IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(DAR ES SALAAM DISTRICT REGISTRY)

AT DAR ES SALAAM

CRIMINAL APPEAL NO 175 OF 2018

(Originating from the Criminal Case No. 36 of 2016 from the District Court of Ilala at Samora)

BETWEEN

IBRAHIMU S/O SHARIFU.....APPELLANT

VERSUS

THE REPUBLIC .....RESPONDENT

JUDGEMENT

Date of last order:18/07/2019
Date of Judgment:17/10/2019

MLYAMBINA, J.

The above-named appellant was charged with rape *offence* ***c/s 130 (1) (2) and 131 (1) of Penal Code Cap 16 RE 2002***. Upon hearing, the appellant was found guilty by the Ilala District Court at Samora and was duly convicted and sentenced to serve thirty (30) years imprisonment. Being aggrieved, the appellant lodged this appeal on the following grounds:

1. That, the learned trial SRM grossly erred in law and fact by convicting the appellant based on a defective charge as the charge sheet did not disclose the specific section of law under which the appellant was charged with.
2. That, the learned trial SRM grossly erred in law and fact by convicting the appellant while relying on the untenable and discredited testimony of PW1 (victim) who barely stated to be raped on 26/12/2015 in the

morning which PW4 (Principal Clinical Officer) stated to receive the victim (PW1) on 29/12/2015, after the lapse of three (3) days.

3. That, the learned trial SRM erred in law and fact by convicting the appellant based on exhibit P2 (witness statements) admitted in court un-procedural.
4. That, the learned trial SRM grossly erred in law and fact by convicting the appellant, relied on merely implication assertions of PW1 (victim) PW4 (principal clinical officer) and exhibit P1 ([PF3) while the trial court failed to allow specimen sample/samples, semen's, spermatozoa, viscid flued, DNA test and sexual transmission infectious diseases for the comparison with findings filed on the PF3 (exhibit P1) by PW4 (principal clinical officer) to prove whether the appellant had committed the charged offence or not contrary to procedure of law.
5. That, the learned trial SRM grossly erred in law and fact by convicting the appellant relied on the discredited testimonies of family members PW1 (victim) and PW2 (victim's sister) while the prosecution side failed to prove the age of the victim (PW1) whether she was aged fifteen (15) years old or above as it failed to tender before the trial court any purported document including birth certificate or a medical sheet/shet contrary to procedure of law.
6. That, the learned trial SRM grossly erred in law and fact by convicting the appellant while erroneously believing that the appellant was the one who reaped the victim (PW1) while failure to determine that the prosecution case lacked cogent and corroborative evidence which linked the appellant with the charged offence.

7. That, the learned trial SRM grossly erred in law and fact by convicting the appellant while erroneously failure to address properly the appellant in terms of law in ruling of prima facie case contrary to procedure of law.
8. That, the learned trial SRM grossly erred in law and fact by convicting the appellant with a case that was not proved to the hit.

WHEREFORE: the appellant humbly prayed to this hon. court to allow his appeal, quash the conviction and set aside the sentence and leave him free at liberty.

At the hearing Noel Nkombe, Advocate merged the eight grounds of appeal into three: ***One,*** the offence was not proved beyond reasonable doubt against the appellant. ***Two,*** the trial RM erred in law and fact for not properly analyzing the evidence hence reaching to erroneous decision. ***Three***, the charge against the appellant was incurably defective.

As regards the third ground, Noel Nkombe told the Court that; it is a mandatory requirement of ***Section 132 of Criminal Procedure Act (R.E 2002)*** that a charge should contain a statement of a specific offence or offences with which the accused person is charged together with such particulars as may be necessary for giving reasonable information as to the nature of the offence charged. However, under the charge against the appellant the time of which the offence was committed was not stated in the charge which is an important particular information required to be stated in the charge sheet.

Secondly, failure for the charge to state that the purported carnal knowledge was unlawful is an omission which renders the charge sheet to be defective. To buttress such averment, Counsel Noel Nkombe cited the case of **Mawazo Makiwa v. R. Criminal Appeal No. 45 of 2013 page 5, The High Court of Tanzania at Dar es Salaam** the Court stated:

> *"....the failure to state, in the particulars of the offence, that the accused's carnal knowledge of the girl was unlawful, renders the charge defective."*

It is from that background Counsel Noel Nkombe submitted that the charge sheet against the appellant was defective.

Regarding the second ground of appeal, the offence was not proved beyond reasonable doubt against the appellant. Counsel Noel Nkombe submitted that; it is the requirement under ***Section 3 (2) (a) of the Tanzania Evidence Act,*** the prosecution has to prove the case beyond reasonable doubt.

For the offence of rape to be proved, one of the elements is penetration of male organ which is penis to the virgina of the victim. However, this was not a case in the trial Court. Counsel Noel Nkombe invited this Court to refer to page 10 (unnumbered) which is the testimony of PW1 who is the victim of rape. There is nothing which presuppose that the appellant committed the alleged rape to the victim. He said:

> *"He turned her under wear and he started to insert my virgina...then I felt pains. It was my first time"*

There is nothing under this evidence which presuppose that the element of penetration was testified against the accused or the appellant even exhibit P1 which is PF3 which was later filled by clinical officer to collaborate the evidence of PW1 does not state anywhere that there was a penetration of blatant object to the virgina of the victim. Even the evidence of PW2 who is the elder Sister of the victim at page 11 explained that it was the elder sister of the victim who raped her. Counsel Noel Nkombe invited this court to refer the case of **Hakizimana Sylivester v. R Criminal Appeal No. 181 of 2007** Court of Appeal of Tanzania at Mwanza at page 11. The court insisted that:

> *"....failure of the victim to say what exactly happened is necessary fatal"*

Also, the age of the victim was not proved. Since this is a statutory offence, the age of the victim must be proved by cogent evidence. There was no any document such as birth certificate to prove birth of the victim. Indeed, at page 2 of exhibit P1 shows the victim is 14 years old, contrary to the age stated in the charge sheet which is 15 years. This causes uncertain which amounts to the case not been proved beyond reasonable doubt.

Finally, even the PF3 refereed was a collaborative evidence. It was recorded three days after the alleged commission of the offence meaning the offence was committed on 26/12/2015 but the victim was taken to hospital on 29/12/2015 there is no any explanation as to that delay. The PF3 shows there was a slightest bleeding without giving any explanation as to why the victim was bleeding. It is possible she was in menstrual period.

On the last ground of not properly analyzing the evidence, Counsel Noel Nkombe stated it is the duty of the court to properly evaluate the evidence of the prosecution and defence. To the contrary the Trial Magistrate evaluated evidence of the prosecution only if you read page 1, 2, 3 and 4 of the judgment, it is only the evidence of the prosecution which was evaluated.

In the last paragraph of the judgment the Trial Court after analyzing the evidence of the prosecution, it was satisfied that the prosecution proved the offence beyond reasonable doubt and the accused was convicted. It was Counsel Noel Kombe's humble submission that the omission of the trial court of not analyzing the evidence of the appellant was fatal and it amounts to miscarriage of justice on the part of the appellant.

It is from those grounds the appellant prayed that this appeal be allowed, this honorable court quash the conviction and set aside the sentence and set he appellant at liberty without giving an apart unity of retrial because it will give a chance to the prosecution the make corrections.

In reply, Senior State Attorney Credo Rugaju stated that the appellant was properly convicted and property sentenced due to the evidence adduced by the prosecution witnesses. On the purported defective charge, according to Counsel Credo Rugaju, the charge sheet was proper. There is no requirement of time. Section 132 is about how the offences are to be specified in the charge with particulars. It is sufficient if it contains a statement of the offence or offences with which the accused is charged together with such particulars as may be necessary for giving information as to the nature of the offence charged. ***Section 135 of Criminal Procedure Act*** states of the mode in

which the offence is to be charged second schedule provides on how the charge should be. There is nowhere the time is required to be stated.

Counsel Credo Rugaju maintained that it is not a preliquisite requirement of the law to state that it was Unlawful. ***Section 130 (1) of Criminal Procedure Act and Section 130 (2) (E)*** were used to frame the charge sheet.

The matter of time is the issue of evidence it is unbecoming to put the exact time of rape. The appellant was charged as the law requires.

On the second ground, Credo Rugaju replied that the offence was proved beyond reasonable doubt. It was proved by the victim (PW1) the testimony of PW1 on 1/09/2015, elaborated on how the incidence took place. The next day they went to Police Gongolamboto.

On the age, the incidence happened in 2015 but the evidence was adduced in 2016. That was a year later. So, the uncertainty of age is not a valid argument. On proving age, the evidence of the victim's sister was enough to prove the age. In the case of Mario **Atanas Sipenga v. R Criminal Appeal No. 116 Of 2013** Court of Appeal of Tanzania at page 10, the Court found the evidence of the mother in that case was corroborated by the evidence of the elder sister.

In this case the age of the victim was proved by PW2. Also, the evidence of PW4 (Doctor) reveals that the victim was not walking well. The doctor examined the victim. The victim was penetrated by a blunt object. PF3 shows the victim was 15 years. Such evidence collaborated the evidence of the victim and of her sister.

On evaluation of evidence, it can't be taken that in totality there was no evaluation of evidence. The court found that the denial of committing the offence had no legal merits. Counsel Credo Rugaju therefore prayed the appeal be rejected for lack of merits.

In rejoinder, Noel Nkombe advocate started with the defects of the charge, he reiterated that the omission to state the time was fatal. **Section 135 (4) of Criminal Procedure Act** requires that particulars of the offence may be varied depending on the circumstance of the case.

On the aspect of proof, he reiterated that there was no any proof, on the offence of rape. It was not clear as to what took place as far as penetration is concerned in the proceedings.

On the age, even the PF3 at page 1 shows she was 15 years. At page 2 shows 14 years. On this point, Counsel Noel Nkombe cited page 5 of the case of **Andrea Francis v. R. Criminal Appeal No 173 of 2014.** The sister was not a guardian. One cannot presume if she was a guardian in absence of the evidence.

On PF3, Noel Nkombe rejoined that there is nothing to prove there was penetration of a blatant object in the victim private part. In absence of the same one cannot say that penetration was proved. The evidence of the accused was not evaluated one cannot say the denial of the accused was an evaluation of evidence.

I have carefully considered the submissions of both parties in the light of the lower records. I must state that, as properly submitted by Senior State Attorney Credo Rugaju, the provisions of ***Section 135 of Criminal***

Procedure Act provide for the mode in which the offence is to be charged and the second schedule provides on how the charge should be. Under Section 135 (supra) there is nowhere the time is required to be stated in the charge sheet.

However, specifying the time of which the offence has been committed would be of importance when proving the case on the legal standard. As such, I do agree with Counsel Noel Nkombe that the impugned charge sheet was defective for not only stating that the appellant committed unlawful knowledge with the victim but also by not specifying the time of which the offence was committed. Specifying the time for the commission of an offence could enable the accused to prepare an informed defence.

Though I agree that the exact time on which rape is committed does not normally matter. (**See Nyeka Kou v. R**. Criminal Appeal No. 103 of 2006). It is the Court's view that, in an automated World of today, a person may commit an offence and fly to a far distant place or even abroad within two or three hours. A mere statement of the date is not of help at all. As such, the prosecution ought to have complied with the requirement of ***Section 132 of Criminal Procedure Act (R.E 2002)*** by making sure that a charge contained a statement of a specific offence together with the specific particulars as may be necessary for giving reasonable information on the time the charged offence was committed.

On the question of proving beyond reasonable doubt, I have noted true, as alleged by Counsel Noel Nkombe that the PF3 was taken three days after the alleged commission of the offence. The offence was committed on

26/12/2015 but the victim was taken to hospital on 29/12/2015. There is no any valid explanation on evidence to that delay.

Indeed, there is nothing in the evidence of PW1 that establishes there was penetration. The evidence from PW1 does not show if the victim was penetrated with a blatant object. She was supposed to give details of penetration. Penetration is a key aspect and the victim (if an adult) must say in her evidence that there was penetration of the male sexual organ in her sexual organ (see **Kayoka Charless v. Republic,** CAT Criminal Appeal No.325/2007 (Unreported). That was not seen in this case. If there is no proof of penetration means that there was no proof of rape.

More so, Senior state Attorney Credo Rugaju maintained that, the incidence happened in 2015 but the evidence was adduced in 2016. That was a year later. In his view, the uncertainty of age is not a valid argument. I find the argument of Counsel Credo Rugaju to be not convincing. Even the PF3 itself is of contradiction in terms of age. At page 1, it shows the victim was 15 years, at page 2 it shows the victim was 14 years. Such inconsistence creates a doubt as to the exact age of the victim by the time the alleged offence was committed.

In the circumstances of the above, the appeal is granted, the conviction and sentence meted against the appellant are nullified and set aside. The appellant be set at liberty forthwith till when held under lawful cause. Order accordingly.

Y. J. MLYAMBINA

JUDGE

17/10/2019

Judgement delivered and dated on 17th day of October, 2019 in the presence of the appellant in person and Senior State Attorney Credo Rugaju for the Respondent.

Y. J. MLYAMBINA

JUDGE

17/10/2019