

**IN THE HIGH COURT OF ZANZIBAR  
AT TUNGUU  
CRIMINAL APPEAL NO 108 OF 2024**  
(from Criminal Case No 168 of 2023, Regional Court, Vuga)

**MOH'D RAMADHAN ABDI .....APPELLANT  
VS  
DPP..... RESPONDENT**

**JUDGMENT**

Date of Last order: 28.02.2025

Date of Judgment: 25.03.2025

**S. A. HASSAN,J.:**

In the Regional Court at Vuga, The The appellant was indicted for incest contrary to section 143(1) (2) of the Penal Act, No 6/2018, Laws of Zanzibar. The Court was informed that the appellant on 05.11.2023 at 03:00hrs at Magogoni, West B District of Unguja, did carnal knowledge against order of nature one KVM (victim's name withheld), who is eight years of age, who is his step daughter. Upon completion of the trial, the court found him guilty and convicted him to serve twenty five years in correctional institute and pay the victim Tsh 1,000,000/ as compensation. Aggrieved by the conviction and sentence, the appellant filed this appeal on the following grounds:

1. That the Regional Magistrate Court erred in law and fact by conviction and sentencing the appellant based on weak, unreliable, implausible, contradictory and incredible evidence adduced by the prosecution witnesses before the trial court
2. That the Regional Magistrate Court erred in law and fact in holding that the prosecution proved their case beyond reasonable doubt.

On hearing date the appellant enjoyed the service of Advocate Omar Sheha while the respondent was represented by Senior State Attorney Othman Senga.

It was argued by the appellant's advocate that PW1 being the key witness, while at the examination in chief she stated that she saw the accused having sex the victim, however, during cross examination she said that she did not see the appellant having sex with the victim, whereas PW5 told the court that she had received the victim on 06.11.2023 and she had healed cuts and old tears. PW2 stated that they went to hospital at 17:00hrs on the same day the incident happened while the charge sheet indicates that the incident happened on 05.11.2023 at 03:00hrs. Furthermore PW4 stated that she heard a call to prayer that is why she knew it was at night. Having four witnesses, with different testimonies show that the evidence is cooked. Refereeing to the case of **Hafidh Iddi Mohd V DPP**, Criminal Appeal 35 of 2019 (unreported) where the High Court was of the view that fresh tear was to be obtained if the incident happened on the same day or even a day after.

In reply, the State Attorney relied in the case of **Suleiman Makumba Vs R [2006] TLR 379** that the victim has the best evidence, whereas the victim did not state that it was the first time for her stepfather to have sexual intercourse with her, and that on that particular day there was a penetration.

It was further argued that prosecution case was very reliable as PW1 stated that she went to police in the morning and went to hospital at 18:00hrs.

The State attorney also noted that there is difference in timing between PF3 and the time which indicated they went to hospital hence prayed that this court expunge the expert evidence from PF3 as it contradicts the remaining evidence and that PF3 did not go to the root of the case. Finally a prayer was made that this court dismisses this appeal.

After hearing submissions from both sides, I am left to determine if this appeal is meritorious, and in doing so I will go through the records in hand to see if indeed testimonies of the witnesses differ.

The records show that initially the charge read that the offence was committed on 06.11.2023 and it was read over to the accused on 30.11.2023 and he denied the allegation, however, on the 12.12.2023 there was amendment on the date of the offence is alleged to have occurred to be 05.11.2023, however, the records do not show that after the amendment the charge was read over to the accused, the records do not even show if there was a prayer to alter the date.

Changes in date, I believe was made to match the testimony of PW1 who told the court that on 05.11.2023 at 03:00hrs while she was sleeping with her husband she noted that he took long time in the bathroom that is why she went to check on him only to see him in her daughter's room, naked, holding his sperms in his hands and having sex with the daughter. However, during cross examination she clarified that she did not see him "entering" the daughter, but the daughter was sleeping sidewise and the appellant was holding his private parts.

PW2 told the court that on 05.11.2023 in the morning she received a call from PW1 who told her that she saw the appellant having sex with the KVM. Then they went to Police and at 17:00hrs they went to the hospital and on the second day they returned to hospital and they were told KVM was sodomised.

PW4 who is the victim, an eight years old told the court that on 05.11.2023 while she was sleeping her stepfather removed her underpants and sodomized her, she knew that it was her stepfather as she heard his voice. She went on stating that the appellant had carnal knowledge her and she felt pain. On cross examination, she said she knew it was 03:00hrs because she heard a call for prayer "*adhana*".

PW5 a medical expert whose testimony was heavily relied by the trial Magistrate that indeed there was penetration, referring the case of **Joel s/o Ngailo V R**, Criminal Appeal no 344 of 2017 (unreported). However, the examining doctor told the court that she had received the victim on 06.11.2023 at 08:15hrs and upon being examined she was found that her anal muscles were not intact, and there is healed tear at 12 o'clock which allowed one finger, however, no specimen was collected.

It is indeed that the testimony of PW2 and PW5 collide on the time, as PW2 stated that they went to hospital on 05.11.2023 at 17:00hrs while PF3 indicated that they were received on 06.11.2023 at 08:15hrs. Noting this confusion, the State Attorney prayed that this court expunges the PF3, the scientific evidence of which the trial court relied in satisfying itself that there was penetration. Before I did so, I looked upon the PF3 which show that it was issued on 05.11.2023, unfortunately, it did not indicate time which it was issued, as this court is of the view that from the time the incident had been reported and PF3 has been issued, to the time the victim reaches hospital for medical and professional examination is very crucial to determine if the suspect is the one indeed who committed the crime, and in sexual offences cases the earlier the victim is sent to medical examination the better as a lot of other proof can be obtained, such as specimen for further examination.

For the prosecutor to tell the court to expunge the PF3 as it does not touch the root of the case, this court believes that prayer has been made because testimonies of the prosecution witnesses differ in their statements and such difference if not cured is fatal and ends up to benefit the accused, for they create doubt.

This court is also of the view that the prosecution side heavily relied on the case of **Suleiman Makumba** (supra) that in sexual offences the best evidence comes from the victim, forgetting that each case is decided on its own facts and that there is a need to evaluate such evidence and conviction should only be entered where the court is satisfied that the victim's evidence is nothing but the truth. See the case **of Mohamed Said Vs R**, Criminal Appeal no 145 of 2017 at Iringa (unreported) where the Court of Appeal clearly stated that it was never intended that the word of victim of sexual offence should be taken as gospel, but that her or his testimony should pass the test of truthfulness.

It is very unfortunate that the trial magistrate rushed in believing the testimonies of the prosecution witnesses while disbelieving the appellant's testimony without even stating why he did not believe him. I do understand in sexual offences it is indeed the

testimony of victim is very important, however, I also see the danger in solely relying on victim's testimony without putting such testimony in a number of tests such as credibility of the witness. The trial court need to always keep in mind that they have the duty to discharge justice but convicting the accused only if there is no reasonable doubt on the prosecution case. In the case in hand, I find the call to expunge PF3 just because it does not match with the statements of other witness this court finds that to be of so much doubt to continue to believe if the crime had actually occurred at the first place.

This court is of the view that in sexual offences the investigating authorities and prosecution should not take them lightly just because the victim mentioned the culprit, the trial court being in a position to examined witnesses should be more careful as such offence attract heavy punishment and conviction should not be entered on weak and contradictory evidence as I had noted in this case.

In view of the above explanation, I am satisfied that this appeal has merits, and I allow it. I set aside the judgment of trial court, the conviction is quashed and sentences are set aside. The appellant is acquitted of the charge above mentioned and I order that he be set free unless he is held for some other lawful cause.

It is so ordered

Date at Tunguu Zanzibar, this 25<sup>th</sup> Day of March, 2025.



**S.A.HASSAN**

**JUDGE**

**25.03.2025**