

**IN THE COURT OF APPEAL OF TANZANIA
AT Mtwara**

CRIMINAL APPEAL NO. 115 OF 2013

(CORAM: BWANA, J.A., ORIYO, J.A., And KAIJAGE, J.A.)

**HANDA MANYAMA APPELLANT
VERSUS
THE REPUBLICRESPONDENT
(Appeal from the decision of the High Court of Tanzania
at Mtwara)**

(Kaganda, J.)

dated the 25th day of November, 2003

in

Criminal Appeal No. 89 of 2002

.....

JUDGMENT OF THE COURT

24th & 28th November, 2014

KAIJAGE, J.A.:

Before the District Court of Mtwara at Mtwara, the appellant was facing a charge of rape contrary to sections 130(1) and 131 of the Penal Code, Cap 16 R.E. 2002. The particulars of the charge read thus:-

*"That Handa s/o Manyama charged on the
17th day of November, 2000 at about
19.00 hours at Nasikole village within Mtwara
rural District and Region of Mtwara did have*

*carnal knowledge with RUKIA D/O ISSA aged 41
years without her consent."*

Upon his first appearance before the trial District Court and when the charge was firstly read over to him on 23/11/2000, the appellant is on record to have denied committing the alleged offence on 17/11/2000. He maintained a similar stance when he was reminded of the charge on 3/1/2001 and when he gave his evidence in defence on 31/5/2001.

At the appellants trial, the prosecution called a total of three (3) witnesses. The key witnesses were Rukia d/o Issa (PW1) and her husband, Juma Mohamed (PW2). The two witnesses gave evidence showing that the appellant allegedly committed the offence charged on **17/12/2000**.

When the appeal was called on for hearing, Mr. Hashim Ngole, learned Senior State Attorney who appeared for the respondent Republic readily conceded that there was a conspicuous material variance between the charge and the evidence adduced in support of it with respect to **the date** on which the alleged offence was committed. In the light of this fundamental deficiency, the learned Senior State

Attorney was quick to submit that the evidence on record does not establish that the appellant raped PW1 Rukia on **17/11/2000**. For this reason, he urged us to find that the case for the prosecution was not proved beyond reasonable doubt.

On our part, we subjected the entire record of the proceedings and the judgments of the courts below to a very close scrutiny. As we have already sufficiently demonstrated, the charge against the appellant was that he had raped PW1 Rukia on **17/11/2000** at 19.00 hours. However, the record is clear that no evidence was forthcoming from the prosecution witnesses to prove this. The said key prosecution witnesses did not allude to this date in their respective testimonial accounts. Instead, they consistently gave evidence on the events which allegedly took place on **17/12/2000**.

We hold a firm view that it was incumbent upon the prosecution to lead evidence showing exactly that PW1 Rukia was raped on **17/12/2000**, as alleged in the charge which the appellant was called upon to answer. The rationale for this was lucidly stated thus in **ANANIA TURIAN V.R.** Criminal Appeal No. 195 of 2009 (unreported):-

*"When a **specific date** of the commission of the offence is mentioned in the charge sheet, the defence case is prepared and built on the basis of that specified date. This defence invariably includes the defence of alibi. If there is a variation in the dates, then the charge must be amended forthwith and the accused explained his right to require the witnesses who have already testified recalled. If this is not done, the preferred charge will remain unproved and the accused shall be entitled to an acquittal as a matter of right. Short of that, a failure of justice will occur."*

We fully associate ourselves with that observation made by this Court in **ANANIA TURIAN'S** case (supra). In this case, the appellant having prepared and built his defence on the basis of the date **(17/11/2000)** specified in the charge sheet, the courts below erred in convicting the appellant basing on the evidence of PW1 and PW2 which supports a non-existing charge in respect of an offence allegedly committed on **17/12/2000**.

On the strength of the foregoing brief discussion, we are constrained to agree with the learned Senior State Attorney that the prosecution failed to prove that the appellant raped PW1 Rukia on **17/11/2000**. Accordingly, we allow this appeal. The appellant's conviction and the jail sentence meted out by the trial court and affirmed by the High court are, respectively, quashed and set aside. The appellant should be released from prison forthwith unless he is otherwise lawfully held.

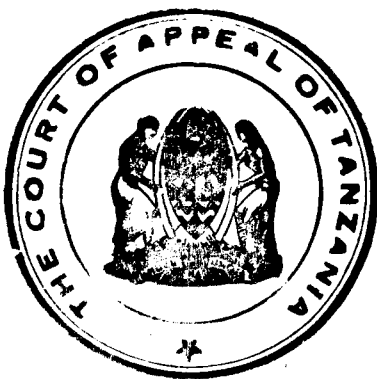
DATED at MTWARA this 28th day of November, 2014

S.J. BWANA
JUSTICE OF APPEAL

K.K. ORIYO
JUSTICE OF APPEAL

S.S. KAIJAGE
JUSTICE OF APPEAL

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




P.W. BAMPIKYA
SENIOR DEPUTY REGISTRAR
COURT OF APPEAL