IN THE COURT OF APPEAL OF TANZANIA

AT IRINGA

CORAM: WAMBALI, J.A. LEVIRA, J.A. And MAIGE, J.A.)

CRIMINAL APPEAL NO. 13 OF 2022

DAMAS MGOVA ..... APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

(Appeal from decision of the High Court of Tanzania at Iringa

(Mlyambina, J.)

Dated the 10th day of November, 2021

in

Criminal Appeal No. 8 of 2020

JUDGMENT OF THE COURT

24th & 28th October, 2022

WAMBALI, J.A.:

This appeal arises from the decision of the High Court of Tanzania at Iringa (the first appellate court) delivered on 10th November, 2020 in Criminal Appeal No. 8 of 2020. In essence, the decision of the first appellate court confirmed the conviction and sentence of the appellant in connection to unnatural offence entered by the District Court of Kilolo at Kilolo (the trial court) in Criminal Case No. 41 of 2019.

It was alleged in the particulars of the offence placed before the trial court that on 8th May, 2018 at about 21:00 hrs at Kihesa Mgagao Village, within Kilolo District in Iringa Region, the appellant had carnal knowledge against the order of nature of one Mathias Kagine aged thirty (30) years old. The appellant strongly denied the allegation.

The substance of the prosecution case is fully depicted by the evidence of four prosecution witnesses; namely, Mathias Kagine (PW1), Wilbert Luhwago (PW2), Ana Mwinuka (PW3) and H57 DC Chakubuta (PW4). It was the evidence of PW1 that on 8th May, 2019 at about 21:00 hrs he was at a traditional liquor club with the appellant drinking a local brew commonly known in Swahili as "Komoni". He then went outside for a call of nature where he was followed by the appellant who suddenly squeezed his neck and took him to the sitting room of his house located 50 steps from the club. While in that room, the appellant threatened to kill him if he had shouted for help, and thereafter, he carnally knew him against the order of nature for almost half an hour.

After the incident, the appellant threw him out of the house. PW1 went to report the incident to the Village Executive Officer (VEO) PW3 who immediately referred him to Mtitu Police Station where he was given the Police Form No. 3 (the PF3) and directly went to Pomeline

Dispensary for medical examination and treatment. At the Dispensary, he was attended by PW2, a Clinical Officer. In his examination, PW2 noted bruises in the anus and discovered further that the Sphincter Muscles on the anus of PW1 was loose. He, therefore, formed an opinion that PW1 was penetrated in his anus by a blunt object. PW2 filled the PF3 which he tendered at the trial and it was admitted as exhibit P1. PW4, a Police Officer, interrogated the appellant on 22nd May, 2019 and recorded a cautioned statement in which he allegedly admitted to have committed the offence. He tendered it and was admitted as exhibit P2.

In his spirited defence, the appellant denied to have committed the offence he stood charged with. He testified that, on the alleged date, that is, 8th May, 2018, he was not at the local club with PW1. On the contrary, he testified, he was at Mitanzi Village at Kihesa Mgagao loading cabbages in a truck which had to be transported to Dodoma. He attributed the source of the allegation which led him to be charged to the grudges which he had with the victim since 21st February, 2018. He testified that on that date, PW1 had informed his wife, who is his sister, that he was the one responsible for connecting her to other men for sexual relationship. Following the allegation, the appellant was

aggrieved and reported the matter to the Village Executive Officer at Kihesa where the dispute was determined and PW1 was ordered to pay a fine of TZS. 50,000.00. The appellant also denied to have recorded the cautioned statement (exhibit P2) on 22nd May, 2019 as testified by PW4. He alleged that PW4 had formulated his own facts.

At the height of the trial, the trial Resident Magistrate was fully satisfied that the prosecution case was proved to the hilt, hence he convicted the appellant under section 154 (1) (a) of the Penal Code [Cap. 16 R.E. 2002, now R.E. 2022] and sentenced him to thirty years imprisonment.

As intimated above, his first appeal was dismissed in its entirety by the first appellate court, hence this second appeal. The dissatisfaction of the appellant with the decision of the first appellate court is vividly expressed through the four grounds of appeal contained in the memorandum of appeal lodged in Court on 4th March, 2022. However, before the hearing of the appeal, it was unreservedly agreed by the appellant, the counsel for the respondent Republic and the Court that, the determination of this appeal revolves around the fourth ground, which is couched in the following terms:

"That, the prosecution side failed totally to prove the case against the appellant beyond reasonable doubt."

The hearing of the appeal proceeded in the presence of the appellant in person, unrepresented and Mr. Alex Mwita, learned Senior State Attorney for the respondent Republic.

It was the contention of the appellant that though he consistently testified that on the date alleged in the charge, that is, 8th May, 2018, he was not at the scene of crime and that the case was framed up because of the family conflict between him and PW1, that defence was not considered by both the trial and first appellate courts. He argued further that his defence was not sufficiently considered despite the fact that the evidence of the key prosecution witness (PW1) and the rest of the witnesses; namely, PW2 and PW4 was to the effect that the offence was committed on 8th May, 2019 and not on 8th May, 2018 as laid in the particulars of the charge. He submitted that the apparent variance between the date indicated in the charge and the prosecution witnesses' evidence on record, rendered the prosecution case to have not been proved beyond reasonable doubt. He thus prayed that the appeal be allowed, conviction quashed and sentence set aside.

The appellant's stance was fully supported by the learned Senior State Attorney for the respondent Republic. He submitted that though the appellant consistently testified that he was not at the scene of crime on the alleged fateful date, the evidence of PW1 is not consistent with the date indicated in the charge. On the contrary, he stated, PW1 firmly testified that the incident occurred on 8th May, 2019. Unfortunately, he added, PW1's evidence on the date of the commission of the offence is fully supported by that of PW2 and PW3. On the other hand, PW4 testified that he recorded exhibit P2 on 22nd May, 2019.

In the circumstances, he submitted that as the charge was not amended to cure the variance between the particulars and the evidence on record as required by law, the case for the prosecution was not proved beyond reasonable doubt. Mr. Mwita, therefore, supported the appellant's appeal. He ultimately prayed that the appellant be released from custody.

Having heard the submissions of the parties, we entirely agree that there is remarkable variance between the date of the commission of the offence indicated in the charge and the prosecution evidence on record. It is plain in the record that PW1 testified that the incident occurred on 8th May, 2019. Similarly, PW2 testified that he examined

PW1 on 8th May, 2019 at about 00:00 hrs. Equally, the evidence of PW3 who was the first person to receive the information from the appellant on the incident, is to the effect that she was so informed on 8th May, 2019 probably at 22:00 hrs. On the other hand, though in his testimony PW4 did not state the exact date of the incident, he testified that he recorded the appellant's cautioned statement at Lugalo Police Station on 22nd May, 2019. This fact is also supported by exhibit P2.

The issue concerning the date of the incident, therefore, casts further doubt on the prosecution case. This is because, though the charge indicates the date to be 8th May, 2018, it is on record that the appellant was initially arraigned before the trial court on 28th May, 2019 after exhibit P2 was recorded by PW4. Besides, there is no evidence on record as to whether after the alleged commission of the offence, it took almost over one year to charge the appellant in court. It is in this regard that based on the evidence on record, it cannot be concluded with certainty that, the charge which was laid at the trial court against the appellant was proved beyond reasonable doubt by the prosecution amid the variance.

It is settled law that it is the duty of the prosecution to prove the allegation as laid in the charge. In the **DPP v. Yusufu Mohamed**

Yusuf, Criminal Appeal No. 331 of 2014 (unreported), the Court 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 of when the offence was committed is proved and supported by the evidence and not otherwise."*

Moreover, in **Mathias s/o Samwel v. The Republic**, Criminal Appeal No. 271 of 2009 (unreported) the Court held that:

> *"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 time and place..."*

[See also **Abel Masikiti v. The Republic**, Criminal Appeal No. 24 of 2015 and **Justine Mtelule v. The Republic**, Criminal Appeal No. 482 of 2016 (both unreported)].

Particulary, faced with an akin situation, in **Ryoba Mariba @ Mungure v. The Republic**, Criminal Appeal No. 74 of 2003 (unreported), the Court held that:

> *"It was 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."

In the case at hand, it is patently clear that considering the evidence of the prosecution on record, it cannot be concluded that the date, that is, 8th May, 2018 on which the appellant was alleged to commit the offence against PW1 was proved beyond reasonable doubt as required by the law. It is unfortunate that, though the appellant raised serious doubts on the occurrence of the incident on the date alleged in the charge, both the trial and first appellate courts did not properly evaluate the evidence and resolve it in his favour. The oversight of both courts below was not withstanding the clear variance between the charge and the prosecution evidence on record.

Regrettably, the variance between the charge and evidence on record was not remedied by the trial court in terms of section 234 (1) of the Criminal Procedure Act [Cap. 20 R.E. 2019, now R.E. 2022] (the CPA) which provides as follows:

"234 (1) Where at any stage of a trial, it appears to the court that the charge is defective, either in substance or form, the court may make such order for alteration of the charge either by way

of amendment or by substitution or addition of a 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 subsection shall be made upon such terms as to the court shall seem just."

The importance of adherence to the provisions of section 234 (1) of the CPA where the evidence is at variance with the charge has been expounded by the Court in several decisions, including **Leonard Raphael and Another v. The Republic**, Criminal Appeal No. 4 of 1992, **Sylvester Albogast v. The Republic**, Criminal Appeal No. 309 of 2015 and **Said Msusa v. The Republic**, Criminal Appeal No. 268 of 2013 (all unreported), to mention but a few.

In the circumstances, we are satisfied that had the first appellate court thoroughly analysed the evidence on record amid the variance in the charge, it would not have come to the concurrent findings of facts with the trial court that the prosecution case was proved beyond reasonable doubt. We are, therefore, compelled to interfere with that findings, and thereby allow the ground of appeal.

Consequently, we allow the appeal, quash conviction and set aside the sentence imposed on the appellant. Ultimately, we order the immediate release of the appellant from prison, unless held for a lawful cause.

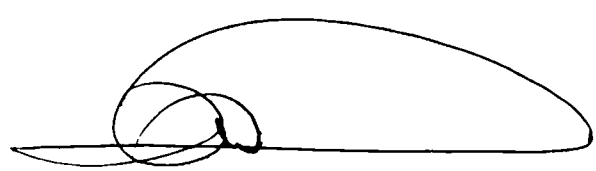
DATED at **IRINGA** this 28th day of October, 2022.

F. L. K. WAMBALI
JUSTICE OF APPEAL

M. C. LEVIRA
JUSTICE OF APPEAL

I. J. MAIGE
JUSTICE OF APPEAL

The Judgment delivered this 28th day of October, 2022 in the presence of the appellant in person and Mr. Alex Mwita, learned Senior State Attorney for the Respondent/Republic, is hereby certified as a true copy of the original.



J. E. FOVO
DEPUTY REGISTRAR
COURT OF APPEAL