IN THE HIGH COURT OF TANZANIA

(DAR ES SALAAM REGISTRY REGISTRY)

AT DAR ES SALAAM

CRIMINAL APPEAL NO. 74 OF 2020

(Arising from the Judgment of the District Court of Kinondoni in Criminal Case No. 170 of 2019 dated 30th January, 2020 before Hon. Lyatuu, **RM**)

ALLY PETRO ..... APPELLANT

VERSUS

REPUBLIC ..... RESPONDENT

JUDGMENT

07th Sept & 12th Oct, 2020.

E. E. KAKOLAKI J

This is an appeal by the appellant against conviction and sentence of life imprisonment term meted to him by the District Court of Kinondoni in Criminal Case No. 170 of 2019, on the offence of Rape; Contrary to section 130(1)(2)(e) and 131(1) of the Penal Code, [Cap. 16 R.E 2002], he stood charged with. Disgruntled he is before this court by way of appeal expressing his dissatisfaction equipped with four (4) grounds of appeal which I reproduce in verbatim:

1. That, the learned trial magistrate erred in law and fact in her failure to analyse the evidence which resulted into wrong decision.

2. That, the trial court proceedings were irregular and unprocedural as it contravened the provision of section 234(b) of the Criminal Procedure Act that resulted injustice which resulted into wrong verdict.
3. That, the learned trial magistrate erred in law and fact in her failure to properly conduct "voire dire" examination of the victim (PW2) as required by section 127(2) of the Law of Evidence Act, [Cap. 6 R.E 2002].
4. That, the learned trial magistrate erred in law and fact in convicting the appellant on rape basing on weak evidence by the prosecution which was not made beyond reasonable doubt.

For the foregoing grounds the appellant is inviting this court to allow the appeal by quashing the conviction and set aside the sentence meted on him and consequently order his immediate release from prison.

The background history of the case that gave rise to this appeal as gathered from both parties case may be briefly narrated as follows. Before the trial Court the appellant was indicted of an offence of Rape; Contrary to Section 130(1)(2)(e) and 131(1) of the Penal Code, [Cap. 16 R.E 2002]. It was alleged by prosecution that on divers dates between January, to 24th February, 2019 at Manzese area, within Ubungo District in Dar es salaam Region, the appellant had carnal knowledge of one **HVK** a girl of 7 years of age. The appellant denied the charge as a result the prosecution called in five (5) witnesses in a bid to prove its case. Earlier in the mid of prosecution case and after two witnesses had testified the prosecution substituted the charge that amended the particulars of offence to read that the offence was committed on divers dates but between January, to 24th March, 2019 as

stated herein above. Before substitution the former charge was reading that the offence was committed on 03/03/2019. The substitution of charge resulted into re-summoning of witnesses and giving testimony afresh. At the closure of prosecution case the trial court found the appellant with a case to answer and called him to enter his defence in which at the conclusion was found guilty of the offence charged with, convicted and sentenced to life imprisonment term. The victim in this appeal is a child whom for the purposes of disguising her identity she is assigned a pseudonym as **HVK** and will be also referred as PW2.

The appellant who works for gain as a passenger motorcycle transporter commonly known as "Bodaboda" is the uncle to the victim PW2 (HVK) being married to PW2's maternal aunt one Faviana Njau (DW2). It was contended by prosecution that between January, to 24th February, 2019, the appellant who was living close to PW2's home raped her at his home in absence of her aunt DW2. PW2 whose age was proved to be 7 years by her mother PW1 through birth certificate Exh.P1 and after the court had conducted inquiry and satisfied itself that she promised to tell the court nothing but the truth, testified to the effect that the appellant took her to his home. While switching on the Television stripped off his and her underpants, lubricated his mdudu (penis) by saliva and put it in her front part (seheme ya kukojolea). That, she felt pain but was warned by the appellant not to tell her mother as she could be heavily punished before she was taken back home using appellant's motorcycle. She testified further that, she could not go out or shout as the door was closed and the TV was on. PW2 who could not tolerate keeping the secret any more, on the 28/02/2019 disclosed it to her sister PW3 who later on in the evening told their mother one PW1. Upon receiving that

shocking news allegedly on 24/02/2019, PW1 reported the matter at Urafiki Police station, issued with PF3 and took PW2 to Palestina Hospital for examination where the doctor PW5 examined her and issued her report Exh. P2. It appears the matter was reported at police on the 04/03/2019, eight (8) days after PW1 had received a report from PW3 and it is the same day when PW2 was examined by the doctor PW5 and found to have loose vagina with no hymen, without more detection as to penetration. Following the report at police the appellant was arrested and charged of rape.

In his defence the appellant apart from disclaiming his involvement in the commission of the offence he was being accused of, fronted a defence of being framed up in that allegation to teach him a lesson following the promise from his wife's relatives to so do, as he owed them some money advanced to him to cover up his wife's operation expenses. And further that, his wife's relatives were unhappy of their peaceful relationship with his wife so they wanted him to part relationship with their daughter DW2. He called in his wife DW2 to support his defence, who testified that it is true her relatives promised to do bad thing to him and that was it. The trial court disbelieved his story. Relying on the victim's evidence PW2 corroborated by that of PW1, PW2 and PW4 investigator and having found PW6's evidence which did not prove penetration for want of bruises was not binding to the court for being expert opinion, expunged it and proceeded to find the prosecution case proved beyond reasonable doubt before convicting the appellant of the offence he was charged with and sentenced him accordingly.

When the appeal came for hearing the appellant was represented by Mr. Mluge Karol Fabian learned advocate whereas the respondent had the

services of Ms. Jacqueline Werema, learned State Attorney. Both parties elected to dispose of the appeal by written submission and the court condoned their wishes. In his submission in support of the grounds of appeal Mr. Mluge opted to argue the 1st and 4th grounds of appeal together while the 2nd and 3rd grounds were done separately. I will also follow the same line when determining them.

Submitting on the 1st and 4th grounds of appeal Mr. Mluge faulted the trial court for its failure to analyse the prosecution evidence which resulted into a wrong decision and further that, the trial magistrate erred for convicting the appellant basing on weak prosecution evidence which was not made beyond reasonable doubt. He contended that, the evidence of PW1, PW3 and PW4 which the trial court used to corroborate PW2's evidence was hearsay incapable of according any corroborative value. That, the only direct evidence is that of PW2 and PW6 who examined the victim.

On the evidence of PW6 Mr. Mluge discredited it by submitting that, the same did not prove that it was the appellant who committed the offence but rather proved that the victim was used to sexual intercourse. He said, there were mere allegations that the appellant used to collect PW2 to his house and then back home but no evidence was fronted by PW1 and PW3 to prove those assertions. With regard to PW2's evidence he argued, the same lacked credibility as there is no reason as to why she failed to tell her mother of the abuse she was undergoing at all that time, if at all the same was done to her. He said, for those discrepancies of evidence the prosecution case was not proved against the appellant. Relying on the case of **Musa Mwaikunda**

Vs. R (2006) TLR 387 he invited the court to find merit on the two grounds and allow the appeal.

In her response Mr. Werema prefaced her submission by the stand that, the respondent was opposing the appeal and supporting the conviction and sentence meted to the appellant. She said, for the offence of this nature (rape to the child) to stand two ingredients must be proved by prosecution which are, **one**, penetration and **second**, that it is the appellant who committed or caused it. And this mandatory duty of so proving the ingredients was discharged by the prosecution, Ms. Werema insisted. It was her submission that, under section 130(4)(a) of the Penal Code, penetration however slight it is, is sufficient to constitute the ingredient of penetration or existence of sexual intercourse, necessary to prove the offence of rape. She said, PW2 in her evidence clearly stated that *"after that he opened his trouser and take off his mdudu and take his saiiva from his mouth and after that he put his penis on my front part (sehemu ya mbele ya kukojolea)."* These word are enough to conclude that the victim was telling nothing but the truth when testifying that she was raped, Ms. Werema stressed. She added that, the witness being a child of tender age was expected to use words of that nature such as ***"mdudu"*** to mean penis and **"seheme ya mbele ya kukojolea"** to mean vagina.

Ms. Werema further countered Mr. Mluge's submission on the two grounds submitting that, in proving rape cases the best evidence comes from the victim. She cited the case of **Ally Ramadhan Shekindo and Another Vs. R**, Criminal Appeal No. 532 of 2017 (CAT-unreported) to support her stance. With regard to the contention by Mr. Mluge that, there was no proof from

PW1 and PW2 that the appellant had a tendency of taking the victim to his home, she said, there is no such evidence apart from that of PW2 stating to have been raped four times which she proved in her evidence. Otherwise Ms. Werema invited the Court not to depart from the finding of the trial court by dismissing the grounds of appeal and find that the prosecution case was proved beyond reasonable doubt.

I have carefully considered the rival submissions from both parties seeking to support and oppose the appeal respectively. The issue for determination before this court is whether the charge against the appellant was proved beyond reasonable doubt as submitted by the learned State Attorney. In determining this issue, the Court found it apposite first to inquire on the validity of the charge sheet and then determine whether the same was proved or not. For so doing Court had to invite parties to address it on the raised issue as the same was not done in their written submissions. Both parties appeared on 09/10/2020 but this time the respondent was represented by Mr. Kisma, learned State Attorney. It was Mr. Mluge's submission that, the charge had defect for not specifying the time in which the alleged offence started to be committed. He said the particulars of offence state that it was between January, to 24th February, 2019 without specifying which year of January, so as to enable the appellant to understand the exactly the date (time) he is accused to have committed the offence, prepare and enter his defence effectively. For that defect he submitted, the charge was not proved against the appellant beyond reasonable doubt and prayed the court to allow the appeal.

Mr. Kisima for the respondent resisted Mr. Mluge's submission charging that, the charge is not defective as there was a typographic error by omission to indicate which year of January the alleged commission of the offence started. He went further to argue that, the omission did not prejudice the appellant as he understood the nature of the offence he was facing. As to whether the charge was proved beyond reasonable doubt he responded in affirmative stating that, it is the victim's evidence (PW 2) that so proved. And that, PW2 being a child of tender age, aged 7 years was not expected to remember the dates she was raped, that is why the particulars of offence referred divers dates between January, to 24th February, 2019. Mr. Kisima implored this court to dismiss the appeal for want of merit.

In considering the contesting arguments by both counsels it is imperative that I reproduce part of the impugned charge sheet:

CHARGE

STATEMENT OF OFFENCE

RAPE;*Contrary to section 130(1)(2)(e) and 131(1) of the Penal Code,[Cap. 16 R.E 2002]*

PARTICULARS OF OFFENCE

ALLY PETRO, *on divers dates between January, to 24th February, 2019 at Manzese area within Ubungo District in Dar es salaam Region, did have carnal knowledge of on* ***HV*** *a girl of 7 years of age.*

Dated at Dar es salaam this 10th day of December, 2019.

Sgd;

STATE ATTORNEY

Noting from the particulars of offence in the above cited charge, there is no dispute that the date and year in which commission of the alleged offence is claimed to have commenced is missing. The law under section 132 of the Criminal Procedure Act, [Cap. 20 R.E 2019] puts it mandatory among other ingredients that a charge should contain all necessary particulars for giving the accused reasonable information as to the nature of the offence he is charged with. Section 132 of the CPA reads:

> *"132. Every charge or information shall contain, and shall be sufficient if it contains, a statement of the 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.****" (emphasis supplied)*

The necessary particulars referred herein above undisputedly include but not limited to specific date, time, place or area where the alleged offence was committed, the manner in which it was committed and to whom the same was committed. Mr. Mluge submits that, none mention of the year in which the offence alleged to be committed started prejudiced the appellant as he could not properly understand the nature of the offence and prepare his defence, whereas Mr. Kisima is of the contrary view charging that the infraction never prejudiced the appellant as it was a typographical error. And further that, since PW2 could not remember the dates she was raped four times the charge was rightly crafted to include divers dates. With due respect to Mr. Kisima, I don't

purchase his views that the infraction was merely typographical error and that the omission to indicate the date and year in which the alleged offence commenced did not prejudice the appellant. The date and year the offence is alleged to have been committed, I hold was so important and necessary information to enable the appellant understand the nature of the offence facing him and prepare his defence effectively. The denial of that information deprived him of his right to fair trial for not understanding the nature of the offence impliedly stated under section 132 of the CPA, thus a finding that the appellant was prejudiced. The offence of rape cannot be alleged to have been committed on divers dates. There should be specific dates in specific counts. Since PW2 alleged to have been raped four time the prosecution ought to have preferred four different counts against the appellant with specific dates so as to enable the appellant understand his allegations and prepare his defence. This is meant to make sure that fair trial is availed on the appellant's part as it was held in the case of **Mussa Mwaikunda Vs. R**,(2006) TRL 388 when the Court of Appeal had this to say:

> *"It is always required that an accused person must know the nature of the case facing him and this can be achieved if the charge discloses the essential element of the offence charged."*

Applying that principle in this matter, the charge of rape in this case indicating the offence was committed on the diver dates between January, to 24th February, 2019, I hold is defective and could not under any stretch of imagination offer the appellant with necessary and reasonable information for him to front up his defence.

With the above finding I now turn to the issue as to whether the offence was proved against the appellant beyond reasonable doubt. I this it is the finding of this court that it was not. The reason is very simple to tell, that, prosecution evidence should have aimed at proving that the appellant committed the offence on the alleged and specified dates in the charge sheet which in this none is existing, leave alone the alleged commencing date and year which are also missing. The commencement month of January mentioned in the charge sheet could have been of any year before 2019, thus even if evidence is led to specific date which in this case is not the case, still I could hold, the offence was not proved to the required standard as the variation of dates from January, to 24th February, 2019, denied the appellant with an opportunity to effectively defend himself. Addressing on the similar situation the Court of Appeal in the case of **ZOMBO S/O RASHIDI Vs. R,** Criminal Appeal No. 7 of 2012 (CAT-unreported) had this to say:

> *"It is now settled law that clear evidence should always be led to prove that the accused committed the alleged rape on the date mentioned in the charge. If there is a variation in the dates, then the charge must be amended accordingly to enable the accused to effectively defend himself. See, for instance:-*
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> (a) ***Ryoba Mariba @ Mungare v. R.,*** *Criminal Appeal No. 74 of 2003,*
>
> (b) ***Christopher Rafael Maingu v. R.,*** *Criminal Appeal No. 222 of 2009,*

(c) ***Simon Abonyo v. R.,*** *Criminal Appeal No. 144 of 2003, and*

(d) ***Anania Turiani v. R.,*** *Criminal Appeal No. 195 of 2009 (all unreported)."*

The same stand was adopted by the Court of Appeal in a recent case of **Faraji Said Vs. R**, Criminal Appeal No. 172 of 2018 (CAT-unreported) when cited the case of **Abel Masikiti Vs. R**, Criminal Appeal No. 24 of 2015 (CAT-Unreported) which emphasized that:

> *"In a number of cases in the past this court has held that it is incumbent upon the Republic to lead evidence showing that the offence was committed on the date alleged in the charges sheet which the accused was expected and required to answer. If there is any variance or uncertain in the dates/ then the charge must have be amended in terms of section 234 of the CPA. If this is not done the preferred charge will remain unproved, and the accused shall be entitled to an acquittal. Short of that justice will occur."*

Having so cited that case the Court proceeded to state:

> *"Since the prosecution failed to lead evidence to show that the offence of rape was committed on the 24th December, 2015 as alleged in the charge sheet then the charge remained unproved. The variance between the charge sheet and evidence coupled with the contradictions entitled the appellant to acquittal."*

It is obvious from the above cited cases that, evidence must be led by the prosecution to prove the charge levelled against the accused person. As already found out in this case, the omission to specify the date and year when the alleged offence is said to have commenced as already found denied the appellant with an opportunity to understand properly the offence facing him and effectively defend himself, thus I hold the offence against him was not proved to the required standard. Even if we are to assume the charge is valid, after going through the entire prosecution evidence still, I would hold that, the offence was not proved beyond reasonable doubt against the appellant. I will tell why? There is material discrepancies in the evidence of prosecution witnesses. It is not specified as to when the offence was committed to PW2 by PW2 herself or any other witness. Whereas PW2 (victim) says rape was committed to her four different times by the appellant, when reporting the incident to her sister PW3 on the 28/02/2020 and later in court, she failed to specify which date and year the alleged rape was committed to her. As to when the report was made to PW1 there is contradiction as PW3 testified in court it was on 28/02/2020. Conversely to what PW3 told the court, PW1 said was told by PW3 of the incident earlier on the 24/02/2020, where she immediately took a step of reporting the matter at Urafiki police station, issued with PF3 and later took PW2 to the hospital for examination where the doctor proved that she was raped. If we are to believe that PW2 reported the incident first to PW3 on the 28/02/2020 then there is variance of dates of the commission of the offence described in the charge sheet to be January, to 24/02/2019 and the evidence tendered by both PW2 and PW3 mentioning 28/02/2019. The contradictions on the time of commencement and ending dates of the commission of the offence

and its reporting to PW1 as put by PW1, PW2 and PW3 in court diminishes their credibility. As if that is not enough if PW1 truly received the information from PW3 on the 24/02/2019 there is no any explanation as to why she delayed to report the matter at police until 04/03/2019 when the PF3 was issued to PW2 something which escalate doubts as to whether the offence was committed or was planted to the appellant as he put it in his defence.

With all such doubtful and incredible evidence coupled with evidence of the doctor PW5 who examined PW2 on the same date which evidence failed to prove penetration with a finding that PW2 had no hymen with loose vagina leave alone absence of bruises or sperms in her private parts, it cannot once again be said the appellant's case was proved beyond reasonable doubt by the prosecution. The finding of the court in this issue suffices to dispose of the matter.

Having so found I wish to go further to address the act of the trial magistrate's decision in the judgment to expunge PW5's evidence. Having recorded evidence of PW5 and admitted the medical examination report PF3 as Exh. P2, the trial court became functus officio in as far as the admissibility of the exhibit and evidence is concerned. What was within the trial court's powers with regard to the said evidence and exhibit is to gauge the weight to be accorded to it when determining the issue as to whether it was credible enough to prove the ingredient of rape to PW2 which is penetration. By expunging that evidence the trial magistrate acted outside his powers as she was not exercising appellate or revisional jurisdiction. I therefore set aside his decision which has effect of retaining the evidence of PW5 and exhibit P2in record.

In the premises, I would hold as I hereby do that, this appeal has merit and is hereby allowed. Since the conviction of the appellant was predicated on incredible evidence of prosecution side, I proceed to quash the conviction and set aside the sentence meted on him. I further order for immediate release of the appellant from prison unless otherwise lawfully held.

It is so ordered.

DATED at DAR ES SALAAM this 12th day of October, 2020.

E.E. KAKOLAKI

JUDGE

12/10/2020

Delivered at Dar es Salaam this 12th day of October, 2020 in the presence of Mr. Mluge Karol Fabian, advocate for the appellant, Mr. Adolf Kisima, State Attorney the respondent and Ms. Monica Msuya, court clerk and in the absence of the appellant who is in prison as the court could not be linked with him through video conference for technical problems.

Right of appeal is explained.

E. E. Kakolaki

JUDGE

12/10/2020