THE UNITED REPUBLIC OF TANZANIA

JUDICIARY

IN THE HIGH COURT OF TANZANIA

(IRINGA SUB-REGISTRY)

AT IRINGA

DC CRIMINAL APPEAL NO. 28 OF 2023

DANIEL HENELY KAFYULILO ..... APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

(Appeal from the Judgment of the District Court of Njombe at Njombe)

(Hon. M.J. Kayombo - SRM)

dated the 13th day of January, 2023

in

Criminal Case No. 22 of 2022

JUDGMENT

Date of Last Order: 29/04/2024 &
Date of Judgment: 10/05/2024

S. M. Kalunde, J.:

This criminal appeal has been filed against the judgment and order of the District Court of Njombe sitting at Njombe (henceforth **"the trial court"**) dated 13th day of January, 2023 in Criminal Case No. 22 of 2022. In the said judgment, the trial court convicted the appellant and sentenced him to life imprisonment for the offence under section 154(1)(a) and (2)(b) of **the Penal Code [Cap. 16 R.E. 2019]** now **[Cap. 16 R.E. 2022]**. In accordance with the records, the charge against the appellant read as follows:

"***STATEMENT OF THE OFFENCE***

UNNATURAL OFFENCE: *Contrary to section 154(1)(a) and (2)(b) of the Penal Code, [Cap. 16 R.E. 2019]*

PARTICULARS OF THE OFFENCE

DANIEL S/O HENELY KAFYULILO *on the 6th day of March, 2922 at River Ruhuji area within the District and Region of Njombe had carnal knowledge of* ***SDM****, a girl of eleven years old (11) against the order of nature."*

Facts and circumstances giving rise to the present appeal, as per the prosecution case, had been that the law was put in motion by the mother of the of the victim, MDR (**Pw1**), who lodged a complaint with the Njombe Police Gender Desk that her daughter had been carnally known by the appellant against the order of nature. The mother alleged that on the fateful day, which was a Sunday, she had sent her daughter to collect vegetables to their farm. Surprisingly, the victim (**Pw2**), returned home without any vegetables. When the mother enquired why the victim did not collect any vegetables as directed, she informed her that, along the way, the appellant forced into her against the order of nature.

The fact that the victim was penetrated by the appellant against the order of nature was supported by LBM (**Pw4**), a 9 year old boy and the victim's brother, who went to Ujumilo area to collect vegetables with the victim on the day of the incident. He recounted that, whilst at the farm he saw the appellant dragging the victim into their grandmothers' farm.

Later the victim came out crying. Thereafter, they rushed home. As pointed out earlier, upon informing their mother, the matter was reported to Njombe Police Station where the victim was issued with Police Form No. 3 (PF3) for medical examination.

On the same day, at around 15:45Hrs, the victim was medically examined by Marcus Mwila (**Pw3**) a medical doctor at Kibena Hospital in Njombe. The medical doctor examined the victim and observed bruises on the victims' vagina and anus. He also noticed that the victim had no hymen and that her vagina was perforated by a blunt object. Besides the perforation and bruises, Pw3 observed human sperms into the victim's vagina. The results of the observations of the doctor were reflected in a medical examination report which was admitted in evidence as **Exhibit P1**.

An investigation into the matter ensued. Two days later on the 08th day of March, 2022, the appellant was arrested. Almost two weeks later, on the 24th day of March, 2022, he was arraigned in court to answer for the charges stated earlier. He denied all the charges.

The appellant defended himself under oath. In his defence, he blatantly denied all the allegation narrated in the prosecution case. He went on arguing that he was arrested for loitering and later charges were changed to rape. He complained of variances between the charge and evidence as to the location where the incident happened. The appellant

alleged that whilst the charge indicated that the incident happened at Ruhuji river, the victim stated that the incident happened at Mama Agnes and Pw4 stated that the incident took place at Ijunilo. He was also surprised why he was not charged or rape as well if the victim was actually penetrated and had no hymen.

Despite his protestation, he was found guilty and convicted as charged. Accordingly, he was sentenced to life imprisonment. Against the judgment and orders of the trial court, the appellant has preferred the present appeal. His petition of appeal contains six grounds of appeal which may be broadly summarized into the following complaints:

1. *That the learned trial magistrate erred in law and fact in convicting and sentencing him based on contradictory prosecution evidence;*
2. *That the learned trial magistrate erred in convicting and sentencing him based on fabricated prosecution case;*
3. *That the prosecution failed to prove the case to the required standard of proof;*
4. *That the learned trial magistrate erred in law and fact in convicting and sentencing the appellant without considering the defence case;*
5. *That the learned trial magistrate was not impartial in discharging his duties when convicting and sentencing the appellant.*

The appellant fended for himself before the court, while the respondent Republic was represented by Mr. Daniel Lyatuu, learned State Attorney. Mr. Lyatuu quickly informed the court that he was supporting the appeal on the strength of the first ground of appeal.

Mr. Lyatuu learned state attorney submitted that there was material variance between the charge sheet and evidence presented in court relating to the place where the incident happened. In elaborating his point, Mr. Lyatuu argued that whilst the charge sheet stated that the incident happened at Ruhuji river, the victim's evidence was that the incident happened at Maheve Village. He referred to page 15 of typed proceedings. While referring to page 21 of typed proceedings, Mr. Lyatuu submitted that, in his evidence Pw4 stated that the incident happened at Ijunilo Village. According to the learned state attorney, the discrepancies indicates clearly that the charge against the appellant was not established according to law. To support his contention, he cited the decision of this court in **John Benson Msangi vs Republic** (Criminal Appeal No. 17 of 2023) [2023] TZHC 17878 (9 June 2023) TANZLII at page 6. In rejoinder, the appellant had nothing substantial than to agree with the counsel for the respondent.

The appellant had nothing to rejoin. He just urged the court to allow his appeal and set him free. That, essentially, concludes the submissions of the parties in respect of the appeal.

Turning to the resolution of the appeal, it is now settled that a charge or information in a criminal trial, is the foundation of any prosecution facing an accused person and that a charge provides the accused a road map of what to expect from the prosecution witnesses during his trial. Through the charge the accused is entitled to be informed of the particulars that identify the "*act, matter or thing*" that is said to provide the foundation for the charge. See Hebron **Kasigala vs Republic** (Criminal Appeal 3 of 2020) [2021] TZCA 268 (01 July 2021) TANZLII.

The particulars of the offence are necessary in order to inform the accused of the case that he or she will face and allow the court to link the evidence that is given with the allegations in the charge sheet. Thus, once the particulars relating to the offence have been stated in the charge, the prosecution must then lead evidence to establish each and every fact establishing the offence. Failure to do so leaves the offence unestablished. In the case of **Issa Mwanjiku @ White vs Republic** [2020] TZCA 1801 (6 October 2020) TANZLII there was variance between the date of commission of the offence and date of hiring a motorcycle. Having observed such variance, the Court of Appeal observed as follows:

> *"The settled position is that, it was incumbent upon the Republic to lead evidence showing that the offence was committed on the date alleged in the charge sheet to which the person accused will be expected to know and prepare his reply. (See* ***Halid***

> ***Hussein Lwambano v. The Republic***, *Criminal Appeal No. 473 of 2016 (unreported)). Therefore, it is our observation that, the variance of the incident dates between the one indicated in the charge sheet and of hiring the bicycle as testified by PW6 is not minor. It goes to the root of the case because it cast doubt regarding the identification and the role of the appellant in the commission of the alleged offence."*

In **Abel Masikiti vs Republic** [2015] T.L.R. 21 [CA]; (Criminal Appeal 24 of 2015) [2015] TZCA 8 (21 August 2015) TANZLII, the Court observed that if there is any variance of the charge and evidence then the charge must be amended in terms of section 234 of **the Criminal Procedure Act [Cap. 20 R.E. 2022]** (henceforth "the CPA"). In the same case, the Court stated that if an amendment is not effected, the preferred charge will remain unproved, and the accused shall be entitled to an acquittal. Short of that a failure of justice will occur.

In the instant case, I took a liberty to reproduce the contents of the charge sheet for which the accused was arraigned in court and convicted with to demonstrate that, according to the particulars of the charge, the incident took place on the 06th day of March, 2022, ***"at River Ruhuji area within the District and Region of Njombe"***. However, it is on record that on the 15th day of September, 2022, when the victim was testifying in court, she stated that the incident took place at Maheve Village. This might be seen at page 15 of the typed proceedings when she was being cross examined by the

appellant. The prosecution case was that on the fateful day the victim was accompanied by Pw4. The evidence of Pw4 contradicts the evidence of Pw2 regarding the place where the incident happened. In his evidence recorded on the 02nd day of November, 2022, Pw4 informed the court that the incident took place at Ijunilo Village. See page 21 of typed proceedings.

From the above explanation, it seems clear to me that there was material variance between prosecution witness themselves, and between the witnesses and the charge sheet. In these circumstances, the remedy was for the prosecution to amend the charge in terms of section 234 of the CPA. As was held in the case of **Faraji Said vs Republic** [2020] TZCA 1755 (31 August 2020 TANZLII) the variance between the charge sheet and evidence coupled with the contradictions between prosecution evidence entitles the appellant to an acquittal.

However, that was not the only ailment in the prosecution case. Even assuming, without deciding that there was no inconsistence between the charge and evidence, the charges against the appellant were not proved because the evidence of Pw2 and Pw4 was received illegally. It is on record that both Pw2 and Pw4 were children of tender years. The victim Pw2 was 11 years old when she testified while her relative brother Pw4 was 9 years old. Their evidence was therefore supposed to be recorded in compliance with section

127(2) of **the Evidence Act, [Cap. 06 R.E. 2022]** which reads:

> *"(2) A child of tender age may give evidence without taking an oath or making an affirmation but shall, before giving evidence, promise to tell the truth to the court and not to tell any ties."*

The procedure to be adopted in recording evidence of a child of tender years was articulated in the case of **Issa Salum Nambaluka vs Republic** [2020] TZCA 10 (TANZLII) where the Court of Appeal (Mwarija, J.A) at page 10 stated:

> *"From the plain meaning of the provisions of sub-section (2) of s. 127 of the Evidence Act which has been reproduced above, a child of tender age may give evidence after taking oath or making affirmation or without oath or affirmation. This is because the section is couched in permissive terms as regards the manner in which a child witness may give evidence. In the situation where a child witness is to give evidence without oath or affirmation, he or she must make a promise to tell the truth and undertake not to tell lies. Section 127 of the Evidence Act is however, silent on the method of determining whether such child may be required to give evidence on oath or affirmation or not."*

Regarding the method of ascertaining whether a child should give evidence on oath or affirmation, the Court stated:

> *"It is for this reason that in the case of **Geoffrey Wilson v. Republic**, Criminal Appeal No. 168 of 2018 (unreported), we stated that, where a witness is a child of tender age, a trial court should at the foremost, ask few pertinent*

questions so as to determine whether or not the child witness understands the nature of oath. If he replies in the affirmative then he or she can proceed to give evidence on oath or affirmation depending on the religion professed by such child witness. If such child does not understand the nature of oath, he or she should, before giving evidence, be required to promise to tell the truth and not to tell lies."

Thereafter, the Court stated thus:

"As stated above, under the current position of the law, if the child witness does not understand the nature of oath, she or he can still give evidence without taking oath or making an affirmation but must promise to tell the truth and not to tell lies. In the circumstances therefore, we agree with both the appellant and the learned Senior State Attorney that in this case, the procedure used to take PW1's evidence contravened the provisions of s. 127 (2) of the Evidence Act. For these reasons, we allow the 2nd ground of appeal. As a result, the evidence of PW1 which was received contrary to the provisions of s. 127(2) of the Evidence Act is hereby expunged from the record."

The rationale of the above procedure was articulated by the Court of Appeal in the case of **John Mkorongo James vs Republic** [2022] TZCA 111 (TANZLII) where the Court (MWAMPASHI. J.A) stated:

"The import of section 127 (2) of the Evidence Act requires a process, albeit a simple one, to test the competence of a child witness of tender age and know whether he/she understands the meaning and nature of an oath, to be conducted

of Pw2 and Pw4 were recorded in contravention of section 127 (2) of the Evidence Act and ought to be expunged as I hereby do. Having expunged the evidence of Pw2 and Pw4, the remaining evidence of Pw1 and Pw3 is insufficient to sustain conviction against the appellant.

For the two reasons given above, I am constrained to agree with Mr. Lyatuu and the appellant that the prosecution failed to prove that the appellant raped Pw2 as alleged in the charge. I accordingly allow the appeal by quashing his conviction and setting aside the jail sentence meted on him by the trial court. The appellant should be released from prison forthwith unless he is otherwise lawfully held.

The appeal is disposed as aforestated.

DATED at **IRINGA** this **10TH** day of **MAY, 2024**.

S.M. KALUNDE

JUDGE