

THE UNITED REPUBLIC OF TANZANIA
JUDICIARY
IN THE HIGH COURT OF TANZANIA
(IRINGA SUB-REGISTRY)
AT IRINGA
DC CRIMINAL APPEAL NO. 60 OF 2022

MICHAEL KYANDO APPELLANT

VERSUS

THE REPUBLIC RESPONDENT

(Being an appeal from the District Court of Mufindi at Mafinga)
(Hon. M.R. Hamduni - RM)

dated the 12th day of October, 2017

in

Criminal Case No. 63 of 2017

JUDGMENT

Date of Last Order: 15/05/2024 &

Date of Judgment: 31/05/2024.

S. M. Kalunde, J.:

The appellant was charged with and convicted of the offence of rape contrary to sections 130(1), (2)(e) and 131 (1) of **the Penal Code [Cap 16. R.E. 2002]** (now R.E. 2022). It was alleged that on the 23rd and 24th day of February, 2017, at Kinyanambo Village within Mufindi District in Iringa Region, the appellant had carnal knowledge of HDB, girl aged 10 years old. The trial court, the District Court of Mufindi sitting at Mafinga, sentenced him to thirty years imprisonment. In addition to the prison terms, the court ordered the appellant to pay the victim TZS. 3,000,000.00, in compensation.

The appellant has been relentless in his quest for justice. This a third appeal having already made two unsuccessful attempts to challenge the said decision. He firstly filed **DC Criminal Appeal No. 23 of 2018** which was struck out for referencing a non-existent District Court. Undeterred, the appellant applied for extension of time and managed to file **DC Criminal Appeal No. 07 of 2020**. Unfortunately, the appeal was also dismissed for lack of merits. The appellant was not satisfied. He approached the Court of Appeal on a second appeal through **Criminal Appeal No. 544 of 2020**. Unfortunately, bad luck struck again, on the 25th day of March, 2023, the appeal was struck out for being supported by a defective Notice of Appeal [see **Michael Kyando vs Republic** (Criminal Appeal 544 of 2020) [2023] TZCA 141 (27 March 2023) TANZLII].

The Court of Appeal advised the appellant to seek an extension of time to file a notice of appeal and appeal to this court. Through **Misc. Criminal Application No. 41 of 2023**, the appellant was granted leave to file a Notice of Appeal and Appeal out of time. Hence the present appeal.

In his petition of appeal, he raised nine grounds of appeal. However, for reasons that shall become apparent shortly, I shall not reproduce the grounds of appeal. However, it suffices to state here that the grounds of appeal focused on the merit of the appeal.

To prosecute the appeal, the appellant appeared in person, unrepresented, whereas Mr. Hubert Ishengoma, learned State

Attorney appeared for the respondent Republic. When the appellant was invited to argue his appeal, he preferred for the learned State Attorney to reply first to his grounds of appeal, reserving his right of rejoinder where need arise.

At the very outset Mr. Ishengoma informed the court that the respondent was supporting the appeal on the ground that the charge against the appellant was not proved to the required standard. The learned counsel submitted that there were material discrepancies between the charge and prosecution evidence presented during trial rendering the charge defective. He submitted that, the particulars of the offence in the charge sheet showed that the incident happened on the 23rd and 24th day of February, 2017, it was therefore the duty of the prosecution to lead evidence to prove that the incident happened on the respective dates.

The learned counsel argued that the prosecution presented five witnesses to prove the case. However, none of those witnesses narrated that the incident happened on the 23rd or 24th day of February, 2017. In explaining the prosecution evidence, Mr. Ishengoma submitted that the victim's father (Pw1) testified that he interrogated the victim on the 24th February, 2017, and the victim narrated that she was raped. However, there was no evidence as to when the incident happened. He added that, the victim (Pw2), did not state, anywhere in her evidence that she was raped on the respective dates. The learned counsel added that, the victim's mother (Pw3), testified that the victim reported

to her that she was raped on the 24th February, 2016, almost a year before the date mentioned on the charge sheet.

The learned counsel concluded that it was the duty of the prosecution to present evidence to prove that the incident happened on the 23rd or 24th day of February, 2017. He added that the material discrepancy between Pw1, Pw2 and Pw3 as to the date of the incidence were material. In bolstering his argument, the learned counsel cited the case of **Abel Masikiti vs Republic**, [2015] T.L.R. 21 [CA] (Criminal Appeal 24 of 2015) [2015] TZCA 8 (21 August 2015) TANZLI at page 8, for a proposition that where there is a discrepancy between the charge and evidence in court, the prosecution has a duty to amend the charge to align with the evidence tendered in court. Failure to do that renders the charge unproved.

In light of the above reasons, the learned counsel argued that since the charge remained unproved, and the appellant is entitled to an acquittal. He prayed that the appeal be allowed. In a very brief rejoinder, the appellant supported the respondents' arguments and stressed that the appeal be allowed.

In resolving the appeal, I wish to preface my determination with a now settled position of the law that, it is incumbent upon the prosecution to lead evidence showing that the offence was committed on the date alleged in the charge sheet to which the accused person will be expected to know and prepare his defence. This view was stressed by the Court of Appeal in the

case of **Anania Turian vs Republic** [2011] TZCA 23 (27 June 2011) Rutakangwa, J.A:

*"In the case of **RYOBA** (supra), the appellant was charged with raping one Sarah Marwa on 20th October, 2000. Sarah testified generally that she "was raped in October and November, 2000 without more." The Court in allowing the appellant's appeal against conviction, held that it was incumbent upon the Republic to lead evidence showing exactly that Sarah was raped on 20th October, 2000 as alleged in the charge the appellant was facing and was expected and required to answer. The same situation arose in **CHRISTOPHER MAINGU's case** (supra), whose conviction for rape was similarly quashed. The rationale for this is not far to find. When a specific date of the commission of the offence is mentioned in the charge sheet, the defence case is prepared and built on the basis of that specified date. This defence invariably includes the defence of alibi. If there is a variation in the dates, then the charge must be amended forthwith, and the accused explained his right to require the witnesses who have already testified recalled. If this is not done the preferred charge will remain unproved and the accused shall be entitled to an acquittal as a matter of right. Short of that, a failure of justice will occur."*

Abel Masikiti vs Republic (supra) [2011] TZCA 23 (27 June 2011), the Court (Masati, J.A as he then was) relied in its decision in **Anania Turian's case** (supra) to hold, at page 8 and 9 that:

"When all this evidence is put together the conclusion is that the date of the commission of the offence is uncertain. And that could explain why the appellant in his defence could not account for the date in question, a question posed by the trial court; which, in the circumstances, amounted to shifting the burden of proof to the appellant to exonerate himself, when no prima facie case had not been established against him. This was no doubt a serious misdirection.

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 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."

In the instant case, a careful perusal of records confirms that none of the prosecution witness testified that the incident happened on the 23rd or 24th day of February, 2017. The victim (Pw2) and his father (Pw1) all failed to state the exact date when the incident happened. The confusion is exuberated by the fact that the victim's mother (Pw3) stated that the incident happened on the 24th February, 2016, which is almost a year before the date mentioned on the charge sheet.

In addition, the doctor (Pw4) at page 11 of typed proceedings, testified that on the 25th February, 2017, he received the victim and examined her in relation to an incident of rape. The doctor states that the victim informed him that she had been raped on the same day at reached the hospital at 18:30Hrs. Additionally, the investigative officer, (Pw5), at page 13 of typed proceedings, narrated that the victim was raped on the 25th February, 2017, by the appellant. He proceeded to arrest the appellant on the same day. The testimony of Pw4 and Pw5 contradicts what was stated in the charge sheet as well as what was stated by Pw1, Pw2 and Pw3.

I have pointed out above 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. It is also the position of the law that, where there is any variance or uncertainty in the dates, then the charge must be amended in terms of section 234 of **the Criminal Procedure Act [Cap. 20. R.E. 2022]**. If the charge is not amended, the preferred charge will remain unproved, and the accused shall be entitled to an acquittal.

In the instant case, the variance between the charge sheet and evidence presented during trial coupled with the contradictions between key prosecution witnesses entitles the appellant's an acquittal. As argued by Mr. Ishengoma, and correctly so, since this finding suffices to dispose the whole


appeal, I shall not venture in determining the remaining grounds of appeal.

In the final analysis, the appeal is allowed, conviction is quashed, and the sentence of thirty years imprisonment is set aside. And so is the order for payment of TZS. 3,000,000.00, in compensation. Accordingly, I order that, unless lawfully held, the appellant should be set free forthwith.

It is so ordered.

DATED at IRINGA this 31st day of MAY, 2024.




S.M. KALUNDE
JUDGE