IN THE HIGH COURT OF UNITED REPUBLIC OF TANZANIA

MOSHI DISTRICT REGISTRY

AT MOSHI

CRIMINAL APPEAL NO. 32 OF 2022

(Originating from Criminal Case No. 95 of 2021 District Court of Rombo at Mkuu)

FRANK EMMANUEL PALANGYO ..... APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

JUDGMENT

Last Order: 14/11/2022

Judgment: 5/12/2022

MASABO, J.:-

The appellant is aggrieved by a judgment of the district court of Rombo at Mkuu which on 17th March 2022 convicted of him of rape contrary to section 130(1) (2) and 131(1) of the Penal Code [Cap 16 RE 2019] and sentenced him to 30 years imprisonment. It was alleged that on the night of 3/5/2021 he raped a woman aged 20 at Nanjara Kibaoni Village within Rombo District, Kilimanjaro region. During the hearing, the prosecution paraded a total of 5 witnesses to build a case that the accussed, a motorcyclist, was sent to pick up the victim from a bus stand and take her to her to her new place of employment. Having picked up the victim he diverted his *bodaboda* to his place where he held her hostage and, in the night, he forcibly knew her carnally. In the morning she managed to escape and reported the incidence to PW3 and, with help of this witness, the incidence was reported to PW4, a

hamlet leader. The appellant was later arrested after he was positively identified by the victim. The victim was given a PF3 for medical examination which after being performed on her, confirmed she was carnally known. On his party, the appellant totally denied involvement and raised an *alibi*, that on the said date he was arrested by policemen at 10:00hrs for riding a *bodaboda* without wearing a helmet and was locked up until on 6/5/2021 when he was taken to court. The court found the prosecution case credible and convicted him.

In his appeal, the appellant has fronted a total of nine grounds of appeal which I will summarized as follows: his *alibi* was not considered; evidence of PW1 was immaterial and null; PW5 was incompetent to tender the PF3 as he did not medically examine the victim; the prosecution's evidence was contradictory and inconsistent; PW1 was a liar; the court shifted the burden of proof to the appellant and convicted him based on the weakness of his defence; the hearing did not proceed in camera.

Hearing of the appeal proceeded in writing at the request of the appellant who was un represented and with consent of Ms. Mary Lucas, the learned State Attorney appearing for the Respondent Republic.

Supporting the appeal, the appellant submitted on the first four grounds of appeal while she silently abandoned the last four. On the first ground of appeal, he submitted that the prosecution case had multiple inconsistencies the major one being the discrepancy on the place at which the crime was

committed. Whereas the charge sheet asserted that the crime was committed at Nanjara Kibaoni Village within Rombo district, the witnesses paraded by the prosecution, notably PW2 and PW3 testified that the offence was committed at their respective village namely Nayemi/ Nayeme Village. He argued that, as per section 234(1) of the Criminal Procedure Act [Cap 20 RE 2022], the defect ought to have been cured at any time during trial but this was not done, an omission which rendered the proceedings and the judgment there to incurably defective, He cited the case of **Godfrey Simoni & Masai Yosia v The Republic**, Criminal Appeal No. 296 of 2018 in support and he proceeded to argue that in this case the Court of Appeal dealt which defects similar to the one at hand and concluded that omission to rectify the anomaly entitles the court enter an acquittal. Therefore, since no rectification was done at the trial stage this court should acquit him.

On the second ground he submitted that the testimony of PW1 ought not to be relied upon in the absence of an identification parade as her evidence against the appellant who was a stranger to her was solely based on visual identification. He proceeded that, by convicting the appellant based on this evidence, the trial court contradicted the principle laid down in **Yohana Chibwingu v R,** Criminal Appeal no. 117 of 2015, CAT which held that if the accused was a stranger to the witness, it was crucial to conduct an identification parade.

On the 3rd ground, he submitted that tendering and admission of the PF3 proceeded in contravention of section 240(3) of the CPA as PW5 who

tendered it was neither the author of the document nor the doctor who examined the victim. Dr. Nasra Ally, the doctor who examined the victim was not called to testify in court and as such she was not available for cross examination. He added that, since he objected the admission of the PF3 and questioned the whereabout of the doctor who examined the victim, it was crucial for the prosecution to summon this witness and since she was not summoned, the PF3 was rendered incompetent and devoid of weight.

On the 4th ground of appeal, it was argued that the victim's age which is an essential part of the charge ought to have been approved but it was not. Thus, it is uncertain whether her actual age was 20 years as alleged in the charge sheet. On the 5th ground of appeal, he submitted that the prosecution omitted to call a person by the name of Rey who allegedly sent the appellant to pick up the victim and take her to her new employer. The omission, he argued, attracts an adverse inference against the prosecution's case.

The respondent's reply in chief focused on the ingredient of the offence and the credibility of the victim's evidence. It was argued that the offence of rape, when committed on an adult woman, as the one in the present case, is proved if the prosecution establishes penetration and absence of the victim's consent to the sexual intercourse. The two were sufficiently proved in the present case as the victim narrated what transpired between her and the appellant on the fateful night after the appellant and his friend held her hostage. She narrated how the appellant forcefully inserted his manhood into her vagina. Her testimony was corroborated by PW3 and PW4 who met

her after the incident and observed that she was bleeding. A further corroboration was rendered by PW5.

On the credibility of the victim's evidence, the case of **Selemani Makumba v Republic** (2006) TLR 380 was cited in support of the argument that the evidence of the victim of sexual offence is the best evidence and can be relied upon to meter a conviction even in the absence of corroboration provided that the trial court is convinced that what the victim has stated is nothing but the truth. Hence forth, the conviction and sentence were justified.

Regarding the contradiction on the place at which the offence was committed, it was submitted that that the contradictions on the scene of the crime is a minor and negligible as they do not go to the root of the offence as held in **Shaba Haruna @ Dr. Mwagilo v R**, Criminal Appeal No. 396 of 2017 and **Elia Bariki v R,** Criminal Appeal No. 321 of 2019, CAT (all unreported). Thus, there is nothing to fault the trial court's conviction and sentence.

From the submission above and the lower court records placed before me, I will now proceed to examine the grounds of appeal starting with the variance on the place at which the crime was committed. I do so mindful that, the law attached a significant importance to the charge sheet. As held in **Issa Mwanjiku @ White vs Republic**, Criminal Appeal 175 of 2018, CAT, '*a charge sheet is a foundation of criminal trial* as it serves to inform the

accused person "*the nature and magnitude of the charge facing him with a view of enabling him/her to prepare his/her defence.*" Thus, it is imperative that it contains the facts that establish the offence and implicate the accussed person.

In the present case, the appellant has adeptly argued that the charge against him was not proved as there was a discrepancy between the charge sheet and the prosecution evidence as to the place at which the crime was committed. In context, his point is basically that, as he was charged of committing the offence at "Nanjara Kibaoni Village within Rombo District in Kilimanjaro" it was upon the prosecution to prove not only that he committed the offence but that the offence was committed at Nanjara Kibaoni Village, a duty which was not discharged as the evidence rendered by the prosecution presupposes that the offence was committed at another place. The respondent has casually replied, without providing further details, that the discrepancy is negligible as it a minor one and do not go to the root of the offence.

Looking at the charge sheet and the evidence on record, it is vividly clear that the alleged discrepancy exists. As correctly submitted by the appellant, according to the charge sheet, the crime was committed at Nanjara Kibaoni Village whereas the evidence rendered by PW3 and PW4, implicitly show that it was committed at Nayeme/Nayemi Village. PW3 was the first person to meet the victim after she escaped from the appellants' house. He told the court that he is domiciled at Nayeme village and that the victim went to his

home looking for help in the morning of 4/5/2021 after she escaped from the appellant's house and upon hearing the victim's ordeal, he notified the village chairman one Dismas who also testified under oath as PW4 and told the court that he is a hamlet leader and resides at Nayemi- Tarakea. Thus, is it not certain whether the offence was committed at Nayeme/Nayemi village or at Nanjara Kibaoni Village.

Since there is no dispute about the discrepancy, the crucial question for determination is on gravity and the consequences, if any. I am specifically tasked to consider whether, as argued the respondent, the discrepancy is non-fatal hence curable or otherwise. It is now settled that, in order to determine the fatality of an error on the charge sheet the court must consider the circumstances of the case and whether the ailment was prejudicial to accussed person. As I embark on this journey, it is worthwhile noting the two cardinal principles. *First,* the trite law that 'he who alleges must prove' (See section 110 and 111 of the Evidence Act, Cap 2019). And, *second,* the principle that burden of proof in criminal cases rests solely on the prosecution to prove the ingredients of the charge to the required standards, that is, to prove the offence to the extent of eliminating all the reasonable doubts.

Moving to the discrepancy, in the case Michael Gabriel v. R, Criminal Appeal No. 240 of 2017 (unreported), the Court of Appeal dealt with a similar issue. The appellant in that case was charged with being found in unlawful possession of two leopard skins at Ng'arwa-Orikiu area in Ngorongoro District. In the course of trial, PW1 and PW4 who were arresting officers

testified that the appellant was arrested at a distance of about one kilometer out of Loliondo town where he was found in possession of the skin. The Court held that the discrepancy was vivid such that it ought to have been cured through amendment of the charge sheet. The omission to amend the charge sheet was found fatal as it rendered the prosecution's case unproven. In a subsequent decision in **Godfrey Simon & Another** (supra), the place indicated in the charge sheet was similarly at variance with the one in the testimonies. The charge sheet showed that the offence was committed at Dofa village whereas PW1 and PW3 testified that the offence was committed at Matofarini. The Court allowed the appeal after it found out that the variance too conspicuous to salvage the charge.

The court had held a similar view in cases involving discrepancy of dates. For instance, in **Marki Said @ Mbega vs Republic**, Criminal Appeal 204 of 2018 in which the prosecution had led no evidence to show that the offence was committed on the particulate date. The Court held that:

> "We will now briefly, highlight on the consequences that follow where the prosecution fails to prove the date it mentions in the charge sheet as being the date on which an offence is alleged to have been committed. In the case of **Salum Rashid Chitende v. R**, Criminal Appeal No. 204 of 2015 (unreported), this Court, in uncertain terms stated:
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> > "When specific date, time and place is mentioned in the charge sheet, the prosecution is obliged to prove that the offence was committed on that specific date time and place."[Emphasis

Elucidating how the variance can be cured in **Said Msusa vs Republic**, Criminal Appeal No. 268 of 2013, the Court of Appeal while dealing with a defect in dates stated thus;

> Section 234(1) of the CPA provides that where there is a variance between the charge and the evidence the court may be moved to amend or alter the charge. (See **MUSSA MUTALEMWA v R** Criminal Appeal No. 172 of 1990 (unreported). However, the amendment must be made before judgment, otherwise the judgment runs the risk of being quashed on appeal on account of such discrepancy (See **JOSEPH SYPRIANO v R** Criminal Appeal No. 158 of 2011 (unreported)

From these authorities, it appears to be well settled that, whereas the discrepancy on the place at which the crime was committed is curable, the cure can only be invoked at the trial stage before the pronouncement of judgment. Pronouncement of the judgment renders the variance an incurable defect capable of vitiating the proceedings and the judgment thereto. The argument by the learned State Attorney that the variance is minor and negligible is certainly opposed to the authorities which underline the fatality of the variance and its consequences. As underscored in these authorities, when the place at which the offence was committed is specified in the charge sheet, it must be proved as a necessary ingredient of the charges. If, as in the present case, the place at which the crime was committed is not proved and no amendment was done to the charge sheet, the charges against the accussed person cannot be fairly said to have been proved and the prosecution cannot be credited to have proved its case to

the required standards. The first ground of appeal consequently passes and is allowed.

Having made the above findings, I see no need to advance to the remaining grounds as the findings above has naturally disposed of the appeal. Accordingly, the appeal is allowed. The trial court's conviction and sentence are quashed and set aside. It is subsequently ordered that the appellant be discharged from custody unless otherwise held for a lawful cause.

DATED and DELIVERED at Moshi this 5th day of December, 2022.

X

Signed by: J.L.MASABO

J. L. MASABO

JUDGE

5/12/2022