IN THE COURT OF APPEAL OF TANZANIA

AT MTWARA

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

CRIMINAL APPEAL NO. 204 OF 2015

SALUM RASHID CHITENDE.....APPELLANT

VERSUS

THE REPUBLIC.....RESPONDENT

(Appeal from the decision of the High Court of Tanzania at Mtwara)

(Mipawa, J.)

dated 10th day of May, 2010

in

Criminal Appeal No. 59 of 2009

JUDGEMENT OF THE COURT

7th & 12th October, 2015

MBAROUK, J.A.:

In the District Court of Newala at Newala, the appellant, Salum Rashid Chitende was charged with the offence of rape contrary to sections 130 (1) (2) (e) and 131 of the Penal Code Cap. 16 R.E. 2002. He was convicted and sentenced to thirty (30) years imprisonment and ordered to pay the victim fifty

thousand shillings as compensation for the injuries she sustained. Dissatisfied, his appeal before the High Court (Mipawa, J.) was dismissed in its entirety. Undaunted, he has preferred this second appeal.

The gist of the matter which appeared before the trial court was to the effect that, Faraha Hamadi (PW1) a young girl aged eleven (11) years old who was a STD. IV student at Mning'alie Primary School at Tankini Village was on the material date of 24 -11-2008 at about 13:00 hrs. going to play purportedly passed near the house of the appellant who showed the sign to call her. PW1 responded to the call and the appellant is alleged to have told her to get inside the house and she complied. Thereafter, the appellant followed suit and closed the door of the house and took PW1 to his room. PW1 testified that, she was then ordered by the appellant to undress herself and she complied. She further testified that, the appellant also put off his trouser and told to lay down on the bed which she complied. The appellant then came and inserted his penis into her vagina but it did not penetrate fully as her vagina passage

was small and that caused her to feel much pain. PW1 also testified that she failed to raise an alarm because the appellant put his tongue into her mouth until he ejaculated. Thereafter, the appellant told PW1 to go home, but on the way she could not walk properly. When Azimina Mshamu (PW2) noticed the way PW1 was walking in difficulty, she informed PW1's grandfather who called the police and she was then sent to a dispensary for further examination.

In his defence, the appellant categorically denied to have committed the offence. He told the trial court that on 2-12-2008 he was at his cashewnut farm when a militia man followed him and required him to report at Kitangari Police Station as he was suspected to have raped a girl. However, he claimed that he remembered the words he was told by PW1's grandmother that she was going to fabricate a case against him. He said, after having reached Kitangari Police Station, he was taken to Newala Police Station and charged with this case.

In this appeal, the appellant appeared in person without being represented, whereas the respondent/Republic was

represented by Mr. Paul Kimweri, learned Senior State Attorney. Four grounds of appeal were preferred by the appellant in his memorandum of appeal, namely:-

1. That, the trial magistrate and the appellate High Court Judge erred in law having convicted the appellant relying on the evidence of PW1, PW2 and PW3 who were relatives.
2. That, the trial magistrate and the appellate High Court Judge erred in law having convicted the appellant relying on the evidence of a single witness (PW1).
3. That, the trial magistrate and the appellate High Court Judge erred in law without assessing the credibility of PW1.
4. That, the appellant's defence was not considered.

At the hearing, the appellant opted to allow the learned Senior State Attorney to submit first and requested to respond later if the need arises.

On his part, Mr. Kimweri from the outset indicated to support the appeal. **Firstly,** he claimed that, there is variance as to the correct name of the victim, because the charged sheet has shown the name FARAHA d/o OMARI as the victim, but when PW1 testified at the trial court the record shows her name appeared to be FARAHA HAMADI. The learned Senior State Attorney further submitted that as far as the appellant categorically denied to have committed the offence, hence such variance of the name as to who was the victim of rape creates doubts as to who was the real victim. Mr. Kimweri urged us to resolve that doubt in favour of the appellant. In support of his argument, he cited to us the decision of this Court in the case of **Mathias s/o Samweli v. Republic,** Criminal Appeal No. 271 of 2009 (unreported).

Secondly, the learned Senior State Attorney submitted that there has occurred a doubt as to which date the offence was committed. Whereas on one hand, PW2 testified that the offence was committed on 30-11-2008, on the other hand PW3 testified to have been told by PW2 (who was the first person to

have discovered that PW1 was sick) that the incident occurred on 24-11-2008. Mr. Kimweri was of the view that PW2 and PW3 should have been consistent as to the correct /actual date when the offence was committed The learned Senior State Attorney added that, in the charge sheet the date which was mentioned to which the offence was committed was 24-11-2008 and not 30-11-2008 as stated by PW2. Mr. Kimweri was of view that creates doubt as to which was the correct date as to when the offence was committed. In support of his argument, he cited to us the decision of this Court in the case of **Mathias s/o Samweli** (supra). The learned Senior State Attorney then urged us resolve those doubts in favour of the appellant and prayed for the appeal to be allowed, quash the conviction and set aside the sentence and set appellant free.

In his rejoinder submission the appellant simply agreed on what has been stated by the learned Senior State Attorney and had nothing to add.

On our part, we fully agree with the learned Senior State Attorney that such variance of the name of the victim featured

in the charge sheet as compared to that found in the proceedings of the case when PW1 testified, surely that 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).

As pointed out in the case of **Mathias s/o Samweli** (supra) when specific date, time and place is mentioned in the charge sheet, the prosecution is obliged to prove that the offence was committed on that specific date, time and place. We think, it is also important that when specific name of the victim is stated in the charge sheet there should be no variance of the name of the victim which has appeared in the charge sheet with that which has appeared in the evidence in the proceedings, otherwise, that will create doubt as to who was the actual victim.

Secondly, we also agree with the learned Senior State Attorney that such variance of dates found in the charge sheet and that found in the evidence of PW2 creates doubt as to what was the correct date when the offence was committed. For example, See – **Mathias s/o Samweli** (supra) where it was stated as follows:-

> ***"We are of the opinion that when a specific date, time and place is mentioned in the charge sheet, the prosecution is obliged to prove that offence was committed by the accused by giving cogent evidence and proof to that effect****."(Emphasis added.).*

In the instant case, there is variance of dates as to when the offence was committed. The charge sheet shows that the offence was committed on 24-11-2008, but the evidence adduced by PW2 as the first person who discovered PW1 to have been raped said it was on 30-11-2008. Such a variance

creates doubt as to what was the actual date when the offence was committed by the appellant.

We are increasingly of the view that, those doubts should be resolved in favour of the appellant, as we hereby do. For that reason, we find that the prosecution failed to prove their case beyond reasonable doubt. In the event, we allow the appeal, quash the conviction and set aside the sentence. The appellant should be released from prison forthwith unless he is lawfully held therein.

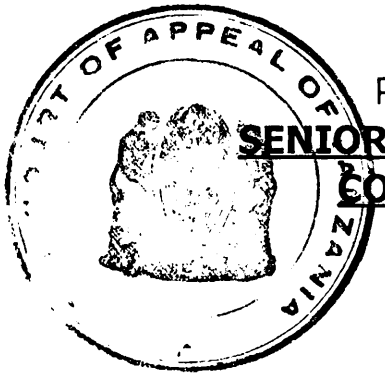
DATED at **MTWARA** this 9th day of October, 2015.

M. S. MBAROUK
JUSTICE OF APPEAL

S. MJASIRI
JUSTICE OF APPEAL

B. M. K. MMILLA
JUSTICE OF APPEAL

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



P. W. BAMPIKYA
SENIOR DEPUTY REGISTRAR
COURT OF APPEAL