

**IN THE HIGH COURT OF TANZANIA**  
**(DAR ES SALAAM DISTRICT REGISTRY)**  
**AT DAR ES SALAAM**

**CRIMINAL APPEAL NO. 255 OF 2017**

*(an appeal from the judgment of Kilombero District Court delivered by Hon.  
Lyon RM on 2<sup>nd</sup> August, 2017 in Criminal Case No. 147 of 2016)*

**1. THOMAS CHANGULA ..... 1<sup>ST</sup> APPELLANT**

**2. ALEX ANDREA MSELEMA ..... 2<sup>ND</sup> APPELLANT**

**VERSUS**

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

**JUDGMENT**

08/06/2018 & 02/07/2018

**BANZI, J.:**

In the District Court of Kilombero at Ifakara, the appellants Thomas Changula and Alex Andrea Mselema (hereinafter referred as 1<sup>st</sup> and 2<sup>nd</sup> appellant respectively) together with Allan Kopa who was not party to this appeal, were charged and convicted with the offence of Gang Rape contrary to section 131A (1) and (2) of the Penal Code [Cap.16 R.E. 2002]. At the end of trial, the 1<sup>st</sup> and 2<sup>nd</sup> appellant were sentenced to thirty (30) years

imprisonment while Allan Kopa was sentenced to suffer twelve (12) strokes as corporal punishment for the reason of being a minor.

Dissatisfied with that decision, the 1<sup>st</sup> and 2<sup>nd</sup> appellant through the service of Advocate Edwin Enosy filed Petition of Appeal containing five grounds but at the hearing the fifth ground was withdrawn and remained with the following;

- 1. That, the trial Magistrate erred in law to convict and sentence the appellants basing on the fatally defective charge.*
- 2. That, the trial Magistrate erred in law and fact by convicting the appellants basing on evidence which did not tally to the offence charged.*
- 3. That, the trial Magistrate erred in law and fact in convicting the appellants without sufficient evidence to ground conviction beyond reasonable doubt.*
- 4. That, the trial Magistrate erred in law and fact to peg conviction without proper identification of the appellants.*

Briefly the background facts of this matter are that, in the evening of 25<sup>th</sup> May, 2016 Sikuzan Jasto Mwajira (PW3) went to the well to fetch water. Upon arrival, the 1<sup>st</sup> appellant came and told her that she is called by her friend namely Julietha. They went back to his house and when approaching she called her friend's name and someone responded. Suddenly, the 1<sup>st</sup>

appellant pushed her inside the room where she found Allan Kopa and at the same time the 2<sup>nd</sup> appellant appeared and closed the door. They stripped her naked and started to rape her one after another. She tried to rise alarm but no one responded. She felt pain and started bleeding. After they finished their desire they threw her out.

Upon returning home, she told her father Jasto Mwajira (PW1) and her sibling one Anna Maibuka (PW4). They reported the matter to the police whereby she was given PF3 and went to hospital. Doctor John Mdamahenda (PW5) examined her and found bruises on her genitals. He tendered PF3 which was admitted as exhibit P1.

In their sworn defence, both appellants neither denied nor admitted to have committed the offence. The 1<sup>st</sup> appellant claimed to be arrested around 1:00pm on the following day of the alleged incident while asleep at their home. On his part 2<sup>nd</sup> appellant claimed to be arrested on the very night of the incident around 1:00pm. They both claimed to be tortured at police station so that they admit the alleged offence.

At the hearing of this appeal, both appellants were Emily Laus the learned Advocate, whereas the respondent Kufuor was in the service of Mr. Bryson Ngidos, the learned State Attorney.

Arguing in support of the first ground, Mr. Laus submitted that, the charge sheet upon which the appellants were convicted was fatally defective for non-citation appropriate provision of the Penal Code. He further submitted that, the prosecutions cited section 131A(1)(2) alone leaving behind section 130(2)(e) which contains the elements of offence. He therefore contended that, the appellants failed to defend themselves properly due to that omission. He cited the case of **Abdallah Ally v Republic**, Criminal Appeal No.253 of 2013 CAT (unreported) to support his argument.

In regards to the second ground, Mr. Laus submitted that, there is variance between charge and evidence. The charge shows that the victim was of the age of 17 when the incident occurred. In the evidence, PW4 stated that the victim was 18 years old. He further submitted that, on the issue of time, charge sheet shows that the incident occurred at or about 1800 hours whereas PW1 said that the victim was raped at night and on the other hand PW4 mentioned 2000 hours. He argued that, there is no anv

prosecution witness who stated the exact time of the offence to supported the charge. To cement his submission, he referred the case of **Salum Rashid Chitende v Republic**, Criminal Appeal No. 204 of 2015.

The learned Advocate submitted on ground number four before he came to conclude his submission on ground number 3. Mr. Laus argued that, the appellants were not properly identified. All prosecution witnesses save for victim were not are at the *locus in quo* and hence their evidence is hearsay. He further argued that, PW3 also failed to state how she identified the appellants. He invited the court to refer the case of **Godlisten Raymond & another v Republic**, Criminal Appeal No. 363 of 2014 CAT (unreported) where the Court of Appeal emphasized on the importance of describing the culprits on the issue of identification. He also referred the case of **Issa Ngwali v Republic**, Criminal Appeal No. 215 of 2005 CAT (unreported).

Finally, Mr. Laus submitted on the inconsistencies on the prosecution evidence by referring his submission in respect of ground number 2 herein above. Therefore, his conclusion was that the prosecutions failed to prove their case beyond reasonable doubt hence he prayed this appeal be allowed

by quashing the conviction, setting aside the sentence and release both appellants.

In response, Mr. Ngidos, the learned State Attorney right away stated his stance that he opposed the appeal. He opted to argue ground number separately and the remaining grounds were argued jointly. According to him, the appellants were properly charged under section 131A(1) and (2) of the Penal Code [Cap.16 R.E. 2002] and the particulars of offence were very clear, hence the charge sheet was not defective. He further submitted that, in proving rape what is required is to prove penetration and lack of consent. The position is the same in gang rape save that in the latter there is additional element need be proved which is the role for each person in assisting/abetting the commission of offence. He referred the case of **Patrick Lazaro & another v Republic**, Criminal Appeal No. 229 of 2014 CAT (unreported). He further argued that, in the instant case PW3 explained clearly the role played by each appellant in the commission of offence, hence all three elements were proved.

Turning to the remaining grounds, Mr. Ngidos began his response on the issue of variance between charge and evidence in respect of time and age. According to him the discrepancies on time and age are very minor. He

further submitted that, the charge shows the offence was committed on or about 1800 hours which relates to evening as testified by PW3. He finally concluded that, the prosecution proved their case beyond reasonable doubt through the evidence of PW3 which is corroborated by the evidence of PW5 and exhibit P1 therefore he prayed for appeal be dismissed for lack of merit.

Mr. Ngidos also commented on the issue of sentence. He submitted that, the sentence meted against the appellants was illegal and contrary to section 131A(1) of the Penal Code.

In a short rejoinder Mr. Laus reiterated on the variance between charge and evidence and maintained that, there must be consistency between what has been stated in the charge and the evidence adduced in court. To him there is a difference between 1800 hours and 2000 hours, and hence this discrepancy in itself when not properly looked upon may result into miscarriage of justice to the appellants.

Having gone through grounds of appeal the court records and submissions by both learned counsels, it is my considered view that, grounds number two and three suffice to dispose of this appeal.

Starting with the second ground, I inclined to agree with the learned advocate for the appellants that, there is variance between charge and evidence. The charge shows that the offence was committed at or about 1800 hours. PW3 in her testimony just said in the evening, PW2 said the offence was committed around 1900 hours while PW1 said the offence was committed at night. Likewise, on the issue of age, the charge sheet indicated that PW3 was 17 years, but PW3 during her testimony she did not give any evidence to establish and prove her age. Her age is only appeared in the citation by the Magistrate before she gave her evidence. On the other hand, the sworn testimony of PW4 shows that PW3 was 18 years. The position of the law is very clear that, the prosecution has a duty to prove what has been stated in the charge sheet. In the case of **Mathias Samwel v Republic**, Criminal Appeal no. 271 of 2009 CAT (unreported) it was held that;

*"When a specific date, time and place is mentioned in the charge sheet, the prosecution is obliged to prove that offence was committed by the accused by giving cogent evidence and proof to that effect".*

The same position was stated in the case of **Salum Rashid Chitende v Republic**, Criminal Appeal No. 204 of 2015 CAT (unreported). In the case at hand there was no evidence adduced by the prosecution witnesses to

prove what has been stated in the charge. The discrepancies stated above create doubts on prosecution case and hence it cannot be said that offence was committed and proved as alleged on the charge sheet.

The position of the law is now settled that; the offence of gang rape is an aggravated specie of the offence of rape. In that regard the prosecution must first prove that the offence of rape in its various categories under section 130 has been committed. And secondly, in addition they must prove the role of each accused abetting or assisting in the commission of the offence. This position was set in the case of **Patrick Lazaro v Republic**, Criminal Appeal No. 229 of 2014 where it was held that;

*"It goes without saying that, like what pertains in the offence of rape under section 130 where prosecution must establish both lack of consent and penetration; lack of consent and penetration must similarly be proved in gang rape under section 131A. In gang rape, evidence must in addition prove the role of another person or other persons abetting or assisting in the commission of the rape".*

In the present case, the charge shows that the victim was 17 years, hence the relevant category of rape need be proved falls under section 130(2)(e) which requires the proof of age and penetration. Therefore, apart

from proving penetration and role of each appellant in the commission of offence, the prosecution ought to have proved the age of the victim as alleged in the charge. However, there was no such evidence to prove the age of the victim. In that regard, the prosecution failed to prove one among the required three elements of the offence.

Turning to ground number three, taking as a whole, the prosecution case relied on the evidence of PW3 the victim of the offence. However, the evidence of PW3 has contradictions in respect of the version of the story she testified before the court and that she narrated to her father PW1 soon after the incident. According to her testimony, the 1<sup>st</sup> appellant was the one who took her from the well to their house pretending that her friend was calling her. Upon arrival he pushed her inside where he found the first accused therein and then the 2<sup>nd</sup> appellant also entered and closed the door. But when she was cross examined by the 1<sup>st</sup> accused she stated that it was the 1<sup>st</sup> accused who told her she was called by her friend and that is when she agreed to go there.

On the other hand, the version of the story narrated to PW1 soon after the incident was that, the 2<sup>nd</sup> appellant was the one who took her from the well to his house. She wanted to run away but he managed to c

upon arrival she found the other two therein. The questions remain; was it 1<sup>st</sup> accused, 1<sup>st</sup> appellant or 2<sup>nd</sup> appellant who took her to the house; whose house was she referring to, was it the 1<sup>st</sup> accused, 1<sup>st</sup> appellant or 2<sup>nd</sup> appellant? If PW3 claims to know the appellants, then how possible she confused the 1<sup>st</sup> appellant with the 2<sup>nd</sup> appellant? All these questions remained unanswered and they cast strong doubt on PW3's evidence.

It is a settled principle that, when there are contradictions and inconsistencies on the prosecution evidence, it is the duty of the trial court to address and resolve them and conclude that if they are minor or they go to the root of the matter. This was set in the case of **Mohamed Said Matula v Republic** [1995] TLR 3. However, being the first appellate court, we are duty bound to make a proper evaluation of the entire evidence in order to satisfy on whether or not the conviction of the appellant was justified or right. Refer the case of **Prince Charles Junior v Republic**, Criminal Appeal No. 250 of 2014 CAT (unreported).

Having examined the evidence of PW3 it leaves a lot of unanswered questions which taking them as a whole they cast strong doubt on prosecution case. The contradictions and inconsistencies of PW3's testimony

were vital and they go to the root of the matter. It is my considered view that, the guilt of both appellants was not proved beyond reasonable doubt.

For that reasons, I allow the appeal of both appellants, quash their convictions and set aside their sentences. I order the immediate release of both appellants unless otherwise they are lawfully held.



**I.K. BANZI**  
**JUDGE**  
**02/07/2018**

Delivered this 2<sup>nd</sup> day of July, 2018 in the presence of Bryson Ngidos the learned State Attorney for the respondent and both appellants.



**I.K. BANZI**  
**JUDGE**  
**02/07/2018**

Right of appeal explained.



**I.K. BANZI**  
**JUDGE**  
**02/07/2018**