carnally knowledge against the order

of nature. For this it is means that the victim evidence was insufficient to prove the charges against the appellant beyond reasonable doubts.

For the foregoing reasons, I find this appeal to be meritorious. It is hereby allowed. Appellant's conviction is quashed and the sentence imposed against him is hereby set aside. The appellant is to be released from prison forthwith unless otherwise held.

It is so ordered.

DATED at TUNGUU, this 24<sup>th</sup> day of April, 2024.

A handwritten signature in black ink, appearing to read 'M.A.M. Shein', with a horizontal line underneath the name.

**M.A.M SHEIN**  
**JUDGE**  
**24.04.2024**