IN THE COURT OF APPEAL OF TANZANIA
AT MWANZA

(CORAM: RUTAKANGWA, J.A.,MASSATI, J.A., And MUGASHA, J.A.)

CRIMINAL APPEAL NO. 461 OF 2015

RAJABU SHABANI @ SANUKA ..... APPELLANT
VERSUS
THE REPUBLIC ..... RESPONDENT
(Appeal from the decision of the High Court of Tanzania at Mwanza)

(Makaramba, J.)

dated the 22nd day of September, 2014
in
Criminal Appeal No. 139 of 2014
.....
JUDGMENT OF THE COURT

26th & 28th October, 2016

RUTAKANGWA, J.A.:

The appellant first appeared before the District Court of Musoma district at Musoma ("the trial court") on 19th August, 2013, to answer a charge of Rape which had been thrown at his door. The particulars of the charge read as follows:-

> *"**RAJABU S/O SHABAN @ SANUKA** on 25th day of July, 2013 Kasoma village within Butiama District in Mara Region, did have carnal knowledge of one **ADA S/O** (sic) **NYAMBEYA** aged 16 years old."*

The appellant denied the charge and the prosecution called six witnesses to prove its case. We should mention in passing from the outset that the prosecution had the duty of proving that the appellant did have carnal knowledge of Ada d/o Nyambeya ("the prosecutrix"), a girl of 16 years of age, on **25th July, 2013** at Kasoma village. The appellant **was convicted as charged** on the basis of the profered prosecution evidence, hence this appeal.

Conscious of our eventual holding in conclusively disposing of the appeal, we have found it not in the interests of justice to get into the nitty-gritty of how the rape was allegedly committed. It will suffice to state here that the prosecutrix, who testified as PW1 at the trial of the appellant, claimed that the appellant carnally knew her against her will on **24th July, 2013**. The venue of the crime was, according to PW1 Ada, an *"unfinished building"* near their home but according to her father, PW3 Asoferate s/o Nyambea, it was *"in a dispensary room."* PW1 Ada, further the appellant testified that as the appellant was carnally knowing her, her parents arrived and arrested him while he was still naked. The appellant, it was claimed, was immediately sent to Suguti Police station and eventually charged.

The other four prosecution witnesses, except PW6 Dr. Joseph Mugasa, who only examined PW1 Ada at Murangi dispensary, testified to

the like effect, although PW4 Isack Simon and PW5 Baridi Makoji never said to have eyewitnessed the alleged incident. These two learnt of it from PW2 Rose w/o Asoferate and PW3 Asoferate.

As already alluded to above, although the appellant was allegedly caught red-handed raping PW1 Ada on 24th July, 2013, and promptly taken to Suguti police station, he was not taken to court until 19th August, 2013.

In his affirmed evidence, the appellant protested his innocence in no uncertain terms. He not only denied raping PW1 Ada but emphatically stated that he had *"never raped anybody"* in his life. He further claimed that on 25th July, 2013, he was at Murangi at the home of one Masamaga, who could not be called as his witness as he was already dead. He told the trial court and he was not contradicted on this, that he was only arrested on 6th August, 2013, taken to Suguti police post and later on to Butiama police station before being arraigned in court.

The two courts below did not buy the appellant's story. They believed the prosecution evidence, hence the conviction for rape as charged, and a sentence of twenty years imprisonment imposed by the trial court and subquently confirmed by the High Court on a first appeal. Still aggrieved, the appellant has lodged this appeal.

The appellant lodged two memoranda of appeal, one being entitled a Supplementary Memorandum of Appeal. In all, both memoranda contain twelve (12) grounds of complaint.

After perusing all the grounds of appeal vis-a-vis the evidence on record, it became apparent to us that the most germane was the one reproaching the High Court for sustaining the conviction of the charge of rape which was not proved at all. The appellant, who fended for himself before us, and had earlier on lodged his written submissions, opted to say nothing by way of highlighting the same.

The respondent Republic, which was represented by Mr. Castus Ndamugoba, learned Senior State Attorney, after a constructive reflection, supported the appeal. He found himself constrained to do so, after it became glaringly clear to him that the prosecution did not tender any evidence, be it credible or not, to establish that the appellant had sexual intercourse with PW1 Ada on 25th July, 2013 as charged. Since the evidence was totally at variance with the charge which was not amended in accordance with the provisions of s. 234 of the Criminal Procedure Act, Cap. 20 R.E. 2003, he reasoned, the charge the appellant was called upon to answer, was not proved at all. We agree and add that the appellant was gravely prejudiced as a result. This is because he was called upon to defend himself on a charge of raping PW1 Ada on 25/7/2013, when the

prosecution evidence was to the contrary and his defence of alibi was rejected by the two courts below without any comment on this obvious variance. He was, therefore, not expected to lead evidence accounting for where he was on 24/07/2013.

This is not the first time we are facing an identical situation. In the case of **Ryoba Mariba @ Mungare v. R.,** Criminal Appeal No. 74 of 2003 (unreported), the appellant had been charged with committing rape on 20th October, 2000. The prosecutrix testified generally of being raped by the appellant "in October and November, 2000 without more". This Court held that the evidence had failed to prove that Ryoba had raped the prosecutrix on 20/10/2000 which was the specific charge he was facing and was required to answer. The Court took the same stance in **Christopher Rafael Maingu v.R.,** Criminal Appeal No. 222 of 2004 (unreported), and **Anania Turiani v. R.,** Criminal Appeal No. 195 of 2009 (unreported).

Following our decision in **Anania Turiani** (supra), this Court in **Mathias Samwel v.R.,** Criminal Appeal No. 271 of 2009 (unreported) categorically stated that *"when a specific date, time and place is mentioned in the charge sheet, the prosecution is obliged to prove that the offence was committed by the accused by giving evidence and proof to that effect."* In all these cases, convictions for rape in which evidence was similarly at

variance with the charge as in the case under scrutiny, the convictions for rape were quashed.

Our misgivings about the quality of the evidence of the prosecution going to establish that the appellant raped PW1 Ada are heightened by the undisputed evidence of the appellant that he was arrested on 6th August, 2013, and no police officer from Suguti police post was called by the prosecution to bear out PW1 – PW5 on their allegations that they arrested the appellant and had surrendered him to the police either on 24th or 25th July, 2013. Another nagging unanswered question is: if the appellant was arrested on 24th July, 2013, how could he have committed the rape on 25th July, 2013, when he was allegedly in police custody?

Furthermore, we are increasingly of the view that the appellant's defence of *alibi* was not unreasonable at all, because if he had been arrested and surrendered to the police on 24th July, 2013, why did it take the police twenty six days before taking him to court? Where was he in between? This unexplained delay lends credence to the appellant's evidence that he was arrested on 6th August, 2013 and not on 24th July, 2013 and totally discredits the prosecution witnesses. We are forced, therefore, to accept the appellant's 7th ground of appeal that the courts below erred in law in not giving due consideration to his defence "*which had risen doubts in the prosecution case.*"

All said and done, we find merit in this appeal which we allow in its entirety. We quash and set aside his conviction for rape as well as the thirty years prison sentence, the sentence of corporal punishment of six (6) strokes of the cane and a compensation order of two million shillings. The appellant is to be released from prison forthwith unless he is otherwise lawfully held.

DATED at **MWANZA** this 27th day of October, 2016.

E.M.K. RUTAKANGWA
JUSTICE OF APPEAL

S.A. MASSATI
JUSTICE OF APPEAL

S.E.A. MUGASHA
JUSTICE OF APPEAL

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

P.W. Bampikya
SENIOR DEPUTY REGISTRAR
COURT OF APPEAL