

**IN THE COURT OF APPEAL OF TANZANIA**

**AT MOSHI**

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

**CRIMINAL APPEAL NO. 285 OF 2020**

**SALIM ABDALLAH MAGANGA ..... APPELLANT**

**VERSUS**

**THE REPUBLIC ..... RESPONDENT**

**(Appeal from the judgment of the High Court of Tanzania at Moshi)  
(Mutungi, J.)**

**dated the 24<sup>th</sup> day of March, 2020**

**in**

**Criminal Appeal No. 51 of 2019**

**\*\*\*\*\***

**JUDGMENT OF THE COURT**

26<sup>th</sup> September & 2<sup>nd</sup> October, 2023

**MAIGE, J.A.:**

At the District Court of Moshi (the trial court), the appellant was charged with and convicted of the offence of assault causing actual bodily harm contrary to section 241 of the Penal Code and rape contrary to sections 130(2)(a) and 131(1) of the Penal Code. He was sentenced to one year imprisonment in respect of the first offence and thirty years in respect of the second. He appealed to the High Court of Tanzania sitting at Moshi (the High Court) but Mutungi, J dismissed the appeal. He has now appealed

to the Court. His appeal is however, confined to the conviction and sentence in relation to the offence of rape.

The particulars of the offence were that on 4<sup>th</sup> day of June, 2017 at Uwanja wa Ndege- Veta area within the municipality of Moshi in the Kilimanjaro Region, the appellant did have carnal knowledge with the victim who was by then a female of 20 years old.

The prosecution relied on three witnesses to prove the case including the victim of the offence who testified as PW1. Others were Benedict George Macha, the owner of a motor vehicle with registration number T. 744 ADJ which was allegedly involved in the commission of the offence (PW2); Abdi Abdu Masawe (PW3), the employer of the victim; and Fortunatus Msafiri (PW4), the doctor who examined the victim.

PW1 testified that, she was at the material time working at PW3's hotel located at Kibo tower within the municipality of Moshi. In the evening when she retired from work, she caught a town bus popularly known as "daladala" to her home residence at Soweto area within the Municipality of Moshi. As she was not familiar with the particular bus stop near her residence, she contacted a motorcycle rider whom she knew who in turn directed the bus conductor the place where she would drop. After all the passengers had disembarked, she found herself alone in the bus. To her surprise, the bus

parked at a strip street (uchochoro) and the lights therein put off. When she asked what was up, the appellant and the conductor pulled her to the back of the seat and raped her in succession. Afterwards, the appellant drove the bus and dropped her somewhere near the hotel she was working at. At the hotel, she narrated to her boss (PW3) as to what happened to her. The matter was reported to the police and PW1 was taken to hospital for examination. PW4 examined her and established that there was no element of forced penetration.

In his defence, the appellant completely denied commission of the offence.

The trial court having examined the evidence, was fully satisfied that, the case was proved beyond reasonable doubt and, as shown above, convicted the appellant with the offence and sentenced him accordingly. The High Court on appeal concurred with the trial court and thus the present appeal.

In the memorandum of appeal, the appellant has raised eight (8) grounds of appeal. He has added four (4) more grounds in his supplementary memorandum of appeal consisting of four (4) grounds. The complaint in the third ground of appeal which in our view is sufficient to dispose of the appeal is that; the charge was at variance with the evidence. Ms. Revina Tibilengwa,

learned Principal State Attorney who together with Ms. Eliainenyi Njiro, Senior State Attorney, appeared for the respondent, informed the Court right from the outset that, the respondent was supporting the appeal on the basis of the third ground of appeal. The appellant on his side had nothing to say other than fully adopting his two versions of memoranda of appeal.

The learned Principal State Attorney submitted that the charge which is the foundation of the case was fatally defective for being at variance with the evidence on the record. She assigned two reasons to support her view. **First**, while the appellant was charged with the offence of rape, the evidence of PW1 suggests that, she was raped by the appellant and the bus conductor in succession. Such evidence, she submitted, was relevant in proving the offence of gang rape under 131 A (1) of the Penal Code and not the offence in question. She submitted, therefore, the trial was unfair as the appellant was prevented from appreciating the nature and implications of the offence he was facing.

**Second**, Ms. Tibilengwa argued that, while the charge sheet alleged that the offence was committed at Uwanja wa Ndege area, the evidence was such that it was committed at a strip street which the victim could not identify. In the premises, she submitted, the charge was not proved beyond reasonable doubt. She prayed thus that, the appeal be allowed.

We have closely followed the submissions by the learned Principal State Attorney and carefully examined the record of appeal in line with the appellant's complaint in the third ground of appeal. With respect, we are in agreement with her that, the charge which is the foundation of the case was materially at variance with the evidence adduced by the prosecution. As the record shows, the offence laid down in the charge is not the same as that which is portrayed in the evidence. As we said, the appellant was charged with the offence of rape contrary to section 130 (2) (a) and 131(1) of the Penal Code. Conversely, the victim's evidence suggests that she was raped by the appellant and a bus conductor not a party to this appeal. In effect, the evidence points out to an offence of gang rape under section 131A (1) of the Penal Code. This is a separate offence having its own ingredients and punishment different from the offence at issue. Despite that, the trial court continued with the trial and ultimately convicted the appellant without the charge being amended. Obviously, therefore, the omission was prejudicial to the appellant as he was rendered unable to know the nature and seriousness of the offence he was facing. In a similar situation we held so in **Marekano Ramadhani v. R**, Criminal Appeal No. 201 of 2013 (unreported).

Still on same point, the charge asserts that the offence was committed at a place known as Uwanja wa Ndege. Quite apart, in her evidence, PW1 told the trial court that the offence was committed at *kichochoroni*. She was further clear in her evidence that, she could not establish where such *kichocho* was, as she was a stranger in the town. In effect, therefore, the piece of evidence proving an incident which occurred at Uwanja wa Ndege, could not be relevant in proving an incident which occurred at a place called "Kichocho". The place of commission of the offence being crucial in establishing the offence, we agree with the learned Principal State Attorney that, the variance in that respect between the charge and evidence renders the charge not proved beyond reasonable doubt. This has been the position of the Court in many of its decisions. For instance, in the case of **Noel Gurth a.k.a ii Bainth & Another v. Republic**, Criminal Appeal No. 339 of 2013 (unreported) the Court observed:

*" where there is a variation in the place where the alleged armed robbery took place, then the charge must be amended forthwith. If no amendment is effected, the charge will remain unproved and the accused shall be entitled to an acquittal as a matter of right. Short of that a failure of justice will occur."*

See also the case of **Issa Mwanjiku @ White v. Republic**, Criminal Appeal No. 175 of 2018 (unreported).

In the final result and for the foregoing reasons, we find the appeal merited and allow it. Accordingly we quash the conviction and set aside the appellant's sentence. We order the immediate release of the appellant from prison unless otherwise lawfully held.

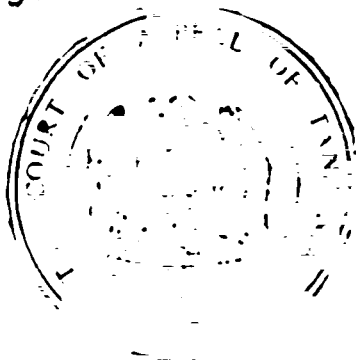
**DATED at MOSHI** this 29<sup>th</sup> day of September, 2023.

S. E. A. MUGASHA  
**JUSTICE OF APPEAL**

L. J. S. MWANDAMBO  
**JUSTICE OF APPEAL**

I. J. MAIGE  
**JUSTICE OF APPEAL**

The Judgment delivered this 2<sup>nd</sup> day of October, 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**