IN THE COURT OF APPEAL OF TANZANIA
AT TABORA

(CORAM: KOROSSO, J.A., GALEBA, J.A., And MWAMPASHI, J.A.)

CRIMINAL APPEAL NO. 204 OF 2018

MARKI SAID @ MBEGA.....APPELLANT

VERSUS

THE REPUBLIC..... RESPONDENT

(Appeal from the Decision of the High Court of Tanzania, Tabora District Registry at Tabora)

(Mallaba J.)

dated the 5th day of June, 2018
in
DC Criminal Appeal No. 19 of 2018

.....

JUDGMENT OF THE COURT

26th October & 4th November 2022

GALEBA, J.A.:

Marki Said @ Mbega, the appellant in this appeal, was charged on two counts of sexual offences before the District Court of Tabora, in Criminal Case No. 17 of 2017. On both counts, he was charged of having committed the offence of grave sexual abuse contrary to section 138C (1) (a) and (2) (b) of the Penal Code [Cap 16 R.E. 2002, now R.E. 2022] (the Penal Code). The victims of the sexual abuse were two girls each aged nine (9). For purposes of concealing their identity, we will refer to the one in the first count as the first victim or PW3, and that in the second count, as the second victim or PW4.

According to the charge sheet, on 25th March, 2017 during evening hours, while at Isike Primary School within Tabora Municipality, for sexual gratification, the appellant told the first victim to hold his sexual organ. As for the second count, it was alleged in the charge sheet that on 31st March, 2017 also in the evening hours, while at Isike Primary School within Tabora Municipality, for sexual gratification, the appellant undressed the second victim and started caressing her buttocks.

Based on those allegations, the appellant was arraigned as above, but he denied any involvement in the crimes charged. To prove the case, the prosecution called a total of six (6) witnesses, and tendered one (1) exhibit which was the appellant's mobile handset. In defending himself, the appellant called no other witnesses other than himself. He denied all allegations stating that he did not even know the victims and that he saw them for the first time in court. Nevertheless, consequent to his trial, the appellant was convicted of the offence of gross indecency, and was sentenced to ten (10) years imprisonment on each count. According to the trial court, the prosecution managed to prove a lesser offence of gross indecency which is cognate to gross sexual abuse, which the prosecution failed to prove.

Being aggrieved, the appellant lodged DC Criminal Appeal No. 19 of 2018 to the High Court. Regrettably however, his attempt was not

successful; the appeal was dismissed on 5th June, 2018. Still dissatisfied, he filed this appeal challenging the decision of the High Court.

In that pursuit, on 21st December, 2018, the appellant's legal counsel, at the time, Mr. Kamaliza Kamoga Kayaga, lodged a memorandum of appeal under rule 72 (1) and (2) of the Tanzania Court of Appeal Rules 2009, containing 5 grounds of appeal. In addition, two days later, on 24th December, 2018, the appellant himself lodged another memorandum of appeal containing nine (9) grounds of appeal. However, at the hearing, the appellant abandoned the first memorandum which had been lodged by his advocate, and preferred to adopt his own.

Although all grounds in his memorandum were argued before us, for reasons that will become obvious at the end of this judgment, we propose to start our deliberations by considering the second ground of appeal, which is to the following effect:

> *"2. That the first appellate court erred when it sustained the appellant's conviction despite the variance between the dates of the commission of the offences as it appears in the particulars of offence in the charge sheet against that mentioned by the prosecution witnesses in their respective testimonies, hence affected the appellant's defence and the prosecution case."*

At the hearing of this appeal, the appellant appeared in person, whereas the respondent Republic, enjoyed the services of Ms. Lucy Enock Kyusa, teaming up with Ms. Alice Thomas, both learned State Attorneys.

The appellant being a layman, when asked to expound on his grounds of appeal orally, he preferred the learned State Attorneys to react to them first, such that he would rejoin, would such a need arise.

Counsel who took the floor to address the Court on the grounds of appeal, was Ms. Kyusa. In doing so, she grouped the grounds into two. The first, third and ninth grounds were argued together and the remaining grounds two, four, five, six, seven and eight, were also argued as one. However, in this judgment, we will only consider her arguments that addressed the complaint raised in the second ground of appeal, singled out above.

As for the fact that the first victim was allegedly abused on 25th March 2017, while that day was a Saturday, Ms. Kyusa conceded, but submitted that sometimes children go to school on Saturdays. As for the fact that none of the six (6) prosecution witnesses, mentioned the offences to have been committed on 25th March 2017 and 31st March 2017, Ms. Kyusa's response was that, the offences were committed four months before the actual trial, so PW3 and PW4 being children, might have forgotten the actual dates on which they were abused.

Based on the above and other submissions made, she implored us to enhance the sentence of ten (10) years imprisonment in respect of gross indecency, to a sentence of not less than twenty (20) years imprisonment for grave sexual abuse in terms of section 138C (2) (b) of the Penal Code, of which he was charged with. Her reasoning was that the two courts below misapplied the law, for gross indecency is not cognate to grave sexual abuse, because the two offences have different ingredients. Be that as it may, Ms. Kyusa's central point was that the charge of grave sexual abuse was proved to the hilt.

In rejoinder, the appellant beseeched us to thoroughly scrutinize his memorandum, allow his appeal and set him free from prison.

In the context of the second ground of appeal quoted above, the issue for our determination, is whether the dates on which the alleged offences were committed were proved, and if not, whether the charge against the appellant was proved to the required standard.

To that end, we propose first to capture the substance of the charge before we get any further. The charge sheet is to the effect that:

"CHARGE SHEET
1ST COUNT
STATEMENT OF OFFENCE

GRAVE SEXUAL ABUSE; Contrary to section 138 (c) (1) (a) and 2 (b) of the Pena Code (CAP. 16 R.E. 2002).

PARTICULARS OF OFFENCE

*MARK SAID @ MBEGA, on **25th day of March 2017** during evening hours at Isike Primary School within Tabora Municipality, for sexual gratification, **did tell** the first victim, a 9 (nine) years old girl to hold his penis.*

2ND COUNT

STATEMENT OF OFFENCE

GRAVE SEXUAL ABUSE; Contrary to section 138 (c) (1) (a) and (2) (b) of the Pena Code (CAP. 16 R.E. 2002).

PARTICULARS OF OFFENCE

*MARK SAID @ MBEGA, on **31st day of March 2017** during evening hours at Isike Primary School within Tabora Municipality, for sexual gratification, **did undress** the second victim, a 9 (nine) years old girl **and started caressing her buttocks**.*

Dated 12th day of April 2017

Sgd
Upendo Malulu
STATE ATTORNEY."

Our deliberations in this ground, will be guided by the principle in criminal law provided under section 3 (2) (a) of the Evidence Act [Cap 6 R.E. 2022] (the Evidence Act), which provides that:

"(2) A fact is said to be proved when-
(a) in criminal matters, except where any statute or other law provides otherwise, the court is satisfied by

the prosecution beyond reasonable doubt that the fact exists."

The cardinal principle in the above section is that the standard of proof in criminal cases is beyond reasonable doubt. The principle has been pronounced as part of our law by this Court on many occasions, including in; **Pascal Yoya Maganga v. R,** Criminal Appeal No. 248 of 2017 and **Mohamed Haruna Mtupeni and Another v. R,** Criminal Appeal No. 25 of 2007 (both unreported).

With that principle in mind, we will then proceed to consider the charge as quoted above *viz-a-vis* the evidence relevant to the issue we earlier framed. The issue framed seeks to show if the prosecution proved that indeed the offences were committed on 25th March, 2017 and 31st March, 2017, and if not, what is the resultant effect to the charge.

In this matter, there is no dispute, and Ms. Kyusa conceded that none of the prosecution witnesses made any reference to or mentioned either 25th March, 2017 or 31st March, 2017, leave alone proving that any offence was committed by the appellant on any of the dates.

Our in-depth study of the record of appeal in this case, reveals that, the prosecution led evidence in respect of some events, except for the dates on which the offences were alleged to have been committed. For instance, **first,** PW3, the first victim at page 27 of the record of appeal,

was asked whether she was the one who reported the appellant on 4th April 2017. **Second,** PW4, the second victim at page 31 of the record of appeal, was asked between which times was the appellant coming to their school. **Third**, PW2 Paulo Adonia Songoro, a head teacher at Isike Primary School, was asked as to which date did he receive information about the appellant and when he was arrested. Similarly, other witnesses like PW5 and PW6 were asked dates on which some other miscellaneous and uncontested events took place, but overall, none of the six (6) prosecution witnesses was asked any question to affirm the dates indicated in the charge sheet as the dates on which the offences were committed.

So, with respect to Ms. Kyusa, her contention that PW3 and PW4 might have failed to remember the respective dates on which they were abused because of long lapse of time, not supported by the record. She would have been right, had any of the witnesses been led into giving evidence about any of the two dates and replied that she forgot the date on which the offence was committed, which unfortunately, was not the case in this matter.

Our thorough scrutiny of the evidence in this case, indicates that the prosecution did not lead any evidence to prove that indeed any offence was committed on 25th March 2017 or 31st March 2017 or on both dates. It is also on record at page 33 of the record of appeal, where PW5, Juliana

Masatu, a teacher at Isike Primary School testified that the school opens only on Monday to Friday, which position contradicts the charge which shows that the offence in the first count was committed on 25th March 2017, a day which turned out to be a Saturday. In the circumstances, we are satisfied that the dates mentioned in the charge sheet as having been the dates on which the appellant was alleged to have committed the offences, were not proved at all.

We will now briefly, highlight on the consequences that follow where the prosecution fails to prove the date it mentions in the charge sheet as being the date on which an offence is alleged to have been committed. In the case of **Salum Rashid Chitende v. R,** Criminal Appeal No. 204 of 2015 (unreported), this Court, in uncertain terms stated:

> *"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."*
>
> [Emphasis Added]

Other cases insisting that once a date is mentioned in the charge, it has to receive corresponding evidence from the prosecution witnesses include; **Abel Masikiti v. R,** Criminal Appeal No. 24 of 2015; **Ryoba Mariba @ Mungare v. R,** Criminal Appeal No. 74 of 2013; and **Justine**

Mteule v. R, Criminal Appeal No. 482 of 2016 (all unreported). In **Abel Masikiti** (supra), as to the consequences of failure by the prosecution to prove a date, the Court stated:

> *"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."*
>
> [Emphasis Added]

In the matter before us, the issue is not that there is variance or that there is uncertainty between the dates in the charge and the dates mentioned by witnesses. In this matter, there is simply nothing in the prosecution evidence on the date that the charged offences were allegedly committed. That, in our firm view, makes the situation worse than variance of the dates or their uncertainty referred to in **Abel Masikiti** (supra).

In the circumstances and based on the reasons we have endeavoured to discuss in this judgment, we are settled in our mind, that indeed the charge was not proved against the appellant beyond reasonable doubt following failure by the prosecution to prove the dates on which the offences were allegedly committed. We are accordingly, unable to

entertain Ms. Kyusa's prayer to enhance the sentence of ten (10) years to at least twenty (20) years imprisonment.

In the circumstances, the second ground of appeal is hereby allowed, and since allowing that ground has the net effect of disposing of the entire appeal, we find no reason to consider other grounds of appeal, in which case we allow the whole appeal.

In the event, we quash the conviction of the appellant and set aside the sentence of ten (10) years imprisonment imposed on him. We further order the appellant's immediate release from prison, unless he is held for other lawful cause.

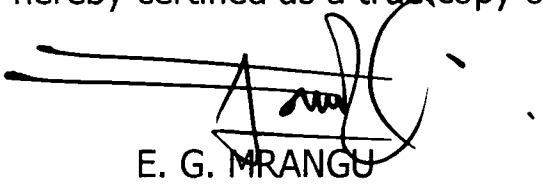
DATED at **TABORA**, this 3rd day of November, 2022.

W. B. KOROSSO
JUSTICE OF APPEAL

Z. N. GALEBA
JUSTICE OF APPEAL

A. M. MWAMPASHI
JUSTICE OF APPEAL

The Judgment delivered this 4th day of November, 2022 in the presence of the appellant in person and Ms. Lucy Kyusa, learned counsel for the Respondent, is hereby certified as a true copy of the original.



E. G. MRANGU
SENIOR DEPUTY REGISTRAR
COURT OF APPEAL