

**IN THE COURT OF APPEAL OF TANZANIA**  
**AT DAR ES SALAAM**  
**(CORAM: MKUYE J.A., MWAMPASHI, J.A. And MURUKE, J.A.)**  
**CRIMINAL APPEAL NO. 179 OF 2022**

**ALLY HAMISI LYUMBA .....APPELLANT**

**VERSUS**

**THE REPUBLIC ..... RESPONDENT**

**(Appeal from the decision of the High Court of Tanzania at Dar es Salaam)**  
**(Mgonya, J)**

**dated the 29<sup>th</sup> day of November, 2021**

**in**

**Criminal Appeal No. 209 of 2021**

**JUDGMENT OF THE COURT**

29<sup>th</sup> April & 7<sup>th</sup> May, 2024

**MURUKE, J.A:**

The appellant, Ally Hamisi Lyumba, was charged and convicted of the offence of raping a 14 years old girl, whom we shall be referring her as “the victim”, by the District Court of Bagamoyo, and sentenced to serve thirty years imprisonment. His appeal to the High Court was dismissed in its entirety. He has come to this Court on a second appeal.

It was the prosecution’s case that on 10<sup>th</sup> day of March, 2020 at about 07:00 hours at Zinga Awadh area, Bagamoyo, the victim who was a form one student at Zinga Secondary School was on her way to school. While on the

road, the appellant called the victim and asked to stop, the request that was refused. Immediately, the appellant started to chase the victim, got hold of her and then took her to the bush. The appellant, while holding a bottle of beer, ordered the victim to undress her under pant which she complied as she was horrified. The appellant then raped the victim while covering her mouth not to shout.

After finishing the ordeal, the appellant left the victim crying for pain. While coming from the bush she met PW2, Kassim Nurdin Mohamed to whom she explained the whole episode describing how the appellant looked like and that she will be able to recognize him once opportunity arises. According to PW1 and PW2 the incident was reported to Zinga Secondary School, then to the police station, and the appellant was arrested accordingly. The Director of Orphanage Centre Zinga, was also informed as the victim was an orphan.

In the course of investigation, Detective Coplo Boniface, PW3, found the victim's under pant at the scene of the crime, same was tendered as exhibit P1 during trial. Equally so, PW4 Doctor Nyangasi Gideon who examined the victim confirmed that the victim was penetrated and PF3 was tendered as exhibit P2. In his defence, the appellant categorically denied to have committed the offence. He told the trial court that, on 10<sup>th</sup> March, 2020 he was at home where a number of people came including PW2 who started

beating him before taking him to the police station. After full trial, the appellant was convicted and sentenced, his appeal to the high Court was dismissed, as intimated earlier, thus he filed present appeal containing nine (9) grounds of appeal to the effect that:

- 1. The learned Appellate Judge erred in law and fact by upholding the conviction against the appellant while failure to assess, to analyse and to evaluate the prosecution evidence tendered by both side PW1, PW2, PW3, PW4 and DW1 at page 57-71 did not subject the evidence to any objective analysis as she was duty bound to do since it was the first appeal and hence it was by way of rehearing instead summarily dismissed the appeal contrary to the procedure of law.*
- 2. The learned Appellate Judge erred in law and fact by upholding the conviction while failure to determine that, the trial court erred in law by convicting the appellant while failure to determine that, the prosecution side lead evidence to JOYCE DENIS at page 11 line 15-16 to testify in the trial as PW1, JOYCE DENIS did not establish the offence because the complainant one FATUMA D/O AMIRI a girl of 14 years of age did not testify and when the charge sheet was read over and fully explained to the accused person he did not plead guilty.*
  - (i) Given the fact that the absence of FATUMA D/O AMIRI a girl of 14 years evidence meant in effect that carnal knowledge was not conclusively establish in law.*
  - (ii) The charge sheet, it was expected that the prosecution side would lead evidence to prove that the appellant did unlawful have*

*sexual intercourse with one FATUMA D/O AMIRI a girl of 14 years of age*

*(iii) On the whole failure by the complainant to testify fatally affected the prosecution case.*

- 3. The learned Appellate Judge erred in law and fact by upholding the conviction while the trial court erred in law by convicting the appellant in a statutory rape, it is important for the prosecution to give clear evidence of age of the victim, failure of that will create doubts as to the real age of the victim in this alleged statutory rape contrary to the procedure of law.*
- 4. The learned Appellate Judge erred in law and fact by upholding the conviction while the trial court erred in law by convicting the appellant while the prosecution deliberately failed to call a material witness who is within reach, without any apparent reason i.e the head teacher or the director of orphanage home care (Patron) at Mapinga would be one to clear doubts for the Court to reach a just decision.*
- 5. The learned Appellate Judge erred in law and fact by upholding the conviction while the trial court erred in law by convicting the appellant relied on discredited and untenable evidence of PW1 and PW3 who both stated that the appellant did the same acts for many times, this statement makes reference to the character of the appellant and no evidence was led to prove this.*
- 6. The learned Appellate Judge erred in law and fact by upholding the conviction while the trial court erred in law by convicting the appellant relied on merely implication assertions of PW1 and PW4 which were full*

*of discrepancies and contradictions as PW1 stated that, we went to police Mapinga and later to the hospital at Kerege at page 12 line 18-19 contrary to PW1 who stated that, on 10/03/2020 I was at Kerege Health Centre about 17:00 hours came one patient complained that she was raped at page 27 line 15-16.*

- 7. The learned Appellate Judge erred in law and fact by upholding the conviction while the trial court erred in law by convicting the appellant relied on exhibit P.1 (Underwear) at page 22 line 1-2 while the prosecution side through PW3 G.821 D/C BONIFACE failed to prove the chain of custody on exh. P.1 as to its searching, seizing, receiving, handling and storing as it failed to tender before the trial court a certificate of handling over exhibit contrary to the procedure of law.*
- 8. The learned Appellate Judge erred in law and fact by upholding the conviction while the trial court erred in law by convicting the appellant based on incredible and inconsistent evidence of PW1 she neither give any graphic description on the basis of which she identified or recognized the appellant, as facial or morphological appearance, colouring or physique and attire are matters of highest importance of which evidence ought to be given.*
- 9. The learned Appellate Judge erred in law and fact by upholding the conviction while the trial court erred in law by convicting the appellant based on the prosecution case which was not proved beyond reasonable doubt.*

In this appeal the appellant appeared in person, unrepresented, whereas the respondent/Republic was represented by Ms. Elizabeth Ulomi and Mr. Clarence Mhoja, both learned State Attorneys. At the hearing, the appellant requested the Court to adopt his nine grounds of appeal as his submission in support of this appeal, insisting his appeal to be allowed.

On her part Ms. Elizabeth Ulomi from the outset indicated to support the appeal on strength of ground two, on the following reasons:

**Firstly**, there is variance of the name of the victim, and the evidence of the person who testified as the victim. Whereas the charge sheet that was read at the trial court, as seen at page 1 of records, the victim was Fatuma Amiri, but it was Joyce Denis, who testified as the victim of the rape already committed by the appellant.

Ms. Ulomi further insisted that, at page 3 of the records, the appellant denied to have known Fatuma Amiri, thus denied to have committed the offence, therefore the variance of the name of the victim raped by the appellant, creates doubts as to who was the real victim. Learned State Attorney urged us to entertain doubts in favour of the appellant, making reference to the cases of **Umaiya Makilagi @ Musoma & Others v. Republic** (Criminal Appeal No. 371 of 2020 [2023] TZCA 17654 (26<sup>th</sup> September, 2023) Tanzilii, and **Salum Rashidi Chitende v. Republic**,

Criminal Appeal No. 204 of 2015 [2015] TZCA 572 (12<sup>th</sup> October, 2015)  
Tanzilii.

**Secondly,** learned State Attorney submitted further that, on 14<sup>th</sup> April, 2020 there was the charge filed to substitute the name of Fatuma Amiri with that of Joyce Denis as the victim of rape. However, records at page 4-5 does not reveal so. Assuming without believing it was so substituted, but same was not read out to the accused person in terms of section 234 (2)(a) of the Criminal Procedure Act, Cap 20 RE 2022, that insist whenever there is substituted charge, same has to be read by the court, for the accused to be well informed. In totality the respondent counsel argued the Court to allow the appeal, quash conviction and set aside sentence.

In his rejoinder submission the appellant simply agreed on what has been stated by the learned State Attorney and had nothing to add, only pressed for his release from custody to be able to join his family.

Having considered the submissions by both sides in particular that of the respondent's counsel, and the record of appeal, we are convinced that the appellant has raised a very important legal point in his second ground of appeal which we think is capable of disposing of this appeal.

On our part, we fully agree with the learned Senior State Attorney that the variance of the name of the victim featuring in the charge sheet that is,

Fatuma Amiri as compared to that found in the proceedings of the case when PW1 testified as Joyce Denis, surely, creates doubts as to who was the real victim. We are of the considered opinion that the prosecution side is obliged to prove what actually has been stated in the charge sheet. Hence variance of the name of the victim found in the charge sheet and what has featured in the evidence is a serious irregularity which is not curable under section 388 of the Criminal Procedure Act (the CPA).

Section 234(1) of the CPA provides that whenever there is a variance between the charge and the evidence the court may be moved to amend or alter the charge. (See **Mussa Mutalemwa v. Republic**, Criminal Appeal No. 172 of 1990 (unreported). However, the amendment must be made before judgment, otherwise the judgment runs the risk of being quashed on appeal on account of such discrepancy (See **Joseph Sypriano v. Republic**, Criminal Appeal No. 158 of 2011 (unreported)).

We have found as correctly submitted by learned State Attorney that the purported substitution of charge is not supported by the records. What is in the original trial court records at the last page of the file is a charge bearing the name of Joyce Denis as the victim of the rape by the appellant. Not only that the said charge is not part of the records, but the same is not



signed by the Prosecutor, much worse, was not read out to the appellant. It is a serious anomaly.

When a charge is substituted, section 234 of the CPA requires that the accused person should be called upon to plead and thereafter, be informed of his right to require a recalling of the witnesses who had testified to either give evidence afresh or be further cross-examined. The provisions state as follows:

*"234 – (1) Where at any stage of a trial, it appears to the court that the charge is defective, either in substance or form, the court may make such order for alteration of the charge either by way of amendment of the charge or by substitution or addition of a new charge as the court thinks necessary to meet the circumstances of the case unless, having regard to the merits of the case, the required amendments cannot be made without injustice; and all amendments made under the provisions of this subsection shall be made upon such terms the court shall seem just.*

*(2) Subject to subsection (1), where a charge is altered under that subsection -*

*(a) the court shall thereupon call upon the accused person to plead to the altered charge;*

*(b) the accused may demand that the witnesses or any of them be recalled and give their evidence afresh or be further cross-examined by accused or his advocate and, in such witness on matters arising out of such further cross examination..."*

The omission to comply with the provisions of section 234 (2)(a) of the CPA renders the proceedings a nullity. In the case of **Tluway Akonaay v. Republic** [1987] T.L.R. 92, the Court had this to say on the effect of such an omission:

*"It is mandatory for a plea to a new or altered charge to be taken from an accused person, as otherwise the trial becomes a nullity".*

On the same principal see also the cases of **Riziki Jumanne v. Republic**, Criminal Appeal No. 370 of 2019, [2021] TZCA 302 (9<sup>th</sup> July, 2021, TANZILII) **Balole Simba v. Republic**, Criminal Appeal No. 525 of 2017 [2021] TZCA 380 (17<sup>th</sup> August, 2021 TANZILII) and **Hassan Said Twalib v. Republic**, Criminal Appeal No. 91 of 2019 [2020] TZCA 1859 (20<sup>th</sup> November, 2020 TANZILII).

With the above exposition on how the proceedings in the trial court were conducted, the irregularities pointed out, the prosecution case was, admittedly, not proven on the standard of proof required. In the case of

**Mohamed Said Matula v. Republic** [1995] T.L.R. 3, the Court held that in a charge of murder the burden is always on the prosecution and the proof has to be beyond reasonable doubt. Although this is not a murder charge the principle is the same in all criminal cases save where the law provides otherwise. We therefore allow the appeal, quash the conviction and set aside the sentence. The appellant should be released from prison unless he is held there for other lawful purposes.

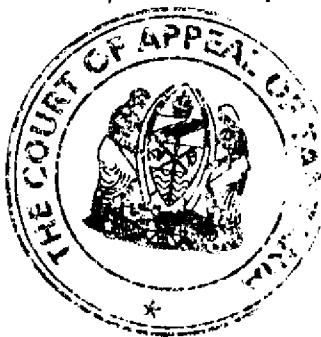
**DATED at DAR ES SALAAM** this 6<sup>th</sup> day of May, 2024.


R. K. MKUYE  
**JUSTICE OF APPEAL**

A. M. MWAMPASHI  
**JUSTICE OF APPEAL**

Z. G. MURUKE  
**JUSTICE OF APPEAL**

The judgment delivered this 7<sup>th</sup> day of May, 2024 in the presence of the Appellant in person and Ms. Pancrasia Protas, Senior State Attorney for the respondent, is hereby certified as a true copy of the original.



  
J. J. KAMALA  
**DEPUTY REGISTRAR**  
**COURT OF APPEAL**