IN THE HIGH COURT OF TANZANIA
IN THE DISTRICT REGISTRY OF SHINYANGA
AT SHINYANGA

CRIMINAL APPEAL NO.78 OF 2021

(*Originating from Criminal Case No. 125 of 2019 of Shinyanga District Court*)

JOHN SALEHE @ MANEE..... APPELLANT

VERSUS

THE REPUBLIC.....RESPONDENT

JUDGMENT

25th April, & 27th May, 2022

MKWIZU,J:

John Salehe @ Manee has appealed against the conviction and sentence in Criminal case No. 125 of 2019 of Shinyanga District Court where he was charged with two counts, rape contrary to section 130 (1) & (2) (e) and 131 (1) of the Penal Code [Cap 16 RE 2002] and impregnating a school girl contrary to section 60A (3) of the Education Act Cap 353 as amended by section 22 of the Written Laws Misc. Amendments) Act No.2 /2016. He denied committing the offences but in its decision, the trial court found him culpable, he was accordingly convicted on both counts and sentenced to 30 years jail term in both counts

Distressed with both conviction and sentence, appellant has lodged his appeal with six grounds which can safely be condensed into two, ***that the exhibits by the prosecution were tendered in violation of the law,***

and ***that prosecution case was not proved to the required standards***.

Re-counting on what traspired, PW1 (the victim) said appellant called her to his home on 1/2/2019 at 19:00 hrs where they had sexual intercourse. She later noticed some changes in her body with vomiting frequently. On interrogation by her mother, she disclosed that she was pregnant and mentioned appellant to be responsible leading to the appellant's apprehension. Her evidence was supported by that of her mother (PW2) and the Doctor (PW3) who tendered in court the PF3 showing that the victim was on 20/6/2020 twenty (20) weeks pregnant.

All the accusations were denied by the appellant saying that he was arrested by the police on 19/6/2019 about 18:00 hours at Tinde transferred to Shinyanga Central Police where he was charged with two counts namely rape and impregnating a schoolgirl. He refuted to have committed the offence challenging the doctor's evidence as well for failure to prove that he was responsible for PW1's pregnancy.

Appellant was during the hearing of this appeal, in person without legal assistance, whilst the respondent/Republic, was represented by Mr. Nestory Mwenda learned State Attorney. Appellant's submissions were brief but focused, he prayed for the consideration of his grounds of appeal without more.

The State Attorney conceded to the complaint that exhibit P1, P2 and P3 were admitted in court as evidence without their contents read out to the appellant liable to be expunged from the records. He was however of the view that, even after the exclusion of all the exhibits from the records, the remaining evidence is strong enough to establish the appellant participation on the offences. He said, the details of exhibit P1 was well explained by the doctor who supported the evidence of PW1, the victim whose evidence remained unshaken during cross examination.

Regarding the age of the victim, the learned State Attorney said, it was properly proved by PW1 and PW2 who all mentioned to the court that victim was born in 2003 and further that the variance complained of between the charge and the evidence is curable under sections 388 of the CPA and cited to the court the decisions in **Osward Mokiwa Sudi Vs R,** Criminal Appeal No. 90 of 2014 CAT (Unreported) from page 21-24 and the case **Masalu Kayeye Vs R**, Criminal Appeal No. 120 of 2017 CAT-Mwanza (unreported) at page 16.He concluded by praying for the dismissal of the appeal.

I have carefully studied the records of the proceedings. It is true as complained by the appellant and conceded to by the learned State Attorney that all the exhibits tendered by the prosecution were not read in court after admission contrary to the requirement of the law as it was emphasized in the case of **Robinson Mwanjisi vs R** [2003] TLR 218 that all documentary exhibits admitted in court must be read out. This is vividly indicated in pages 10, 34 and 42 of the proceedings denying the

appellant the opportunity of appreciating the evidence tendered in court and. In the case of **Jumanne Mohamed & 2 others v Republic**, Criminal Appeal No. 534 of 2015 (unreported) the Court of Appeal held that after a document is cleared for admission and admitted in evidence, it should be read out to the accused person to enable him to understand the nature and substance of the facts contained therein. The omission constituted a fatal irregularity. I, as suggested by the learned State Attorney, expunge exhibit P1, P2 and P3 from the record.

I doubt if after the exclusion of the above exhibits from the records the remaining evidence is insufficient to prove the prosecution's case beyond reasonable doubt. Mr. Mwenda suggested that the remaining evidence, after the exclusion of the above exhibits from the records, is strong enough and has managed to prove the prosecution case. He largely relied on the PW1's evidence as the best witness in sexual offences and that her evidence was properly corroborated by that of the doctor. This takes me to the evaluation of PW1's evidence and that of the Doctor to see if they are satisfactory enough to hold the appellant responsible of both rape and impregnation offence.

Appellant is charged with two offences one being a statutory rape contrary to sections 130 (1) (2) (e) and 131 (1) of the Penal Code where prosecution's obligation is to establish (i) age of the victim (ii) penetration and (iii) that appellant is responsible. There is no doubt that the age of the victim was properly proved by the victim. Her evidence mentioned that she was born in 2003 and that she was 16 years old in 2019. Her evidence on age was supported by her mother PW2.

There is also no doubt that the second element of rape , penetration, was proved. In this case, two pieces of evidence was relied upon by the prosecution, direct evidence of PW1, and that of the medical doctor PW3. On this, PW1, re-counted on how she personally encountered the appellant on 1/2/2019, how the alleged sexual intercourse was committed and her life thereafter. That after a months' time, she started feeling sick, headache and upset stomach. This is the key witness in this case carrying the best evidence in terms of **Seleman Makumba V.R.** [2006] TLR 384 (H). She is the only person who know the incident and the perpetrator. Section 127 (6) of the Evidence Act, Cap 6 R E 2019 gives guideline on how to deal with this evidence. The section reads:

> *"127 (6).* ***where in criminal proceedings involving sexual offence the only independent evidence is that*** *of a child of tender years or* ***of a victim of the sexual offence,*** *the court shall receive the evidence,* ***and may, after assessing the credibility of the evidence*** *of the child of tender years of as the case may be* ***the victim of sexual offence on its own merits, notwithstanding that such evidence is not corroborated, proceed to convict, if for reasons to be recorded in the proceedings, the court is satisfied*** *that the child of tender years or* ***the victim of the sexual offence is telling nothing but the truth.****" [Emphasis added].*

I have curiously evaluated PW1's evidence in relation to the charge and the rest of the evidence on the records. I have no doubt that there was a sufficient penetration for purposes proving rape. This is because, the victim's allegation of being pregnant were supported by the Doctor Pw3 who confirmed to the court that on 20/6/2019 victim was twenty (20) months pregnant.

The crucial issue is whether appellant is responsible. According to PW1, appellant is the rapist. Her evidence, however, is somehow questionable on how she named the appellant. In her evidence PW1 said she could not tell her stepmother at Tinde about the rape incident because she feared of her, but she failed to tell the court why she kept on hiding the name of the person responsible even to her own mother. The records reveal that victim named the appellant to her grandmother and that the naming of the appellant came very late as she initially refused to mention the man responsible even to her grandmother. The question here is, what vacillated her naming the appellant? It should be remembered that this witness was 16 years of age at the time of the commission of the offence. She is not expected, without any threat, intimidation, and the like to have no idea of the person she had had sexual intercourse with if at all she was sure of him. Though I agree that the doctor's evidence was supportive to the victim's evidence, as stated above, such corroboration was only to the pregnancy issue.PW1's evidence on who is responsible for her pregnancy is as explained above weak.

This is also supported by the appellant's complaint on the variance between the charge and evidence on the date of the commission of the offence. The learned State Attorney concedes to the discrepancy but quickly added that the disparity is not fatal to the proceedings as they are remediable under section 388 of the CPA Cap 22 R E 2019 and pegged his reliance on the case of **Oswald Mokiwa @ Sudi V The Republic,** Criminal Appeal No 190 of 2014 and **Masalu Kayeye V R**, Cr. Appeal No 120 of 2017 (All unreported).

According to the charge sheet presented before the court on 17/7/2019 mentioned the date of the commission of the offence as 28/6/2019 at Shibe area in Shinyanga region. This was before the evidence by the victim who testified on 9th October 2019 to the effect that rape incident was committed on 1/2/2019. In **Oswald Mokiwa,** the Court outlined two tests to be considered when dealing with the issue of variance between charge sheet and evidence. The court observed:

> "In our view, the test applicable by an appellate court when determining, at first, the existence of a defective charge, and secondly, its effect on an appellant's conviction, is whether the conviction based on the alleged defective charge occasioned a failure of justice or pronounced prejudice to the appellant. This test is in consonance with the curative provisions of section 388 of the CPA we referred to earlier"

I have taken trouble to evaluate the evidence *vis a vis* the charge sheet. As correctly admitted by the learned State Attorney, there is apparent variance between the evidence adduced by the victim and the particulars of the charge sheet concerning the date of the commission of the offence. The initial charge sheet filed in court on 17/7/2019 indicated the date of commission of the offences as 28/6/2019 at Chibe area in Shinyanga Municipality. The appellant denied the accusations therein on the same date -17/7/2019. The prosecution informed the court thereafter that the investigation is still underway necessitating several adjournments to 28/8/2019 when the court was informed of the completion of the investigation by the prosecution.

The records also reveal that, the preliminary hearing was on 25/9/2019 conducted pursuant to section 192 of the CPC. The prosecution insisted on 28/6/2019 as the date of commission of the offence. These facts were not narrated by a lay person, but by the State's Attorney, a learned personnel from the prosecution machinery well knowledgeable with the facts he was presenting before the court. And hearing was conducted on 9/10/2019 where the victim gave evidence as PW1. She informed the court that she was raped on 1/2/2019 at Tinde area and not on 28/6/2019 at Chibe area as indicated in the initial charge sheet. The prosecution seems were awakened by the said evidence. They on 3/12/2019 prayed for and leave was granted for the substitution of the charge under section 234 (1) of the CPC. The amendment, however, did not change the date of the commission of the offence. It only changed the place of the commission of

the offence. Thus, the accusation against the appellant committing the offence officially presented before the trial court was that he committed the offence on 28/6/2019. My view, is had it being a slip of the pen, the prosecution could have corrected the error on the date immediately after leaning from the victim of the correct date. This wasn't done.

It should be stressed here that a charge sheet is the foundation of the trial. Its primary function is to inform the accused person about the offence for which he is charged, including time, date, place of commission of the offence, names and the manner in which the offence was committed which is normally read to the accused to enable him/her to decide rationally whether or not to plead guilty and prepare for the defence. It is to be drawn in compliance with sections 132 and 135 and the second schedule to the CPA where place and time of commission are mentioned as among the necessary features of the charge sheet. Speaking of the importance of the charge sheet, the Court in **Musa Mwaikunda V R**, [2006] T.L.R 38 observed:

> "The principle has always been that an accused person must *know the nature of the offence facing him. This can be yachieved if the charge discloses the essential elements of an offence if that is not done the accused will not have been put on a proper notice of the nature of the case he has to answer. He cannot therefore adequately prepare himself to put up an effective defence"*

And in **Mathayo Kingu Versus Republic**, Criminal Appeal. 589 of 2015 (CAT-DOM) (UNREPORTED), the Court said: ;

> *There is no doubt in our minds that in a criminal trial a Charge Sheet is the foundation of any prosecution facing an accused person and provides him with a road map of what to expect from the prosecution witnesses during his trial...The important role of the charge sheet is to alert the accused person of the important elements of the offence he is facing..."*

I am aware that there is a plethora of authorities to the effect that variance of the date of offence between the charge sheet and evidence is curable under section 234(3) and 388 of the CPA but it is only where the error has not occasioned any prejudice nor injustice to the appellant. In **Oswald Mokiwa's** case for instance, depended upon by the learned State Attorney, the Court of Appeal having considered the error went on at page 19 to say:

> *"...**we are satisfied that the error on the charge sheet was inoffensive; it neither prejudiced the appellant nor occasioned any injustice to him.** Our view is particularly based on two factors: first, **that the appellant did not raise any alibi or similar defence whose effect depended so much on the exactness of the date alleged on the charge as being the date when the offence occurred.** And secondly, that **the appellant fully focused his defence on what the prosecution witnesses alleged to have***

occurred on 22nd November 2008 at the crime scene. *We recall, to the prosecution's credit, that the appellant admitted that the victim visited his home on that day and stayed there for over forty-five minutes. Given these facts, we find no substance in the complaint in the second issue, which we hereby dismiss."(emphasis added)*

The facts in our case are different. As hinted earlier, the appellant was accused of raping and impregnating the victim on 28/6/2019. The conduct of the prosecution from the commencement of the trial to the end shows that they intended the charge to so read, and they meant what they disclosed in the charge sheet. In fact, at the completion of the investigation, prosecution ought to have all material evidence at their disposal ready for prosecution, and these should be nothing more than, when how and who committed the offence. Since the investigation in this case was completed after the charging of the appellant, then prosecution was expected, in case of any new discoveries, to amend the charge to avail the accused (now appellant) with all relevant information in relation to his accusations. Prosecution in this case did not bother, they maintained the former charge even after disclosure of the correct date of the offence by their key witness, PW1.They kept quiet feeding the court and the appellant wrong information just to come in appeal disowning what they had presented in court. I think, this is not acceptable. Criminal indictments are not to be taken lightly as they involve taking away one's liberty. So, to ensure that justice is administered fairly to all involved, the prosecution is

expected to act diligently giving the process a deserving serious attention, both during investigation and prosecution stages to create a conducive environment for a full and fair hearing/trial, as guaranteed by Article 13 (6) (a) of the Constitution of the United Republic of Tanzania, which deals with equality before the law.

Appellant like most of the accused persons, is a normal citizen, unrepresented in court. The essential document that he would have put his reliance on in preparing his defence, is the charge sheet tabled before him by the prosecution. If the charge, which is the foundation of trial is left to be drafted at the prosecution's wishes, the accused persons will have no base upon which to organize their defense.

To say the least, the prosecution in this case had only two options, prove the charge as it is or rectify the error before the end of the trial. The prosecution did not accomplish either of the two. It is obvious therefore that, the only accusation against the appellant in this case, is that he committed the offence on 28/6/2019 and the State Attorney suggestion that the error was a slip of the pen is, in my view, taking into account the circumstances of the case, and general nature of the prosecution, an afterthought and to hold otherwise would be to take the appellant by surprise which would amount to an unfair trial. The error is thus not curable.

As a result, I find the charge against the appellant not proved to the required standard. Conviction is quashed and sentence meted against the appellant is set aside. The appellant is to be released from prison forthwith unless otherwise held for lawful cause. It is so ordered

DATED at **Shinyanga** this 27th **day** of **May** 2022.

E.Y. MKWIZU
JUDGE
27/5/2022

COURT: Right of appeal explained.

E.Y. MKWIZU
JUDGE
27/5/2022