IN THE HIGH COURT OF ZANZIBAR

HOLDEN AT TUNGUU

CRIMINAL APPEAL NO. 92 OF 2023

(FROM CRIMINAL CASE NO. 189 OF 2020)

(REGIONAL MAGISTRATE COURT, VUGA)

JUMA YUSSUF JUMA..... APPLICANT

VERSUS

DIRECTOR OF PUBLIC PROSECUTIONS ..... RESPONDENT

JUDGMENT

Dated 21st February 2024

BEFORE: K. SHAMTE. J

Before the Regional Court at Vuga, the Appellant Juma Yussuf was charged with two counts, in the first count, abduction contrary to section 113(1)(a) of the Penal Act No. 6 of 2018; and in the second count, the offence of rape contrary to section 109(1) of the Penal Act No. 6 of 2018. Upon a full trial, the Regional Magistrate (Hon. Ziredi A. Msanif) convicted the appellant on both counts and sentenced him to serve ten years in the Education Centre for the first count and thirty years in the Education Centre for the second count. Both sentences were ordered to run concurrently. The appellant being aggrieved with the order of conviction and sentence appealed to this Court in Criminal Appeal No. 92 of 2023.

In this appeal the Appellant was unrepresented and the Respondent (DPP) was represented by learned State Attorney, Fatma Saleh. The Appellant filed eight Grounds of Appeal, which can be summarised as follows:

1. That the Regional Magistrate erred in law and fact as PW3 agreed to have sex more than three times with the Appellant and at different times, why she didn't inform proper authorities if she hurt that action.
2. That the Regional Magistrate erred in law and fact because PW3 confirmed before the Court that the appellant took the victim to Maalim Seif station, why instead she reach Mbuzini while there was a person who was waiting for her?
3. That the Regional Magistrate erred in law and fact even PW4 confirms that the victim was not a virgin while PW3 agrees that it is her first time to do that act as explained on page 7, para 1 of the proceedings.
4. That the Regional Magistrate erred in law and fact as PW5, in court clarification, states that the victim arranged to meet with the Appellant when she went to buy a torch, this proves that the Appellant didn't conduct any abduction of the victim as stated at page 29.
5. The Regional Magistrate erred in law and fact and misdirected herself due to conflicting evidence of PW2, PW3, PW4, and PW5 while the prosecution side failed to prove the charge beyond reasonable doubt.
6. That the Regional Magistrate erred in law and fact, in his judgment, he is required to state how the appellant was convicted and which evidence was used to convict the Appellant.
7. The Regional Magistrate erred in law and fact because there is no reason to transfer file from the first Magistrate to the second Magistrate.

Upon being asked to provide more information about his grounds for appeal, the Appellant requested to submit his written grounds of appeal and expressed dissatisfaction with the judgment, conviction, and sentence.

State Attorney Fatma Saleh, with regard to the **first ground of appeal,** submitted that the victim being experienced does not give the Appellant a right to commit that offence. Fatma added that the issue is the admission of evidence used to convict the Appellant for abduction and rape.

SA Fatma referred to the principle that "the best evidence in cases of rape comes from the victim" and referred to the case of **(Selemani Makumba V. Republic** [2006] T.L.R. 379) that true evidence of rape has to come from the victim if an adult, that there was penetration and no consent, and in case of any other women, where consent is irrelevant that there was penetration. She finalized that the victim's evidence in the present case was corroborated in material particulars with that of PW2, PW3, and PW4.

The Court agrees with the State Attorney that the victim's experience in sex is irrelevant to the commission of the offense. Even if the victim is experienced, it doesn't mean that the offender is absolved of their liability for committing the offense. The prosecution must prove their case beyond a reasonable doubt, regardless of the victim's experience.

It is a well-established legal principle that the credibility of evidence is the best test for its quality. (see **Anangise Masendo Ng'wang'wa V. The Republic** (1993) T.L.R. 202 and **Shabani Daudi V. The Republic**, Criminal Appeal No. 28 of 2001 (unreported) in which the Court stated that credibility of a witness is the monopoly of the trial court but only in so far as demeanor

is concerned. The credibility of a witness can be evaluated in two ways. Firstly, by analyzing the coherence of the witness's testimony. Secondly, by considering the witness's testimony as evidence, especially if it is related to the testimony of another witness or an accused person. In both situations, a witness's credibility can be established. Hence, this ground lacks merit and is dismissed.

On the second ground, which relates to the action of taking a victim to Mbuzini, the learned State Attorney referred to the statement of PW3 on page 11 of the trial Court proceedings that the victim took a car with Juma (and during the trial, she pointed at Juma). Additionally, during cross-examination, the Appellant didn't make any objection.

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As the victim did not return to his residence, the matter was reported to the Police where the victim was issued with the PF3 and taken to the hospital. This Court considers the evidence by Clinical Officer Mwanaisha Bilali Ramadhan (PW4) who, inspected the victim and observed that the victim's sectional appearance did not have any blood stains and her private parts proved that she was not a virgin, and penetration allowed two fingers to pass smoothly and easily.

It was also the prosecution's account that, the victim who had disappeared at her residence, returned home after three days. Upon investigation, PW5 (WP 4098 Sargent Zawadi) who recorded the cautioned statement of the Appellant, recounted that the appellant confessed to having raped the victim (see page 28 of the proceedings).

I agree with the learned State Attorney's assertion that the Appellant did not cross-examine the witnesses. In support of this, I refer to the case of **Nyerere Nyangue V. R** (Criminal appeal No. 67 of 2010) (unreported), where the Court of Appeal established a principle that if a party fails to cross-examine a witness on a particular matter, it is deemed that they have accepted the evidence provided by the witness on that matter. Consequently, they will not be allowed to challenge the credibility of the witness's testimony in the trial court. This ground also lacks merit and is dismissed.

Concerning the third and fourth grounds of appeal, which state that the victim was not a virgin, SA Fatma argued that abduction was conducted as the victim was under the custody of her parents. She also referred to the evidence of PW3 and PW4 that the victim was a virgin until she slept with the Appellant for three days as stated on page 11 and page 17 of the trial court proceedings.

With regard to section 113(1) (a) of the Penal Act No. 6 of 2018, the elements of the crime include taking a girl, unmarried from one area to another without the parent's consent, she insisted that the Appellant on11th February 2020 took the victim to Kwanyanya from JKU.

"113(1) A person who, unlawfully takes:

(a)an unmarried girl out of the custody or protection of her father or mother or other person having the lawful care or charge of her, and against the will of such father or mother or other person....."

Regarding the two grounds of appeal, no evidence of consent or arrangements with the victim was found by the Court. In summary, I am of the considered view that PW4 adduced direct evidence that the Appellant failed to cross-examine, hence acknowledging PW4's testimony which corroborated the evidence of PW1, PW2, and PW3 that the Appellant lived in the room where he raped PW2. When invited to cross-examine these two witnesses, the Appellant had no questions, meaning that he accepted their evidence. The Court in **Damian Ruhele V. Republic**, Criminal Appeal No. 501 of 2007 (unreported) stated that: "It is trite law that failure to cross-examine a witness on an important matter ordinarily implies the acceptance of the truth of the witness evidence."
Thus, the third and fourth grounds of appeal fail.

Regarding the fifth ground which deals with evidence that was not corroborated by PW2, PW3, PW4, and PW5, the learned State Attorney has admitted that it was true that the trial Magistrate noticed the discrepancies but the settled position in law is that minor discrepancies do not dismantle the prosecution case. The cases of **Mwinyimkuu @Babuseya V. R**, Criminal Appeal No. 499 of 2017, and the Court of Appeal in **Dickson Elia Nsamba Shapwata and Another V. Republic**, Criminal Appeal No. 92 of 2007 (unreported) on page 7 state: "Normal discrepancies in evidence are those which are due to normal errors of observation, normal errors of memory due to lapse of time, due to mental disposition such as shock and horror at the

time of occurrence and those are always there however honest and truthful a witness may be. Material discrepancies are those which are not expected of a normal person."

I am in agreement with the trial Court and Fatma, the learned State Attorney, that the contradictions are minor and do not go to the root of the matter to discredit the prosecution case. I take into account that the facts proved that the victim (Awena) was missing from her residence from Tuesday to Thursday in the testimony on pages 9-10 of the court proceedings and the statement of PW4 and PW5 that the victim was raped.

I now address the differences alleged to be contradictions that damage the entire case. The position of law is that contradictions in evidence are inevitable and if they exist the Court has to address them and finally decide whether they go to the root of the matter **Mohamed Said 17 Matula V. Republic** [1995] TLR 3 and **Shukuru Tunugu V. Republic**, Criminal Appeal No. 243 OF 2015.

I have read the evidence of the relevant witnesses and noted, that the first alleged contradiction that appears in the evidence was time; PW2 stated that on 11th February 2020, she asked her mother to assist Awena in getting a car at 9.00 p.m. and PW3 (the victim) stated that 9.00 p.m. she was selling mungs at Kwanyanya. What is important before this Court is both PW2, PW3, PW4 and PW5 reflect that the Appellant commits the offence contrary to section 113(1) of the Act.

Another difference was on time of the commission of rape, PW5 states that the offences were committed at 1.00 a.m. on 12th February 2020 (refer to

page 28 of the proceedings) while the victim said it was committed at midnight (refer to page 11 of the proceedings).

It is settled law that the finding depends on the correct appreciation of the evidence in the record (see **Yohana Msigwa V. The Republic** (1990) T.L.R. 143, and **Richard Mtengule and Another V. The Republic** (1992) T.L.R. 5. It is in this regard that in **Michael Elias V. The Republic,** Criminal Appeal No.243 of 2007 (unreported), it was stated that the above-alluded position depends on the requirement that the finding of facts by the trial court was based on the correct appreciation of the evidence in the record.

I am also referring to the case of **Dickson Elia Nsamba Shapwata and Another V. Republic,** (supra) which states that Courts have to label the category to which a discrepancy may be categorized and I agree that these normal discrepancies in evidence caused by normal errors of memory due to lapse of time. Ground five also lacks merit and is dismissed.

With regard to the sixth ground, SA Fatma submitted that the evidence proves the commission of the offences. She refers to pages 3 and 7 of the proceedings which concerned the issue of whether the offence of rape was proved beyond reasonable doubt and the credibility and reliability of evidence used to convict the Appellant.

According to the case of **Michael Elias V. The Republic,** Criminal Appeal No.243 of 2007 (unreported), the decision taken in a case relies on the fact that the court's findings were based on a correct understanding of the evidence presented in the record..

This Court is on the observation that the evidence in the present case was corroborated in material particulars by the evidence of PW1, PW2, and PW4., since the best evidence in cases of rape come from the victim (**Selemani Makumba V. Republic** [2006] T.L.R. 379).

I am conscious of the evidence produced by the victim being of great significance in establishing the offence of rape as the law requires. I am satisfied that the trial court properly concluded on the evidence that the victim was raped, and thus, ground six is meritless and I dismiss it.

The seventh ground of appeal raises concerns regarding the procedures followed while transferring the case file from the first magistrate to the second magistrate. SA Fatma argued that as per the proceedings, the case file was transferred on July 22, 2020, from Hon. Makame Mshamba Simgeni to Hon. Chausiku, after Hon. Mshamba was assigned other duties. This information can be found on page 7 of the proceedings.

Furthermore, the case was properly transferred to Honorable Ziredi because Honorable Chausiku was assigned special cases involving drug abuse. Therefore, the proceedings reflect a valid reason for transferring the case from one magistrate to another. Such transfers do not cause any injustice to the appellant.

In concluding, this Court finds that there is an issue that needs to be addressed regarding the sentence. The learned RM sentenced the accused to ten years imprisonment for the first count of abduction contrary to section 113(1)(a) of the Penal Act, and thirty years for the second count which was

rape contrary to section 109(1) of the Penal Act. In his words, the sentences were to run concurrently.

With respect to the second count, rape, the appellant was sentenced to thirty years imprisonment. This is contrary to section 109(1) of the Penal Act which provides that:

"Any person who commits rape is, except in the cases provided for in subsection (2) of this section, liable to be punished with imprisonment for life and in any case for imprisonment of not less than thirty years and with fine, and shall in addition be ordered to pay compensation of an amount determined by the Court, to the person in respect of whom the offence was committed for the injuries physical or psychological caused by such person."

It was discovered that the trial Magistrate made an error by not ordering payment of compensation on the second count against the accused person. After reviewing the appeal records and considering the gravity of the crime committed, I believe it is appropriate to correct the sentence.

As a result, the appeal is hereby dismissed for lack of merit. The sentence on the first count is maintained and the sentence for the second offence is substituted to thirty years imprisonment together with the order that the appellant also pay TZS 500,000 as compensation to the victim.

It is so ordered.

KHADIJA SHAMTE MZEE

JUDGE

Dated at Zanzibar this date 21st February 2024.