

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

AT SUMBAWANGA

DC CRIMINAL APPEAL NO. 11 OF 2020

(Originating from Mpanda District Court in Criminal Case No. 128 of 2019)

JAMES LUISI APPELLANT

VERSUS

THE REPUBLIC RESPONDENT

Date of last Order: 23/03/2021

Date of Judgment: 24/03/2021

JUDGMENT

C.P. MKEHA, J

Before the District Court of Mpanda, at Mpanda, the appellant (James s/o Luisi) was arraigned, it being alleged that, on the 06th day of June, 2019 at Kabatini Area within Mpanda District in Katavi Region, he did have sexual intercourse with the victim of the offence without her consent c/ss 130 (1) and (2) (a) and 131(1) of the Penal Code. Despite protesting his innocence when the charge was read over to him, at the end of trial, the appellant was found guilty, convicted and sentenced to be jailed for thirty years. The appellant was also ordered to compensate the victim to the tune of TZS. 1,000,000/=.

Being dissatisfied with both, conviction and sentence, the appellant preferred the present appeal consisting of four grounds of appeal. On the hearing day, through Ms. Amulike learned advocate, the appellant argued one ground of appeal as hereunder:

1. That, the trial court erred both at law and fact by convicting the appellant while the prosecution evidence especially PW1 and PW2 and the charge sheet, contradict on the day on which the said rape occurred.

Submitting in respect of the said ground of appeal Ms. Amulike learned advocate told the court that the evidence in support of the charge was at variance with the allegation as per the charge sheet with regard to date of commission of the alleged offence. The learned advocate submitted that, whereas it was alleged in the charge sheet that the event happened on 06/06/2019, evidence from PW1 and PW2 indicates that the event happened on 10/06/2019. The learned advocate urged the court to order immediate release of the appellant since in view of the decision in **Justine Mtelule vs. Republic, Criminal Appeal No. 482 of 2016, CAT at Iringa**, the charge against the appellant was not sufficiently proved.

When Mr. Mwashubila learned Senior State Attorney rose to reply, he submitted briefly that, through the anomaly explained by the learned advocate for the appellant, the charge against the appellant was not sufficiently proved before the trial court.

The counsel for the parties are at one that the evidence adduced by PW1 and PW2 was at variance with the allegation in the charge sheet regarding date of commission of the offence charged. They do further agree with each other that when that happens, the inevitable conclusion is that, the charge is to be held not to have been sufficiently proved.

The only determinative issue is **whether the parties' agreement is factually and legally backed.** It is true that the charge sheet indicates that the victim was raped on 06/06/2019. While the said charge sheet was not amended as per section 234 of the Criminal Procedure Act, PW1 and PW2 testified to the effect that the event of rape happened on 10/06/2019. PW1 and PW2 happened to the victim of the event and Medical Officer who examined the victim, respectively. **See:** Pages 6 to 13 of the typed proceedings of the trial court.

There is no denial that in this case, variance between the charge and evidence adduced in support of it with respect to the time at which the alleged offence was committed was material as to necessitate amendment of charge. That was not done. In the case of **Abel Masikiti vs. Republic, Criminal Appeal No. 24 of 2015 (Unreported)**, the Court of Appeal held 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 charge sheet, which the accused was expected and required to answer. If there is any variance or uncertainty in the dates, then the charge must be amended in terms of section 234 of the Criminal Procedure Act. If this is not done the preferred charge will remain unproved, and the accused shall be entitled to an acquittal. Short of that a failure of justice will occur".

See also: 1. Masasi Mathias VS. Republic, Criminal Appeal No. 274 of 2009 (Unreported). 2. Vumilia Penda Mushi vs. Republic, Criminal

Appeal No. 327 of 2016 (Unreported). 3. Ryoba Mariba @ Mungare vs. Republic, Criminal Appeal No. 74 of 2003 (Unreported). 4. Anania Turian vs. Republic, Criminal Appeal No. 195 of 2009 and 5. Justine Mtelule Vs. Republic (supra)

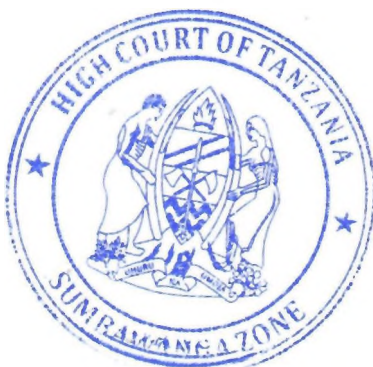
For the foregoing reasons, it is my holding that the charge against the appellant was not sufficiently proved before the trial court. Consequently, the appellant's conviction is quashed. The sentence and orders earlier imposed upon the appellant are set aside. The court orders immediate release of the appellant unless he is held in custody for other lawful cause.

Dated at **SUMBAWANGA** this 24th day of March, 2021.




C.P. MKEHA
JUDGE
24/03/2021

Court: Judgment is delivered this 24th day of March, 2021 in the presence of the appellant, Ms. Amulike learned advocate for the appellant and Mr. Mwashubila learned Senior State Attorney for the Respondent.




C.P. MKEHA
JUDGE
24/03/2021