

**IN THE COURT OF APPEAL OF TANZANIA
AT DAR ES SALAAM**

(CORAM: WAMBALI, J.A., GALEBA, J.A. And KAIRO, J.A.)

CRIMINAL APPEAL NO. 607 OF 2021

KASSIM ARIMU @ MBAWALA APPELLANT

VERSUS

THE REPUBLIC..... RESPONDENT

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

(Ebrahim, J.)

Dated the 24th day of August, 2021

in

Criminal Appeal No. 99 of 2020

.....

JUDGMENT OF THE COURT

23rd September & 21st October, 2022

WAMBALI, JA.:

In Criminal Appeal No. 99 of 2020, the High Court of Tanzania at Dar es Salaam (Ebrahim,J.) upheld the conviction and sentence of the appellant meted by the District Court of Kinondoni (the trial court) upon being found guilty of the offence of rape of a girl aged nine (9) years old (hereinafter to be referred as "XYZ" or "PW2" or "the victim" for the purpose of consistence). The decision of the trial court was arrived at after it was convinced that the evidence tendered by the prosecution at the trial left no doubt that the appellant raped the victim on 8th July, 2018 at Kimara

Kilungule area within Ubungo District, Dar es salaam Region. At the trial, it was not disputed that the appellant is the brother in law of the victim, as he married her sister known as Mafrida Kinanga. It was not further disputed that until the alleged date of the incident, the victim lived together with the couple for sometime. It was found as a fact by the trial court and upheld by the first appellate court that on the fateful date the appellant's wife had travelled to Mang'ula Morogoro and therefore the appellant remained with the victim and one Getruda.

According to the evidence on record, on the alleged fateful date, the appellant entered the room in which the victim and Getruda had slept, and raped her. Later the appellant cautioned her not to reveal the incident to anyone before he went out. It is further revealed in the record of appeal as per evidence of the victim that the incident was repeated on the following day in the mid night after she had gone to school in the morning and returned home in the evening. The victim reported the incident the following day to the neighbor named as Hadija who took her to Kimara Police Station where they obtained a PF3 and went to Sinza Hospital for examination and treatment. Doctor Gloria Aniny Lema (PW3) examined the victim (PW2) on 10th July, 2018 at 10. 00hrs and found that she had lost her hymen PW3 also

revealed that the victim's vagina had swollen with bruises and discharged foul smell. PW3 tendered the PF3 which was admitted as exhibit PE1. WP. 41425 Sgt. Gladness investigated the case and came to the finding that the victim was raped by the appellant.

It was on the strength of the said evidence for the prosecution which prompted the trial court to disbelieve the appellant's story who testified as DW1 to the effect that the case was framed up by the relatives of his wife (Matrida Kiwanga) who had consistently restrained her to be married by the appellant. Asha Said (DW2) testified in support of the appellant. The trial court thus patently found the appellant guilty, convicted and sentenced him as alluded to above.

The trial court's decision was upheld by the first appellate court, hence, the present appeal supported by the substantive and supplementary memoranda of appeal consisting six grounds of appeal. However, at the hearing of the appeal which proceeded in the presence of the appellant in person, unrepresented and Ms. Jenipher M. Massue learned Senior State Attorney assisted by Ms. Regina Kayuni, learned State Attorney for the respondent Republic, it was unreservedly agreed that the determination of the appeal rests on the overall complaint contained in the first ground of

appeal, which is; “Whether the prosecution case was proved to the required standard”.

It is the complaint of the appellant in support of this ground that though the charge indicates that the victim (PW2) was raped on 8th July, 2018, there is variance with regard to the specific date on which the incident occurred between the charge and the prosecution evidence on record. The appellant contends that though the charge sheet indicates the date of the incident to be 8th July, 2018, during examination in chief the victim did not mention the specific date. On the contrary, he argues, the victim stated that she was raped on two consecutive nights without mentioning the specific days of the week. On the other hand, during cross – examination, the victim emphasized that the incident occurred on Monday and Tuesday. We further note that according to the written submission lodged in Court by the appellant in support of the appeal, the evidence of the investigator of the case (PW4), which would have been expected to support the prosecution case, also casts doubt on the exact date of the incident. This is so because in his testimony at the trial court, PW4 stated that the victim told her that the incident occurred for two consecutive days, that is, 7th and 8th July, 2018.

In the circumstances, the appellant maintains that the evidence of PW1 and PW3 cannot be of assistance with regard to the date of the incident. This is so, he states, the evidence of PW1 is to the effect that he was informed of the incident on 10th July, 2018 at 12.00 by Hadija and went to join her and the victim at Sinza Hospital. He added that the evidence of PW3, a doctor who examined the victim also shows that the PF3 was issued by the Kimara Police Station on 10th July 2018 at 10.05 am and that she attended the victim on the same date. The appellant therefore submits that both PW2 and PW3 did not confirm the allegation contained in the particulars of the charge that the incident occurred on 8th July, 2018. The appellant further argues that unfortunately the prosecution did not summon Hadija who was immediately informed of the incident by the victim. In his submission, Hadija could have probably shed some light on when she was informed by the victim concerning the occurrence of the alleged incident.

In the event, the appellant asserts that the variance between the charge and the prosecution witnesses with regard to the date of the incident renders the allegations to remain unsubstantiated to the required standard. He maintains that since the charge is the foundation of a trial, the prosecution was bound to prove beyond reasonable doubt that the offence

of rape was committed on 8th July, 2018 and that it was the appellant who was responsible. To support his argument, he made reference to the decision of the court in **DPP v. Yusufu Mohamed Yusufu**, Criminal Appeal No. 331 of 2014 (unreported) where it was stated that:

"It is always the duty of the prosecution to make sure that, what is contained in the particulars or statement of the offence including the dates when the offence was committed is proved and supported by the evidence and not otherwise".

The appellant concluded his submission in support of his appeal by urging the Court to find that the variance between the charge and the evidence on record renders the prosecution case against him unproved and resolve the doubts in his favours. He thus prays that the appeal be allowed as the Court did in an akin situation in **Vumi Liapenda Mushi v. The Republic**, Criminal Appeal No. 327 of 2016 (unreported). He adds that unfortunately, according to the record of appeal, there is no evidence that the charge was amended in terms of section 234 (1) of the Criminal Procedure Act [Cap. 20 R.E. 2022] to bring the particulars in line with the evidence on record.

The appellant's submission is fully supported by the learned Senior State Attorney on account of the fact that there is clear and remarkable variance between the date of the alleged incident indicated in the charge and the testimonies of the victim (PW2) and PW4. She added that though during cross examination the victim's stated that the incident occurred on Monday and Tuesday, if we are to go with the dates stated by PW4, that is, 7th and 8th July, 2018, that assertion cannot be true. This is because according to the calendar those dates fell on Saturday and Sunday and considering according to the testimony of the victim, after the first encounter with the rapist, she went to school on the following day is not enable. In the circumstances, she supported the appellant's appeal on the argument that the variance between the charge and the evidence penetrated the root of the case and thus it cannot be cured under section 388 of the CPA. She submits further that the failure of the prosecution to summon Hadija who was allegedly informed immediately after the incident dented the prosecution case. In essence, she submits the case for the prosecution was not proved to the required standard.

She finally prays for the appeal to be allowed resulting in the release of the appellant from custody.

We entirely agree with the appellant and Ms. Massue that in the case at hand, it is undoubted that there is clear variance between the date of the incident indicated in the charge sheet and the evidence of the victim (PW2) and the investigator (PW4) on record. It is apparent that though the charge sheet shows that the incident occurred on 8th July, 2018, the victim's evidence does not confirm any specific date. On the contrary, it was her testimony that she was raped on two consecutive days, that is, Monday and Tuesday. On the other hand, PW4, testified that she was informed by the victim that the incident occurred on two consecutive days, that is, 7th and 8th July, 2018 which fell on Saturday and Sunday. As correctly stated by the learned Senior State Attorney, despite the failure of the victim to mention the specific date consistent with the charge sheet, PW4's evidence cannot also be taken to be true. The reason for this stance is that according to the testimony of the victim, after the first incident in the mid night, she woke up was again raped by the appellant in the mid night.

Having regard to the totality of the evidence on record, we are settled that the prosecution failed to prove the allegation in the charge in respect of the date of the incident. At this juncture, we wish to reiterate what the Court stated in **Mathias s/o Samwel v. The Republic**, Criminal Appeal, No. 271

of 2009 which was also referred in **Salum Rashid Chitende v. The Republic**, Criminal Appeal no. 204 of 2015 (both unreported) thus:

"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..."

More particularly, in **Ryoba Mariba @ Mungare v. The Republic**, Criminal Appeal No. 74 of 2003 (unreported), the Court stated that:

"It is essential for the Republic which had charged Ryoba with raping one Sara Marwa on 20/10/2000 to lead evidence showing exactly that Sara was raped on that day, a charge the accused was required to answer"

[See also **Christopher. R. Maingu v. The Republic**, Criminal Appeal No. 222 of 2004 (unreported)].

Regrettably, as acknowledged by both the appellant and Ms. Massue, though the victim alleged to have immediately reported the incident to Hadija who sent her to Kimara Police Station and later to Sinza Hospital for examination by PW3, she was not summoned as a witness to support the prosecution case with regard to the date of the incident. To this end, the trial court was required and entitled to have drawn an adverse inference to

the prosecution case because no reason was given for non-summoning of Hadija. We wish to emphasize what the Court stated in **Hemedi Said v. Mohamedi Mbilu** [1984] T.L.R. 113 thus:

"Where, for undisclosed reasons, a party fails to call a material witness on his side, the court is entitled to draw an inference that if the witnesses were called they would have given evidence contrary to his interests".

In the case at hand, as there is no disclosed reason why the prosecution failed to summon Hadija, a material witness, who would have explained some missing links in the case, we accordingly draw an adverse inference that if Hadija was summoned, she would have testified contrary to the prosecution interest.

In the circumstances, we are settled that had the first appellate judge critically evaluated the evidence with regard to the exposed variance between the particulars in the charge and the evidence on record, she would not have come to the concurrent finding of fact with the trial court that the prosecution case was proved beyond reasonable doubt. In the result, we interfere with the concurrent findings of facts of the two courts below and

resolve the doubts in favour of the appellant. Ultimately, we allow the overall ground of appeal.

Consequently, as this ground of appeal suffices to dispose of the appeal without considering other grounds, we allow the appeal. In the event, we quash the conviction set aside the sentence of life imprisonment and order the immediate release of the appellant from prison custody, unless he is held for other lawful cause.

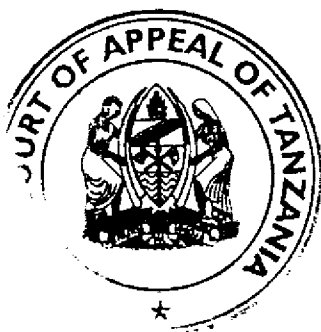
DATED of DAR ES SALAAM this 20th day of October, 2022.

F. L. K. WAMBALI
JUSTICE OF APPEAL

Z. N. GALEBA
JUSTICE OF APPEAL

L. G. KAIRO
JUSTICE OF APPEAL

The Judgment delivered this 21st day of October, 2022 in the presence of Appellant connected via Video facility from Ukonga Prison, and in the presence of Mr. Faraji Nguka, State Attorney for the Respondent is hereby certified as a true copy of the original.




F. A. MTARANIA
DEPUTY REGISTRAR
COURT OF APPEAL