THE UNITED REPUBLIC OF TANZANIA

JUDICIARY

IN THE HIGH COURT OF TANZANIA

MBEYA DISTRICT REGISTRY

AT MBEYA

CRIMINAL APPEAL NO. 48 OF 2022

(Originating from the Court of Resident Magistrate of Mbeya at Mbeya in Criminal Case No. 264 of 2019)

Between

VALES PASKALI MWAMBALO .....APPELLANT

VERSUS

THE REPUBLIC .....RESPONDENT

JUDGMENT

Date of last order: 1th June, 2022

Date of judgment: 25th July, 2022

NGUNYALE, J

The appellant was arraigned in the Court of Resident Magistrate of Mbeya at Mbeya for the offence of rape contrary to section 130(1)(2)(e) and 131(3) of the Penal Code [Cap 16 R: E 2002] now R: E 2019. It was alleged that on diverse dates between September and 17th October, 2019 at Santilya Village within the District of Mbeya in Mbeya region the appellant had carnal knowledge with PW1 a girl of seven years (name withheld for not disclosing her identity as per law, herein referred to as PW1 or victim). The appellant denied any involvement. The prosecution

called six witnesses and three documentary exhibit, PF3 of the victim (exhibit P1), caution statement (exhibit P2) and extra judicial statements, (exhibit P3). The appellant testified on oath and called no witness in support.

It was alleged by the prosecution that on 17th October, 2019 the appellant took the victim who was playing with her fellows including PW5 Rihanna John by holding her hand to his house. While there he undressed the victim and undressed himself too, then he inserted his manhood into PW1 vagina. The victim started bleeding and went to tell her mother that she was raped by Baba Naomi. The victim was sent to police where he was given PF3 and received treatment at Ifisi hospital. PW3(Asia Ismail) a doctor examined PW1 and found her infected with syphilis, parcels and hymen was perforated. The result was filled in PF3 which was admitted as exhibit P1. The appellant while at police was interrogated where he admitted to commit the offence through exhibit P2 and was further sent to justice of peace for extra judicial statement, exhibit P3

In defence the appellant distanced from commission of the offence. He testified that he was arrested on 11/10/2019 and sent to primary court and eventually police station at Mbalizi. After three days was sent to Songwe police post where he stayed for three weeks. Then there was

forward and back movement from Mbalizi to Songwe police post before he was sent to court. He denied to know the victim before.

After full trial the trial magistrate found the appellant guilty and was consequently convicted and sentenced to life imprisonment. Aggrieved with the whole judgment the appellant has filled petition of appeal to this court containing seven (7) grounds of appeal which can be fairly summarized as follows;

1. *That the appellant was wrongly convicted and believed evidence of PW1 who did not raise alarm;*
2. *The appellant was convicted on evidence in which PW1 and all prosecution witnesses did not mention the date on which the offence was committed.*
3. *That the charge on which the appellant was convicted was defective*
4. *That the appellant was wrongly convicted on evidence of recognition to the effect that they lived in the same village*
5. *That the trial court did not consider appellant's defence.*
6. *The prosecution evidence contained contradictions, inconsistencies and was insufficient to ground conviction*
7. *That the doctor did not explain how she examined PW1 and filled PF3.*

When the appeal came for hearing the appellant appeared in person while the respondent appeared through Mis. Hannarose Kasambala, learned State Attorney. When the appellant was called to argue his grounds of appeal, he opted the State Attorney to start and then could make rejoinder.

Mis. Kasambala submitted generally on all grounds of appeal. It was her submission that the offence of rape was proved through PW1 who narrated how the appellant took her to his home and inserted his penis into PW1' vagina. She added that in rape cases best and true evidence comes form the victim. She cited the case of **Seleman Makumba v R** [2006] TLR 379 to support the argument. She added that a doctor who examined PW1 corroborated evidence of PW1 as he found her infected with syphilis and had bruises and injuries. It was further submission that the appellant was known to PW1 before as they were neighbours.

On whether defence evidence was considered, Mis. Kasambala submitted that it was, but was quick to point that this court being the first appellate court can evaluate afresh the evidence. She referred this court to the case of **Prince Charles Junior v R**, Criminal Appeal No. 250 of 2014.

On defective charge it was submitted that subsection was not cited in the charge the omission which is curable under section 388(1) of the Criminal Procedure Act [Cap 20 R: E 2019] as particulars of the offence made the appellant to understand the charged levelled against him. She insisted that the appellant was not prejudiced. She cited the case of **Jamal Ally@Saum v R**, Criminal Appeal No. 52 of 2017. He prayed the appeal to be dismissed.

During rejoinder the appellant implored the court to consider his grounds and set him at liberty.

I have considered the submission by the state attorney and prayer from the appellant. After going through grounds of appeal and submission I am of the view that this appeal can be disposed based on second ground which is on point of law that is variance of dates on which the offence was committed between the charge and evidence.

I have gone through the charge and evidence of all witnesses and found that in the particulars of offence it is disclosed that the offence was committed between September, 2019 and 17th October, 2019. PW1 in her evidence stated that in dates of September and 12/10/2019 is when the offence was committed while PW2 said on 18/10/2019. Based on the above it is clear that there is uncertainty on the clear date on which the offence was committed.

There are numerous decisions which has taken the stance that variance between dated in the charge and evidence is not fatal and are curable under section 234(3) and 388(1) of the Criminal Procedure Act. These includes **Bore Cliff v Republic**, Criminal Appeal No. 193 of 2017, **Said Majaliwa v Republic**, Criminal Appeal No. 2 of 2020, **Selemani Rajabu v. Republic,** Criminal Appeal No. 149 of 2013 and **Damian Ruhele v.**

Republic, Criminal Appeal No. 501 of 2007 (both unreported). In all these cases the court held that the variance may due to slip of pen.

Different view which is similar to the present appeal was discussed in the case of **Justine Mtelule v Republic,** Criminal Appeal No. 482 of 2016. In this case particulars of the charge indicated that the offence was committed on 5th February, 2007, victims testified that it was on 5th July, 2017 and examination by a doctor to victims was shown to be done on 7th February, 2007. The court considered the variance and it held that;

> *'Therefore, the situation in this case is different because, as also found by the learned first appellate judgment, the variance is in the dates of incidence of commission of an offence between what is in the charge sheet and the evidence on record by witnesses and not the time when the offence was committed. Thus, if the High Court judge would have critically considered this in light of the existing decisions of this Court on the issue, she would not have reached the conclusion she did but found that, the variance in the dates of the incidence between the charge sheet and the evidence on record, makes the anomaly fatal and not curable.*

In this appeal as stated earlier evidence of PW1 was to the effect that the offence was committed on 12/10/2019 and she immediately reported the incident to her mother (PW2) who testified that it was on 18/10/2019 when PW1 was raped. It can be said evidence of PW1 may be due to her age being seven years could not remember exactly the date but the inconsistency I expected to be filled in by PW2 who again gave a different

date which is not indicated in the charge. Going further there is inconsistence on evidence of PW2, PW3 and PW5. PW3 in exhibit P1 that is PF3 examined PW1 on 19/10/2019 which show that the victim was sent for examination after lapse of three days, on the other hand PW5 said the matter was reported to police on 17/10/2019. The glaring question is was the appellant prejudiced.

During defence the appellant stated that it was on 11/10/2019 when he was arrested and sent to police where now he was implicated with the offence. Prosecution gave three accounts of dated the offence alleged was committed which materially did not inform well the appellant on what date to defence himself. That is why he testified that he was arrested on 11/10/2029 and the prosecution did not cross examine him on the date he was arrested. The appellant's evidence was not on dates mentioned by the prosecution witnesses. Thus, the prosecution having noted the variance in the date of the commission of the offence in the charge sheet and the evidence of the complainant and other witnesses, were expected to amend the charge. This was not done leading to uncertainty on what was the date of incident and therefore unresolved doubts.

Having considered circumstance of this case I have come to the conclusion that variance between the charge and evidence was not minor

and it prejudiced the appellant who was placed on dilemma on exactly date the offence of which he was accused was committed as such the appellant has to benefit from the doubts.

At the end, this ground disposes off ground three which touches on defective charge and six on prosecution case containing contradictions, inconsistencies and being insufficient to ground conviction. Determining the remaining grounds of appeal will not serve any purpose.

In the event, I find merits in the appeal and order the appellant be set at liberty forthwith unless held otherwise for lawful purposes.

DATED at MBEYA this 25th day of July, 2022

THE HIGH COURT OF TANZANIA

D.P Ngunyale
Judge