IN THE COURT OF APPEAL OF TANZANIA

AT IRINGA

(CORAM: MUSSA, J.A., LILA, J.A., and KOROSSO, J.A.)

CRIMINAL APPEAL NO. 482 OF 2016

JUSTINE MTELULE .....APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

(Appeal from the Judgment of the High Court of Tanzania at Iringa)

(Sameji, J.)

Dated the 17th day of June 2016

In

DC Criminal Appeal No. 263 of 2015

JUDGMENT OF THE COURT

14th& 16th May, 2019

KOROSSO, J.A.:

Justine Mtelule the appellant, was arraigned and tried before the District Court of Iringa at Iringa for unnatural offence against a 12 year old, who we shall henceforth refer to using an acronym "**EPC**" or "**PW1**", contrary to section 154(1) of the Penal Code, Cap 16 Revised Edition 2002 (the Code). It was alleged in the particulars of the offence, that on the

5th of February 2007, at about 22.00hrs at Wambi village Mafinga, the appellant did have carnal knowledge of **"EPC",** against the order of nature. The appellant was convicted and sentenced to thirty (30) years imprisonment and was also ordered to pay a fine of Tshs. 5,000/- and compensation to the victim of Tshs. 50,000/-

The appellant refuted the charges, and to prove their case, the prosecution called four witnesses (PW1-**EPC**; PW2- **JP**; PW3-Dr. Meshack Mlyapatali; and PW4- Veronika Chula) and tendered one exhibit (Exh. P1- the PF3). On the part of the defence they had two witnesses (the appellant and DW2- Lucy Kasumini Kyala). Upon conviction by the trial court, the appellant being aggrieved by the decision, appealed to the High Court against conviction, sentence and orders. His appeal was unsuccessful, being dismissed in its entirety. Being further aggrieved, he appealed against the High Court decision, hence this second appeal to this Court.

The facts, though in brief, leading to the appellant's arraignment, are as follows: On the 5th of February 2007 on or about 22.00hrs at Wambi Village, Mafinga township within Mufindi District, while the appellant was under guard duty at his place of work, that is, at Mama Kadadaa's shops area, three young people "**EPC**", a 16 year old who we shall name "**JP**" or

PW2 and Jiulize passed by where the appellant was, allegedly looking for an open shop to buy candles. When the appellant saw the three young people, he called them, believing them to be street children or popularly known as "*chokoraas*". The appellant then arrested the three young people, allegedly harassed and assaulted them. Thereafter, took and put two of the young people, Jiulize and PW2 in a nearby hut, one used for tailoring, locked the door from outside and left with PW1. The appellant took PW1 to another hut and ordered him to lie down. PW1 resisted and the appellant hit him with a club and PW1 fell down. It was then soon after that, PW1 felt pain when the appellant's penis entered his anus and despite raising an alarm, no assistance was forthcoming. Thereafter, the appellant asked PW1 to give him money and PW1 gave the appellant two hundred shillings and wanting to escape informed him that there was more money in the other hut. When moving to the other hut to follow-up on the promised money, PW1 managed to free himself and escaped, found another hut where he slept until morning.

The next day, PW1 went to the hut where his colleagues had been left and informed them of what had happened to him, that he had been sodomized by the appellant. PW1 and his colleagues then left for the

market and went to meet PW1's brother in law, where PW1 narrated to him the incident of sexual assault against himself occasioned by the appellant. Soon after, PW4, who is PW1's sister was called and informed of the incident. While narrating the incident, PW1 saw the appellant, and informed those listening that the man who had sexually assaulted him, is the one passing by, so the appellant was called, blamed for what he has done to PW1, and thereafter, was taken to the police station and arrested. PW1 was then taken to the hospital having given a PF3. The doctor who examined PW1, that is PW3, reveals that, upon examination of PW1, bruises and swelling were observed in PW1's anus, leading to a conclusion that a blunt object was forced to penetrate therein. That PW1 was a victim of someone having carnal knowledge in his anus against the order of nature.

On the part of the defence, there was vehement denial of the incidence of having carnal knowledge of PW1 against the order of nature. The appellant conceded being at his place of work, at Wambi area, guarding shops of Mama Kadadaa and Mgimwa's Industry at around 22.00 hrs on the 5th of February 2007. The appellant acknowledged that, to have also seen three young men passing by including PW2 at the said time, and

that, at the time, he was with his wife- DW2, who had brought him food. He denied any knowledge of assaulting and arresting the young people or locking the other two young men in another hut and taking PW1 to another hut and sexually assaulting him. The appellant contended to have stayed with his wife the whole night on the respective day, and that he had chased the three young men away and they had left. On the part of DW2, his wife, she narrated having visited her husband on the 4th of February 2007 and at 22.00hrs, seeing three young people who were chased away by the appellant and that the young people then left. DW2 also stated that she left the area around 23.00hrs and did not stay all night and thus differing with the evidence of DWI on how long she stayed, apart from the discrepancy in the dates.

As already presented hereinabove, the trial court found that the charges against the appellant have been proved and convicted the appellant. The first appellate court, upheld the decision of the trial court, finding that there was sufficient evidence from the prosecution witnesses' testimonies and tendered exhibits to prove the case against the appellant, whilst discrediting the evidence by the witnesses for the defence. At the same time, in evaluating the grounds of appeal before it, the High Court

was of the view that the challenge against the defects in the charges against the appellant as contained in the charge sheet, that is, relating to variance in the date of the incident as found in the charge sheet and as against the testimonies of prosecution witnesses, was curable vide section 234(3) of the Criminal Procedure Act, Cap 20 R.E. 2002 (the CPA).

In the present appeal, the appellant, first presented six ground of appeal as found in a memorandum of appeal. Later, a supplementary memorandum of appeal was filed consisting of four grounds and thus making a total of ten grounds of appeal. The said grounds of appeal we proceed to paraphrase were necessary as follows:

1. *That the High Court Judge erred in law and fact in dismissing the appeal without evaluating the variance in the dates in the charge sheet and the evidence in Court. That while the charge sheet stated that the said incident occurred on 5th day of February 2007, PW1 and PW2 testified that he said incident occurred on the 5th of June 2007.*

2. *The High Court Judge erred in law and fact dismissing the appeal having relied on the evidence of PW1 while the trial magistrate admitted that the PW1 as a child of tender years having examined his intelligence was*

satisfied on this but that he did not understand the nature of an oath, and thus disregarded the principle emanating from the holding in ***Elias Joakim vs. Rep.****(1992) TLR 220, which held that "competency in giving evidence in so far as the child of tender years is concerned is not a matter of age but of understanding and further that where a child is tender years gives evidence after successful voire dire test and that he understands the nature of....."*

3. *That the High Court Judge erred in law and fact when the appellant appeal was dismissed by believing the evidence of PW2 that it corroborated PW1's evidence and not considering the discrepancy in their evidence, including the fact that PW2 when cross-examined stated he did not know the appellant prior to the incidence. That therefore PW2 identification of the appellant in the dock in court was because the appellant was a single accused.*

4. *The High Court Judge erred in law and fact in dismissing the appeal while disregarding the appellant's defence and the evidence of DW2 that she was together with the appellant from 22.00hrs up to 23.00hrs on 5/2/2007.*

5. *The High Court Judge erred in law and fact in dismissing the appeal while the trial magistrate after finding the appellant guilty of the offence charged, convicted and*

sentenced the appellant without citing section 235(1) of the CPA, R.E 2002.

6. *That the charge against the appellant was not proved by the prosecution side beyond reasonable doubt.*

7. *That the High Court Judge erred in law and fact when dismissing the appeal relying on the prosecution witnesses and Exhibit PE1, the PF3 which was not issued by a police officer while prosecution failed to call a police officer who issued the said PF3 and the investigating officer.*

8. *That the evidence of PW1 and PW2 was that on the fateful day of incidence they met a guard, meaning that the appellant was not known to the witnesses, but he was arrested because of his uniform only. This uniform was being used by many people in this country and that the charges were drawn out of suspicions only and is against the procedure as held in* ***Judo Rhobi vs. Republic,*** *Criminal Appeal No. 2 of 2001, where it was held: "suspicion there is. But cannot be the basis of conviction in a criminal trial".*

9. *That the trial magistrate and the High Court Judge failed to analyse in their judgments how PW1 was sodomized by*

the appellant where there was no fact established at the trial court such as DNA test or finger prints from the appellant to verify it was trued the appellant touched the clothes of PW1. That these facts were left unproved to support the evidence of PW1 as a single witness.

10. *That apart from the evidence of PW1, the evidence of all the other remaining witnesses was hearsay. The High Court Judge dismissed the appeal relying on a single witness which is against the law requiring corroboration.*

At the hearing of this appeal, the appellant appeared in person being unrepresented, while Ms. Kasana Maziku, being assisted by Ms. Hope Masambu, both learned State Attorney respectively, represented the respondent Republic.

The appellant, when accorded an opportunity to amplify on his grounds of appeal, had nothing substantive to add, praying that his grounds of appeal be adopted by the Court and considered and prayed to allow the learned State Attorney to submit so that he may respond afterwards.

Ms. Kasana Maziku, learned State Attorney, on behalf of the respondent, moved directly to address the Court on ground one of the appeal, which challenged the competency of the charge. The issue being the variance in the date of commission of the offence. This is because the date of the incident, as drawn in the charge sheet, stated it was on the 5th of February 2007, whilst the testimonies of PW1 and PW2 was that the date of the incident was 5th June 2007. This disparity further amplified by the testimony of PW3 who stated that he examined PW1 on the 7th of February 2007, and thus a date at variance with PW1 and PW2 evidence on the date of incidence, since the date stated by PW3, when he examined PW1, is before the date of incident as testified by PW1 and PW2.

When the Court inquired from the Learned State Attorney on the position of the law, especially case law, where the date in the charge sheet is at variance with the testimony of witnesses regarding the date of incidence, the learned State Attorney, her response was that, where that is the situation, in effect similar to the position in the present case, such defect is fatal and incurable. The learned State Attorney having conceded to the fatality of the identified defect, proceeded to submit that the

respondent Republic were not resisting to the appeal, and prayed that the appeal be allowed, conviction quashed and sentence set aside.

When called upon to respond, the appellant did not have much to say in the rejoinder, against the learned State Attorney's submissions, apart from extending his support and reiterating his grievances as promulgated in his grounds of appeal, and imploring the Court for the appeal to be allowed.

In determining the appeal under consideration, we have decided to first consider the 1st ground of appeal, alleging that the charge is fatally defective in view of the variance in dates of the alleged incidence of the appellant having carnal knowledge of PW1 against the order of nature. We have deemed it imperious to consider the propriety of the charge sheet because it is the basis which lays a foundation of any trial, as it is expected that, an accused must know the nature of the case he is facing before making any defence. The issue under scrutiny as regards the charges against the appellant in the present case is that, whereas, the charge sheet reveals that the incidence occurred on the 5th of February 2007 at 22.00hrs, the testimonies of PW1 and PW2 state that, it was on the 5th of

June 2007.The counsel for the respondent as alluded to above, has conceded to this anomaly.

Therefore, this being the position, the task of this Court, will be to consider and determine whether or not there is the said disparity between what is stated in the charge sheet and the evidence on record, relating to the date of incidence, and where the Court finds this assertion to be factual, then to determine the consequences.

To allow easy scrutiny of the matter, regurgitate the contents of the charges:

> ***"OFFENCE SECT AND LAW:*** *Unnatural offence c/s 154(1) of the Penal Code Cap 16 of the Law, as repealed and replacement by S. 16 of the Sexual offences special provisions Act, No. 4 of 1998.*
>
> ***PARTICULARS OF OFFENCE:*** *JUSTINI s/o MTELULE IS CHARGED on the 5th day of February, 2007 at about 22.00hrs at Wambi Village Mafinga within Mufindi District in Iringa Region did have carnal knowledge of one "**EPC**" against the order of nature, a boy of 12 yrs old".*

For PW1 and PW2 evidence relating to the above issue on the dates the incidence is supposed to have taken place, we start with an excerpt from the testimony of PW1 and it reads thus:

> *"I reside at there downwards. I know the accused. I know him he was a watchman guarding at Kadadaa area. On 5th June 2007, at about 22.00hrs, I was from home proceeded to by a candle. I accompanied my two fellows, on "JP" and Jiulize. We had found the shop already closed. The accused called us we proceeded there, he alleged that we were the street children famously known in Swahili as "chokoraa". He arrested us, proceeded to assault us and asked my fellows to sleep at the hut and proceeded with me to the other hut. He alleged today I am going to have carnal knowledge with you against the order of nature.*
>
> *We proceeded to another hut, he asked me to sleep, I denied he assaulted me with a club. I falled down, he inserted his penis into my anus. He inserted it, I felt pain..."*

The testimony of PW2 is that:

"On the 5th June 2007. We left home and proceeded to buy candles from one Mama Kadadaa. I accompanied PW1 and Jiulize.... We met the guard he was holding a club....Thereafter he left with PW1, we heard an alarm from Chula. We were unable to proceed out since he locked the door ..."

The trial court and the first appellate court relied on the evidence of PW1 and PW2 in holding that the prosecution proved their case, finding them to be credible. It is obvious from the imported excerpts of PW1 and PW2 testimony, that they assert that the date of the incidence as 5th June 2007.

It is important to remind ourselves that the Court has at numerous times, buttressed on the importance for the Prosecution to lead evidence where the alleged date of commission of an offence in the charge sheet is not at variance with the evidence they lead to prove the charge, and that this is so as to accord the accused person to know the charges on when the alleged offence was committed, and so that he prepares his response accordingly. One of these decision is found in **Abel Masikiti vs Republic,** Criminal Appeal No. 24 of 2015 (unreported), where it was held:

"In a number of cases in the past, this Court has held that it is incumbent upon the Republic to lead evidence showing that the offence was committed on the date alleged in the charge sheet, which the accused was expected and required to answer. If there is any variance or uncertainty in the dates, then the charge must be amended in terms of section 234 of the CPA. If this is not done the preferred charge will remain unproved, and the accused shall be entitled to an acquittal. Short of that a failure of justice will occur".

The above position is reiterated in other decisions, such as **Masasi Mathias vs Republic,** Criminal Appeal No. 274 of 2009 (unreported); **Vumilia Penda Mushi vs. Republic**, Criminal Appeal No. 327 of 2016 (Unreported); **Ryoba Mariba @ Mungare vs R.**, Criminal Appeal No. 74 of 2003 (unreported) and **Anania Turian vs Republic**, Criminal Appeal No. 195 of 2009 (unreported).

Thus taking the above decisions in consideration, we thus differ with the finding of the first appellate Judge that the inconsistency and disparity in the date of the commission of the offence is curable under section

234(3) of the CPA. This is because a scrutiny of the said provision shows that, section 234 (3) of CPA states:

> "*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*" (the emphasis is ours).

Therefore the situation in this case is different because, as also found by the learned first appellate judgment, the variance is in the dates of incidence of commission of an offence between what is in the charge sheet and the evidence on record by witnesses and not the time when the offence was committed. Thus, if the High Court judge would have critically considered this in light of the existing decisions of this Court on the issue, she would not have reached the conclusion she did but found that, the variance in the dates of the incidence between the charge sheet and the evidence on record, makes the anomaly fatal and not curable.

We have also considered the fact that Section 234 (1) of the CPA is also a curing provision for defective charges. It confers powers on the trial court to allow amendment of the charges to meet the pertaining circumstances. The section states:

> *"Where in any stage of the trial, it appears to the court that the charge sheet is defective, either in substance or in form, the court may make such order for alteration of the charge either by way of amendment of the charge or by substitution or additional of 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 sub section shall be made upon such terms as the court shall seem just."*

Thus the section requires that the prosecution having noted the variance in the date of the commission of the offence in the charge sheet and the evidence of the complainant and other witnesses, are expected to amend the charge. This was not done and thus leading to non- clarity on

what was the date of incident and therefore unresolved doubts, which have to benefit the appellant.

Suffice to say, that this ground alone, is sufficient to dispose of this appeal since no useful purpose will be served in considering the other grounds of appeal raised by the appellant.

In the event, we allow the appeal and, proceed to quash the conviction and set aside the sentence and the orders for fine and compensation imposed on the appellant. Accordingly, we order that, the appellant be set at liberty forthwith unless held otherwise for lawful purposes.

DATED at **IRINGA** this 16th day of May, 2019.

K. M. MUSSA
JUSTICE OF APPEAL

S. A. LILA
JUSTICE OF APPEAL

W. B. KOROSSO
JUSTICE OF APPEAL

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

A.H. MSUMI
DEPUTY REGISTRAR
COURT OF APPEAL