# IN THE HIGH COURT ZANZIBAR

HOLDEN AT VUGA

CRIMINAL APPEAL CASE NO.17 OF 2015

SILIMA MUSTAFA KHAMIS ... ... ... (APPELLANT)

**VERSUS**

D.P.P. ... ... ... (RESPONDENT)

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## JUDGEMENT

***BEFORE HON. ABDUL-HAKIM A. ISSA, J***

The Appellant, Silima Mustafa Khamis was charged with three counts of offence; one is abduction of a girl contrary to section 130 (a), two, is rape contrary to section 126(1), and three is having carnal knowledge of a girl against the order of nature (un natural offence) contrary to section 150(a). All offences are under the Penal Act No. 6 of 2004 of the Laws of Zanzibar. The Regional Magistrate Court Vuga (Nassor A. Salim (RM)) convicted the appellant and sentenced him to serve two years in the Education Centre for the first count, to serve seven years in the Education Centre for the second count and to serve seven years in the Education Centre for the third count. The sentences were to run separately. The appellant being

aggrieved with the order of conviction and sentence appealed to this Court in Criminal Appeal No. 17 of 2015.

From the evidence as established in the trial, the background giving rise to the case may be briefly stated. The victim in this case is Mwajuma Dude Mcha, a girl aged 12 years who is living at Chaani Mkurukuchuni, Zanzibar. On 8.9.2013 at about 3.30 pm the victim was at her house when the appellant appeared and asked her to accompany him to the bush located near the victim's parents' shamba. The appellant ordered the victim to take off her underwear and lay down on the field and he raped her. He also ordered her to lie down on her stomach and he had carnal knowledge of her against the order of nature. The appellant was found in a compromising position by three people who went back to the houses and reported the matter. The matter was reported to the Sheha first and then to the police station and the appellant was arrested and charged with abduction, rape and having carnal knowledge of a girl against the order of nature.

In this appeal the Appellant was unrepresented and the Respondent (DPP) was represented by learned State Attorney, Mr. Hamad Kombo Zidikheri. The Appellant filed his memorandum of appeal which contained eight grounds of appeal, which can be summarised as follows:

1. That the Regional Magistrate failed to find out that the victim is experienced in sex and there is no evidence that she got that experience from the appellant.

2. That the Charge sheet contains no signature of the public prosecutors contrary to the law.

3. That there was lack of testimony of the expert witness, which is similar with having no case at all.

4. That the Honourable Regional Magistrate erred in law and evidence as the testimonies of PW1, PW3, and PW4 show clearly that they were planned to taint the name of the appellant.

5. That the testimony of the victim is that while they were together with the appellant three children passed by and saw them doing sex. Why these witnesses were not called to testify.

6. That there was delay in reporting the matter and the charge against the accused has no base in law.

7. That the way the discrepancies in the testimony of the appellant is the doubt of insanity. The Regional Magistrate failed in law and evidence to remove this doubt of insanity.

8. That the Honourable Regional Magistrate erred in law and fact as his judgment does not qualify to be called a judgment. The judgment is contrary to section 302 (1) of Act No. 7 of 2004, and in law it is not a judgment.

The appellant adopted his grounds of appeal, and he added that he is not satisfied with the judgment, conviction, and punishment given to him. He is not satisfied and the victim was not checked and after one week he was told that he was responsible for that act. He was told that the doctor was outside the country.

On the side of the Respondent, Mr. Zidikheri started with the first ground of appeal in which he submitted that the girl being experienced does not give the appellant a right to commit that offence. He added that when the evidence produced is sufficient the appellant could be convicted even if the victim is experienced. This Court agrees with the learned State Attorney that experience of the victim has nothing to do with the commission of offence. The fact that the victim is experienced in sex does not absolve an appellant from the liability that he committed an offence against that victim. What is required is that the prosecution has to prove its case beyond reasonable doubt that it was the appellant who committed the offence on which he was charged. Hence, this ground lacks merit and is dismissed.

With respect to the second ground of appeal, Mr. Zidikheri submitted that the appellant is not conversant with the way proceedings are written. They are retyped, but they are not submitted to DPP to sign the charge sheet. The original charge sheet which is signed remains in the court file as exhibit of instituting a case. This Court after going through the trial Court

case file found that there is a charge sheet and was signed by a State Attorney. Hence, the second ground of appeal lacked merit and is dismissed.

Regarding the third ground of appeal, the learned State Attorney resisted that ground. He argued that section 45 of the Evidence Decree says that the expert gives opinion to the Court. He cited the case of Abdul-baad Timim V. SMZ [2006] TLR 188 where the Court held when the evidence of eye witness is credible and trustworthy medical opinion pointing to alternative possibility is not accepted as conclusive. He added that eye witness evidence is a fact while expert evidence is an opinion. He further submitted that in the case at hand the expert evidence was there, the doctor was absent as he was out of the country and they prayed to produce PF3 under section 32. The learned State Attorney has admitted that it was true that the doctor was not called to testify in this case as she was abroad for studies and instead the PF3 was admitted in evidence under section 32(2) of the Evidence Decree, Cap. 5 of the laws of Zanzibar. When I looked at pg.13 of the proceedings I found that the appellant was represented by learned advocate, Mr. Hamad at the trial Court and the learned advocate did not object on the tendering of the PF3 without calling the doctor. Hence, this objection cannot be taken at this stage of appeal. This ground of appeal is dismissed.

With respect to the fourth ground of appeal, Mr. Zidikheri submitted that the witnesses PW1, PW3, and PW4 are credible

witnesses. They are the father of the victim, the social worker and a Sheha. They testified in accordance with their role in the society. When this Court looked at the testimonies of these witnesses failed to understand the import of this ground of appeal as these witnesses did not contribute much on the evidence against the accused. PW1 is the father of the victim who was not even in Chaani when the incident took place. He testified on what he was told and the action he took. PW3 is the Sheha who the matter was reported and as he was sick he left the matter to the Sheha Committee to handle it. PW4 is a social worker who deals with sexual offences in that locality. Her testimony is that she assisted taking the victim to the local hospital at Chaani where the victim was examined and they were informed that the victim was raped. Later they took the victim to Kivunge for further examination and they were told that the victim was carnally known both and the front and rear. The learned Magistrate had no reason to doubt the testimonies of these witnesses. This ground of appeal lacked merit and is dismissed.

With respect to the fifth ground of appeal, the learned State Attorney argued that according to section 133 of the Evidence Decree, Cap. 5 of the Laws of Zanzibar there is no required number of witnesses to prove a case. He cited a case of **Hamad Bakari Moh'd** V. **DPP** Criminal Appeal No. 145 of 2004 (Unrep) where this Court held that there is no specific number of witnesses required to prove a case. In this case eight witnesses were brought, and among the witnesses

mentioned by the appellant one was brought to prove that case. This Court agrees with the learned State Attorney that there is no specific number of witnesses required to prove a case. Further, on those witnesses mentioned by the appellant that were not all called. The Court found PW2, Asma Juma Omar who found the accused and the victim on the sweet potato field and she testified that the appellant was naked. He covered the front part with his trouser and the victim covered herself with her dress. She is also the one who went to inform others. Hence, this ground of appeal also lacked merit and is dismissed.

With respect to the six ground of appeal, the learned state attorney denied that PW1 delayed in taking action. He submitted that PW1 took action immediately by reporting the matter. If we look at the testimony of PW1 found at pg 4 of the proceedings we fill find that PW1 got the information about the incident on the same day, 8.9.2013 when he was at Magogoni and he returned to Chaani and found the case has already been reported to Sheha. When the Sheha was delaying to take action he reported the matter immediately to Mkokotoni police station. Hence, there is no delay on the side of PW1. Even PW4, a social worker testified to that effect that on 8.9.2013 she got a call from Haji Juma that the victim was raped. On the second day morning she took her to Chaani hospital for examination. Then the victim was sent to Mkokotoni police and finally she was sent to Kivunge hospital. Hence, this ground of appeal also lacked merit and is dismissed.

Regarding the seventh ground of appeal, Mr. Zidikheri argued that the answer is found in section 191(1) of Criminal Procedure Act No. 7 of 2004. The Court had no reason to believe that the appellant was of unsound mind because the appellant denied all charges against him. On his defence he testified as was directed by this advocate. Mr. Zidikheri cited the case of **Republic** V. **Siza Pembe Maneno** Criminal Session Case no. 61 of 2001, which cited the case of Hilda Abel V. R [1993] TLR 246 where the Court of Appeal held that insanity is a question of fact which can be inferred from the circumstances of the case and the conduct of the person at the material time. The onus rest upon the accused person to prove insanity. This Court agrees that this is a correct proposition of law. Further, the accused was represented by advocate on the trial court and the issue of insanity has never been brought before the trial magistrate. In addition, the learned RM did not observe anything abnormal about the appellant and did not make any inquiry under section 191 of Criminal Procedure Act. Hence, this ground lacks merit and is dismissed.

With respect to the eighth ground of appeal, Mr. Zidikheri argued that section 302 lays down criteria for judgment. There is no particular form for judgment writing, it should only follow the criteria. There should be issues, point for determination, decision and reasons for decision. On pg 16 issues are found, the decision is there on pg 18 and 19 and the reasons are on pg 18. The judgment in question is in accordance with the law.

He prayed that the conviction should be upheld and leaves the sentence to the Court as it sees fit.

The issue of judgment writing is very clear in our law. In the case of **Amiri Moh'd** V. **Republic** [1994] TLR 139 the Court of Appeal explained that every judge has its own style of writing judgment. What is essential is that ingredients of the judgment should be there. The ingredients are found in section 302 of Criminal Procedure Act, which provides:

> "302. (1) ***Every such judgment shall, except as otherwise expressly provided by this Act, be written by the presiding officer of the court in the language of the court, and shall contain the point or points for determination, the decision thereon and the reasons for the decision, and shall be dated and signed by the presiding officer in open court at the time of pronouncing it.***
>
> (2) ***in the case of a conviction the judgment shall specify the offence of which and the section of the Penal Act or other law under which the accused person is convicted and the punishment to which he is sentenced....***

Looking at the judgment in hand, it has been written by the Presiding RM and on the language of the Court, which is English. The learned RM has his own style of writing, but this

Court found the judgment in question to be very short- it is only three pages, and each count of offence was not given the analysis required. But in this case all the three counts are part and parcel of one transaction which involves all three offences, and the ingredients of the judgment though not clearly defined are present in the judgment in question. Further, the judgment was dated and signed by the Presiding RM. In addition, the judgment specifies the offence on which he was convicted and also the punishment on which he sentenced the accused. Hence, this Court is of the view all contents of judgments have been present in the said judgment. Hence, the last ground of appeal also lacked merit and is dismissed

There are two issues though need to be mentioned with respect to the sentence. The learned RM sentenced the accused to two years imprisonment in the first count, seven years in the second count, and seven years in the third count. In his words the sentence to run separately. The issue of sentencing whether to run concurrently or consecutively is not very difficult, the judicial view and approach on when concurrent sentences should be ordered is abundantly and oversupplied in the case law. In the case of **Musa s/o Bakari** V. **R.** [1968] H.C.D. No. 239. It was held that, it was universal practice, in the absence of good reason to the contrary, to order the sentence for related offences, of house breaking and stealing to run concurrently, or where charged counts, attracting convictions, arose out of single transaction, or are part and parcel of the same transaction, or are part and parcel of single

plan of campaign concurrent sentences will be ordered. In this case abduction, rape and unnatural offence are so related that the sentence should have been ordered to run concurrently.

Secondly, is the issue of sentencing. In the first count, abduction the appellant was sentence to two years imprisonment which is contrary to section 130 (a) where the provision provides "... is guilty of an offence and shall on conviction be liable to imprisonment for a term of three years". Here, the Court has no discretion other than to convict the appellant to serve three years imprisonment.

In the second count, rape the appellant was sentenced to seven years imprisonment which is contrary to section 126 (1) which provides:

> ***"126(1) Any person who commits rape, is except in the cases provided for in subsection (2), liable to be punished <u>with imprisonment for life and in any case for imprisonment of not exceeding thirty years and with fine, and shall in addition be ordered to pay compensation</u> 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 to such person".*** (Underlining is mine).

This provision should be read together with section 326 which reads:

> ***"326. When a court convicts an accused person of sexual offence, it shall in addition to any penalty which it imposes make an order requiring convict to pay such effective compensation as the court may determine to be commensurate to possible damages obtainable by a civil suit by the victim of the sexual offence for the injuries whether physical or psychological sustained by the victim in the course of the offence being perpetrated against him or her".***

Section 326 has been couched in a mandatory language that compensation should be ordered to be paid to the victim. Hence, the learned RM was wrong in sentencing the accused without ordering payment of compensation. Further, the learned RM erred again in sentencing the appellant for seven years. The punishment given in section 126(1) is "imprisonment for life and in any case for imprisonment of not exceeding thirty years and with fine, and shall in addition be ordered to pay compensation". In this provision the learned RM had discretion of awarding sentence up to thirty years imprisonment. But due to the severity of the offence, the learned RM should have taken inspiration from section 128, which deals with attempted rape particularly 128(3) which provides:

***"(3) Where a person commits the offence of attempted rape by virtue of manifesting his intention in the manner specifled in paragraph (c) or (d), he shall be liable to imprisonment for a term not less than twenty years".***

For obvious reasons, taking into consideration the severity of the penalty for attempting to commit the offence, I am constrained to interfere with the sentence. In the result the appeal his hereby dismissed for lack of merit and the sentence for the first is count is substituted to three years imprisonment, the sentence for the second count is substituted to twenty five years imprisonment. The appellant should also pay fine of TZS 20,000, failure of which he should be imprisoned for 15 days. He should also pay TZS 500,000 as compensation to the victim. The sentence for the third count is confirmed. The sentences on both first, second and third count are ordered to run concurrently.

**It is so ordered**.

(Sgd)ABDUL-HAKIM A. ISSA

JUDGE

**18/4/2016**

**CURT:**

The Judgment was delivered in chambers on this 18/4/2016 in the presence of Appellant and in the presence of Mr. Ayoub Nassor for Respondent (DPP).

(Sgd)ABDUL-HAKIM A. ISSA

JUDGE

**18/4/2016**

**COURT:**

The right of appeal is explained.

(Sgd)ABDUL-HAKIM A. ISSA

JUDGE

**18/4/2016**

***I certify that this copy is true from the original.***

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GEORGE KAZI

REGISTRAR HIGH COURT

**ZANZIBAR**