IN THE COURT OF APPEAL OF TANZANIA

AT DAR ES SALAAM

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

CRIMINAL APPEAL CASE NO. 268 OF 2013

SAID MSUSA .....APPELLANT

VERSUS

THE REPUBLIC .....RESPONDENT

(Appeal from the decision of the High Court of Tanzania at Dar es Salaam)

(Temba,J.)

Dated the 10th day of June, 2013

in

HC Criminal Appeal Case No. 14 of 2012

JUDGMENT OF THE COURT

13th & 21st July, 2015

MASSATI, J.A.:

The appellant was convicted of the offence of raping a 6 year old girl by the District Court of Morogoro, and sentenced to 30 years imprisonment. His appeal to the High Court was dismissed in its entirely. He has now come to this Court on a second appeal.

At the trial court, it was alleged that on the 6th day of May 2010 at about 13.00 hrs at Kisemo, Ngerengere, in Morogoro Rural District the appellant did have unlawful carnal knowledge of one **MWENDA d/o IDDI** a girl of six years of age. Upon his pleading not guilty, the

prosecution produced 5 witnesses to prove its case. PW1, **MWENDA IDDI** (the victim) testified not on oath, how the appellant, who was her step farther, on the night in question, climbed in her bed and ravished her. PW2 **MARIAM MRISHO**, the appellant's wife and the victim's mother, told the court that she saw the applicant on top of the victim having sex with the victim and that when she asked him, he replied that it was normal to do so in their culture. Next morning, PW2 went to inform the victim's biological father, **IDDI KIVURUGA** who testified as PW3. He was the one who took up the matter with the authorities, and took the victim to the hospital for medical examination. PW4 No **E. 8686 DC GIDION,** investigated the case, arrested the appellant and tendered the PF3 as E.xh. P1. The last witness was **KELVIN KANDILA** (PW5). He testified that he was the one who examined the victim the very next morning, and prepared the PF3 (Exh.P1). It was his opinion before the trial court that the bruises found in the victim's internal parts of the vagina were caused by sexual intercourse. In his defence, the appellant denied having raped the victim and that PW2 did not tell the truth. He contended that she was intent on fixing him because he had threatened to divorce her and take another woman. He pointed out that, that was the reason why she

The appellant's defence notwithstanding, the trial court found that the victim's evidence was corroborated by PW2, PW5 and the PF3, and found that the appellant committed the offence. The first appellate court agreed with the said finding of fact. There are therefore concurrent findings of facts by the trial court and the first appellate court.

These findings of facts are the subject of attack by the appellant in the present appeal. He has come up with six grounds of appeal which in summary are (i) that the PF3 was not properly admitted (ii) that the trial court had no jurisdiction to try the case; (iii) that the two courts below should have drawn adverse inference against PW2 who decided to report the incident to PW3 first instead of her neighbors;(iv) that an adverse inference should be drawn against the prosecution failure to summon the village, and ward executive officers to whom the crime was first reported; (v) that the first appellate court failed to properly evaluate the evidence of PW5 and the PF3, and (vi) that the first appellate court failed to consider the defence case. At the behest

of the appellant, the Court also allowed him to add another ground of appeal which was that (vii) that there was a variance between the charge and the evidence as to the time of the commission of the offence.

After adopting those grounds, the appellant was ready to let the respondent begin, reserving his right to reply.

The respondent/Republic, was represented by Ms Monica Ngogo, learned Principal State Attorney. She came out in full support of the conviction and sentence. Against the first ground, she submitted that although the PF3 was tendered by PW4 the investigator, its author in the person of PW5 was called to testify. So section 240 (3) of the Criminal Procedure Act (Cap 20 – RE 2002) (the CPA) was complied with. On the second ground, it was her submission that, as there was no evidence establishing prohibited relationships between the appellant and the victim, the question of incest did not arise. So the trial court had jurisdiction to try the case of rape which was before it. With regard to the third and fourth grounds of appeal, which she argued together, the learned counsel submitted that, first, PW2 explained why she did not raise an alarm to call in neighbours, as she was afraid the

appellant would run away; but secondly, that the evidence of the Village and Ward Executive Officers was not material as they did not witness the commission of the crime. So, no adverse inference could and should be drawn for not calling them. On the fifth ground, she submitted that the two courts below properly analyzed the value of the evidence found in the PF3, it being corroborative of that of PW1 and PW2. On the sixth ground, it was her submission that PW2 and PW3 could not have fabricated the case against the appellant, because according to his own defence, those witnesses had intended to withdraw the matter, had it not been for PW4 who insisted on charging the applicant. With regard to the additional ground, Ms. Ngogo conceded that indeed there was a variance between the charge and the evidence with regard to the time of committing the offence. However it was her opinion that this was curable in terms of sections 234(3) and 388 of the CPA. She therefore prayed for the dismissal of the appeal in its entirety.

In his reply, the appellant insisted that the trial court had no jurisdiction; that the PF3 was not properly handled as PW5 was not the doctor who was intended to be summoned; that the non-calling of the Village and Ward executive officers ought to attract an adverse

inference; that he had also complained about the non-calling of the doctor who prepared the PF3 before the High Court; that the case was a fabrication as PW3 was not even listed as a witness in the preliminary hearing; and lastly that the variance between the charge and the evidence was an incurable irregularity. He thus reiterated his prayer that his appeal be allowed.

This is a second appeal. The mainstay in such appeals is to deal with points of law, and to rarely interfere with concurrent findings of fact made by the lower courts unless it can be shown that such findings are based on a misapprehension of the evidence, nature and quality of the evidence resulting in an unfair conviction (See **SALUM MHANDO v R** (1993) TLR. 170), **ISAYA MOHAMED ISACK v R** Criminal Appeal No 38 of 2008. (unreported)

In the present case, as shown above, there are concurrent findings of fact by the two courts below that the victim was raped, and that it was the appellant who did so. After revisiting the evidence on record ourselves, we cannot fault the two courts below, for reaching that conclusion of fact. And that takes care of the first. third fourth, fifth and sixth grounds of appeal, which are hereby dismissed.

The second ground, and the additional grounds of appeal however, raise points of law, which we are bound to consider.

The second ground touches on the jurisdiction of the trial court. In his elaboration, the appellant said that if the offence was committed, and since the victim was his step daughter, an offence of incest was committed, and so not justiciable in the District Court. Ms. Ngogo agreed that the District Court had no jurisdiction to try cases of incest in terms of the Second Schedule to the CPA, which, according to her, indicates that an offence under section 158 of the Penal Code, is triable by the High Court. However in this case, there was no evidence that the appellant had adopted the victim as his child. So incest could not be proved, but certainly rape was committed, she argued.

We would not wish to go into the question whether or not there was any prohibited relationship between the victim and the appellant, because as we shall shortly demonstrate below, that is not necessary for the determination of the appeal.

With due respect, we do not agree with both the appellant and Ms. Ngogo. According to the First Schedule (Division III) to the CPA, even if there was incest by males, chargeable under section 158(1) (a) of the Penal Code, (Cap 16. RE 2002), the offence is triable by a subordinate court, of which the trial court in the present case was one, in addition to the High Court. So even if the appellant was charged with incest, the trial court had jurisdiction to try the case. This is sufficient to dispose of this issue.

The second point that we have to determine is on the variance between the charge and the evidence.

Ms. Ngogo, readily conceded that there was such variance; in that; whereas the charge alleges that the offence was committed at 13.00 hrs on 6/5/2010; PW1 and PW2 testified that this was committed at night. The learned counsel however, submitted that this type of variance was curable under section 234(3) of the CPA.

(which is day time) that appears in the charge sheet and whatever time of the night, PW1 and PW2 could have been referring to in their testimonies. Ms Ngogo attempted to "amend" the charge from the bar by saying that it was meant to reflect 1.00 am the morning of that day; but with respect, that was no way to amend, the defect. Section 234(1) of the CPA provides that where 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 R** 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 R** Criminal Appeal No. 158 of 2011 (unreported). But, before allowing the amendment, it must be shown that the charge is defective either in "substance" or in "form". Whatever the terms "in substance" and "in form." may mean, it is expressly provided in section 234(3) of the CPA that:-

> *"variance between the charge and the evidence adduced in support of it with respect to the time at*

which the alleged offence was committed is not material and the charge need not be amended for such variance if it is proved that the proceedings were in fact instituted within the time if any limited by law for the institution thereof."

It is our view therefore, that so long as it is not contended that the charge was instituted outside the prescribed time, it is the position of the law that if the variance is as to the time the offence was committed, it is immaterial, and as correctly submitted by Ms. Ngogo, curable under section 388 of the CPA.

Having held so, we proceed to hold that this appeal was lodged without sufficient cause. It is accordingly dismissed in its entirety.

DATED at DAR ES SALAAM this 16th day of July,2015.

S. A. MASSATI
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

E. F. FUSSI
DEPUTY REGISTRAR
COURT OF APPEAL