

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
(IRINGA SUB REGISTRY)**

AT IRINGA

DC CRIMINAL APPEAL NO. 18 OF 2023

*(Original Criminal Case No. 190/2020 of the District Court of Mufindi
before Hon. E. Uphoro, SRM.)*

JUMA KADEGE

.....

APPELLANT

VERSUS

REPUBLIC

.....

RESPONDENT

JUDGMENT

15th May & 12th June, 2023

I.C MUGETA, J:

The appellant was convicted of rape contrary to sections 130(1), 2(e) and 131(1) of the Penal Code, [Cap.16 R.E 2019]. The prosecution alleged that the appellant on 22nd day of August 2020 at Kihanga village within Mufindi District in Iringa region did have carnal knowledge to one A d/o M a girl of 19 years. The appellant denied the charge leveled against him.

The appellant filed his petition of appeal consisting of nine grounds which can be grouped into four complaints as follows. **one**, that there were contradictions on when the incident occurred, **two**, the appellant was not properly identified at the crime scene and the identification parade was not proper as there was no independent witness, **three**, the prosecution did

not prove beyond reasonable doubt, **four**, no expert on cybercrime proved the alleged M-PESA transaction.

The appellant appeared unrepresented at the hearing. The respondent was represented by Ms. Jackline Nungu, Mr. Barton Mayage, Mr. Herbert Ishengoma, Ms. Prisca Kipagile and Mr. Sauli Makori, learned State Attorneys.

The appellant being a lay person, prayed that the prosecution begins but reserved his right to rejoin.

Ms. Nungu supported the appeal. She argued on the 1st complaint that there was variance on the date of incident between the charge sheet and the evidence adduced in court. She argued further that according to the charge sheet the incident occurred on 21/08/2020 at night hours. During preliminary hearing it was stated that the incident took place on 22/08/2020 while during hearing PW.1 testified that the incident took place on 20/08/2020 at night hours. Again, PW.2 and PW.3 testified that the incident took place on 21/08/2020. In her view, the contradictions go to the root of the case thus invalidates the trial. She cited the case of **Khalid Hussein Lwambano V. Republic**, Criminal Appeal No. 473 of 2016, Court of Appeal – Iringa (unreported) where it was held that variance

Ngeta

between the charge sheet and evidence on the date and the charge is not amended renders the charge unproved.

On the 2nd complaint she contended that the identification parade was not proper as the victim had not described the assailant before the parade. That even during the hearing, the victim did not properly describe the appellant. She contended further that failure to describe the perpetrator before the parade invalidated the parade as it was held in **Adriano Agondo v. Republic**, Criminal Appeal No. 29 of 2012, Court of Appeal – Tabora (unreported) where the court referred to the case of **Rex V. Mwango Manaa** [1941] 8 EACA 29.

She contended further that there was no independent witness who participated in the identification parade thus the identification parade register should be expunged from the record. After expunging the identification register, in her view, there is no any other evidence supporting the appellant's conviction.

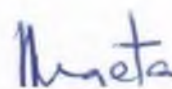
In rejoinder the appellant prayed that his appeal be allowed.

I shall consider the appeal under one complaint, whether the charge was proved beyond reasonable doubts as it suffices to dispose of this case.



I agree with the learned State Attorney that there are contradictions in the prosecution case. This is because the charge sheet shows that the incident occurred on 22/08/2020. When PW.1 testified in court she said the incident occurred on 20/08/2020 night hours. PW.2 testified that the incident occurred on 21/08/2020. His evidence is corroborated by the testimony of PW.3 who testified that the incident occurred on 21/08/2020 around 1:00 hours. Again, PW.4 (the medical doctor) who examined the victim testified that he examined the victim on 22/08/2020 in the morning as evidenced on the PF.3. I am aware that not every inconsistency and or contradictions will make a prosecution's case to flop but those that go to the root of the case. This was the position taken by the Court in **Silas Sendaiyebuye Msagabago v. The D.P.P**, Criminal Appeal No. 184 of 2017, Court of Appeal – Mbeya (unreported).

In the matter at hand, I agree with the learned State Attorney that the inconsistencies and contradictions went to the root of the matter. This is because PW.1, PW.2 and PW.3 were all at the same place when the incident occurred but referred to different date to that in the charge sheet. The evidence of PW.1 (the victim) is not only inconsistent with the other prosecution witnesses but also with the charge sheet. The evidence,



therefore, did not prove the charge. These contradiction prejudiced the appeal is defence for their uncertainty.

The appellant also complained on his identification at the crime scene and at the identification parade held at the police station. The record shows that the incident took place at night hours where PW.1, PW.2 and PW.3 had retired to sleep. However, no prosecution witness testified on how they identified the appellant on that fateful night. It was not enough for them to state that it was the appellant who committed the offence. They should have stated the features that enabled them to identify him, the amount of light and whether they knew him before the incident.

At the identification parade no information is given on the features of the appellant which helped the victim to identify him. PW.1 did not describe to PW.5 any feature that would help her differentiate the appellant from other people who paraded together with him. Moreover, the record does not show whether the appellant was afforded his rights to have an advocate or relative when the parade took place. Further, PW5 did not ask the appellant if he was satisfied that the parade was conducted in a fair manner.

Mugeta

For the evidence derived from identification parade to have probative value all the factors stated in **R. V. XC- 7535 PC Venance Mbuta** [2002] TLR 48 must be met. Consequently, I hold that the identification of the appellant was not watertight. I, thus, agree with the appellant's complaint, which is supported by the respondent that the charge against him was not proved beyond reasonable doubt.

I allow the appeal, quash the conviction and set aside the sentence meted against the appellant. The appellant to be released from custody unless held for other lawful cause.




I.C MUGETA

JUDGE

12/6/2023

Court: Judgment delivered in chambers in the presence of the appellant and Muzzna Mfinanga for the Respondent.

I.C MUGETA

JUDGE

12/6/2023