IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(MBEYA SUB – REGISTRY)

AT MBEYA

CRIMINAL APPEAL No. 28 OF 2023

(Originating from the District Court of Songwe, Criminal Case No. 7 of 2023 before Hon. A.E. Lugome, dated 22.2.2023)

ADROFU AMOS FUNGAMEZA..... APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

4th March, 2023 & 15th April, 2024

POMO, J.

The appellant, ADROFU AMOS FUNDAMEZA, is before this court appealing against the decision of the Songwe District Court, which found him guilty of the offence of rape contrary to sections 130(1)(2)(e) and 131(1) of the Penal Code, Cap 16 Revised Edition 2022. Dissatisfied with the verdict, has now lodged this appeal on the following grounds: -

1. *That the trial court erred in law and fact when convicted and sentenced the appellant in a case that was not proved to the required standard.*
2. *That the trial court erred in law and fact when it convicted and sentenced the appellant by considering*

fabricated and contradictory sentence the appellant by considering fabricated and contradictory evidence.

3. *That the trial court erred in law and fact by its failure to analyse it and evaluate evidence put forth before it.*

It was the prosecution case that on 30.11.2022 at Majengo village, within the District and Region of Songwe, the appellant did unlawfully have sexual intercourse with a girl (name withheld) aged 14 years old.

Disposal of this appeal was through written submissions. The appellant enjoyed legal representation of Ms. Nyasige Kajanja, a learned advocate, while the respondent republic was represented by Mr. James Mwenda, a learned State Attorney.

Ms. Kajanja combined the first and second grounds of appeal. Arguing the two, submitted that the case before the trial court failed to meet the required standard of proving the offence for several reasons. Firstly, she pointed out variance in the prosecution evidence regarding the date on which the appellant is alleged to have committed the offence. Secondly, she questioned the credibility of the witnesses. And thirdly, she highlighted the existence of fabricated and contradictory evidence.

Arguing on the credibility of the witnesses, Ms. Kajanja pointed out that the prosecution presented five witnesses to support its case. However, she asserted that the key witness among them lacked

credibility. Specifically, she highlighted the testimony of PW2, the victim, as detailed in the first paragraph on page 14 of the proceedings. According to PW2, on the material day, they arrived at Mawenda Guest House where she alleged that the appellant forcibly took her to a room, undressed her, and engaged in sexual intercourse for 30 minutes starting from 16:00 hours. Ms. Kajanja further argued that Charles Richard Mawenda (PW5), testified at pages 21 and 22 of the proceedings, claiming to have served as the guest attendant at Mawenda Guest House for five years. He stated that in November, the appellant had rented room No.2, signed the guest register, and received the keys. Ms. Kajanja contended that if PW2 was indeed forced to enter, PW5, being the one who provided the keys to the appellant, should have witnessed the alleged coercion. She questioned how the victim could have been forced to enter the room, especially considering that PW5, who provided the keys to the appellant, could have observed any such coercion if it had occurred. She accentuated that the victim's testimony appeared inconsistent with the evidence presented. Citing the case of **Selemani Mkumba vs. Republic** (2006) TLR 397, she highlighted the court's caution against solely relying on the testimony of the victim in criminal cases. She argued that courts have repeatedly been warned about the risks of convicting an accused based solely on the victim's testimony, stressing the importance of subjecting such testimony

to scrutiny to ascertain its truthfulness. To further support her argument, she referred to the case of **Mohamed Said vs. Republic**, Criminal Appeal No. 145 of 2017 CAT at Iringa (Unreported).

Submitting on the evidence of PW1, a clinical officer, Ms. Kajanja argued that PW1 testified to receiving a patient, PW2, accompanied by her mother, Faraja Rashid (PW3), on 30.11.2022 at 4 p.m. That, PW1 informed the court that, based on his diagnosis, he observed dry bruises on the victim's vagina walls, the bruises suggesting that she had engaged in sexual intercourse for more than a week. When he inserted his figure into the victim's vagina, he found dirty like semen. She contended that PW1, in his testimony, failed to elucidate the methodology she employed as an expert to conclude that the victim had engaged in sexual intercourse. Despite mentioning the presence of dry bruises, PW1 did not provide sufficient explanation regarding how he observed these bruises in the vagina of the victim, which instrument he used.

Further, she argued that PW1 did not clarify whether the dry bruises were indeed scars or not, leaving ambiguity regarding their nature. Additionally, she raised concerns about PW1's claim of observing what appeared to be sperm-like substances when she inserted her fingers into the victim's vagina. She questioned how sperm could persist in the vagina for two weeks following sexual intercourse, considering that normal

discharge would likely have washed them out within 72 hours. She asserted that the inability to visually detect sperm with the naked eye or through touch cast doubt on the reliability of PW1's evidence.

She reiterated to the court that another aspect undermining the case's proof to the required standard was the inconsistency in the dates pertaining to the alleged offence, as indicated by the prosecution witnesses. She argued that while the charge and witnesses referred to the date of 30.11.2022, the victim herself did not confirm this date nor demonstrate awareness of when the offence occurred. According to PW2's testimony on page 14 of the proceedings, the offence supposedly took place in November 2022 at 4 p.m., without specifying the exact time as stated in the charge. She emphasized that victims of such traumatic experiences, as claimed by PW2, typically remember the date vividly due to the physical and mental distress caused by the alleged assault. Furthermore, she stated that on 29.11.2023, PW3 received information from the victim's friend regarding PW2's sexual relationship with a boda boda driver. The following morning, PW3 discovered a note in her bag, reading: *"Najua nimekukosea mama, naomba unisamehe. "Mimi kwa sasa sitaki shule, pesa unazohangaika kunisomesha mimi, msomeshe mdogo wangu. Hayo ndio maamuzi yangu".*

She contended that if PW3 received the information on the evening of 29.11.2022 and then received the message from her daughter the next morning, on 30.11.2022, she decided to visit Maweni Secondary School where her daughter was studying. On the same day, she was advised to go to the police station, where PW2 was given a PF3 for medical examination. PW3 and PW2 then met PW1 at Mwambani Hospital at 4 p.m. on the evening of 30.11.2022.

She emphasized to the court that the particulars of the offence in the charge sheet specified that the offence was committed on 30.11.2022 without mentioning a specific time. However, PW2, as stated on page 14, paragraph 3 of the proceedings, clearly indicated that it was 4 p.m. She questioned the plausibility of the victim being at both Mwenda Guest House and the hospital simultaneously. She argued that the date of the incident did not support the charge against the accused.

Furthermore, Ms. Kajanja asserted that in criminal cases, it is the prosecution's responsibility to lead the court through its evidence to demonstrate when and how the offence was committed. If the evidence fails to establish the timing of the offence in conjunction with the accusations, the guilt of the accused cannot be sustained, and the court must acquit the accused. To support her argument, she referenced the case of **Abel Masikiti vs. Republic**, Criminal Appeal No. 24 of 2015 CAT

at Mbeya (unreported). She concluded by stating that there had been no amendment to the charge sheet by the prosecution, thus suggesting an injustice in the determination of the case.

She pointed another inconsistency in PW1's evidence. She argued that according to the charge sheet, PW1 diagnosed the victim and detected dry bruises on the same day of the incident. However, she questioned the likelihood of finding dry bruises if the incident occurred at the time of diagnosis, suggesting that bruises would likely be bleeding rather than dry. This discrepancy, in her opinion, indicated that PW1 did not conduct a thorough examination of the victim but instead filled out the PF3 based on his prior experience.

She insisted that PW1's examination suggested that the offence occurred two weeks before 30.11.2022, contradicting PW2's assertion that it happened on that very day. While PW2's testimony aligns with the allegation in the charge sheet, PW1's examination does not support it.

She asserted that the trial court placed significance on the evidence of PW4, who stated that on the material day, her mobile phone was used in the communication between PW1 and PW2. She clarified that PW4, who used to call the phone number 075267571 via PW4's cellular phone, sometimes depleted PW4's airtime and compensated her accordingly. Importantly, She stressed that PW4 did not witness the alleged rape

taking place. She further emphasized that in Tanzania, making phone calls to someone is not considered an offence.

In addition, she argued that due to the lack of credibility of the prosecution witnesses and the inconsistency between the evidence presented and the date in which the appellant is alleged to have committed the offence, compounded by the existence of contradictory and fabricated evidence, the case against the appellant was not proven beyond a reasonable doubt.

Furthermore, she argued that the appellant denied the accusations against him and presented a witness, DW2, before the court. DW2 testified that she was the individual who engaged in sexual intercourse with the appellant at Mawenda Guest House. Ms. Kajanja emphasized that the trial court failed to consider the defense presented by the appellant and proceeded to convict and sentence him. She asserted that it is well-established law that the non-consideration of defense evidence constitutes a fatal irregularity to the trial and the entire proceedings, thus vitiating the conviction. To support her argument, she cited the case of **Fikiri Katunge vs. Republic**, Criminal Appeal No. 552 of 2016 CAT at Tabora (unreported).

In response, Mr. Mwenda quickly informed the court that the appeal lacked merit. He argued that the appellant's assertion regarding the

credibility of the prosecution witnesses was merely an afterthought. He pointed out that PW2 had testified that on the material date, they went to Mawenda Guest House with the accused person, who then forced her inside, leading to the alleged incident. He argued that this statement by the victim did not necessarily imply the existence of quarrels between them to the extent described by the appellant. Instead, he contended that it only indicated the persuasive language used by the accused person to convince the victim to enter the scene of the alleged crime, especially considering their previous relationship as lovers. Citing the case of **Goodluck Kyando vs. Republic,** T.L.R 363, he emphasized that each witness is entitled to credence and belief by the trial court unless there are compelling reasons to doubt their testimony. He asserted that the appellant failed to provide sufficient grounds to undermine the credibility of the prosecution witnesses, particularly the victim, and thus, the appellant's argument lacked legal merit.

He went further to say that it should be noted that the testimony of PW1 was based on expert opinion, as explained at pages 9 and 10 of the trial court proceedings. She clarified that PW1 attended the victim and upon observation her, discovered dry bruises on her vaginal walls, as well as a substance resembling semen in the victim's vagina, and also stated that the bruises suggested that a blunt object had penetrated her vagina

for more than a week. He contended that, being an expert opinion, it is essential for it to be relevant to the fact at issue, pursuant to the requirement of section 46 of the Tanzania Evidence Act, Cap 6 Revised Edition 2022. He argued that the observations made by the clinical officer indicated his findings, which are not conclusive in stating that the victim had sexual intercourse for more than a week. The issue in question was whether there was penetration on her vagina of which the answer is affirmative that there was penetration and the issue of who had sexual intercourse with her need to be corroborated which was well complied by the prosecution side.

On the argument that the victim was both at the scene of the crime and at the hospital at 4 p.m. on 30.11.2022, he contended that this was a total misconception on the appellant's side. He submitted that the victim testified that she was present at the scene of the crime, and it was plausible that after the incident, she was taken to the hospital. Considering that she stated being raped for about 30 minutes, it would still have been around 4 p.m. He informed the court that the appellant failed to provide details regarding the distance from the scene of the crime to the hospital, undermining the validity of their argument.

He submitted that it should be noted that the discrepancies analyzed by the appellant are normal errors of observation and memory, likely due

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to the lapse of time. However, he argued that all the prosecution witnesses, including the victim, were honest and truthful. He emphasized that such errors are generally accepted in the eyes of the law. He cited the case of **Dickson Elia Nshamba Shapwata and Another vs. Republic,** Criminal Appeal No. 92 of 2007 CAT at Mbeya, where it was held that normal discrepancies do not undermine the credibility of the parties.

He further submitted that the argument by the appellant, suggesting that the prosecution failed to prove the offence, is baseless. He emphasized that the victim identified and accused the appellant at the earliest opportunity during the hearing of the matter. He stressed that in sexual offence cases, the best evidence typically comes from the victim, a position underscored in the case of **Seleman Makumba** (supra). He highlighted that in that case, the court continued to believe the victim's testimony despite some normal discrepancies appearing on record, indicating the strength of the victim's testimony in such matters.

He averred that the trial court lightly considered the testimony of PW4, which corroborated the victim's testimony regarding her relationship with the accused person. He argued that the appellant's assertion that calling someone via cellular phone in Tanzania is not an offence is baseless and lacks merit. He emphasized that the victim's testimony on this point

was honest and credible, deserving belief by the trial court, and falls within the principle established in the case of **Goodluck Kyando** (supra), which held that every witness is entitled to credence.

Regarding the failure of the trial court to consider the defense of the accused, he argued that the court explicitly addressed this issue at pages 12 and 13 of the judgment. He further contended that the case of **Fikiri Katunge** (supra) is too remote from the facts of this case because the trial court thoroughly analysed and evaluated the entire defense raised by the appellant during the trial. Therefore, he argued that it is distinguishable, and its verdict should not be considered by the honorable court.

He went on to submit that this court is endowed with the full mandate to interfere with the findings of the trial court only if there was misapprehension, misdirection, or non-direction of the evidence, or omission to consider available evidence. He referenced the position articulated by the Court of Appeal of Tanzania in the case of **Elias Mwangoka @ Kingolo vs. Republic,** Criminal Appeal No. 96 of 2019 CAT at Mbeya (Unreported). He emphasized that there is no evidence on record indicating any misapprehension, misdirection, or omission by the trial court regarding the evidence presented. Therefore, prayed for this honorable court to dismiss the appeal.

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On my part, having thoroughly reviewed the entire proceedings of the trial court and its judgment, as well considering the submissions filed by both parties, at first I am grateful for the arguments presented for and against the appeal. However, I am of the opinion that the primary issue to be addressed in this appeal is whether there exists a variance between the charge sheet and the evidence presented by the witnesses.

For clarity, I will let the charge sheet laid by the prosecution against the Appellant speak by itself:

> ***"STATEMENT OF THE OFFENCE***
>
> *RAPE CONTRARY TO section 130 (1) (2) (e) and 131 (1) of the Penal Code [Cap 16 Revised Edition 2022]*
>
> ***PARTICULARS OF THE OFFENCE***
>
> *Adrofu s/o Amos Fungameza* ***on 30th day of November 2022*** *at Majengo village within Songwe District in Songwe Region did have unlawful sexual intercourse with one XXX, a girl of fourteen (14) years old."*

It is apparent from the charge sheet that the alleged offence occurred on 30.11.2022, as asserted by the prosecution. However, upon examining the evidence presented during trial, discrepancies arise. PW2, the victim, mentioned the incident happened "sometimes in November" at 4 p.m., without specifying the exact date. Additionally, PW4, the victim's mother, was informed of her daughter's relationship with the

accused on 29.11.2022, and then went to the police station and hospital on 30.11.2022. PW5, the guest house attendant, testified to the effect that the Appellant stayed at the guest house sometime in November 2022, but did not mention seeing the victim (PW2) with him. Furthermore, PW1, the clinical officer, indicated that the bruises observed on PW2 suggested sexual intercourse occurred over a period of more than a week, contradicting the specific date mentioned in the charge sheet. These discrepancies, in my view, indicate a variance between the charge sheet and the evidence adduced during the trial.

Considering the discrepancies noted above, one might question how the prosecution arrived at the date of 30.11.2022, which does not align with the presented evidence. To rectify this inconsistency, the prosecution could have amended the charge in accordance with section 234 of the Criminal Procedure Act, [Cap 20 Revised Edition 2019] (the CPA). In the case of **Matera Simago@ Masana vs Republic,** Criminal Appeal No. 517 of 2019 CAT at Musoma (unreported) which at page 9 cited the case of **Leonard Raphael and Another vs Republic**, Criminal Appeal No. 4 of 1992 CAT (unreported), in which it was held thus:

> *"This, is not however to say that prosecutors cannot make mistakes in drafting charges. But where there are such mistakes, the law has also provided a solution. The remedy,*

as suggested by this Court in Leonard Raphael and Another v. The Republic, Criminal Appeal No. 4 of 1992 (unreported) is that: - "Prosecutors and those who preside over criminal trials are reminded that when, as in this case, ***in the cause of trial the evidence is at variance with the charge and discloses an offence not laid in the charge, they should invoke the provisions of section 234 of the CPA 1985 and have the charge amended in order to bring it in line with the evidence.***"

In the present case, there is no indication on the record that the charge sheet was amended by the prosecution. Without such an amendment, the preferred charge remains unproved, and the accused is entitled to an acquittal. This principle is supported by the case of **Thabit Bakari vs. Republic**, Criminal Appeal No.73 of 2019 CAT at Dar es Salaam, which, at page 12, cited the case of **Abel Masikiti vs. Republic**, Criminal Appeal No.24 of 2015 CAT (Unreported), where the Court of Appeal observed thus:

> ***"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."***

Guided by that authority, as narrated above, the evidence presented by the prosecution and the laid down charge do not align. Since it was no amended to accommodate the variance, then the charge remained

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unproved of which, in the manner held in **Abel Masikiti** case (supra), entitles the Appellant to an acquittal.

In the upshot, I hereby allow the appeal, set aside conviction and sentence entered against the Appellant on such un-amended charge laid against him by the respondent. Further, I hereby acquit the Appellant forthwith unless is otherwise held for other lawful cause.

It is so ordered

Right of Appeal explained

DATED at MBEYA this 15th day of April, 2024

MUSA K. POMO
JUDGE
15/04/2024

Judgment delivered in chamber in presence of the Appellant but in absence of Ms. Nyasige Kajanja, his learned advocate. Also, in presence of Mr. Dominck Mushi, learned state attorney for the respondent republic

MUSA K. POMO
JUDGE
15/04/2024