

IN THE COURT OF APPEAL OF TANZANIA

AT ZANZIBAR

(CORAM: MBAROUK, J.A., LUANDA, J.A., And MJASIRI, J.A.)

CRIMINAL APPEAL NO. 331 OF 2014

DIRECTOR OF PUBLIC PROSECUTIONS APPELLANT

VERSUS

YUSSUF MOHAMMED YUSSUF RESPONDENT

(Appeal from the judgment of the High Court of Zanzibar

at Vuga)

(Mwampashi, J.)

Dated the 13th day of May, 2014

In

Criminal Appeal No. 02 of 2014

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JUDGMENT OF THE COURT

8th & 11th December, 2014

MBAROUK, J.A.:

In this appeal, the appellant, the Director of Public Prosecutions Zanzibar, is challenging the decision of the High Court (Mwampashi, J.) in Criminal Appeal No. 2 of 2014 dated 13-5-2014 which allowed the respondent's appeal by quashing the conviction and setting aside the sentence passed by the Regional Magistrates' Court of Zanzibar at Vuga which initially convicted

and sentenced the respondent to fourteen (14) years imprisonment (Chuo cha Mafunzo). At the Regional Magistrates' Court, the respondent was convicted of two out of three counts which he was originally charged with **one**, indecent assault, contrary to section 131(1) and (2) of the Penal Act, and **two**, Unnatural Offence, contrary to section 150(a) of the Penal Act.

Having being aggrieved by the decision of the High Court, the appellant preferred a memorandum of appeal containing ten grounds of appeal, but at the hearing some grounds were left and remained with five main grounds of complaint namely:-

- (1) That, the Honourable Judge erred in law to disvalue and disregard the testimony of PW5 and his exhibits.*
- (2) That, the Honourable Judge erred in law and in fact by ignoring the testimony and questioning of the credibility of PW3.*
- (3) That, the Honourable Judge erred in law and in fact by disqualifying the trial Court from entertaining and indicating the indecent assault charge.*

- (4) *That, the Honourable Judge erred in law by considering subsections (2) and (3) of Section 4 of Act No. 7 of 2004 to be read together.*
- (5) *That, the Honourable Judge erred in fact by demanding that all pupils were to be called in to testify if they were given money by the respondent.*

Initially, when the appeal was called on for hearing, neither the respondent nor his advocate entered appearance. However, the record showed that, there was a letter from the former advocate of the respondent with Ref. No. AJM/YMY/53/2014 dated 10-11-2014 which informed the Court that he has no further instructions to represent the respondent. Also the record showed that the respondent was duly served, hence, we were forced to invoke Rule 80(6) of the Court of Appeal Rules, 2009 and order the appeal to proceed to hearing.

At the hearing of the appeal, the appellant was represented by a team of four learned State Attorneys, namely Mr. Omar

Sururu Khalfan and Ms. Sabra Mselem, learned Senior State Attorneys and Mr. Khamis Juma and Mr. Anuar Saadum, learned State Attorneys.

Mr. Omar Sururu, vehemently started by arguing in support of the appeal. However, in the course of hearing of the appeal, a pertinent issue arose which prompted the Court to ask the learned Senior State Attorney to comment as to whether the respondent was properly charged at the trial court. This is because of the fact that, there is no clear evidence to prove that the dates of the offences allegedly committed by the respondent stated in the statement of the offence in the charge sheet were proved in the evidence by the prosecution's witnesses.

Looking at the charge sheet in this case, it shows that the offences were committed between the month of June and July, 2012, but the evidence on record does not support that contention. To appreciate the point raised by the Court, we have

seen the necessity to reproduce the charge sheet for ease of reference:-

HATI YA MASHTAKA

MAD/PCR.81/2012

MSHITAKIWA: Yussuf Mohammed Yussuf, mwanaume, mtumzima 46 Mzanzibar wa Bet-el-Ras Unguja.

KOSA LA KWANZA: Kutorosha msichana aliechini ya uangalizi wa wazazi wake Kinyume na kifungu 130(a) cha kanuni ya adhabu sharia No. 6/2004 ya Baraza la wawakilishi Zanzibar.

MAELEZO YA KOSA: Yussuf Mohammed Yussuf mnamo mwezi wa sita na mwezi wa saba saa zisizojulikana mwaka 2012 hapo Skuli ya Rahaleo Wilaya ya Mjini Mkoa wa Mjini Magharibi Unguja. Bila ya halali ulimchukua Fatma Abulla Juma miaka 9 kutoka Skuli ya Rahaleo na kumpeleka nyumbani kwako Bet-El-Ras bila ya idhini ya wazazi wake.

KOSA LA PILI: Shambulio la aibu Kinyume na kifungu 131(1) (2) sheria No. 6/2006 sheria za Zanzibar.

MAELEZO YA KOSA: Yussuf Mohammed Yussuf mnamo mwezi wa sita na mwezi wa saba saa zisizojulikana mwaka 2012 hapo Skuli ya Rahaleo Wilaya ya Mjini Mkoa wa Mjini/Magharibi Unguja bila halali ulimkashifu Fatma Abdulla Juma miaka 9 kwa kumchezea maziwa na sehemu zake za siri akiwa mtoto mdogo.

KOSA LA TATU: Kumuingilia mtoto wa kike kinyume na maumbile: Kinyume na kifungu 150(1) (c) sheria No. 6/2004 sheria za Zanzibar.

MAELEZO YA KOSA: Yussuf Mohammed Yussuf mnamo mwezi wa sita na mwezi wa saba saa zisizojulikana mwaka 2012 hapo skuli ya Rahaleo Wilaya ya Mjini Mkoa wa Mjini Magharibi Unguja bila ya halali ulimuingilia Fatma Abdulla Juma miaka 9 kinyume na maumbile na kumsababishia maumivu makali katika sehemu zake za siri.

MADEMA POLISI

6/9/2012

PP.....

As shown herein above, the charge sheet shows that the offence was committed between June and July, 2012, but according to the evidence on record, PW3 – Fatuma Abdulla Juma a child aged 9 years old testified to the effect that the respondent committed the offences charged since 2011. In addition to that,

PW5 – Msafiri Marijani who is a medical doctor who examined PW3 testified to the effect that on 3-9-2012, he received PW3 suspected to be sexually abused.

Whereas according to PW5 the victim (PW3) was sent to him not on the day she was sodomized, but four days after the incident, this he was told by PW3. This clearly shows that, the evidence adduced by the prosecution witnesses has not specifically proved the contention that the offence against the respondent was committed between June and July, 2012.

Looking at more closely, the prosecution could have identified the specific period when the offence was committed taking into account the testimony of PW5 who was told by the victim that she was sodomized four days from 3-9-2012. But they failed to take that into consideration and that led them to be vague and uncertain on the time when the offences were committed. Our main concern is that, can we sustain the respondent's conviction from that evidence which is tainted with

uncertainty of the dates when the offence was committed? This is because of the uncertainty which exists between the dates found in the charge sheet compared to those found in the evidence.

Responding to the issue raised by the Court, the learned Senior State Attorney vehemently submitted that, even if the evidence on record has not specifically shown the dates to which the offence was committed, but PW3 generally testified that the respondent committed the offences against him since 2011. The learned Senior State Attorney then urged us to consider that, the victim in this case was a child aged 9 years old. All in all, he submitted that, such a defect is minor and is curable under section 394 (1) (a) of the Zanzibar Criminal Procedure Act No. 7 of 2004 (CPA). Hence, he urged us to find the defect as minor and curable.

However, it has to be borne in mind that the prosecution in criminal proceedings is under the duty of proving its case against an accused person beyond reasonable. In doing so, the

duty begins at the time of framing the charge. As it was observed in the case of **Mohamed Kaningo v. Republic** (1980) TLR 279 where it was stated as follows:-

"...it is the duty of the prosecution to file the charges correctly, those presiding over criminal trials should, at the commencement of the hearing, make it a habit of perusing the charge as a matter of routine to satisfy themselves that the charge is laid correctly and if it is not to require that it be amended accordingly."

Also See **Charles s/o Makapi v. Republic**, Criminal Appeal No. 85 of 2012 (unreported).

To be more specific on the issue raised by the Court, the case of **Ryoba Mariba @ Mungure v. Republic**, Criminal Appeal No. 74 of 2003 (unreported) held as follows:-

"It was essential for the Republic which had charged Ryoba with raping one Sara Marwa on 20/10/2000 to lead evidence showing exactly that Sara was raped on the day, a Charge the accused was required to answer."

[Emphasis added].

As pointed out earlier on, the prosecution failed to produce clear evidence to prove that the offences charged against the respondent were committed between June and July, 2012 as per the statement of the offence in the charge sheet. We are increasingly of the view that, it is always the duty of the prosecution to make sure that what is contained in the particulars or statement of the offence including the dates when the offence was committed is proved and supported by the evidence and not otherwise. With due respect, in the instant case, the evidence on record is vague and has not specifically proved that the offences against the respondent were committed between June and July, 2012. With such obvious shortfall in the prosecution case, that is

why we were constrained to interfere due to the fatality of the defect.

In the up short, from what we have demonstrated herein above, we have found no evidence to sustain the conviction. For that reason, we are constrained to dismiss the appeal. Without going any further, we think, the issue raised by the Court alone has disposed of the appeal as the defect is fatal and is not curable under section 394(1) (a) of the Zanzibar CPA. In the event, the appeal is dismissed.

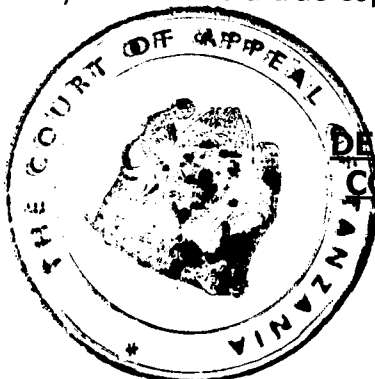
DATED at ZANZIBAR this 10th day of December, 2014.

M. S. MBAROUK
JUSTICE OF APPEAL

B. M. LUANDA
JUSTICE OF APPEAL

S. MJASIRI
JUSTICE OF APPEAL

I certify that this is a true copy of the original.




F. J. KABWE
DEPUTY REGISTRAR
COURT OF APPEAL