IN THE HIGH COURT OF ZANZIBAR

AT TUNGUU

CRIMINAL APPEAL No. 05 OF 2023

(Appeal from judgment of the Criminal Case No. 110 of 2020 of the Regional Magistrate's Court of Zanzibar at Mwera, Hon Said H. Khalfan, RM given on 19/07/2021)

SHAIBU AME OMAR…….....……....APPELLANT

VERSUS

DIRECTOR OF PUBLIC PROSECUTIONS..... RESPONDENT

JUDGMENT

22nd APRIL, 2024

A. I. S. Suwedi, J

The facts of this appeal in nutshell is that the appellant before the Regional Magistrate Court at Mwera charged with three counts, Abduction of a Girl contrary to section 113 (1) (a); Rape contrary to section 108 (1) (2) (e) and 109 (1) and Unnatural offence contrary to section 133 (a), of the Penal Act, No. 6 of 2018 of the Laws of Zanzibar. It was stated by the respondent that in September, 2019 at about 01:00pm, at Koani, in the Central District within the Southern Region of Unguja, the appellant took **XY** (a name for the purpose of this judgment only), a girl of 10 years, out of the custody of her parents at Koani to his house. At 01:10pm, the appellant had sexual intercourse with her and at 01:15pm, the appellant also had carnally knew

her against the order of nature. Finally, the appellant convicted with all three counts and sentence to serve Education Centre for 10 years to each count which was ordered to run concurrently and to pay TZS 3,000,000/- compensation to the victim.

Aggrieved by that decision, the appellant filed this appeal with four grounds as:

1. That, the Honourable learned trial Magistrate glossily erred in law and in fact for convicting and sentencing the appellant based on weak, coached and flimsy evidence.
2. That, the Honourable trial Magistrate erred in law and in fact for succumbing conviction and sentence against the appellant in violation of sentencing principles governing sentencing procedures.
3. That, the Regional Magistrate Court glossily erred in law and fact by failure to consider the strong evidence and doubts adduced by the appellant and his witnesses during the trial.
4. That, generally the entire judgment of the Regional Court is problematic and contains illegal sentence.

Before this Court, the appellant represented by the learned counsel Gido Simfukwe and the respondent appeared through Mr. Moh'd Saleh and Mr. Said A. Said, learned Principal State Attorney and Senior State Attorney respectively.

Submitting ground one, counsel Gido stated that the evidence of PW1 is not reliable for the reason that she kept silent after the incident. Also PW2 said to have been informed by the teacher that PW1 is not walking properly,

it is a hear-say evidence. PW3 did not say when PW1 sent to him, whether immediate or after several days and he cited a case of **Ramadhan Ismail v. the Crown**, Vol. VII ZLR, 36. Besides, it was submitted that the learned trial Magistrate did not give the reasons for the decision while there are inconsistencies (age of the victim 11 and she said she is 12 years). Counsel Gido further mentioned PW4, PW5 and PW6 that there evidence contains inconsistencies.

In respect with ground two, counsel Gido submitted that the trial Court did not follow sentencing procedure as the respondent gave mitigation after conviction and sentence passed out. The trial Court also did not considers some crucial factors such as appellant background, characters, family background and he quoted a case of **Tabu Foliwa v. R** (1998) TLR 48 which talked about sentencing principles.

Concerning ground three, it was submitted that the appellant raised doubt in evidence at page 32 that there was a jealous in the family but was not considered. He also said that the appellant accused of raping two girls but in Court only **XY** while he was normally leaving in the morning until night. With regards to doubt, counsel Gido cited a case of **Ali Saleh Msule v. R** (1980) TLR 1.

Counsel Gido lastly submitted ground four that an order that punishment should run concurrently is problematic as they can run at the same time when there is greater punishment. Finally, he prayed for the appeal to be allowed and the appellant to be set free.

The respondent via Mr Moh'd opposed the appeal, supported the conviction and challenged the sentence given. With regard to ground one, he submitted that the evidence produced by the respondent was strong bear in mind the best evidence is that of the victim as said in **Selemani Makumba v. R** (2006) TLR 379. PW1 who was a child of 12 years explain clearly on how the incident of rape occurred. PW1 used the term "dudu lake la kukojolea" to insert into the vagina and anus and in the case of **Filbert Gadson @ Pasco v. R**, Criminal Appeal No. 267 of 2019 translated "mdudu" to mean pennis. He submitted further that PW2 reported on 17/10/2019 and the same date PW3 received a victim and PW4 said a similar story. It was a month since the commission of the offence and the reporting and so the credibility is measured on delay of reporting. The case of **Seleman Hassan v. R**, Criminal Appeal No. 2003 of 2021 (unreported) was cited. The credibility of PW1 was not shaken and it was proved that the she was below 18 years. Besides, there is no case without discrepancies what is important they should go to he root of the prosecutions case.

In respect with ground three, Mr. Moh'd submitted that the evidence produced by the appellant was weak. DW1 relied on the evidence of alibi but the procedure was not followed and he cited the case of **Hassan Shaaban @ Ugoyn v. R**, Criminal Appeal No. 60 of 2022 (unreported) whereby if the trial Court did not analyse the evidence the Appellate Court can step into the shoes and analyse the same.

Replying ground two and four he submitted that concurrent sentence based under section 302 of the Criminal Procedure Act, No. 7 of 2018 and the trial Court was right. Regarding the punishment to be harsh, he said that the punishment of rape is 30 years but the appellant was given 10 years. This Court can interfere with the sentence as said in **DPP v. Focus Patric Munish**, Criminal Appeal No. 672 of 2020 at page 7 to 8.

Mr. Said continued to talk about the sentence imposed by the trial Court and he requested this Court to impose higher sentence as given by the law since punishment of attempt is not less than 20 years and he prayed for this Court to enhance the sentence.

Counsel Gido insisted that the sentence imposed was not lenient but it was imposed on weak evidence and the issue of "mdudu" and "dudu" are two different things and finally he reiterated his earlier prayers.

From the grounds of appeal and the submission made, the appeal based on two things. One, the appellant challenged the evidence by the prosecution and he claimed that his evidence was not considered. Second, violation of sentencing procedure. The fact that the appeal touched the evidence it will be good to pass by the evidence given with the judgment of the trial Court in order to know the correctness of this claim.

The evidence of the respondent as given by 6 witnesses started in September, 2019 around noon when the appellant called **XY** (PW1) and took her to mama Hamida's house, a place where the appellant reside. At mama Hamida's house the appellant undressed PW1 and entered his penis at her anus and then to her vagina by laying her on the mattress. PW1 said "*dude lake la kukojolea katika sehemu yangu ya kujisaidia haja kubwa kwa kunyia na kisha ninapokojolea*". PW1 did not tell anyone about the happening as the appellant told her not to say. But the matter came to be known after her Madrassa teacher (not called as a witness) found a book which according to PW1, the book belonged to another child of which she wrote mysteries about adult matters who took it to her father.

The evidence shows that the parents of PW1 got the knowledge of the occurrence on 17/10/2019. Having that information, PW1's parents, **Mone Ali Bakar**, testified as PW2 and **Said Khamis Ali** (PW4) went to Dunga

Police Station and then to Mnazi mmoja Hospital. At Mnazi mmoja, they came to know that PW1 was affected in both sides (anus and vagina). When they returned to their home, PW1 told them that the appellant is responsible.

The evidence also shows that the matter was taken to PW1's school and the book found with PW1 was read and the words wrote were "*una hashuo la mdoriani kufirwa na chupi kichwani, una hashuo la jogoo kufirwa bila kibod*". According to **Khadija Talib Talib**, PW1 school teacher who testified as PW5, the school disciplinary committee sat and consequently they discovered that PW1 had done the act through vagina.

Salim Omar Mbarouk (PW3) was the one examined PW1 on 17/10/2019 and that he found evidence of penetration in her vagina as well as in her anus. The incident investigated by **F. 9233 D/C/Fadhil** (PW6) who took witnesses statement and visited the place where the crime occurred. PW6 testified that the house where the incident happened is about 50ft from PW1's house and he found a mattress in the appellant's room. By interviewing PW1, PW6 connected the appellant with the 3 offences.

On the other hand, the appellant's case made up by 3 witnesses and his evidence was that he lives at Koani with his brother Omar Ame and Hamida Ali Bakar. The appellant had a shop, the business which started on 17/06/2018 and usually he is leaving home from 06:00am to 09:00pm. On

the material day, the appellant was called by his brother that his computer was taken and he went to the owner of the shop. From the appellant's testimony, the case arose due to the envious of PW1's family and he heard that PW1 has no good manners.

Hamida Ali Bakari who testified as DW2 testified that her family and PW1's family have conflicts. She knows PW1 as the daughter of her sister and she also said that appellant had no sexual relation with PW1 as he had no time to stay and on material day he was in Dar-es-salaam. **Omar Ame Omar**, DW3 on his side, said that on material day, appellant was at his duty station and the PW1 was at Madrassa. The source of the case is the political differences their parents have and in the house they are living, his wife (DW2) id present all the time. In re-examination, DW3 said that in September, 2019, appellant was in Dar-es-salaam.

Having sum up the evidence, I directly starts with the claim tabled by the appellant that the learned trial Magistrate relied on the weak evidence by the respondent and that he did not consider the evidence given by the respondent. The evidence by the respondent managed to show that the appellant took PW1 without her parents' consent. PW1 testified that in September, 2019 while she was at home, she was called by the appellant and he took him to mama Hamida's house. PW2 proved that PW1 is a girl below

18 years of age and she is under the care of her parents. Also she proved that she never gave permission to go to the appellant. The evidence shows the requirement under section 113 (1) which the appellant was charged with in the first count. Then I perused the judgement of the trial Court and I found the learned Magistrate analysed the stated provision throughly and came up with a conclusion that the respondent proved the offence of abduction, a decision which I cannot fault.

With regard to second and third count, I will based mainly with the evidence of PW1. As we know that the law is settled that the best evidence in sexual offences like this one, is that of the child victim. Please see **Frank Deule @ Damas v. Republic**, Criminal Appeal No. 396 of 2018 (unreported). It is also settled law that the evidence of a child of tender age in sexual offence can be relied upon without corroboration after the Court warning itself of using such evidence to ground conviction of an accused person as provided under section 49 (4) & (5) of the Children's Act, No. 6 of 2011. Establishing that these offences were committed, the respondent was obligated to prove, first is the age of the victim. Please see **Solomon Mazala v. R**, Criminal Appeal No. 136 of 2012 (unreported) and **Rwekaza Bernado v. R**, Criminal Appeal No. 477 of 2016. In **Solomon**, the Court of Appeal said

> The cited provision of the law makes it mandatory that before a conviction is grounded in terms of Section 130 (2) (e), above, there must be tangible proof that the age of the victim was under eighteen years at the time of the commission of the alleged offence.

The provision cited is mutatis mutandis to section 108 (2) (e). Besides, the respondent required to prove penetration. The evidence of PW1 reveals that the appellant in September did sexual intercourse with PW1. She testified that:

> ……he undressed his underwear as well as my dressing then he lay down on the mattress thereafter he entered his "*dude la kukojolea katika sehemu yangu ya kujisaidia haja kubwa …… na kisha ninapokojolea"*

The words signifies that the appellant did sexual intercourse with PW1 as corroborated by the evidence of PW3 who testified as:

> ……there is evidence of penetration. As to the anus there is old tear with no presence of discharge……
>
> in her anus the sphincter muscle is loose which allowed finger to penetrate easy without any feeling so it is gaping on anus. As to vagina there is old tear hymen not intact……..

Additionally, PW 2 proved the age of PW1, she said that PW1 was born on 04/11/2009 of which until now, as I am composing this judgment, she has not yet turned 18 years. With this point of view, I am hesitating to blame the learned trial Magistrate.

On the other side, I read thoroughly the judgment of the trial Court to observe if it true that the Court did not consider the evidence given by the appellant. In my look, I saw that the defence was taken into consideration and the reason for it not to be given weight was stated as shown hereunder:

> ……..as to the accused person told this Court that on material day day he was not there whereby he was called by his brother that his stuffs was taken thus to say his defence was alibi.
>
> In this regard the court has to consider the defence side as the direction of Court of Appeal of Tanzania to take into consideration a defence ……..

The Magistrate then consulted section 190 (1) (2) (3) of the Criminal Procedure Act, No. 7 of 2018 (the Act) which provides for a requirement to rely on the defence of alibi. The law requires a person who want to rely on the alibi defence has to furnish a notice before the prosecution case is closed. The appellant who was legally represented did not issue a notice prior as required. The learned trial Magistrate said that:

> In this so far the accused person has an advocate in his case but no notice has been raised hence his defence has o weight in this case

Looking to subsection (3) of section 190 of the Act, I see no wrong to the decision of the trial Court. The provision says:

> 190 (3) If the accused raises a defence of alibi without having first furnished the particulars of the alibi to the court or to the prosecution pursuant to this section, **the court may in its**

discretion accord no weight of any kind to the defence.
[Emphasis Added]

Therefore, I see grounds 1 and 3 to have no merit and hence I am disregarding them.

The appellant also claimed that the trial Court violated sentencing procedure in ground 2 as well as mistake committed by ordering sentence to run concurrently. In his submission counsel Gido said that the respondent gave mitigation after conviction and sentence passed out. Glance to the judgment of the trial Court, what I have noted is that the Magistrate entered conviction of count one after analysis, then count two and finally convicted the appellant with count three. Then the learned State Attorney presented on that date informed the court on that the appellant had no records of previous conviction. Records show that the Court then gave chance to the advocate represented the appellant who requested for lenient sentence as the appellant was the first offender as well as he requested eyes treatment for the appellant and he tendered appellant's admission certificate in which the State attorney present did not object the treatment. The said process done prior pronouncement of sentence. Finally the learned trial Magistrate pronounced sentence and he explained on the right to appeal. With this, the claim tabled has no truth in it as the records show clearly what happened before the trial Court.

Again, counsel blamed the trial Magistrate by ordering the sentence to run concurrently while there is no greater sentence. As said early that the appellant was convicted with three counts and sentence to serve 10 years to each count but to run concurrently. I right away consult the Act to see what it is saying with regard with the sentence to run concurrently. Section 302 (1) says:

> Where a person after conviction for an offence is convicted of another offence, either before sentence is passed upon him under the first conviction or before the expiration of that sentence, any sentence, other than a sentence of death, which is passed upon him under the subsequent conviction, shall be executed after the expiration of the former sentence, **unless the court directs that it shall be executed concurrently with the former sentence or any part thereof**. [Emphasis is mine]

Under normal circumstances the sentences should run consecutively, unless the Court ordered otherwise as done in the instant appeal. In **Shomari Mohamed Mkwama vs Republic** (Criminal Appeal 606 of 2021) [2022] TZCA 644 (21 October 2022), the Court of Appeal said that:

> The position of the law obtaining in this jurisdiction is that, unless there are exceptional circumstances, trial courts must order imprisonment sentences to run concurrently in case a suspect is convicted of two or more offences committed in a course of one transaction.

The Court of Appeal of Tanzania in **Ramadhani Hamisi @ Joti v. R,** Criminal Appeal No. 513 of 2016 (unreported), insisted on the properness of the Court to impose concurrent sentence. The Court said that:

> The law is settled that the practice o f the courts in this jurisdiction is that, where a person commits more than one offence at the same time and in the same series of transaction; save in very exceptional circumstances, it is proper to impose concurrent sentences.

From the quoted provision and the authorities cited, the learned trial Magistrate did not commit any error in ordering the sentences to run concurrently. The only sentence prohibited to run concurrent is the sentence given in leu of fine as said under section 302 (2) of the Act and so ground 2 and 3 are also lacks merit.

On the issue of sentence given to the appellant as tabled by the respondent on the hearing day, I will concentrate on this point with regard to second count only as the other has no such problem. The punishment given under section 109 (1) for a person convicted with the rape under section 108 (2) (e) of the Penal Act is life imprisonment. But the wording of the provision signifies discretion of the Court to impose a sentence until life imprisonment of which the trial Court has no such powers under section 7 (a) of the Act. However, the trial Court did not impose 10 years sentence by regarding its powers under section 7 (a) but he relied with section 299 which allows a

shorter sentence instead of life imprisonment with the appellant's health condition as a ground of doing so. In this regard, I am of the view that what was done is wrong. If penalty given under section 109 (1) of the Penal Act is a minimum sentence, then Magistrate would have no choice but to give that punishment. On this basis, the trial Court would have the power to invoke section 299 of the Act. Hence, my observation is that, the fact that the penalty of rape under section 109 (1) gives discretion to Court to sentence up to life imprisonment, there is no need to justify and find a way not to give the penalty provided.

On the other hand, I have thought about the health condition used a basis to give a lesser punishment. I wondered what health condition was that? Records do not show the prescription tendered on the day of the judgement, was it eye disease said earlier or there was something else? Under normal circumstances, it is possible that disease became a reason to reduce the punishment, but a presiding officer should consider a kind of disease that person is facing. In my opinion, diseases that should be considered as ground must put a person in danger or put another person close to him in danger. I am aware that there are hundreds of different eye diseases and vision problems. Some have no cure, but many others are treatable, but the records do not show the kind of eye disease that the

appellant was facing in order to determine the punishment to impose. Hence, I find my self responsible to interfere the punishment given with regard to second count.

I straightly observe section 111 (1) of the Penal Act which provides punishment of attempted rape that:

> (2) A person who attempts to commit rape is guilty of an offence and is liable to imprisonment for a term not less than twenty years.

In this situation where the punishment of attempt to commit particular crime is set, then a punishment for a person convicted for committing the offence itself must consider the punishment of attempt as said 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).

in this case, 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 and it substitute the sentence of fifteen (15) years imprisonment with that of thirty (30) years imprisonment.

Consequently, from the reason given, I am hereby dismissing the appeal for lack of merit and substitute the sentence of ten years (10) years imprisonment given in the second count with that of twenty five (25) years imprisonment to run concurrently with a sentences given in other counts.

DATED at TUNGUU ZANZIBAR this 22nd day of April, 2024

A. I. S. Suwedi

JUDGE