

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA**

**SONGEA DISTRICT REGISTRY**

**AT SONGEA**

**CRIMINAL APPEAL NO 35 OF 2020**

*(Originating from Criminal Case No. 87 of 2020 of Mbinga District Court)*

**KRINTON N. NICHOMBE ..... APPELLANT**

**VERSUS**

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

*Date of last hearing: 22/02/2021*

*Date of Judgment: 23/03/2021*

**JUDGMENT**

**I. ARUFANI, J.**

The appellant, was arraigned before the District Court of Mbinga (hereinafter referred as the trial court) with an offence of rape contrary to section 130 (1) and (2) (e) and 131 (1) of the Penal Code [Cap. 16, R.E 2019]. It was alleged that, on divers dates between December, 2019 and February, 2020 at Utiri Village within Mbinga District in Ruvuma Region the appellant did have sexual intercourse with one R. V. (not her real name) a girl of fifteen years old.

After full hearing of the case the appellant was convicted and sentenced to serve thirty years imprisonment. The appellant was aggrieved

by the decision of the trial court and filed in this court a petition of appeal carrying eight grounds of appeal. When the appeal came for hearing the appellant was represented by Mr. Alex Nyoni, learned advocate and the respondent was represented by Ms. Amina Mawoko, learned State Attorney who supported the appeal.

The counsel for the appellant prayed to abandon the second, fourth, fifth and eighth grounds of appeal. He argued the first and seventh grounds of appeal together and he argued the third and sixth grounds of appeal together. I will start with the third and sixth grounds of appeal which were supported by the learned State Attorney and if need will arise I will continue to deal with the first and seventh grounds of appeal.

The counsel for the appellant argued in relation to the third and sixth grounds of appeal that, if you look into the particulars of the offence contained in the charge sheet you will find it is stated the offence was committed in the period between December, 2019 and February, 2020. He said the evidence of R. V. who was the victim of the offence as recorded at page 8 of the proceedings of the trial court it shows the victim said she didn't meet the appellant and she didn't do sexual intercourse with him in the period of time mentioned in the particulars of the offence. He said the



victim said she met the appellant and have sexual intercourse with him on March, 2020 and not between the periods running from December, 2019 to February, 2020.

He submitted that, failure to prove the correct time of commission of the offence raised doubt in the prosecution case and caused the appellant to fail to defend himself properly. The counsel for the appellant said that is contrary to section 132 of the Criminal Procedure Act, [Cap 20, R.E 2019] which requires the charge sheet to contain the necessary and correct particulars of the offence like the time of commission of an offence to enable the accused person to make his proper defence.

He said the above position of the law was stated in the case of **Mathayo Kingu V. R**, Criminal Appeal No. 589 of 2015, CAT at Dodoma cited in the case of **Amos Charles V. R, Criminal** Appeal No. 44 of 2020, HC at Mwanza (both unreported). He prayed the court to use the above stated arguments to allow the appeal, quash the conviction entered against him, set aside the sentence imposed to him and set him at liberty.

In reply the learned State Attorney told the court that, the offence leveled against the appellant was not proved beyond reasonable doubt. She said the evidence of the prosecution's witnesses and specifically PW1,

PW2 and PW3 failed to support the charge leveled against the appellant. She said that, while the particulars of the offence contained in the charge sheet alleged the appellant raped the victim (PW2) in the period running from December, 2019 to February, 2020 but PW2 denied to have done sexual intercourse with the appellant in the stated period of time.

The learned State Attorney said that, PW2 told the trial court she did sexual intercourse with the appellant on March, 2020. She said even PW1 who is the father of PW2 and PW3 who is the grandmother of PW3 said they found PW2 in the house of the appellant on March, 2020. She argued further that, although PW1 and PW3 said PW2 was living with the appellant from January, 2020 to March, 2020 but PW2 denied to have lived with the appellant and said she used to go to the appellant and return to their home without doing anything.

She submitted that, after seeing there was variation in the particulars of the offence and the evidence given by the prosecution witnesses the prosecution was required to amend the charge so as to tally each other but that was not done. She argued that, as the charge was not amended it is crystal clear that the charge leveled against the appellant was not proved beyond reasonable doubt. To support her argument she referred the court



to the case of **Abel Masikiti V. R**, Criminal Appeal No. 24 of 2015 cited in the case of **Issa Mwanjiku @ White**, Criminal Appeal No. 175 of 2018 where it was held when there is any variance in the dates indicated in the charge sheet the charge must be amended and if is not amended the charge will remain unproved and the accused person is entitled to an acquittal.

She went on arguing that, as stated in the case of **Seleman Makumba V. R**, [2006] TLR 379 the true evidence of rape is supposed to come from the victim of the offence herself. She submitted that, that being the position of the law and as the evidence of PW2 who was the victim of the offence is not tallying with the particulars of the offence contained in the charge sheet then it cannot be said her evidence proved the offence of rape laid against the appellant. She submitted further that, as there is no other evidence from the prosecution to prove the charge, they are praying the court to allow the appeal, quash the conviction entered against the appellant, set aside the sentence imposed to him and set him at liberty.

Having carefully considered the arguments from both sides the court has found the parties are in agreement that the charge laid against the appellant was not proved beyond reasonable doubt as there was material

variance between the charge sheet and the prosecution evidence. That being the position the court has found the issue to determine here is whether the alleged variance exists and if the answer is in affirmative whether it affected proof of the charge laid against the appellant to the standard required by the law.

The court has gone through the particulars of the offence laid against the appellant as stated in the charge sheet and found it was alleged therein that, on divers dates between December, 2019 and February, 2020 the appellant did have sexual intercourse with the victim. The court has found that, as rightly argued by both sides the above stated particulars are not tallying with the evidence given by the prosecution witnesses. The court has come to the above finding after seeing that, while it is alleged in the charge sheet that the victim was raped between December, 2019 and February, 2020 but PW2 who was the victim of the offence denied to have done sexual intercourse with the appellant on the stated period of time.

The court has found that, although PW2 who as stated in the case of **Selemani Makumba** (supra) the true evidence of being raped was required to come from her she stated in her testimony that, the appellant told her he loved her and he took her to his house on different dates from



December, 2019 to January, 2020 but they didn't do sexual intercourse during that period. PW2 said the date the appellant did sexual intercourse with her was on March, 2020. The court has also found that, as rightly argued by the learned State Attorney even the evidence of PW1 and PW3 who are the father and grandmother of PW2 respectively stated in their evidence that they found PW2 with the appellant on March, 2020 and they didn't say anything in relation to the period running from December, 2019 to February, 2020.

Since the particulars provided in the charge sheet alleged the offence was committed between December, 2019 and February, 2020 and the evidence given by PW1, PW2 and PW3 shows they said the offence was committed on March, 2020 it is crystal clear that the particulars of the offence as contained in the charge sheet are at variance with the evidence given by the prosecution's witnesses. The court has found that, as rightly argued by the learned State Attorney, after seeing the evidence of their witness is differing from the particulars stated in the charge sheet they were required to amend the charge under section 234 of the Criminal Procedure Act so as to tally with the evidence of their witnesses but that was not done up to the end of that case.

Consequences of failure to amend the charge which its particulars are at variance with the evidence given by the prosecution's witnesses was well stated in the case of **Abel Masikiti** (supra) cited by the learned State Attorney where it was held that:-

*"If there is any variance or uncertainty in the dates, then the charge must be amended in terms of section 134 of the CPA. If this is not done, the preferred charge will remain unproved and the accused shall be entitled to an acquittal."*

Since the dates of commission of the offence stated in the evidence given by the prosecution's witnesses is not tallying with the dates indicated in the particulars of the offence contained in the charge laid against the appellant the court has found it cannot be said the charge was proved to the standard required by the law. Consequently, the court has found that, as rightly prayed by both sides the appeal of the appellant deserves to be allowed as it was not proved to the standard required by the law.

Having arrived to the above finding the court has found that suffice to dispose of the appeal and there is no need of laboring on other arguments advanced to the court by the counsel for the parties as it will for academic purpose only and this court is not ready to venture into at this moment. In the upshot the appeal filed in this court is hereby allowed, the



conviction entered against the appellant is quashed and the sentence of thirty years imprisonment imposed to him is set aside. The appellant to be set at liberty if there is no other lawful cause to incarcerate him. It is so ordered.

Dated at Songea this 23<sup>rd</sup> day of March, 2021



A handwritten signature in blue ink, appearing to read "I. Arufani".

**I. ARUFANI**

**JUDGE**

**23/03/2021**

**Court:**

Judgment delivered today 23<sup>rd</sup> day of March, 2021 in the presence of Mr. Alex Nyoni, Advocate for the appellant and in the presence of Ms. Tumaini Ngiluka, Senior State Attorney. Right of appeal to the Court of Appeal is fully explained to the counsel for the parties.



A handwritten signature in blue ink, appearing to read "I. Arufani".

**I. ARUFANI**

**JUDGE**

**23/03/2021**