IN THE HIGH COURT OF TANZANIA

DODOMA SUB-REGISTRY

AT DODOMA

DC. CRIMINAL APPEAL NO. 46 OF 2022

(Appeal from the Judgment of Juvenile Court of Singida, R. A Oguda - SRM, Dated the 09th of March, 2022 in Criminal Case No. 02 of 2021)

SIRUNA BIN ATHUMAN IRUMBA ..... APPELLANT

VERSUS

THE REPUBLIC.....RESPONDENT

.....

JUDGMENT

19th April & 30th June, 2023

HASSAN, J.:

Siruna Bin Athuman Irumba, the appellant herein, was charged before the Juvenile Court of Singida for the offence of rape contrary to the provisions of section 130 (1) & (2) (e) and section 131 (1) of the Penal Code, Cap. 16 R. E 2019. It is in the particulars of offence that, on 20th day of April, 2021 at Utemini area, Utemini Ward, Unyakumi Division within District and Region of Singida the appellant did have sexual intercourse with one Nauthary D/o Hussein @ Muhibu, a child of four (4) years old.

When the charge was read over to the appellant at the trial court, the appellant denied the charge. The prosecution, thereafter, called a total of four (4) witnesses who testified against the appellant. The appellant entered his defence and called a total of five (5) witnesses to defend his case. At the conclusion of trial, the appellant was convicted and sentenced to serve six months conditional discharge and ordered appellant's parents to pay compensation of Tshs. 300,000/= to the victim in consequence thereof. This was on 09th of March, 2022.

Aggrieved, the Appellant preferred an appeal to this court on the following grounds:

1. *That, the Juvenile Court of Singida erred in law and in facts when it failed to make a finding that the prosecution evidence had a lot of reasonable doubt on the Appellant's association with the commission of the offence he was charged with, as such, convicted him relying on the evidence that did not prove the appellant's guilty at the required standard of proof at law.*

2. *That, the Juvenile Court of Singida erred in law and in facts when it shifted the burden of proof to the appellant contrary to the dictates of the law which pose the said burden to the prosecution.*
3. *That, the Juvenile Court of Singida erred in law and in facts when it ordered the appellant's parents to pay a sum of Tanzania Shillings Three Hundred Thousand (300,000/=) only as compensation to the victim whereas, there was no proof of the commission of the offence by the appellant and even if it could have been proven such order could not be made without assessing the damage the victim suffered.*
4. *That, the appeal is within time as the judgement was delivered on 9th March, 2022; Notice of intention to appeal and letter requesting for certified copies of the proceedings and judgement were lodged with the trial court on 14th March, 2022 and the copies of the judgement and the proceedings were supplied to the appellant on 6th May, 2022.*

When the appeal came for hearing, the appellant was represented by Mr. Benda, Learned Counsel. Whereas, the respondent Republic had the service of Mr. G. Mlagala, Learned State Attorney.

Submitting on the first ground of appeal, Mr. Benda stated that, the evidence of prosecution was weak to prove the offence to the standard required by law. The testimony of PW2, PW3 and PW4 differs. PW2 testified that this offence occurred on 10/04/2021, while PW3 (doctor) stated that on 14/04/2021, PW2 brought the victim to the health Centre and examined the victim. To him, there is contradiction of dates. He added that, the record shows that the appellant was arrested by CPL Noah on 17/04/2021 which is long time from the date offence occurred. Charge sheet also shows that the offence was committed on 20/04/2021. According to the evidence of PW2, PW3 and PW4 neither of them had proved that the victim was raped on 20/04/2021 as indicated in the charge sheet.

Mr. Benda submitted further that, prosecution evidence was supposed prove that, the appellant has raped the victim on the said date of 20/04/2021 as it appears in the charge sheet. He adds, failure to do so it means prosecution has failed to prove their case at the standard required by law. The requirement of DPP to prove the case beyond reasonable doubt is

referred in the case of **Kassim Arimu @ Mbawala v. Republic, Criminal Appeal No. 607 of 2021** (unreported), where at page 6 of judgment it was held that:

> *"it is always the duty of prosecution to make sure that, what is contained in the particular or statement of the offence including the dates when the offence was committed is proved and supported by the evidence and not otherwise."*

He also cited the case **of Damas Mgova v. Republic, Criminal Appeal No. 13 of 2022** (unreported), which quoted the case of **Mathias Samweli v. Republic, Criminal Appeal No. 271 of 2009** (unreported) to support his point of variation of dates.

Additionally, Mr. Benda cited section 3 (2) (a) of the Tanzania Evidence Act, to cement those facts laid down in the charge sheet, that accused has raped the victim on 20/04/2021 was subject to prove by the prosecution. He top-up that, according to section 234 of CPA, it provides that, prosecutions are allowed to make amendment of the charge whenever there is variation between the charge and the evidence adduced. He referred to the court the

case of **Marki Said @ Mbega v. Republic, Criminal Appeal No. 204 of 2018** (unreported), at page 10 it provides that, consequences of failure by prosecution to prove the date, the charge will remain unproved and the accused shall be entitled to an acquittal.

As to the second ground of appeal, he stated that, the court has shifted the burden of proof to the appellant. Looking at page 7 of the judgement, the trial magistrate when analysed the evidence of DW1, he said that, the appellant and victim's family are not in good term. Therefore, the reason that the appellant has failed to adduce evidence which shows that he was not the one who had committed the offence, to him, the appellant's rights was prejudiced.

With regard to the third ground of appeal, he argued that, if the appellant is found to be not guilty, then, the order of the court to subject appellant's parents to pay compensation will have no legs to stand. Thus, since the offence was not proved beyond reasonable doubt, then even the order for compensation should be set aside. He therefore prayed this court to allow this appeal, quash conviction and set aside the six months conditional sentence and order for the payment of Tshs. 300,000/= compensation imposed to the appellant's parents.

In reply, Mr. Mlagala did not resist the appeal, and instead he submitted that, there is problem in the charge sheet whereby the charge sheet shows that the appellant has committed the offence of rape on 20/04/2021 at Utemini, Ward of Utemini, Division of Unyakumi in the District and Region of Singida. However, looking on the evidence of PW2 (victim's mother), she testified that the offence occurred on 10/04/2021 which is ten days before the date indicated in the charge sheet. Again, PW3 (a medical Doctor), also testified that she has received the victim for examination on 14/04/2021, which is again six days before the date reported in the charge sheet, that the offence was committed. Looking on the PF3 which was filled by PW3 (a medical Doctor), it indicates that this offence occurred on 10/04/2021 as at page 10 of the typed proceedings. Moreover, PW4 (an investigator) testified that on 15/04/2021 she was handed over the investigation file No. SGD/IR/1874/2021 for the purpose of investigating the matter. Here, it seems that she was handed over the file five days before offence was committed as per the date reported in the charge sheet. PW4 testified to have arrested the appellant on 17/04/2021 and started interrogation forthwith. That shows, it was three days before the date mentioned in the charge sheet that the offence was committed. See page

13 of the typed proceedings. Further to that, PW1 testified that she was raped during a day time, while in cross examination she asserts that it was during the afternoon.

Mr. Mlagala added more that, DW1 testified that on 20/04/2012 he was at school. Thus, there is nowhere the trial magistrate has addressed the issue of alibi as raised by the appellant. DW5 school teacher of the appellant also testified that the appellant was his student and on 20/04/2021 the appellant reported at school at 7:00 am and leave the premises at 5:00 pm as per page 24 of the typed proceedings. To him, since there was variance of dates between the charge sheet and evidence it was the duty of the prosecution to make amendment of the charge as provided under section 234 of the Criminal Procedure Act, in order to cure the problem. However, he averred, that prosecution failed to make amendment. He cited the case of **Malik Said @ Mbega v. Republic, Criminal Appeal No. 204 of 2018 CAT-Tabora** (Unreported) of which at page 10 of the judgement, the court make reference to the case of **Abel Masikini v. Republic, Criminal Appeal No. 24 of 2015** and held that:

> *"If there is variance of dates in the charge sheet and the evidence then the charge cannot be said to be proved."*

He further cited the case of **Kassim Arimu @ Mbawala v. Republic, Criminal Appeal No. 607 of 2021 - CAT** (Unreported), at page 6 the Court of Appeal make reference to the case of **DPP v. Yusufu Mohamed Yusufu, Criminal Appeal No. 331 of 2014** (unreported) to support his point.

To him, since the date indicated in the charge sheet was 20/04/2021 and the date which was proved by prosecution witness was 10/04/2021, then the charge was not proved beyond the standard required. The appellant was supposed to defend himself for the charge of 20/04/2021 which was in the charge sheet and not that of 10/04/2021 which was averred in the evidence.

To cement his point, he referred to the court the case of **Damas Mgova v. Republic, Criminal Appeal No. 13 of 2022 CAT - Iringa** (Unreported), where the court referred the case of **Mathias s/o Samweli v. Republic, Crimina Appeal No. 271 of 2009** (unreported).

To conclude his submission, Mr. Mlagala stated that, the prosecution side failed to prove the case beyond reasonable doubt and therefore, the

guilty of the appellant was not proved. Thus, the conviction has to be quashed and the sentence be set aside.

In rejoinder, Mr. Benda, Learned Advocate for the appellant concurred with learned state attorney that the appeal be allowed, conviction be quashed and sentence to be set aside.

I have taken into consideration the submissions entered by both parties. Indeed, the records and the case laws relied onto by the parties has established the merit of this appeal. It is a trite law, that in criminal cases, prosecution bears burden of proving its case beyond reasonable doubt. To start with the provisions of section 110 and 111 of the Evidence Act, Cap. 6, the law is clear that the burden of proof lied to the prosecution and the standard of such proof is beyond reasonable doubt. See also **Sylivester Stephano v. R, Criminal Appeal No. 527 of 2016** (unreported), and **DPP v. Peter Kibatala, Criminal Appeal No. 4 of 2015 (CAT) Dar es salaam** (unreported), where at page 18 when the Court held that:

> *"In criminal cases, the duty to prove the charge beyond doubts rests on the prosecution and the court is enjoined*

to dismiss the charge and acquit the accused if that duty is not discharged to the hilt."

On that legal position, the prosecution has the duty to prove the charge beyond reasonable doubts. It follows that, in any criminal charges, it is the duty of prosecution to lead evidence by disclosing when the offence was committed by linking the date alleged in the charge sheet, failure of which, it renders the preferred charge fatally incurable for being unproved; unless the same is amended under section 234 (1) of the CPA; otherwise. It will entitle the accused to an acquittal. This was held in the case of **Abel Masikiti v Republic, Criminal Appeal No.24 of 2015-CAT** (Unreported) that:

"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."

Similar stance was taken by the Court of Appeal in the case of **Justine Mtelule v. Republic, Criminal Appeal No. 482 of 2016 -CAT** (Unreported), where variance of dates between charge sheet and the evidence adduced was noted, the Court of Appeal observed that:

"...thus, if the High Court Judge would have critically considered this in light of the existing decision 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 the instant appeal, as observed above, the dates in which the appellant is alleged to have committed the offence are at variance with the evidence adduced by the prosecution's witnesses against him. The prosecution ought to have requested the court under section 234 of the CPA

to amend the charge so as to reflect the evidence adduced. However, they fell short, and leave the matter untenable.

It was evidenced by PW2, PW3 and PW4 that, the appellant raped PW1 on 10/04/2021. While in records, the charge sheet indicated that the offence was committed on 20/04/2021. Again, PW3 testified that she examined the victim and filled PF3 on 14/04/2021. This means she attended the victim before the offence occurred. Furthermore, the record shows that the appellant was arrested on 17/04/2021, yet again three days before the offence was committed.

It stands without saying that, all these variances and contradictions touches the root of the case at hand. I therefore agree with both counsel that, this case was flawed. Notably, conviction and sentence cannot stand unless it should be under the expenses of injustice.

In consequence thereof, the appeal has merit and is accordingly allowed. Conviction quashed, sentence and compensation order meted out is thus set aside.

Further to that, I order release of the Appellant from incarceration unless he is lawfully held.

It is ordered.

DATED at **DODOMA** this 30th day of June, 2023.

S. H. HASSAN
JUDGE