

**IN THE HIGH COURT FOR ZANZIBAR
AT TUNGUU
CRIMINAL APPEAL NO. 31 OF 2023**

(Appeal from Criminal Case No 22 of 2022 of the Regional Magistrate's Court at Vuga)

IBRAHIM SULEIMAN NAIM **APPELLANT**

VS

DIRECTOR OF PUBLIC PROSECUTIONS **RESPONDENT**

JUDGEMENT OF THE COURT

05/03/2024 & 14/05/2024

KAZI, J.:

The victim of the crime, AO (name withheld), who, at the trial Court, testified as PW1, was a young girl of the age of 16 years on the date of the incident. She was a Form II student at Kiembe Samaki Secondary School and residing with her family members at Fuoni Mambosasa. The appellant is a bodaboda driver well known by PW1's family; he used to provide service to them, including sending PW1 to Kijito Upele with his bodaboda. On 30th December at about 4 pm, PW1 was with his brother, ABD (name withheld), testified as PW3, in the Café at Fuoni Mambosasa. PW1 left her brother there and went back home. At that time, there was nobody at PW1's home. When PW1 was at home, the appellant went there, and together, they sat in the sitting room on the carpet. They talked, and the appellant started to touch PW1's body and kissed her lips, then he undressed her and had sexual intercourse with her. During all this time, PW3 was still at the Café expecting PW1 to return, but after realizing she took too long to get back there, he gets

suspicious and decides to follow her home while accompanied by his young brother HO (name withheld). On their arrival home, they found the main gate and the front door of their house locked, and the appellant's shoes were outside. PW3 knocked on the door while calling PW1, and it took a while for the door to be opened.

Later, the appellant opened the door and then forced his way outside, leaving his shoes behind, which were held by PW3. After the appellant left, PW3 decided to call his mother, KUM (name withheld), PW2, and inform her what he found at home. Having received the devastating news, PW3 rushed back home with her husband and later reported the incident to the Police, where PF3 was issued, and PW1 was sent to the hospital for medical examination. PW5, Ahmed Abuu Juma, was the Doctor from Mnazimmoja who attended PW1. After examining PW1's vagina, his finding, which was recorded in the PF3 (Exhibit PE1), was that there was hyperemia on PW1's labia manora without bruises and a presence of old tears at 3 o'clock. He also found seamen oozing from PW1's vagina. It was PW5 evidence that the hyperemia indicated that there was fresh physical contact, hence concluded that PW1 was penetrated (had sexual intercourse).

The appellant, in his defence, denied the claim. He claims that he was accused of the offence after refusing to have an affair with PW2. He alleged that PW2 threatened to send him to jail if he rejected her from having an affair.

The trial Court heard the evidence from both sides and was satisfied that the prosecution had proved their case beyond reasonable doubt.

Ultimately, the appellant was convicted under sections 108 (1) (2) (e) and 109 (1) of **the Penal Act**, 2018, and sentenced to 30 years in prison. In addition, he was ordered to pay Tsh 200,000/—as a fine and TSh. 300,000/—as compensation to the victim.

The appellant was aggrieved with the judgement, sentence and orders passed on him and preferred this appeal on the grounds which can be summarized as follows: -

1. The learned Regional Magistrate erred in law by convicting the appellant on the defective charge sheet.
2. The learned Regional Magistrate erred in law by convicting the appellant based on contradictory evidence.
3. The learned Regional Magistrate erred in law for not considering that prosecution evidence had reasonable doubts.
4. The learned Regional Magistrate erred in law in relying on PF3 which was not authentic for sentencing the appellant 30 years imprisonment.
5. The learned Regional Magistrate erred in law by convicting and sentencing the appellant to 30 years imprisonment without considering that the prosecution failed to exhibit the appellant's shoes as evidence to support their case.

At the hearing of the appeal, the appellant was advocated by Mr. Said Ali Said, learned Advocate, the respondent the DPP enjoyed the service of Mr. Suleiman Yusuf Ali, learned State Attorney.

In arguing the appeal, Mr. Said commenced by adopting their ground of appeal and proceeded to submit on the first ground of appeal. He argued that the charge sheet was defective as it did not have information clearly showing what the accused was facing. He stated that the charge sheet shows that the appellant raped the victim in December 2021 at about 4 pm at Fuoni Mambosasa. He stressed that Criminal Procedure Act under Section 164 indicated how charge sheet should be framed. He added that the charge must contain the particulars of the offence, the name of the accused and the victim. He further stated that the accused needs to know the particulars of the offence so he can prepare his defence and that if the particulars in the charge sheet are unclear, it may lead to unfair justice. He supported his submission by the case of **Yusuf Mohamed Yusuf vs Republic**, Criminal Appeal no. 331 of 2014, CAT (Unreported). Mr Said then argued that page three of the typed proceeding shows that PW1 remembered that she was raped in December 2021, whereas on page six, PW2 recalled that the crime was committed on 30/12/2021; similarly, on page 10, PW3 stated that the crime was committed on 30/12/2021. In his view, there is a contradiction in the date with which the crime was committed, the contradiction caused by the charge sheet in its failure to indicate the exact date of the commission of the crime. It was his further views that prosecution was supposed to invoke the provision of section 219 of the Criminal Procedure Act, by seeking leave to amend their charge sheet.

He referred to the Case of **Mshenga Shaibu Khamis v Republic**, Criminal Appeal No. 62 of 2023, CAT (Unreported) to support his stand.

Arguing in support to the second ground, Mr. Said contended that there was a contradiction on the evidence of PW3 and PW2, that on page six of the typed proceeding, PW3 testified that at the time she left her house and went to town, PW1 and PW3 was at home, in contrast, on page 11 PW3 testified that at about 16;00 hrs. she was with PW1 at the Café. Mr. Said alleged that another contradiction is shown on page 11 whereby when cross examined PW3 stated that when PW1 was interrogated by her parents regarding the crime, she responded that she did nothing, while on page six paragraph five PW2 when testified stated that after beating up PW2 she was told. Moreover, it was alleged by Mr. Said that there was a contradiction regarding the date the crime was committed since, on page four, PW1 testified that she did not remember the date of the crime while PW3, on page 10, testified that the crime was committed on 30/12/2021. He referred to the case of **Noel Samuel vs Republic**, Criminal Appeal No. 418 of 2020, CAT and stated that the Court has the duty to address and resolve the witnesses' discrepancies. He submitted that the mentioned contradictions were not minor and goes to the root of the matter.

Arguing for the third ground, Mr. Said contended that the prosecution's evidence had a lot of doubts, which could not warrant a conviction. He started by querying the credibility of PW1. He maintained that as PW1, who is a victim of the crime, did not remember the date of the commission of the crime, her credibility as a witness became doubtful. It

was his further view that PW1 testified that the appellant raped her on two different occasions, but she only reported the crime to her parents on the second occasion, therefore her failure to report the crime on the first time she was raped, her evidence become unreliable. Mr. Said was also of the view that PW1's evidence was unreliable because she revealed what happened to her after getting beaten by PW2.

As regards to the fourth ground, Mr. Said submitted that Exhibit P1 (PF3) was not authentic as it lacks hospital stamp, he therefore urged the Court to expunge it from the record.

Arguing for the last ground, Mr Said questioned the non-tendering in evidence of the appellant's shoes, which, according to him, was prosecution vital evidence. He contended that all PW1, PW2, and PW3 talk about the shoes that were alleged to be of the appellant and found at the crime scene. The shoes which PW3 took as evidence as it is shown on page 11 of the typed proceedings. Mr. Said therefore maintained that failure of the prosecution to tender in Court the shoes found at the crime scene weakened the prosecution case. He referred to the case of **Mshenga Said Khamis** to support his stance.

In the reply, Mr. Ali, a learned State Attorney, started by opposing all grounds of appeal and stated that they have no merit. He then proceeded to respond on the last ground, where he submitted that there are two types of exhibits, which are material and non-material. His view is that the non-tendering of non-material exhibits is not fatal. Relying on the case of **Alexandre Peter Mvungi vs Republic**, the learned State

Attorney was of the view that shoes were non-material evidence and failure to tender them was not fatal to the proceedings.

Responding on the fourth ground, the learned State Attorney submitted that it is the signature which authenticates the document and not the stamp. He added that, the maker of the document testified in Court therefore his evidence was enough to explain the contents of the documents. Therefore, he was of the view that this ground lacks merit.

Mr. Ali combined grounds two and three, stating they both lack merit. He was of the view that there are no contradictions in the witness testimony. It was his submission that PW2 did not mention the time she left PW1 and PW2 home, so her evidence did not contradict PW3's evidence, and if they did, he cautioned, it does not go to the root of the matter. The learned State Attorney also dismissed the allegation that PW2's evidence contradicts PW3's evidence about what PW1 tells her mother. He stated that PW2 did not reveal what PW1 told her, so that piece of evidence does not contradict the evidence of PW3, who told the Court that PW1 told her mother nothing. As regards the alleged contradiction of PW1's testimony who testified that she couldn't recall the date of the commission of the crime with PW3's evidence who said the crime was committed on 30/12/2021, Mr. Ali argued that PW1 did not remember the date, therefore her evidence does not contradict PW3's evidence who remembered the date when the crime was committed.

In response to the issue of PW1's credibility, Mr Ali believed that the ground on PW1's credibility is weak. He argued that the state of remembering things or not is human nature and cannot render a witness unreliable. He also claimed that the failure of PW1's not to report the crime on the first date she was raped does not make her an incredible witness. In addition, he argued that PW1's credibility was not lowered by the fact that she revealed what happened after getting beaten by her mother.

As regards to the first ground that relating to the charge sheet, the learned State Attorney submitted that failure to mention date and time on the charge sheet does not make the charge defective. He said the omission can be cured under section 219 (5) of the Criminal Procedure Act, which provides that the variation of time and evidence is not material. He added that, the month and the year of the commission of the crime was stated in the charge sheet and supported by the evidence adduce. Therefore, he maintained that the month and year mentioned were enough for the accused to prepare his defence.

In rejoinder Mr. Said stated that as the date was not mentioned in the charge sheet it leads PF3 to have information which are not certain regarding the date of the commission of the offence. As on the issue of contradiction between the evidence of PW2 and PW3 regarding PW1's whereabouts, Mr. Said rejoined that PW2 insinuated that PW1 and PW3 were at home while PW3 shows that at 4 pm they were at the Café.

Having considered the grounds of the appeal, the trial Court records, and submission made by the parties during appeal hearing, the main issue that await my determination is whether this appeal is meritorious. I shall begin with the first ground of appeal. The question to be resolved in this ground is whether the charge sheet was defective for not specifying date with which the crime was committed. As claimed by Mr. Said, the charge sheet, which was presented in the trial Court, did not specify the date of the commission of the crime. It just stated that the crime was committed in December 2021. For Mr. Said the charge sheet is defective for want of specific date of the commission of crime. On his part, Mr. Ali was confident that the charge was not defective and the omission to state a date on the charge sheet is curable under section 219 (5) of the CPA.

It is instructive that a charge sheet is the base of the trial against an accused person in any criminal trial. Therefore, as rightly argued by Mr. Said the charge sheet must contain particulars of the offence which are so clear enough to enable the accused to prepare his defence. See, **Remina Omary Abdul vs Republic** (Criminal Appeal 189 of 2020) [2022] TZCA 118 (15 March 2022). In the instant matter, the charge sheet did not specify the date, but it shows the month and the year with which the offence was committed. Thus, the question is whether the omission to state a date in the charge sheet made it not informative enough to enable the appellant to prepare his defence properly. In other words, was the appellant prejudiced by that omission? Mr. Ali was of the view that as the charge sheet specify the month and year when the crime was committed which was supported by the

evidence of the prosecution witnesses, those particulars were clear enough to enable the appellant to prepare his defence. I'm inclined to concur with the learned State Attorney that the charge sheet indicated with reasonable clearness that the offence was committed in December 2021, which reasonably informed the appellant of the period the crime was committed. The evidence of PW1, PW2 and PW3 supported the said facts. Besides, PW2 and PW3 were more precise that the crime was committed on 30/12/2021. The appellant, therefore, was aware of those facts and was in a good position to make a proper defence.

In his submission, Mr. Ali relied on **Yusuf Mohamed Yusuf** (Supra) to support his position. With great respect to the learned Advocate, the case of Yusuf is distinguishable from the instant matter, as in that case, the charge sheet indicated that the offence was committed between the months of June and July, 2012, but the evidence adduced by PW3 who was a child of the tender year shows that the offence was committed since 2011. Another piece of evidence from PW5, a medical doctor indicated that he received PW3, who was suspected to be sexually abused on 3/9/2012. With that variance in the period when the offence was committed, the Court of Appeal was of the opinion that there was uncertainty on the dates found in the charge sheet compared to those found in the evidence. As I have pointed out, in this case, there was no uncertainty about the period when the offence was committed and what was testified by the witnesses. I, therefore, find this ground of appeal to have no merit.

On the second grounds, the appellant's query is on the alleged inconsistency of the evidence of PW2 with that of PW3 regarding the

place where PW1 was on 30/12/2021 at about 4:00 pm and on what happened to PW1 on the fateful day. Another inconsistency claimed is from the evidence of PW1 with that of PW3 regarding the date when the crime was committed. In resolving this issue, I will be guided by the decision of **Abel Orua Matiku Others vs Republic** (Criminal Appeal No 441 of 2020) [2024]se TZCA 78 (21 February 2024), which reaffirm the position of law when there is inconsistency and contradiction in evidence. It observed that;-

"It is trite law that, it is only contradictions or inconsistencies which affect the central story which are to be considered to be material and adverse to the party in whose favour the evidence is given. Such contradictions or inconsistencies should not be those that are of an insignificant nature".

From the force of the above principle of law, the question is whether inconsistencies exist in this matter, and if yes, whether they significantly affect the prosecution's central story.

I have considered the arguments from both sides regarding this issue, and I have scrutinized the pieces of evidence alleged to be in contradiction. From my scrutiny of the evidence on record, as rightly argued by Mr Ali, I find no contradiction in the evidence of PW2 and PW3 regarding the place PW1 was on the material day and time. As Mr. Ali argued, PW2 did not indicate when she left home on the day in question. But when you consider PW2's evidence as a whole, it is clear

that there was a time gap between the time she went to town while living PW1 and PW3 at home to the time she received a call, that is, 4:30 pm from PW3 regarding what happened to her place. Whereas PW3, in his evidence, stated that on the material day at about 4:00 pm, he was with PW1 at the Café in Fuoni Mambosasa. As I have stated earlier, it is clear that the above evidence from PW2 and PW3 is free from inconsistencies. As for what happened to PW1 on the material day, the evidence of PW2 and PW3 did not contradict each other. According to the handwritten proceeding, PW2, when testified, stated, "*I went to the room where I found AO sitting on the bed at her room while already wearing her clothes, I beaten her to tell what happened. Then I got information that Ibrahim is the one who was found inside the house.*" While PW3, in his evidence, stated that, "*AO when she was called by my parents said didn't do anything.*" These two pieces of evidence show that PW1 did not reveal what she did. In addition, PW2's testimony shows that she was informed that the appellant was the one who was found inside her house. Therefore, there is no inconsistency in the evidence of PW2 and PW3; they are both talking about the same thing. Again, there is no inconsistency from the evidence of PW1 with that of PW3 regarding the date when the crime was committed. From her testimony, PW1 told the Court that she had sexual intercourse with the appellant in December 2021, and when cross examined, she stated that she doesn't remember the date when the offence was committed. During cross-examination, she stated in her own words, that, "*I can't remember the date which the offence occurred. I did not pay attention on date, but I know the month.*" PW3, on his side, told the Court that the offence was committed on 30/12/2021. It is clear that there is no

contradiction in the evidence of PW1 and PW3; besides, both witnesses confirmed that the offence was committed in December 2021. It is of no doubt, therefore, that there were no inconsistencies claimed by the learned Advocate. Thus, I find this ground of appeal with no merit, and I dismiss it.

Next, I shall jointly determine the third, fourth and fifth grounds and I will consider whether the case against the appellant was proved beyond reasonable doubt. In doing so, I will focus, among other matters, on the appellant allegation on the credibility of PW1, authenticity of exhibit P1, and the effect of non-tendering of the appellant shoes in evidence.

In criminal cases, the prosecution has a duty to prove the case beyond reasonable doubt. In this case, the appellant was indicted under section 108 (1) (2) of the Penal Act which makes an offence for a male person to have sexual intercourse of a girl who is not his wife, with or without her consent, when she is under the age of eighteen years.

The evidence available from the trial Court records revealed without doubt that AO is a girl under the age of eighteen. It is not contested that in December 2021, to be precise, and according to the evidence of PW5, on 30/12/2021, PW1, when examined, was found to have had sexual intercourse. PW5 evidence was conclusive based on his findings that, among other things, PW1's labia minora had hyperaemia, and some semen were leaked from her vagina. As to whom PW1 had sexual intercourse with on the date in question, there is evidence of PW1 who categorically testified that it was the appellant who she had sex with. The evidence of PW3 supports PW1's evidence of the culprit's

identity. It was PW3's evidence that he was at the Café in Fuoni Mambo Sasa with PW1 at about 4:00 pm, but PW1 left him there and went home. As she delayed returning to the Café, PW3 was concerned and decided to follow her sister to their home, where he found the gate and main door was locked from the inside. It was after PW3 repeatedly knocking the door of their house while calling PW1 and asking her to open the door; the door was eventually opened by the appellant, who was inside the house alone with PW1. According to PW3, he also found the appellant shoes outside their door, which he took and refused to hand to the appellant, who wanted them before forcing his getaway by pushing PW3.

Further evidence shows that the appellant is familiar with PW2 and PW3. The appellant who is bodaboda rider is known very well to PW2 as his bodaboda station located near to PW2's workplace. Moreover, the appellant used to provide service to PW2 by transporting PW1 to Kijitoupele by his bodaboda, that was revealed by PW2 when cross-examined by the appellant advocate; she stated that "*Ibrahim, I know him very well, I used to tell him to send AO to Kijito upele by his bodaboda*". The testimony of PW3 during cross-examination also indicated that he knows the appellant well. Responding to the question on the appellant's identity, PW3 stated "*Ibrahim used to come to our house...*".

The evidence of PW2 and PW3 was not contested by the appellant in his defence, in fact he confirmed that he is known to them and was providing a service to PW2 of shuttling PW1 with his bodaboda. The

appellant, however, in his defence, claimed that PW2 framed him after rejecting her proposal of having an intimate relationship with him.

With the evidence I have demonstrated above, I am settled that the prosecution successfully established the offence against the appellant. Therefore, considering the circumstances of the case, I'm of the settled mind that PW1 was a credible witness. I am aware of the settled principle of law that the best test for quality evidence is based on the credibility of witness. In determining the witness's credibility, the Court must scrutinize the evidence to ascertain whether or not prosecution witnesses are credible. Thus, in assessing the credibility of the prosecution evidence the Court of Appeal of Tanzania in **Shabani Daudi vs The Republic**, Criminal Appeal No. 28 of 2001, stated that: -

"The credibility of a witness can also be determined in two other ways. One when assessing the coherence of the testimony of that witness, two', when the testimony of that witness is considered in relation to the evidence of other witnesses; including that of the accused person. In those two other occasions, the credibility of a witness can be determined even by a second appellate court when examining the findings of the first appellate court."

I am also aware of the principle that every witness must be trusted unless proven otherwise, as it was observed in **Goodluck Kyando vs Republic** (2006) TLR page 376 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."

The good and cogent reasons for not believing the witness are those underscored by the Court of Appeal in **Ludovick Sebastian vs Republic** (Criminal Appeal 318 of 2007) [2010] TZCA 13 (4 June 2010). These include the fact that the witness has given improbable evidence or that the evidence has been materially contradicted by another witness or witnesses.

In the instant matter the learned Advocate for the appellant claimed that PW1 credibility was diminished after being beaten by her parents and forced to reveal what she did on the date the crime was committed. With due respect to the learned Advocate, the whipping PW1 sustained from her parents almost three months before she stands at the witness dock could not diminish the weight of the evidence she delivered in Court. PW1 evidence was convincing and not contradicted by the evidence adduced by other prosecution witnesses. In addition, PW1's evidence was supported by PW3, who found the appellant coming from their house where he was locked in with PW1; and PW5, who confirmed that PW1 had sexual intercourse on the day in question.

As for the failure of the prosecution to tender the appellant's shoes, I find the claim to be baseless since the exhibited evidence is sufficient to prove the offence against the appellant.

Lastly, it is about the authenticity of exhibit P1. The Advocate for the appellant claimed that exhibit P1 is not authentic because of the lack of

a hospital stamp. I'm afraid I have to disagree with him. As the learned State Attorney correctly argued, exhibit P1 is authentic as its contents support the oral testimony of PW5, the doctor who examined PW1, and filled out his findings in exhibit P1.

On the totality of what I have expounded in relation to the grounds of appeal number three to fifth, it is my finding that they are all baseless, and I dismiss them.

On the strength of the reasons stated herein above, it is my conclusion that I am satisfied the appellant was properly convicted and sentenced for the offence of rape. Thus, the appeal is dismissed in its entirety.

Dated in Tunguu, Zanzibar this 14th day of May 2024.



G. J. KAZI
JUDGE
14/05/2024