IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

[ARUSHA SUB- REGISTRY]

AT ARUSHA

CRIMINAL APPEAL NO. 145 OF 2022

JAMALI RAMADHANI HUSSEIN _____ **APPELLANT**

VERSUS

REPUBLIC _____ **RESPONDENT**

JUDGMENT

14/03/2024 **&** *06/05/2024*

BADE, J.

In this appeal, this court is being requested to overturn the decision of Arusha RM's Court sitting at Arusha (Trial Court) in Criminal Case No. 367 of 2020, which convicted the appellant, Jamali Ramadhani Hussein. Before the trial court, he stood charged, prosecuted and convicted of the one count of offence of rape c/s 130 (1) (2) (e) and 131 (3) of the Penal Code, Cap 16, Revised Edition, 2019.

Upon conviction, the trial court sentenced the appellant to a life imprisonment. Aggrieved by the said judgment of the Court of Arusha (Mbelwa, RM) the Appellant herein lodged this appeal to challenge it, being represented by Ms. Fauzia Mustafa Akonaay, Advocate, and Mr. Mahfoudh Mbagwa, State Attorney for the Respondent. The appeal was

ordered to be disposed by written submissions and the parties heeded promptly. The grounds of appeal are reproduced verbatim hereunder:

1. That the learned honourable trial magistrate erred in law and fact in holding that the prosecution proved the offence of rape c/s 130 (1) (2) and 131 (3) of the Penal Code against the Appellant beyond reasonable doubt.

2. That the trial court erred in law and fact when convicting and later sentenced the Appellant despite of contradiction in the testimony of prosecution witnesses.

3. That the learned honourable trial magistrate grossly misdirected himself in not complying with the requirement of writing judgment according to the provisions of the Criminal Procedure Act.

4. That the learned honourable trial magistrates erred in law by abdicating his role as adjudicator and assumed the role of prosecutor by erroneously considering and relying upon opinions, assumptions and other extraneous matters which were not supported in evidence.

5. That, the learned honourable trial magistrate erred in law and fact by failing to analyze and properly evaluate evidence which was tendered before the court and eventually convicted and sentenced the appellant.

6. That the learned trial magistrate erred in law by convicting the

appellant on the uncorroborated sworn evidence of the prosecutrix (PW4).

The substance of the prosecution evidence through their 5 witnesses is to the effect that, in some unknown dates, the appellant had raped a 6-year-old girl, whom he was entrusted by her father to ferry to school on different occasions, on a motorcycle ridden by the appellant. On 17th December 2021 while being washed by her mother she was discovered to be bleeding on her vagina, but would not say what has happened to her. However, later on at night while attending a short call, she agonized in pain and was checked by her grandmother, who found her labia to have been swollen. She did not disclose what happened to her despite being interrogated by her grandmother, who then the next day, called the victim's aunt, PW3, in a bid to get the truth out of her as they were closer. She divulged to her that she was raped on 3 different occasions, the last one being on 17th December 2020 The defence side had also brought in 5 witnesses in denial of the charges levelled against the appellant.

In arguing the Appeal, the Appellant's counsel combined grounds 1, 2 and 6, and similarly argued grounds 3, 4, 5 jointly.

Regarding ground number one, she argued that it is an elementary rule in Criminal law that for a case to be taken to have been proven beyond a reasonable doubt, its evidence must be strong against the accused person as to leave a remote possibility in his favor which can easily be dismissed.

The trial records show that, the victim of rape (PW4) was raped by the Appellant who was a 'bodaboda' driver. The victim's mother was the first person to discover when she was washing her daughter's private parts. This being the case, the victim's mother was one of the material witness

to prove the said allegations, however, she was not among the prosecution's witnesses that testified before the trial court. PW1's testimony was to the effect that he was informed by the mother of the accused about the incident, arguing why was she not called by the prosecution as a witness?

In further argument, the Appellant reasoned that even though in sexual offences the evidence of the victim is the best, the evidence of the material witness is of vital importance, and failure by the Prosecution to bring such an important material witness without any cogent reason should make this court draw adverse inferences towards them. This position was decided in a number of cases including the case of **Joseph Jovita vs Republic,** Criminal Appeal No. 60/2023 (Unreported).

Secondly, she argues that the Prosecution failed to prove its case for failure to amend the Charge after noticing some variance between the evidence adduced and the Charge. The Charge shows that the incident took place on the 'unknown dates' of 2020 while at the Preliminary Hearing (page 7 of the typed Proceedings) shows that the incident took place on 17/12/2021 (sic) which was also reflected in the evidence of PW1, PW4 and PW5 (page 13,25 and 33 of the typed Proceedings).

She strongly argued that the Prosecution ought to have amended the Charge after seeing the said variance, failure of which made the Charge a defective one. The omission by the Prosecution to amend the Charge has to benefit the accused/Appellant, supporting this stance with the case of **Kiliani Peter vs Republic,** Criminal Appeal No.508 of 2016 and **Vumi Liapenda Mushi vs Republic,** Criminal Appeal No. 327 of 2016 both unreported.

Arguing on the second ground of Appeal that the trial court erred in law in convicting the Appellant based on contradictory testimony of the prosecution witnesses. The trial Court record shows that PW1 in his testimony mentioned the evening hours as when the mother washed her daughter while PW3 referred to the morning of 17/12/2020. Comparing the two testimonies as made by PW1 and PW3, there is a contradiction as to when the victim was checked by her mother referring to Pages 13 and 22 of the typed proceedings.

Pointing further the contradictions, still, the testimony of PW4 had a separate time as to when the incident occurred. First, she stated that on **7/12/2020** when she came from school her mother took her for shower and when she was washing her body, she saw blood out of her vagina. She further stated that she recalls on **17/12/2020,** the Appellant met her when she was coming from school, and it was on this day when the Appellant raped her, referring this court to pages 25 and 26 of the typed Proceedings. She also support her argument with the case of **Kamilian Richard vs Republic,** Criminal Case No. 23 of 2022.

Arguing grounds number 3, 4 and 5, the Appellant counsel faulted the trial magistrate in the requirement of writing a Judgment in that he based it on his own assumptions rather than a proper evaluation of evidence before him from both parties, referring to page 7 of the typed judgement. She argues further that this is contrary to the law as provided under section 312 of the Criminal Procedure Act, Cap 20 (R.E 2022), as well as case law relying on **Agasto Emmanuel vs Republic,** Criminal Appeal No. 8/2020**; Huba Hasan Makeh vs Republic,** Criminal Appeal No.318 of 2018/2019 TZHC 144.

Regarding the sixth ground of appeal, on contradictions in the evidence of the prosecution witnesses, and the unsworn testimony of the victim (PW4) not corroborated by any of the witnesses. In her view, this evidence should not have, therefore, been relied upon by the trial magistrate in convicting the Appellant, and thus urged this court to consider the stated position of the law while quashing the conviction of the Appellant.

Responding, addressing ground 1 of appeal, on the contention that the victim's mother is a material witness and should have testified since she is the one who discovered that the victim was experiencing pains. He argues that under the circumstances of this case, the mother was not a material witness. In his view, the question of material witness depends on the circumstances of the case, and it is not true that every person mentioned by the witness in court should be brought before the court to testify. He distinguished the case of **Joseph Jovita vs Republic** (supra) as being irrelevant and not relating to the facts being contended by the Appellant.

In further argument, the learned counsel argued that the prosecution paraded witnesses PW1 to 4 and these were enough. PW1 the father of the victim testified before court and tendered the birth certificate to prove the age of the victim. PW2 the victim's aunt testified on how the victim mentioned the accused as the one who had raped her. PW3 who is the grandmother of the victim testified on how she managed to discover the painful situation which the victim was experiencing, testifying that after discovering the said situation she informed the victim's mother of the condition of the victim.

He argued that in any case, the testimony of PW4 was sufficient to prove the prosecution's case beyond reasonable doubt, as she testified that she was raped by the accused, and she managed to identify him before the Court, concluding that the prosecution's case was proven beyond reasonable doubt.

Further, the learned State Attorney pointed out the fact that the Appellant has raised a new ground from the bar that the prosecution failed to prove the case for failure to amend the charge after noticing variance between the charge and the evidence adduced. In his view, this point has been improperly brought before this court; noting that if the Appellant intended for the said point to be one of the grounds of appeal he should have filed an additional ground of appeal.

He insisted that the said point of variance between the charge and the adduced evidence cannot be argued under the umbrella of the first ground of appeal on failure by the prosecution to prove the case beyond reasonable doubt. He further reasoned that if it was a proper practice to argue the appeal in such a way, there would arise no need of filing a petition of appeal containing grounds of appeal.

The point of failure by the prosecution to prove the case beyond reasonable doubt would have been sufficient to argue the appeal. In this regard he submits that the point of variance between the charge and the adduced evidence should stand as a separate ground of appeal, thus the said point as argued in the first ground of appeal should be disregarded by this court since it is against the principles that regulate appeals.

Regarding ground 2 of the grounds of appeal that there are contradictions in the testimony of prosecution witnesses. The learned state attorney on

the prevalence of such contradictions in the testimonies of PW1 and PW3 on when they got to know the victim's pain, but was quick to point out that this contradiction does not go to the root of the case. He also conceded on the contradiction in the testimony of PW4 on the date when the incident occurred, as per the record of the lower court proceedings, between 07/12/2020 and 17/12/2023 as the dates when the incident occurred, as per pp 25 and 26 of the proceedings respectively.

He argues in insistence that the said contradictions are minor and do not go to the root of the case pointing to the possibility that the variance in the mentioned dates could only be typing errors of the record. He distinguished the cited case of **Kamilian Richard,** (supra) in that the contradictions on the said case were strong and went to the root of the case.

Responding to the argument fronted against ground 3, 4 and 5 the learned counsel faulted the argument by the counsel for appellant that the Trial Magistrate did not adhere to the requirements of section 312 of the Criminal Procedure Act. Both the prosecution and defense evidence were well analyzed and consequently the trial court arrived at a just decision, where she believed the testimony of the victim to be the best evidence since the victim managed to identify the accused and mentioned the place where she was raped, referring the court to page 7 of the judgment.

Regarding ground 6, that the trial Magistrate relied on uncorroborated evidence of PW4, he argued that the witnesses brought by the prosecution sufficiently proved the case beyond a reasonable doubt. Further, he submitted that even in the absence of other witnesses, the

testimony of PW4 who was the victim is the best evidence for the trial court to rely upon and convict the appellant, relying on the case of **Selemani Makumba vs Republic,** Criminal Appeal No 94 of 1999 TLR 384.

Rejoining, The Appellant's counsel retorted that the Respondent's response does not have any points of law that could be relied upon by this court that could lead to the Appellant be found guilty.

She argues regarding ground 6 that the evidence given by the victim of offence (PW4) was taken contrary to section 127 (2) TEA, pointing to page 25 of the typed proceedings.

The counsel argued on an issue of credibility of the victim of offence (PW4) who is said to have failed to state the incident to her mother immediately after the incident, pointing at page 1 of the copy Judgment, it was alleged that the incident took place on unknown date of 2020. In her view, this simply meant that the victim of offence did not report the matter to her mother immediately, referring to page 26 of the typed proceedings where the victim was recorded as saying that she did not disclose to her mother the cause of bleeding because the Appellant threatened her. In her testimony, the victim testified that she woke up at night for urinating as she lived with her grandmother, and when she started urinating, she felt pain and shout out of pain and agony. When her grandmother asked her why was she in agony she replied that she felt pain in her private parts without telling her what was wrong.

She argues that this shows that the victim of offence was not credible because despite the fact that the Appellant was not living in the same house with the victim, hence the said threatening could not lead the victim

to fear the threat from the Appellant.

In her view, the trial magistrate not only failed to analyze the evidence of the prosecution, but also failed to assess the credibility of the victim of the offence as required by section 127 (6) of Tanzania Evidence Act.

On further argument, the incident is alleged to have been committed at SOKON 1 but the prosecution evidence showed that the victim of offence lives at USWAHILINI and the same incident occurred at the place where the victim was living, arguing that it is a mandatory requirement that, when at any stage of trial, the evidence adduced varies with the charge sheet, the prosecution should have sought permission to amend the charge according to section 234 (1) of the Criminal Procedure Act.

In this quest, she insists that not only was the appellant convicted on a defective charge, but the case against the Appellant was not proved beyond reasonable doubt as the case was not investigated. She points out that there was no police investigator who investigated the case nor was there any leader such as a chairman or a ten cell leader who was summoned by the prosecution's side to testify on the said alleged offence.

Finally, she argued that the trial magistrate did not accord the Appellant's defence any weight while it is a mandatory requirement of law to regard the defence of the appellant, while in this case, the same was not considered without the trial magistrate not assigning any reason for disregarding the defence adduced by the Appellant.

Having considered the arguments by both parties, the issue for determination is whether this appeal is meritorious and more pertinent whether the case against the appellant was proved beyond reasonable doubt.

At the outset, I am aware of the fact that while this is an appeal, being a first appeal, it is in the form of rehearing, therefore the court has a duty to evaluate the entire evidence on record by subjecting it to critical scrutiny, and if warranted, to arrive at its own conclusion of facts. See **D. R Pandya vs R** [1957] EA 336, **Reuben Mhangwa and Anor vs R**, Criminal Appeal 99 of 2007 (unreported).

In any case, the counsel argued and made remarks regarding a ground that was objected by the counsel for the respondent that the same was not raised as a ground of appeal, particularly on the variance of the charge and evidence; and as such, should not have been considered by the court. This I am not persuaded to do based on the fact stated above, but more importantly, the point raised is on the law, which I am enjoined to consider. See the case of **Abel Masikiti vs R**, Criminal Appeal No 24 of 2015 where the issue of variance between the charge and evidence is raised pointing on the varying dates, which have the effect of not proving the charge, causing the appellant to earn an acquittal.

I am fully aware of the fact that a petition of Appeal should stand as pleading, which means one has to be bound by it. But as the 1st appellate court, this court is able to deal with all matters factual or legal even if the matter was not raised as a ground of appeal, and in the present case, since the issue of variance of the charge and evidence is a legal matter, I think it needs to be considered. In the **Abel Masikiti** (supra) the Court of Appeal observed while quoting with approval its previous decisions **(Ryoba Mariba @ Mungare vs R,** Criminal Appeal No. 74 of 2003, **Christopher Rafael Maingu vs R,** Criminal Appeal No. 222 of 2004, **Anania Turian vs R,** Criminal Appeal No. 195 of 2009, all of which unreported) held:

> *"....this Court has held that it is incumbent upon the Republic to lead evidence showing that the offence was committed on the date alleged in the charge sheet, which the accused was expected and required to answer. If there is any variance or 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."*

The trial court fell into the same error by assuming that there was cogent prosecution evidence in respect of the date of the commission of the offence. I have also observed that there is a variance on the place where the alleged offence is said to have been committed.

The evidence adduced by all prosecution witnesses does not on all fours, support the charge laid against the appellant, hence the charge was not proved to the required standard. The Charge shows that the incident took place on the 'unknown dates' of 2020 while the evidence adduced shows that the incident took place on 17/12/2021 which was also reflected in the evidence of PW1, PW4 and PW5. Also, the incident was alleged to have been committed at Sokon 1 while the prosecution evidence shows that the victim of offence lives at Uswahilini, and the incident occurred at the place where the victim lives. It is therefore obvious that the charge sheet is further at variance with respect to the place where the offence is said to have been committed hence the charge is defective. (page 13,25 and 33 of the typed Proceedings).

Interestingly, both parties are at one on the issue of variance of the

charge sheet and the evidence as pointed out, but took different approach on its consequences, and particularly with the respondent counsel objecting to it being raised, obviously knowing the consequence of such variance. Meanwhile, the counsel for the appellant submitted that the said variance weakens the prosecution case as the evidence adduced is not supportive of the particulars of the offence, Mr. Mbagwa argued that the same should not have been raised as part of the ground on failure to prove the case beyond a reasonable doubt, and that despite being so raised and argued, it did not water down the prosecution case.

Therefore, in determining this ground, I find it appropriate to reproduce the particulars of the offence as per the charge sheet, which reads as follows:

> *"PARTICULARS OF THE OFFENCE*
>
> *JAMALI RAMADHANI HUSSEIN, on the unknown dates of 2020 at Sokon 1 area within the city, District, and Region of Arusha, did have sexual intercourse with one Karen D/O EPSON BASHIRI, a girl of six years old, the act which contravenes the law* "

It is evident that the prosecution did not seek leave to amend the charge while they already knew that it varied with the facts stated during the PH, which would have been an opportunity for them to do so. This is apparent on the record pertaining to the preliminary hearing, where the appellant disputed all the facts except his particulars. It is trite law that failure to amend the charge sheet is fatal and prejudicial to the appellant, and leads to serious consequences in the prosecution case. This was the position as restated by the Court of Appeal in various decisions including **Mohamed Juma @ Mpakama vs Republic,** Criminal Appeal No. 385 of 2017,

Noah Paulo Gonde and Another vs Republic, Criminal Appeal No. 456 of 2017 and **Issa Mwanjiku @ White vs Republic**, Criminal Appeal No. 175 of 2018, and most recently, **Francis Fabian @ Emmanuel vs Republic** (Criminal Appeal No. 261 of 2021) [2023] TZCA 17936. In the latter case, the Court restated this stance thus:

> *"..... it is a duty of the prosecution to produce all necessary evidence to each and every allegation made therein ..... it is incumbent upon the Republic to lead evidence showing that the offence was committed on the date alleged in the charge sheet, which the accused was expected and required to answer. If there is any variance or uncertainty in the dates or month, then the charge must be amended in terms of section 234 of the CPA. If this is not done as in this appeal, the preferred charge will remain unproved and the accused shall be entitled to an acquittal."*

The determination of the foregoing ground of appeal is in my view, sufficient to dispose of the appeal since the charge is the foundation of any criminal case. I find no point in determining other evidential issues touching the merit of the case which was prosecuted against an apparent defective charge. See **Simon Kitalika vs R,** Criminal Appeal No. 468 of 2016, where the Court guided:

> *"Without doubt, criminal proceedings are initiated by a charge and determination of the competence of a charge is important in order to proceed any further on any other matters for determination in the appeal before the Court."*

On the basis of the foregoing, I allow the appeal and accordingly quash

the conviction and set aside the sentence imposed on the appellant. Consequently, I order for immediate release of the appellant from prison unless he is being held for some other lawful cause.

It is so ordered.

DATED at **ARUSHA** this **06th** day of **May, 2024**

A. Z. BADE
JUDGE
06/05/2024

Judgment delivered in the presence of the Parties and or their representatives in chambers on the **06th** day of **May, 2024**

HIGH COURT OF TANZANIA

A. Z. BADE
JUDGE
06/05/2023