

**IN THE COURT OF APPEAL OF TANZANIA
AT MOSHI**

(CORAM: MUGASHA, J.A., MWANDAMBO, J.A. And MAIGE, J.A.)

CRIMINAL APPEAL NO. 247 OF 2020

GODLISTEN RAYMOND MOSHA @ GIBSONAPPELLANT

VERSUS

THE REPUBLICRESPONDENT

**(Appeal from the judgment of the Resident Magistrate's Court of Moshi
at Moshi)**

(Maziku, SRM. Ext.Juris.)

dated the 22nd day of May, 2020

in

Criminal Appeal No. 16 of 2019

JUDGMENT OF THE COURT

25th & 29th September, 2023

MWANDAMBO, J.A.:

The District Court of Siha at Siha, convicted Godlisten Raymond Mosha @ Gibson, the appellant of statutory rape involving a little girl aged four years. The conviction earned the appellant a mandatory life imprisonment sentence. After the unsuccessful request to assail the conviction before the Resident Magistrate's Court of Moshi Extended Jurisdiction the appellant is now before this Court on a second appeal.

The charge sheet to which the appellant pleaded not guilty resulting into his conviction alleged that, on 9 April, 2019 at a place called Lomakaa within Siha District, Kilimanjaro Region, the appellant had unlawful sexual intercourse with a girl aged four years. Following a plea of not guilty, the prosecution produced four witnesses to prove the offence. The witnesses were, Naomi Charles (PW1), the mother of the victim, Sungi John (PW2), a clinical officer from Siha Hospital, the victim (PW3) and WP 6812 DC Jane (PW4) a Police Officer. According to PW1, who stated to be a resident of Fuka at 10:00 am she was at the material time a neighbor of the appellant to whom the victim went to play on the material date at about 10:00 am. She told the trial court that she saw the appellant in the garden. Later in the evening, PW2 returned home from the appellant's place and, as she was bathing her, PW2 started complaining and upon further questioning, the victim revealed that the appellant had hurt her with his "urine". Upon examination, PW1 saw blood oozing from the victim's vagina. Thereafter, PW2 took her child to a hospital after obtaining PF3 from the police. PW3 whose evidence was taken without an oath told the trial court that she knew the appellant as Gibson who put his "mkojo" (penis) into her vagina and told her not to

tell anyone about what had done before returning home PW4 was a police officer who is recorded to have received a call from her boss; OC-CID in the afternoon with instructions to accompany PW1 and the victim to hospital. Afterwards, PW4 recorded a cautioned statement from the appellant which was admitted in evidence as exhibit P2. Earlier on, PW2 who had examined the victim had it that he attended PW2 in the evening accompanied by a police officer carrying a PF3 with a complaint of rape, upon examination on the victim's private parts, she found bruises on her vagina and some unusual discharge which turned out to be male sperms. In his opinion, existence of the bruises on the victim's vaginal walls suggested insertion of unusual object particularly a male sexual organ. PW2 tendered the PF3 which was admitted as exhibit P1.

In his defence, the appellant distanced himself from the scene of crime as he was away from home in Machame from 07:30 am till 08:00 pm having spent the whole day in a shamba at a distance of 6 kilometers. According to him, he was shocked to be confronted by police officers at 09:00 pm who led him into a motor vehicle and taken to a police station where he was forced to record a statement the following day around 11:00 a.m after being tortured. The trial court believed the

prosecution evidence being satisfied that it proved the offence against the appellant on the standard required in criminal cases. The first appellant court presided over by a B. T. Maziku, Senior Magistrate with extended jurisdiction, concurred with the trial court in its finding result which into the appellant's conviction. It dismissed the appeal, hence this instant appeal.

Before us, the appellant has preferred a memorandum of appeal comprising nine grounds to indicate his innocence. While some of the grounds are complaints on procedural irregularities others fit well into elaborations on specific complaints on evidential aspects aimed at faulting the two courts below for concurring in their findings of guilt amidst weak evidence which did not prove the charge against him on the required standard.

At the appellant appeared in person to prosecute his appeal, unrepresented at the hearing at which, the respondent Republic was represented by Ms. Revina Prosper Tibilengwa, learned Principal State Attorney who learned up with Ms. Eliainenyi Njiro, learned Senior State Attorney. Apparently, the appellant had lodged a statement of written arguments in support of the two grounds in the supplementary

memorandum of appeal which he invited the court to consider and allow the appeal. Initially, Ms. Tibilengwa had expressed the respondent's Republic's stance to resist the appeal. Midway, she gave in yielding to the appellant's complaint in ground one in the supplementary memorandum of appeal.

The substance of the complaint in ground one in the supplementary is that the appellant's conviction was wrongful by reason of variance between the charge and evidence on record. Ms. Tibilengwa conceded to the appellant's submission that while the charge sheet alleged that the charged offence was committed at Lomakaa area, PW1, the victim's mother testified that it was at Fuka. It was submitted too that, as the prosecution did not seek to amend the charge sheet to reflect the correct place where the offence was committed, the evidence on record did not prove the charge as required on the authority of the Court's decision in **Godfrey Simon v. Republic**, Criminal Appeal No. 296 of 2018 (unreported).

Ms. Tibilengwa could not agree more in her submission that, the variance as to the place where the offence was committed was fatal to the prosecution case attracting an order allowing the appeal. We need

not be detained more in view of the settled law on the effect of the variance between the charge and evidence on record. For instance, in **Abel Maskiti v. Republic** Criminal Appeal No. 24 of 2015 (unreported), the Court stated that, unamended charge involving a variance or uncertainty as to dates is tantamount to such charge remaining unproven entitling the accused person to an acquittal. See also; **Godfrey Simon v. Republic** (supra) cited to us by the appellant. The position in the instant appeal is, as agreed by Ms. Tibilengwa such that the evidence of PW1; the mother of the victim who was a material witness with regard to the place where the offence was allegedly committed; Lomakaa area did not support the charge. This is so because, PW1's evidence who claimed to have been the appellant's neighbor mentioned Fuka as her residence. Under the circumstances, it could not have been practically possible for the appellant was a resident at Lomakaa at the time to have committed the offence at Fuka where PW1 resided. Therefore, guided by the decisions we have referred to, we sustain ground one in the supplementary memorandum conceded by Ms. Tibilengwa and hold that in view of the variance, the charge remained unproved. The appellant was entitled to an acquittal.

That said, we allow the appeal on the basis of ground one in the supplementary memorandum of appeal which is sufficient to dispose the whole appeal. Having so held, we quash conviction, set aside the sentence and order the appellant's release forthwith if he is not held for any other lawful cause.

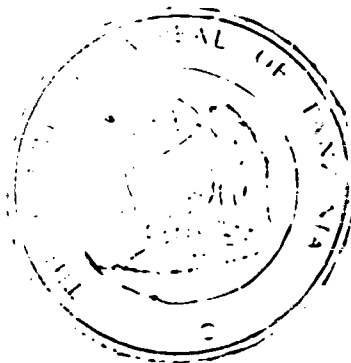
DATED at MOSHI this 28th day of September, 2023.

S.E.A. MUGASHA
JUSTICE OF APPEAL

L. J. S. MWANDAMBO
JUSTICE OF APPEAL

I.J. MAIGE
JUSTICE OF APPEAL

The Judgment delivered this 29th day of September, 2023 in the presence of the Appellant in person and Ms. Bertina Tarimo, learned State Attorney for the Respondent/Republic is hereby certified as a true copy of the original.




D.R. LYIMO
DEPUTY REGISTRAR
COURT OF APPEAL