IN THE COURT OF APPEAL OF TANZANIA

AT IRINGA

(CORAM: LILA, J.A., KITUSI, J.A. And MASHAKA, J.A.)

CRIMINAL APPEAL NO. 451 OF 2021

CHARLES MWINAMI ..... APPELLANT

VERSUS

THE REPUBLIC..... RESPONDENT

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

(Mlyambina, J.)

dated at 30th day of July 2021
in
Criminal Appeal No. 34 of 2020
.....

JUDGMENT OF THE COURT

15th & 22nd March, 2024

LILA, J.A:

The appellant's arraignment and incarceration in prison are purely out of the efforts by Tabia Mkondola (PW4), a Village Executive Officer, instead of the victim's mother one Mariam Mwinami (PW1) who had exhibited a behaviour proving her to be an irresponsible mother. Acting on rumours that the appellant had the bad habit of having sexual intercourse with the victim (PW2) who was his granddaughter aged 5 years, PW4, at first, summoned PW1 and informed her so but no action was taken. Showing that she was such a responsible leader, she could not

hold it up when she again received such rumours. She arrested both the appellant and PW1 and reported the matter to the police, although the police initiated legal proceedings against the appellant only. The appellant was charged before the Resident Magistrates' Court of Njombe and was convicted of the offence of incest by male contrary to section 158(1) of the Penal Code. He was sentenced to serve thirty (30) years imprisonment. His first appeal to the High Court had disastrous consequences to him as it did not only fail, but also resulted in the sentence being enhanced to life imprisonment. This is his second appeal.

As it is very relevant in the determination of this appeal, we find it apposite to recite the particulars of the charge, disguising the name of the victim by referring to her as the victim or PW1. It stated thus: -

> *"Charles Mwinami on the 2nd day of January, 2020 at Itunduma Village within the District and Region of Njombe, had carnal knowledge of one "the victim", who is to his knowledge his granddaughter."*

It was common ground that the victim was staying with the appellant who was her grandfather. Following the appellant denying commission of the offence, four witnesses were paraded by the prosecution in a bid to prove the charge who comprised of Mariam Mwinami (PW1), the victim's mother, the victim (PW2), Revina Sundi

Mbogoma (PW3), the doctor who examined PW2 and Tabia Mkondola (PW4), the Village Executive Officer (VEO). These witnesses were very brief in their testimonies. The substance of PW1's evidence was that the victim was her daughter born on 28/1/2015 and was staying with her biological father, the appellant. She admitted not taking legal action against the appellant, her father, when on 30/12/2019 she was informed by her sister-in-law that the appellant was having carnal knowledge of the victim. That, later on, she was summoned by the hamlet chairman and was put in the lockup and joined with her father, the appellant. The victim was taken by her father's relatives.

The victim who testified as PW2 stated that, the appellant who was her grandfather used to sleep in the same bed with her. That, the appellant had in two occasions inserted his "kidudu" (penis) in her vagina during which she felt pains but had nobody to tell as her mother did not take any action.

PW4's testimony was that, on 2/1/2020 she was informed that, there were rumours from the citizens that, there was suspicion that the appellant was having canal knowledge of his granddaughter (the victim). She made a follow up to the victim's mother but in vain. Same information reached her on 9/1/2020, which incited her to make follow-up again. She

called the victim to her office and the headteacher of Itunduma Primary School and interrogated the victim. The victim told PW4 that, she was sleeping with her grandfather in the same bed and that the appellant was carnally knowing her several times by inserting his penis into her vagina. The victim told PW4 that she had informed her mother, but she could not take any action. PW4 decided to take the victim to Mtwango Dispensary where the medical doctor (PW3) confirmed that the victim was raped. PW4 reported the matter to the Social Welfare Officer and later to the police following which the appellant was arrested by the people's militia and was taken to the police station.

The gist of PW3's evidence was that on 9/1 /2020 while at Mtwango hospital, PW4 arrived accompanied with the victim and asked her to examine the victim because she was raped. Her examination revealed that the victim was carnally known because her hymen was not intact and there were bruises in her vagina and there were remains of seamen. She concluded that the cause of the injury was penetration. She also opined that the hymen may be removed by a blunt object like penis.

The appellant admitted staying with PW2 at his home and was helping him in his shamba work. As regards the commission of the

offence, he said PW4 went to him purporting to help the victim by buying her clothes. That he was later arrested and taken to the police station.

At the conclusion of the trial, the trial court was satisfied that, the prosecution had proved the charge beyond reasonable doubt. He was therefore convicted as charged. The evidence by PW2 was found to have been corroborated by the evidence of PW3, PW1, and PW4. As a result, as earlier stated, he was convicted and sentenced to 30 years which sentence was enhanced by the High Court on first appeal upon his appeal being unsuccessful. Enhancement of the sentence, was due to the victim of the offence being below 10 years old.

Still aggrieved, the appellant has preferred this appeal based on seven (7) grounds. Of all these grounds, like Ms. Pienzia Ireneus Nichombe, the learned State Attorney, who appeared for the respondent Republic and supported the appeal, we find ground three (3) decisive of this appeal. That ground may be paraphrased thus: -

> *"There was no evidence supporting the charge to warrant the appellant's conviction of the offence charged".*

Ms. Nichombe was first to address us after the appellant who appeared in person and unrepresented, had adopted his grounds of

appeal and urged us to allow his appeal. She was brief and focused on the point that although there were rumours that the appellant was committing the offence to the victim and the matter taken up by PW4, neither of the prosecution witnesses could substantiate when exactly the offence was committed. While making reference to the charge which specifically stated 2/1/2020 as the date the offence was committed, she insisted that all the prosecution witnesses were very casual in their testimonies as neither of them testified to establish that fact stated in the charge. She drew the Court's attention to section 132 of the Criminal Procedure Act (the CPA) which requires the charge to state the offence committed and the relevant provisions of the law contravened followed by particulars of the offence providing necessary particulars for the purpose of sufficiently informing the appellant the nature of the offence charged. To bolster her argument, she cited to us the case of **Francis Fabian @ Emmanuel**, Criminal Appeal No. 261 of 2021 (unreported). It was her strong view that after drawing up the charge with such particulars then the prosecution is duty bound to provide evidence establishing the facts as particularised in the charge. Taking cognizant of the fact that the victim was just 5 years then who could or could not remember the date, that was not expected of PW4 who acted on rumours and her mother (PW1), she wondered. Arguing further, she said even PW3 who examined

and allegedly found that the victim was penetrated and there were spermatozoa, the examination was done after seven days had lapsed from the date of the appellant was arrested and the victim taken by other relatives making her findings doubtful.

There was no rejoinder submission from the appellant other than reiterating his prayer that he be set at liberty.

We know the charge is the foundation of every criminal trial. As a matter of insistence, in **Hamisi Maliki Ngoda vs Republic**, Criminal Appeal No. 7 of 2017 (unreported) this Court with lucidity explained the importance of a charge thus: -

> *"We need to emphasize that it is important for a charge to indicate a specific provision of the law that is contravened. This is so because the charge sheet lays the foundation of the trial. (see **Zarau Issa v. Republic**, Criminal Appeal No. 159 of 2010 (unreported). It is also important to enable the accused to understand the nature of the offence he is alleged to commit before he is called upon to make his plea and be in a position to prepare an informed defence. (See **Simba Nyangura's and Zarau Issa**'s cases (supra)."*
>
> *[see also **Francis Fabian @ Emmanuel vs Republic** (supra)]*

Having carefully scanned and scrutinized the entire evidence on record, we are, with respect, in full agreement with the learned State Attorney. We take it to be settled law that it is the cardinal principle of law in criminal trials that onus is always on the prosecution to prove the charge. The burden of proof never shifts to the accused and the standard of proof is always beyond reasonable doubt. (See, for instance, **Mohamed Said Mtula v. R,** (1995) T.L.R.3.)

In this case, the prosecution was required to prove that the offence was committed as alleged in the charge. We see no such evidence coming from the prosecution as rightly argued by the learned State Attorney. Neither of the prosecution witnesses attempted to explain when the offence was committed. All that is on record is the dates PW4 heard of the rumors and took legal action. Even the medical examination and the resultant findings are not reliable the victim having been examined seven days after the appellant's arrest. In the absence of a clear date when the victim was allegedly penetrated, the findings of PW4 becomes unreliable. In the circumstances, as asserted by the learned State Attorney, there was no evidence on which the appellant's conviction could validly be grounded. Apparently, the case against the appellant was not proved beyond reasonable doubt. It was based on unfounded rumors and

suspicion. Trite law is, suspicion, however grave, is not a basis for a conviction in a criminal trial. The appellant ought to have been given the benefit of doubt and acquitted.

All said, we allow the appellant's appeal. Conviction is hereby quashed and sentence set aside. The appellant be released from prison forthwith if not lawfully held for some other cause.

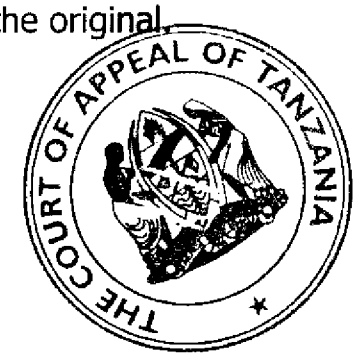
DATED at **IRINGA** this 21st day of March, 2024.

S. A. LILA
JUSTICE OF APPEAL

I. P. KITUSI
JUSTICE OF APPEAL

L. L. MASHAKA
JUSTICE OF APPEAL

The Judgment delivered this 22nd day of March, 2024 in the presence of the appellant in person and Ms. Sophia Manjoti, learned State Attorney for the Respondent/Republic is hereby certified as a true copy of the original.



J. J. KAMALA
DEPUTY REGISTRAR
COURT OF APPEAL