IN THE HIGH COURT OF TANZANIA

(DAR ES SALAAM SUB DISTRICT REGISTRY)

AT DAR ES SALAAM

CRIMINAL APPEAL NO. 260 OF 2021

(Originating from the Judgment of Temeke District Court at Temeke Criminal Case No. 231 of 2020, of 10th November, 2021, before Hon. J. H. Mwankenja, SRM)

HASSAN IBRAHIM SEFU@DANIEL..... 1ST APPELLANT

OMARY PAZI NYIMKUU @OMARY PWIKU.....2ND APPELLANT

VERSUS

THE REPUBLIC.....RESPONDENT

JUDGMENT

Date of last Order: 23rd January, 2023

Date of Judgment: 3rd March, 2022

E.E. KAKOLAKI, J.

In the District Court of Temeke at Temeke the appellants were arraigned with two counts of **Gang Rape**; Contrary to section 131 A (1) and (2) and **Unnatural offence**; Contrary to section 154 (1) (a) both of the Penal Code, [Cap 16 R.E 2019] (Now R.E 2022]. It was prosecution case that, on diverse dates between 1st January up to 10th day of August 2020, at Mbagala Mbande within Temeke District in Dar es Salaam Region, the accused persons had carnal knowledge of *MSP* (Name withheld to conceal her identity), a girl aged

11 years (PW2), and at the same time had carnal knowledge of her against the order of nature.

Appellants pleaded not guilty to both counts, the fact which prompted the prosecution to parade five (5) witnesses and tendered two (2) documentary exhibits in a bid to establish their guilty to the offences booked with. On their party, appellants had their own defence without calling witnesses. After full trial, the court was convinced that, prosecution successfully proved to the hilt the 2nd count of Unnatural Offence, as were both acquitted on the 1st count, on account of defectiveness obtained in the charge. They were thus convicted on the 2nd count and sentenced to serve the sentence of 30 years in jail.

It is the said decision which displeased them and triggered the present appeal in which appellants raised eleven (11) grounds of appeal followed by six (6) supplementary grounds and which during the hearing opted to reduce then to seven (7) grievances only. I am not therefore intending to reproduce all grounds herein, instead I am proposing to reduce down the said seven (7) grounds or issues for determination by this Court, in which the appellants are basing to invite the Court to allow their appeal, quash the conviction, set aside the sentence and free them from prison.

At the hearing of the appeal, both appellants appeared in person unrepresented while the respondent was represented by Mr. Hezron Mwasimba, Senior State Attorney and the appeal was disposed of by way of written submissions. Both parties complied with the filling schedule as ordered by the Court.

In this matter the seven (7) grievances/issues advanced by the appellants to challenge their conviction and sentence, in which this Court is called to determine are coached that; *Firstly*, the issue of Identification/recognition evidence by PW2 was insufficient, incredible, untruthful and unreliable to warrant appellants' conviction*. Secondly*, there was nothing in prosecution evidence to prove that 1st appellant was also called Daniel. *Thirdly*, misapprehension of the evidence of PW2 which was improbable/implausible, untruthful, incredible and unreliable to base appellants' conviction. *Fourthly,* that evidence of PW1, PW3, PW4, and PW5 was hearsay evidence weak and unreliable to establish appellants guilty beyond reasonable doubts. *Fifthly;* the charge sheet was fatally defective as the prosecution evidence was in variance with the particulars of the offence in regard to the dates of incidents, *Sixthly,* Defence evidence was wrongly rejected/ disregarded while the same raised reasonable doubt, and *seventhly,* the case was not proved

beyond reasonable doubt. Respondent on the other hand made it clear from the outset that, was opposing the appeal and supporting appellants' conviction and sentence. In so doing through the learned Senior State Attorney, was able to respond to all seven grounds of appeal as summarized and argued by the appellants. In determining the merits or otherwise of this appeal, for the reasons to be apparent soon, I am proposing to start and consider first the fifth ground and then the seventh ground of appeal before I revert to other grounds of appeal if need be. And in so doing this Court enjoys the powers of rehearing of the matter for re-evaluating trial court's evidence and come up with its own findings. See the cases of **Peters Vs. Sunday Post Ltd.** (1958) E.A. 424 and **Demaay Daat Vs. R**, Criminal Appeal No. 80 of 1994 (CAT-unreported).

To start with the fifth ground it is the appellants' complaint that, the charge sheet is fatally defective as the prosecution evidence is in variance with the particulars of offence regarding the dates of incident in which the offence is alleged to have been committed. It was their contention that, there is no evidence proving that the incident occurred on diverse dates from 1st day of January to 10th day of August as stated in the particulars of the offence. They contended that, there is no word from prosecution witnesses (PW1 and

PW1) that matches with particulars of the offence. It was their submission therefore the charge against them was unproved to ground the conviction. They added that, even if it is true that the appellants committed that crime in diverse dates, why didn't PW2 tell any of her parents, relatives, teacher or schoolmates for that long time, and why didn't PW1 take any action on the changes of her daughter coming home late? Appellants supported their stance by citing the case of **Abel Masiki VS R,** Criminal Appeal No. 24 of 2015 (unreported) on the effect of variance between the charge and evidence adduced in Court and prayed the Court to find merit on this ground and allow their appeal.

In rebuttal, it was Mr. Mwasimba's submission on proof of dates of commission of an offence that, since PW2 said was sodomized several times, she would definitely be unable to specify an exact date. None mentioning of dates was therefore not fatal as it was held in the case of **Evarist Kachembeho and Others Vs. R**, [1978] LRT 70 that, human recollection is infallible, the learned counsel stressed. To him, the charge sheet cannot be fatally defective for merely not mentioning specific dates as to when the offence was committed. He said, according to PW1 the incident took place on 10th August 2020 and PW2 was treated on 11th day of August, 2020, thus

a proof that the offence took place on 10th of August 2020 and other dates not remembered. He referred the court to page 15, 20, and 24 of the typed proceedings.

It was his further submission that, under section 243 (3) of the CPA, variance between the charge and the evidence adduced in support of it with respect to the time at which the alleged offence was committed is not material hence curable. He supported his stance by citing the case of **Maneno Hamza Vs. R,** Criminal Appeal No 388 of 2014 and **Damian Ruhele Vs. R**, Criminal Appeal No. 501 of 2007 (both CAT-unreported) where it was held that, an error on the charge sheet was inoffensive as it neither prejudiced the appellant not occasioned any injustice to them since they did not raise the defence of alibi.

In concluding this ground, Mr. Mwasimba contended that, what is alleged by the appellants on account of variance on dates or time was never cross examined by them during trial, hence they are estopped from inquiring the same at the appellate stage. He supported that stance with the case of **Mawazo Anyandwile Mwaikaja Vs. R**, Criminal Case No. 455 of 2017 (CAT-unreported) that failure to cross examine a witness on important matter ordinarily implies the acceptance of the truth of the witness evidence.

He implored the court to dismiss this point. In their rejoinder appellants had nothing material to add on this ground apart from the respondent's submission that, their failure to cross examine prosecution witness on the variance of dates implied their acceptance of the facts, in which they commented was misleading as failure to cross examine is not conclusive evidence that accused are admitting the facts stated since it is a merely consideration to be weighed up with all other factors in the case when deciding on the truthfulness or otherwise of the unchallenged evidence. The relied on the decision of this Court in the case of **Kwiga Masa Vs. Samwel Mtubwata** [1984] TLR 103 (HC -Samatta J, as he then was) and maintained their prayer for having their appeal allowed.

I have dispassionately considered the fighting submissions by the parties as well as taken time to peruse the record and impugned decision. It is a principle of law as provided under section 132 of the CPA that, every charge must contain essential elements disclosing the offence among others particulars necessary for providing reasonable information to the accused as to the nature of the offence he is charged with, the object being to enable him understand the nature and extent of the accusation levelled against him so as to prepare his defence. Section 132 of the CPA reads:

> *132. Every charge or information shall contain, and shall be sufficient if it contains, a statement of the specific offence or offences with which the accused person is charged, together with such* ***particulars as may be necessary for giving reasonable information as to the nature of the offence charged****. (Emphasis supplied)*

The particulars referred in the cited provision above to my view includes the particulars as to **who** allegedly committed the offence, **when** (dates and time if any), **where** (place), **how** was it committed and to **whom** was it committed. The importance of supplying particulars of offence in the charge was articulated by the Court of Appeal in the case of **Isidori Patrice Vs. Republic**, Criminal Appeal No. 224 of 2007 (CAT-unreported) where the Court held that:

> *It is a mandatory statutory requirement that every charge in a subordinate court shall contain not only a statement of the specific offence with which the accused is charged but such particulars as may be necessary for giving reasonable information as to the nature of the offence charged... It is now trite law that the particulars of the charge shall disclose the essential elements or ingredients of the offence. This requirement hinges on the basic rules of criminal law and evidence to the effect that the prosecution has to prove that*

the accused committed the actus reus of the offence with the necessary mensrea. Accordingly, the particulars, in order to give the accused a fair trial in enabling him to prepare his defence, must allege the essential facts of the offence and any intent specifically required by law.

In this case the appellants contends the charge is defective as none specification by PW1 and PW2 of the dates of commission of an offence rendered the charge defective as their evidence was at variance with it, the submission which is contested by Mr. Mwasimba in that, variance of dates does not render the charge defective as such defect is curable under section 234(3) of the CPA. In order to appreciate the rivalry arguments I find it apposite to reproduce part of the charge sheet in particular the second count in which the accused were convicted with. The same reads:

2ND COUNT

UNNATURAL OFFENCE*: Contrary to section 154(1)(a) of the Penal Code [Cap. 16 R.E 2002].*

PARTICULARS OF OFFENCE

HASSAN IBRAHIM SEFU @ DANIEL and OMARY PAZI NYIMKUU @ OMARY PWIKU *on diverse dates between 1st day of January up to 10th day of August, 2020 at Mbagala Mbande area within Temenke District in Dar es salaam Region did*

unlawfully have carnal knowlwdge against the order of nature of one MSP, a girl of 11 years old.

From the face of the above cited excerpt of the charge sheet, it is noted that the offence is alleged to have been committed between 1st January to 10th of August, 2020. Apart from the date and month in which the offence is alleged to have started being committed, the charge does not mention the year. In my considered view, none mentioning of the year of the starting date and month denied the appellants herein with an opportunity to understand exactly as to when they are alleged to have started committing the offence, for them to be able to prepare an informed defence, since the principle has always been that an accused person must know the nature of the case facing him before entering his defence. See the case of **Mussa Mwaikunda Vs. R** [2006] TLR 387. I so view as it is highly improbable that they started committing the alleged offence to the victim from 1st of January of the year she was born up 10th August, 2020. It follows therefore none mentioning of the specific year in which the alleged offence started to be committed, I hold rendered the charge defective, hence could not be relied on by the trial court to convict the appellants.

That aside, even if I was to hold the charge was not defective which is not the case, still I would have found the offence was not proved to the hilt against the appellants. The reason is that, PW2 who was in standard six when testified in Court on 29/04/2021, in her evidence stated that, appellants started ravishing her since when she was in standard five without mentioning the exact year. And that the offence was perpetrated to her several times without mentioning the year, date and month in which it was committed, apart from 10th of August, 2020 mentioned by PW1 (PW2's father) who no doubt was not at the scene of crime at all those times alleged by PW2. Since the charge was defective for not disclosing the year in which the alleged offence of unnatural offence started to be committed by the appellants and since as per evidence of PW2 the offence was committed to her by the appellants several times without specification of the dates, this Court finds the prosecution evidence was at variance with the charge, which no doubt left the charge unproved. I so find as it is incumbent upon the Republic to lead evidence showing that the offence was committed in the date alleged in the charge sheet, which the accused was expected and required to answer, failure of which leaves the charge unproved, entitling the accused to acquittal as it was held in the case of **Abel Masikiti Vs.**

Republic, Criminal Appeal No. 24 of 2015 (CAT-unreported) where the Court of Appeal had this to say:

> *"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 in the date alleged in the charge sheet, which the accused was expected and required to answer. If there is any variance and uncertainty in the dates, then the charge must be amended in terms of section 234 of the CPA. 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."*

It is Mr. Mwasimba's contention that, variance dates in the charge sheet is curable under sectiion 234(3) of the CPA, hence an omission to state date does not render the charge fatal defective. With due respect to the learned counsel I do not subscribe to his proposition on the ground that the said section is very specific and treats immaterial variance between the charge and evidence on aspect of time only and not dates as it was also held in the case of **Justine Mtelule Vs. R,** Criminal Appeal No. 482 of 2016 (CAT-unreported). The provision of section 234(3) of the CPA provides:

> *234(3) Variance between the charge and the evidence adduced in support of it* ***with respect to the time at which***

the alleged offence was committed is not material and the charge need not be amended for such variance *if it is proved that the proceedings were in fact instituted within the time, if any, limited by law for the institution thereof. (Emphasis supplied).*

From the above exposition of the law even the cases of **Damian Ruhele** (supra) and **Maneno Hamza** (supra), I hold are distinguishable from the circumstances of this case. Now as to what is the remedy where there is an omission to state specific dates such as the year in which the offence was committed or where the evidence is at variance with particulars of the charge, the provision of section 234(1) of the CPA provides an answer that, the charge must be amended or substituted. The section reads:

234.-(1) Where, at any stage of a trial, it appears to the court that the charge is defective, either in substance or form, the court may make such order for alteration of the charge either by way of amendment of the charge or by substitution or addition of a new charge as the court thinks necessary to meet the circumstances of the case unless, having regard to the merits of the case, the required amendments cannot be made without injustice; and all amendments made under the provisions of this subsection shall be made upon such terms as the court shall seem just.

In essence the above cited provision confers powers on the trial court to allow amendment of the charges to meet the pertaining circumstances and must be so moved by the prosecution, failure of which the charge becomes incurable defective. See the case of **Justine Mtelule** (supra) where the Court of Appeal had the following observations to make:

> *"…as also found by the first appellate judgement, the variance is in the dates of the 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****." (Emphasis added)*

In this matter since the charge was defective and no amendment was ever preferred by the Republic, I find it was improper to base conviction on it, hence appellants were wrongly convicted and sentenced. This ground in my opinion suffices to dispose of the appeal and I see no reason to direct my mind to the rest of the grounds of appeal for being academic exercise.

Consequently, this appeal has merit and is hereby allowed. Appellants' conviction is quashed and sentence meted on them set aside. I order for their immediate release from prison unless otherwise lawful held.

It is so ordered.

Dated at Dar es Salaam this 03rd day of March, 2023.

E. E. KAKOLAKI

JUDGE

03/03/2023.

The Judgment has been delivered at Dar es Salaam today 03rd day of March, 2023 in the presence of both appellants in person, Mr. Laiton Mhesa, Principal State Attorney for the Respondent and Ms. Tumaini Kisanga, Court clerk.

Right of Appeal explained.

E. E. KAKOLAKI

JUDGE

03/03/2023.