

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(DAR ES SALAAM DISTRICT REGISTRY)

AT DAR ES SALAAM

CRIMINAL APPEAL NO.58 OF 2022

(Originating from Criminal Case No.58 of 2022 Kigamboni District

Court Hon. Janet Mgaya -RM)

MOHAMED HUSSEIN @ MUDDY BEST.....APPELLANT

VERSUS

THE REPUBLIC.....RESPONDENT

JUDGMENT

Date of last Order: 30/09/2022

Date of Judgment: 24/10/2022

Before the Kigamboni District Court (the trial court) the appellant was charged with three offences, to wit; **one, Rape** contrary to section 130(1)(2)(a) and 131(1) of the Penal Code Cap 16 R.E.2019; the facts of the offence being that on 11/3/2020 at Mji Mwema Are within Kigamboni District in Dar es Salaam region, did have sexual intercourse with one



NASRA AMIR without her consent. **Two, Cyber Bullying** contrary to section 23(1)(2) of the Cyber Crimes Act No.14 of 2015 whereas the statement of offence is that on 11th March,2020 at Mji Mwema Area within Kigamboni District in Dar es Salaam region did send naked photographs of one NASRA AMIR using a computer system to wit, WhatsApp to MILK MOHAMED MUSSA with intend to cause emotional distress. And **three; Publishing Pornography** contrary to section 14(1)(a) and (2)(a) of the Cyber Crimes Act No.14 of 2015. Under this, the statement of facts were that on 11th March,2020 at Mji Mwema Area within Kigamboni District in Dar es Salaam region did publish naked photographs of one NASRA AMIR to MILK MOHAMED MUSSA through a computer system to wit, WhatsApp.

The respondent republic having brought six witnesses to testify in support of the offence, the trial court was satisfied that the appellant is guilt of the second and third counts, to wit; **Cyber Bullying** contrary to section 23(1)(2) of the Cyber Crimes Act No.14 of 2015 and **Publishing Pornography** contrary to section 14(1)(a) and (2)(a) of the Cyber Crimes Act No.14 of 2015 respectively. As to the first count which is rape contrary to section 130(1)(2)(a) and 131(1) of the Penal Code Cap 16 R.E.2019 the trial found it not to have been proved. In the end, for the second count,



the trial court sentenced the appellant to pay a fine **not less** than five million shillings in default to serve imprisonment for a term **of not less** than three years. On the third count, the appellant was sentenced to pay fine of **not less** than twenty million shillings in default to serve imprisonment term of **not less** than seven years. The sentences were ordered to run concurrently.

Aggrieved with the decision of the trial court, the appellant filed seven grounds of appeal, to wit: -

- 1. That, the trial magistrate erred in law and against the evidence that the Appellant's mobile phone was used in transmitting pornographic images and cyber bullying while it is in evidence that the said whatsapp message was deleted*
- 2. That, the trial magistrate erred in law and in fact to convict and sentence the Appellant on count of cyber bullying and publication of pornography sent through whatsapp while the evidence in court was on a screenshot image in a third -party mobile phone*

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3. *That, the trial magistrate erred in law and in fact that the photographs were naked photographs of the victim contrary to the court tendered image which had no connection with the victim's body nor any other person's body*
4. *That, the trial court magistrate erred in law and in fact to rely on the evidence of identity of the alleged pornographic image of the victim through a third party and not the victim herself, and it is in trial record the victim was at home and available on the material date of identity of the image in court*
5. *That, the trial magistrate having established that the case against the appellant was framed to extort money from the Appellant and having in record that prosecution witness (PW2) was intimidated by the police to testify against the Appellant erred in law and in fact to convict and sentence the Appellant on the same offences based on the same testimonies*
6. *That, the trial court erred in law to admit in evidence prosecution's electronic evidence which never adhered to the provision of section 18 of the Electronic Transaction Act, 2015*
7. *That, the trial court erred in law and in fact to convict and sentence the Appellant on the charges not proved beyond reasonable doubt.*

When the appeal came for hearing on 30/09/2022 the Appellant appeared in person unrepresented while the respondent republic was represented by Ms Yasinta Peter, the learned Senior State Attorney. While the Appellant submitted in support of appeal, the learned senior state attorney supported the conviction and at length submitted discrediting the grounds of appeal

Having heard the submission for and against the grounds of appeal, then in determining the appeal, I will start with ground No.7 which is the last ground of appeal, that, ***"the trial court erred in law and in fact to convict and sentence the Appellant on the charges not proved beyond reasonable doubt."***

It is the submission by the appellant that the charge was not proved beyond reasonable doubt. He questioned the IMEI numbers of the samples under investigations, Sample "A" and Sample "B" to be at variance with his phone and the failure to call the victim in court, the wife of PW4, to testify henceforth the case against him was a fabricated one.

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Responding, Ms Yasinta for the respondent republic argued that failure to call in court the victim the wife of PW4 couldn't lower down the prosecution case as PW4 sufficed and gave credible evidence. That PW4 as a husband of the victim knows well the body appearance of his wife as such he correctly identified the images the subject of the offence to be that of his wife. There was no need to call her in court to testify as there is no specific number of witnesses the law commands to bring in proving a fact. The learned senior state attorney cited section 143 of the Evidence Act, [Cap.6 R.E.2019] to bolster her argument.

As to variance of IMEI numbers of samples A and B which are admitted under investigations, it was the submission by the learned senior state attorney that sample "A" which is TECNO Sark Gold which is **Exhibit PE.4** (see page 27 of the typed proceedings) belongs to the Appellant while sample "B" which is Samsung Galaxy Grand Prime **Exhibit PE.2** (see p. 25 of the typed proceedings) belongs to PW4 MILK MOHAMED.

I have visited the trial court record specifically the proceedings both typed and hand written. The said IMEI numbers of the phones under dispute here, as pointed above , are the exhibits PE.2 and PE.4 the exhibits which were tendered by **PW3 - WP 1020 DC Devotha**. PW3 who

adduced her evidence in court on 28/08/2020. **She did not take oath before** adducing her evidence. The trial court hand written proceedings dated 28/08/2020 reads as follows: -

"PW3 – WP 1020/D/C Devotha states:

- *I underwent police training at C.C.P (chou cha Police Moshi) for nine months (9). I have eight years*"

It is vivid that the evidence by PW3 being is unsworn evidence and should not form part of the court record. The remedy available to such evidence and testimonies is to be discarded from the court record. This is a trite law as it was so propounded by the court of appeal in a number of decisions.

In **Joseph Elisha Vs Tanzania Postal Bank, Civil Appeal No.157 of 2019 CAT at Iringa (Unreported) at page 5** had this to state: -

'Section 4 (a) of the Oaths and Statutory Declarations Act [CAP 34 R.E. 2019] makes it mandatory for the witnesses giving evidence in court to do so under oath. It provides:

"Subject to any provision to the contrary contained in any written law, an oath shall be made by-

(a) any person who may lawfully be examined upon oath or give or be required to give evidence upon oath by or before a court."

*Since it is mandatory for the witnesses to take oath before giving evidence, **its omission vitiates the proceedings***

Again, in **Mwazo Mohamed Nyoni @ pengo and 2 Others Vs R, Criminal Appeal No.184 of 2018 CAT at Dar es Salaam (Unreported) pp. 15-17** the Court of Appeal had this to state: -

*'There is, in this regard, a long and unbroken chain of decisions of the Court which underscores **the duty imposed on the court to ensure that every witness is examined upon oath or affirmation.** It is an elementary principle of law that, evidence to be acted upon by any court must come from a competent witness and unless a witness is exempted under written law such as section 127 (1) of the Evidence Act, Cap 6 R.E 2019 (EA), **any other witness in any judicial proceedings must be sworn or affirmed.** This is a peremptory requirement under Section 198 (1) of the CPA which states that:*

*"Every witness in a criminal cause or matter shall, subject to the provisions of any other law to the contrary, **be examined upon oath or affirmation in accordance with the provisions of the Oaths and Statutory Declaration Act.**" [Emphasis added]*



The spirit of the above provision is to the effect that no witness in any criminal case or matter will be examined without oath or affirmation and that any evidence recorded without oath or affirmation will have no value before any court of law and therefore will be disregarded.

The Court of Appeal went further by stating thus: -

*"In the instant matter, we subscribe to the concurrent submissions by the learned counsel that, the trial Judge's **recording of the testimony of PW4 without being sworn was clearly irregular.** On the strength of the authorities cited above, PW4's evidence recorded when he gave his testimony was no evidence at all and, in that accord, we agree with both learned counsel that, such evidence deserves not to be considered by the Court to determine the guilty or otherwise of the appellants.*

Finally, the Court of Appeal concluded by stating thus: -

In view of the infractions as canvassed above, we are constrained by the law to hold that the testimony of PW4 was irregularly recorded by the trial Judge in contravention of section 198 (1) of the CPA and therefore, is hereby accordingly discarded.

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Guided by the above settled law, I hereby discard the unsworn evidence of **PW3 – WP 1020/D/C Devotha** from the court record. Since PW3 is a witness who tendered in court sample "A" the TECNO Sark Gold which is **Exhibit PE.4** belonging to the Appellant and sample "B" the Samsung Galaxy Grand Prime **Exhibit PE.2** belonging to PW4 MILK MOHAMED, the two exhibits being the only evidence establishing the offence the appellant stood charged then there is nothing left on record which can ground the conviction on the charge the appellant faced before the trial court.

That said, the appeal is hereby allowed. The trial court judgment and sentence meted to the Appellant are hereby quashed and set aside.

In the event, this court orders the Appellant be released from custody with immediate effect unless is otherwise lawfully held.

It is so ordered

Right of Appeal explained

Dated at Dar es Salaam this 24th day of October, 2022




Musa K. Pomo

Judge

This Judgment is delivered on this 24th October, 2022 in presence of the Appellant and Dorothy Massawe, the learned Principle State Attorney, for the Respondent



A handwritten signature in blue ink, appearing to be "M.K. Pomo".

Musa K. Pomo

Judge

24/10/2022