IN THE UNITED REPUBLIC OF TANZANIA

JUDICIARY

IN THE HIGH COURT OF TANZANIA

MOSHI SUB-REGISTRY

AT MOSHI

CRIMINAL APPEAL NO. 45 OF 2023

(C/F Criminal Case No.108 of 2022 in the District Court of Hai at Hai)

ISAYA SAMWELI MKEYA @ SUMA.....1ST APPELLANT

OMBENI ELIAS MOLLEL @ KALALAI.....2ND APPELLANT

VERSUS

REPUBLIC..... RESPONDENT

JUDGEMENT

Date of Last Order: 29.01.2024
Date of Judgment:18.03.2024

MONGELLA, J.

The appellants were arraigned in the district court of Hai at Hai for Gang Rape contrary to **section 130 (1), (2)(b) and 131A (1) and (2) of the Penal Code [Cap 16 RE 2022].** The particulars of the offence allege that on 04.07.2022 at Muungano area within Hai district in Kilimanjaro region, the appellants had carnal knowledge of a woman aged 38 years (to be referred as "the victim" or PW1, hereinafter) without her consent by use of force and threat.

The prosecution's case presented through four witnesses and one exhibit (PF3) was to the effect that: on the material night of

04.07.2022 at around 22:00hrs, the victim left her home following a dispute with her husband who had threatened to kill her with a knife. While walking down the road, she met the 1st appellant who asked her where she was heading. She explained to him what had befallen her and he promised to help her by taking her to his relative. To her dismay, upon arriving the destination to which they headed, she found it was an unfinished building and no one was residing in. He welcomed her to sit on a small mattress in the said house. Later he changed his mind into wanting to have intercourse with her. She screamed for help and one named Ras, (PW4) appeared at the scene.

Upon PW4 appearing, he found the 1st appellant hugging PW1 at the corner of the room. He began questioning the 1st appellant as to why he was forcing himself on her. The 1st appellant alleged that he had reached an understanding with PW1. Amid such conversation, PW1 ran away heading to the street chairman. On the road, while running to the street chairman, she met the 2nd appellant who also inquired as to why she was running. She responded that she was heading to the chairman's home. The 2nd appellant offered to escort her there. PW1 ignored his offer and proceeded to run to Mother City School whereby she knocked on the gate to no response. The 1st appellant appeared at the scene and both (the 1st and 2nd appellants) told her they wanted to take her to the chairperson. They lifted her up and took her to a plot with hedge. The 1st appellant stripped off her underwear and his shorts and boxers and started to have sexual intercourse with her. After

he was done, the 2nd appellant took off his trousers and boxers and he too proceeded to have sexual intercourse with her. When done, they left PW1 there. She then decided to head back home.

On the other hand, sometime after the fight, PW3, the victim's husband, discovered that she was nowhere in the house. He thus headed out in search of her to no avail. He then decided to head back home as he had left their children sleeping. Hours later PW3 heard their get opened. When he looked at the window, he saw PW1 coming back home. He opened the door for her and she, while crying, informed him that she had been raped by two young men she identified a one Suma and one, Kalalai. That is, the 1st and 2nd appellants.

Accompanied by PW3, the victim went to the police station whereby they were issued with a PF3 (exhibit P1). Thereafter, they went to Hai district hospital whereby the victim was examined by PW2. PW2 testified to have found bruises and spermatozoa in her vagina. On the next day, the victim lodged a case at the police leading to the arrest of the appellants.

In their defence, the appellants sorely presented their testimony without any other witnesses. The 1st appellant denied responsibility over the rape incident. He alleged being at Moshi on the material day. He claimed to have been arrested by PW3 on 05.07.2022 at around 23:00hrs at his home in Bomang'ombe. He also contended

that PW3 had promised to have him released if he agreed to become a witness to the case. The 2nd appellant also denied the allegations against him alleging that the case was fabricated against him. He challenged the testimony of PW1 on the reason that it varied with her statement at the police station.

Upon considering the evidence of both parties, the trial court found the appellants guilty and convicted them to serve 30 years imprisonment term. Aggrieved, the appellants have preferred this appeal on the following grounds:

1. *That, the trial Court erred in law by convicting and sentencing the appellants to serve thirty years in prison as appellants grossly failed to identify accused persons as the offence was committed at night time.* (sic)

2. *That, the trial court erred in law by convicting and sentencing Appellants to serve thirty years in prison as no identification parade has ever conducted to identify accused persons as at the police station four people were arrested over the same accusations*. (sic)

3. *That, the trial Court erred in law by convicting and sentencing Appellants to thirty years in prison as the prosecution side grossly failed to prove the case beyond reasonable doubts as the testimony of PW-1 is much tainted with many doubts.* (sic)

4. *That, the trial court erred in law by convicting and sentencing Appellants to thirty years in prison as the*

testimony of PW-1 does not corroborate with the testimony of PW-4 thus creates much doubts on the commission of the offence by accused persons. (sic)

5. *That, the trial court erred in law by convicting and sentencing Appellants to thirty years imprisonment as the trial Magistrate grossly failed to properly evaluate the testimony of PW-2 and the document tendered which is exhibit P.* (sic)

6. *That, the trial court erred in law by convicting and sentencing Appellants to thirty years imprisonment as the trial Magistrate grossly failed to state the language which the accused new in explaining Exhibit P-1 to accused persons, thus curtailed accused's' right to be heard.* (sic)

The appeal was resolved by written submissions whereby the appellants were represented by Mr. Engelberth Boniphace, learned advocate, while the respondent was represented by Ms. Bertina Tarimo, learned state attorney.

While submitting in chief, Mr. Boniphace abandoned the 2nd and 4th grounds of appeal and consolidated the 3rd, 5th and 6th grounds of appeal. He corrected the 1st ground to read:

"*That, the trial court erred in law by convicting and sentencing the appellants to serve thirty years in prison as the victim grossly failed to identify the accused persons as the offence was committed at night time.*"

Addressing the 1st ground, he challenged the trial court for failure to observe the question of identification of the accused persons at the crime scene. He averred that courts ought to warn themselves on evidence of identification whereby such evidence ought to be watertight. Describing the factors for identification, he contended that the factors to be considered include the time the witness observed the accused, the distance at which the accused was observed, the condition in which the observation was made, that is, whether day or night, the intensity of the light at the crime scene and whether the witness knew the accused before. He supported his averment with the case of **Kisandu Mboje vs. Republic** (Criminal Appeal No. 353 of 2018) [2022] TZCA 425 TANZLII; **Samwel Thomas vs. Republic**, Criminal Appeal No. 23 of 2011 (unreported) and **Waziri Amani vs. Republic** [1980] TLR 250.

He however, appreciated that there is an exception to the general rule as to the key ingredients to be considered in visual identification of the accused at the crime scene. He said, the exception lies on the ability of the victim to name the accused at the earliest opportunity whereby naming of the accused person at the earliest opportunity is important in assuring the reliability of the witness. He supported that stance with the case of **Marwa Wangiti Mwita and Another vs. Republic** [2002] T.L.R 39. Considering the facts in the case at hand, he argued that, as records indicate, the victim failed to name the appellants at the earliest time.

Mr. Boniphace further challenged the non-tendering in court of the statement of the victim recorded at the Police station. In those premises, he had the stance that the prosecution remained with no evidence indicating that the appellants were named by the victim at the earliest time possible. He challenged that between the appellants' arrest and the time they were brought in court, the victim had not identified them. He averred that the only person known to the victim was one "Ras" a black man who was never named as one of the appellants. Cementing on the importance of prior identification, he contended that at it was imperative for the prosecution to lead evidence to prove that the victim identified the appellants at the earliest time possible.

He further contended that the factors for identification are not exhaustive in determining credible identification of a suspect but the same should be applied after the court has satisfied itself that the victim did identify the suspect at the earliest time possible. He supported his argument with the case of **Marwa Chacha Wangiti** (supra), **Chacha Jeremiah Murimi & Others vs. Republic** (Criminal Appeal 551 of 2015) [2019] TZCA 52 TANZLII and **Jaribu Abdallah vs. Republic** [2003] T.L.R 271.

Arguing further, Mr. Boniphace challenged the evidence of PW1 with regard to release of PW4. He averred that there was no record showing that PW1 had identified that PW4, who was allegedly arrested with the appellants, was not a suspect in the crime leading to his release from police custody. He added that there was no

record that PW1 had identified PW4 and the appellants when making her statement at the police station on the night the incident took place. He argued that the PW1's statement at the police ought to have been tendered at the trial court to prove that appellants were named on the night the incident occurred. In his view, the arrest of PW4 and release thereafter entails that naming of the suspects by the victim was not done.

Still on the factors to be considered on identification, Mr. Boniphace further challenged on the question of light, considering that the offence occurred at night. He challenged the prosecution evidence on the ground that there was no evidence on record as to the source of light that was used to identify the "black man" so named by PW1. That, there was no proof that the said "black man" ran after PW1 when she left the abandoned building. To cement on his point, he referred the testimony of PW4 who stated that the "black man" told him that he was done with her. He argued further, that while PW4 claimed to have used a torch, he did not describe the intensity of its light and whether the same was sufficient to identify the appellants. Still insisting that naming of the suspect at early stage is a factor to assess credibility of a witness, he concluded that the evidence of PW1 and PW4 did not prove identification of the appellants beyond reasonable doubt.

Addressing the consolidated grounds, he contended that the case was not proved beyond reasonable doubt. He challenged the victim's evidence for her failure to mention the number of lights at

Mother City School, the crime scene. That, the victim only stated that there were electrical tube lights illuminating the area. He further challenged the victim's description of the appellant's clothes on the grounds that the said were not produced before the court. I however find this argument absurd as the appellants were not arrested at the crime scene.

Mr. Boniphace raised another doubt as to the variation between PW1 and PW4 on the time the incidence occurred. He contended that while PW1 stated that the offence took place around 22:00hrs, PW4 stated that he found the 1st appellant and PW1 at the abandoned building at around 23:30hrs. He challenged the testimony of these witnesses on the ground that there was no clarification as to the alleged variation. Further, considering the testimony of PW3, he found the question of time more contradictory. He said that PW3 stated that PW1 returned home after 3 hours which would be 01:00hrs, but the victim was taken to the police at 00:00hrs. That, she made her statement at the police and was issued a PF3 and went to Hai District Hospital whereby she was examined and the PF3 Form filled at 00:00hrs. In his view, this implies that PW1 had gone to the hospital before 00:00hrs. Considering these contradictions, he had the stance that since the same remained unresolved, the appellants are entitled to the benefit of doubt.

Mr. Boniphace further challenged the admission and reliance on the PF3 by the trial court. He alleged that the trial court only

recorded that the PF3 was read out, but did not indicate in which language it was read and whether it was read in the language understood by the appellants. He contended that since the PF3 contained both, English language and medical jargons, absence of indication of the kind of language the exhibit was read over to the appellants entails that they were denied their right to be heard, which violates principles of natural justice.

He argued so, on the ground that the appellants could have not understood the PF3 enough to cross examine PW2 on the same. To bolster his argument, he cited the case of **De Souza vs. Tanga Town Counci**l, Civil Appeal No. 89 of 1960 EA 377-388. He added that the failure to interpret the PF3 to the appellants was clear violation of **section 211(1) of the Criminal Procedure Act** [Cap 20 R.E 2022]. Alleging that the appellants were entitled to interpretation under said provision, he cited the case of **Mariko Jiendelee vs. Republic** (Criminal Appeal No. 136 of 2018) [2022] TZCA 463 TANZLII. He contended that the noncompliance with the provision was fatal rendering the proceedings null and void.

Mr. Boniphace further challenged the evidence of PW1 on the ground that she failed to disclose to which Mother City School did she run. He considered that creating doubts as there are several of schools going by that name in the area. He mentioned one being in Muungano Ward at Gezaulole and Jiweni Street, one at Magadini in Bondeni ward and another at Mungushi in Bomang'ombe Ward. He alleged that it is incumbent that when the

date, time and place of the incident are mentioned in a charge, such facts must be proved. Otherwise, he said, the prosecution ought to have amended the charge else the case remains unproved. He supported his assertion with the case of **Abel Masikiti vs. Republic** (Criminal Appeal 24 of 2015) [2015] TZCA 219 TANZLII.

Still arguing on the place of the incident, he further contended that the charge indicated that the incidence took place at Muungano area, while Muungano is a ward. In the premises, he found it was of paramount importance for PW1 to mention the specific area to avoid doubt, otherwise the charge remained unproved. Mr. Boniphace finalized his submission by praying for the conviction and sentence of the trial court to be quashed and the appellants set at liberty.

Ms. Tarimo opposed the appeal. Reacting to Mr. Boniphace's submission on the 1st ground, she contended that the visual identification of the appellants was watertight. In her stance, PW1 named the assailants to PW3 at the earliest stage, immediately after the incident occurred. She was convinced that all required factors for identification established in **Waziri Amani vs. Republic** (supra) were met as vivid in PW1's testimony on record. In that respect, she averred that it was irrelevant to tender the statement made by PW1 at the police as PW1 came herself to give her testimony in court. That, the same would have only been done if she was unable to enter appearance before the trial court.

Addressing Mr. Boniphace's challenge on PW1's failure to state the number of tube lights; she countered that the same was immaterial as PW1 had clearly stated that the lights illuminated the area enabling her to identify the appellants. She argued that the number of tube lights ought to have been challenged at cross examination and not raised at this appeal stage as an afterthought. As to the clothes described by PW1 as worn by her assailants, she averred that it was not a legal requirement to have the same produced before the court. That, such requirement is not part of the factors settled under **Waziri Amani vs. Republic** (supra).

She however admitted that the prosecution failed to parade witnesses to prove that the offence took place at Muungano area as mentioned in the charge and during preliminary hearing. That, all prosecution witnesses did not mention that the incidence took pace at Muungano area. She averred that it was imperative to call the investigator of the case to prove such fact as held in **Director of Public Prosecution vs. Sharif s/o Mohamed @ Athumani & Others** (Criminal Appeal 74 of 2016) [2016] TZCA 635 TANZLII. Referring to the testimony of PW1, she said that PW1 testified that the offence took place at Mother City, but did not clarify that the same was a school at Muungano area. Citing the case of **John Julius Martin & Another vs. Republic** (Criminal Appeal 42 of 2020) [2022] TZCA 789 TANZLII; she averred that it was mandatory for the prosecution to prove the specific time, place and date the incidence took place as appearing on the charge. She thus conceded that the failure of the prosecution to prove the place the offence took pace,

rendered the charge unproved. On those bases, she prayed for the appeal to be allowed and the conviction and sentence of the trial court quashed.

Rejoining, Mr. Boniphace reiterated his submission in chief as to visual identification being unsuccessful. He averred that visual identification ought to have been made at the earliest opportunity. He argued that there was no proof on record of the trial court that PW1 identified her assailants at the earliest time, hence the case was not proved beyond reasonable doubt as required under **section 3(2)(a) of the Evidence Act** [Cap 6 R.E 2022] and as settled in **Pascal Yoya @ Mganga vs. Republic** (Criminal Appeal 248 of 2017) [2021] TZCA 36 TANZLII.

With regard to the place of the offence, he seconded Ms. Tarimo's support of the appeal, averring that since the charge remained unproved, the proceedings, conviction and sentence are nugatory and the only remedy is to acquit the appellants. He supported his argument with the case of **Abel Masikiti** (supra) and maintained his prayer for this court to quash the conviction and sentence and set the appellants at liberty.

I have considered the grounds of appeal and the submissions of both parties. I have as well thoroughly gone through the trial court record. As I noted earlier, Mr. Boniphace abandoned the 2nd and 4th grounds of appeal and consolidated the 3rd, 5th and 6th grounds

of appeal. In the surviving grounds, the appellants allege that the case against them was not proved beyond reasonable doubt for four major reasons: **one**, that the identification was faulty; **two**, the place the incidence took place was not proved before the trial court; **three**, there are inconsistencies on the time the incidence took place and; **four**, Exhibit P1 (PF3) was not read in the language understood to the applicants.

With regard to the 1st issue, the appellants allege that there was no proper identification of them at the alleged crime scene. It is well known that evidence of identification must be water tight to avoid a case of mistaken identity. This has been emphasized by the apex Court in plethora of cases including, **Ngaru Joseph & Another vs. Republic** (Criminal Appeal 172 of 2019) [2022] TZCA 73 (25 February 2022) TANZLII, whereby the Court stated:

> "It is important to note that it is now well settled that the evidence of visual identification is the weakest kind of evidence and the courts are warned not to act on it unless all possibilities of mistaken identity are eliminated and that courts are required to be satisfied that such evidence is absolutely watertight."

There are crucial factors that ought to be taken into consideration in visual identification. These factors were well laid in **Waziri Amani vs. Republic** (supra) whereby the apex Court stated:

> "Although no hard and fast rules can be laid down as to the manner a trial Judge should determine questions of disputed identity, it seems clear to us that he could not be said to have properly resolved the issue unless there is shown on the record a careful and considered analysis of all the surrounding circumstances of the crime being tried. We would, for example, expect to find on record questions as the following posed and resolved by him: the time the witness had the accused under observation; the distance at which he observed him; the conditions in which such observation occurred, for instance, whether it was day or night-time, whether there was good or poor lighting at the scene; and further whether the witness knew or had seen the accused before or not. These matters are but a few of the matters to which the trial Judge should direct his mind before coming to any definite conclusion on the issue of identity."

The factors settled in the forementioned case are not exhaustive. The same have been modified in many occasions to suit the diverse circumstances of identification. (See, **Jaribu Abdallah vs. Republic** (supra); **James Kisabo @ Mirango and Another vs. Republic,** Criminal Appeal No. 216 of 2006 (unreported); **John Jacob vs. Republic** (Criminal Appeal 92 of 2009) [2011] TZCA 112 TANZLII; **Christopher Chacha @ Msabi & Others vs. Republic** (Criminal Appeal No. 235 of 2009) [2016] TZCA 792 TANZLII; **Rajabu s/o Issa Ngure vs. Republic** (Criminal Appeal No. 164 of 2013) [2013] TZCA

461 TANZLII and; **Byamtonzi John @ Buyoya vs. Republic** (Criminal Appeal No. 289 of 2019) [2021] TZCA 385 TANZLII.

In observing the submissions in chief by Mr. Boniphace, it appears that he misconstrued two principles; that is, the factors to be considered in visual identification as opposed to naming of the assailant at an earliest stage, such that at a certain point he attempted to argue that the latter is an exception to the former. These are two different concepts though related in such that the later cannot be implemented without the former. That is, a witness cannot name an assailant he or she has not identified.

Identification of an assailant where the witness was not prior familiar to the assailant is termed as visual identification. Where the witness was prior familiar to the assailant it is commonly referred as recognition or rather identification by recognition. There is further, voice identification whereby a witness identifies the assailant through his or her voice. The three categories were well expounded in the case of **Jumapili Msyete vs. Republic** (Criminal Application 4 of 2017) [2018] TZCA 314 (12 December 2018) TANZLII whereby the Court of Appeal stated:

> "For the purpose of analysis and the experience enriched from case law, cases of identification may be identified into three broad categories. Visual identification, identification by recognition, and voice identification. In visual identification, usually,

> the victims would have seen the suspects for the first time. In recognition cases, the victims claim that they are familiar with or know the suspects. In the last category the victims would usually claim to be familiar with the voice of the suspect although they may or may not have seen him. It is akin to identification by recognition."

In the case at hand, the concept at play is recognition since PW1, the victim, and PW4 alleged to have known the assailants prior to the incident. PW1 claimed to have identified both assailants at the crime scene while PW4 claimed to have identified the 1st appellant at an earlier incident. PW1 alleged to have identified the assailants at Mother City School with the aid of electric tube lights. However, she did not explain how she came to know the appellants prior to the incident and she also did not describe the intensity of the lights nor size of the area illuminated. She only stated that she was positioned three steps from the assailants and one step from the lights and thus she could see the assailants well. This is reflected in her testimony whereby she stated:

> *"…I saw them, At the school of Mother City, there was light, Electrical lights, tube lights, they were illuminating clear."*
> *"…From where I stand to the place where lights were fixed there is about one step. There were three steps from where I stand to the place, I saw them coming. At the place where the scene occurred there were no lights, it was*

> *dark. They took me from the place where there were lights to the dark place."*

It is well settled that in cases of identification or recognition there should be detailed explanation as to the source and intensity of the light and size of the area illuminated. This was established in **Waryoba Elias vs. Republic** (Criminal Appeal No.112 of 2020) [2023] TZCA 17314 TANZLII whereby the Court of Appeal stated:

> "It is trite that except where identification is by voice, in visual and recognition identification, light is a critical prerequisite. Accordingly, the Court has been resolute regarding its source and intensity stressing their proof beyond reasonable doubt that such light is bright enough to see and positively identify the assailant"

In **Issa s/o Mgara @ Shuka vs. Republic**, Criminal Appeal No. 37 of 2005 (unreported), the Court of Appeal clarified the essence behind clarification of source and intensity of light. It stated:

> "It is our settled mind, we believe that it is not sufficient to make bare assertions that there was light at the scene of the crime. It is common knowledge that lamps be they electric bulbs, fluorescent tubes, hurricane lamps, wick lamps, lanterns etc. give out light with varying intensities. Definitely, light from a wick lamp cannot be compared with light from a pressure lamp or fluorescent tube. Hence the overriding need to give insufficient

> details on the intensity of the light and the size of the area illuminated."

While PW1's testimony indicates that she was close to the light, it is still unclear as to the intensity of the said light. The position of the light is itself unclear. Was it on a wall of the alleged school, or perhaps from a building around the school. I find it was imperative for PW1 to give further details of her surroundings rather than merely stating that there was clear illumination.

Further, despite claiming to have been in position to identify her assailants, she gave two diverse descriptions of their outfits on the alleged date. Earlier on, she stated that the 1st appellant took off his shorts and boxers prior to committing the said act against her and that the 2nd appellant also removed his trousers and boxers before committing the act against her. Her exact words were as hereunder:

> *"The two pulled me to the plot which had hedge, Suma started to put off my under wear, he then put off his short and boxer, then he started to have sexual Intercourse with me. Kalalai 2nd Accused was also there… When he finished, Kalalai came to me, he put off his trouser and boxer, and proceed to have sex with me. Suma was beside looking at me and Kalalai."*

Later, she stated that the 1st appellant wore black jeans and grey T-shirt and the 2nd appellant was in blue jeans and blue T-shirt. Her exact words were:

> *"The lights were intensity.* (sic) *Kalalai had blue jeans and blue Tshirt. Suma had black jeans and grey T-Shirt."*

Clearly, her testimony presents varying outfits, that is, shorts, trousers, jeans rendering the description doubtful.

It seems that PW4 was meant to corroborate PW1's evidence especially on the involvement of the 1st appellant. However, his circumstances of identification of the 1st appellant are also lacking. This is because he merely stated that he entered the unfinished room with a torch, but did not describe the intensity of the light. Evidently, his identification of the 1st appellant was not watertight. Further, he merely mentioned a 'woman' throughout his testimony, but did not elaborate who the said woman was.

In addition, it is on record that the appellants were arrested together with PW4, who was also a suspect. Such fact is found in the cross examination of PW4 by the 1st appellant whereby he stated:

> *"I was arrested with you, but I was released soon after I record* (sic) *my statement."*

It is questionable as to why they arrested PW4 if indeed PW1 had properly identified and named her assailants immediately after the incidence took place. Taking into account the foregoing analysis, I find that the identification of the appellants was not watertight as to eliminate possibilities of mistaken identity. Thus, the trial court erred in finding otherwise.

Concerning the issue of place of commission of the crime, which was also conceded by the respondent; it is well settled that where the charge states the exact date, time or place in which the incident occurred, it is mandatory that evidence is adduced to prove that the incident occurred on such date, time and place. Otherwise, the charge goes unproved. This position was emphasized in **Mathias s/o Samweli vs. Republic**, Criminal Appeal No. 271 of 2009 (unreported) whereby the Court stated:

> "… when specific date, time and place is mentioned in the charge sheet, the prosecution is obliged to prove that the offence was committed on that specific date, time and place."

Mr. Boniphace alleged that the prosecution did not parade witnesses to prove that the incident took place at Muungano area as stated in the charge. As I indicated at the beginning of this judgement, the particulars of the charge are that the incident took place at 22:00hrs at Muungano area within Hai district. However, as alleged by Mr. Boniphace, none of the prosecution witnesses

stated that the offence took place at Muungano area. Instead, PW1, only stated that she lives at Kenyatta within Rundugai while PW3, her husband, mentioned that he resides at Jiweni-Muungano ward where their home is located.

On the other hand, PW4 stated that he resided at Kenyata Street at Bomang'ombe. Apart from PW1, PW3 and PW4 stating where they resided, none of them mentioned the said Muungano area as being the area where the incident took place. In fact, PW1 stated to have run to Mother City School whereby she was carried by the appellants to a hedge at a plot where the incident took place.

The failure to mention Muungano area could not be fatal if the area mentioned was perhaps within Muungano area or if there were clear descriptions as to the environment under which the incident took place. However, in this case, apart from mentioning of a school named Mother City, there are no other details on the surrounding environment. It would have helped if the alleged school was the sole school identified to be in Muungano area. However, the evidence on record shows that Mother City has branches in the same name at different areas and two of the branches are in Muungano Ward. In the premises, it becomes clear that there was no evidence produced to soundly prove that the offence took place at Muungano Area.

It is well settled that a charge is a foundation of a criminal trial and for a case to be proved, the prosecution must prove the charge beyond reasonable doubt. Where it is discovered that there is variance between the charge and the evidence adduced, the charge ought to be amended otherwise, the case will stand unproved. This was well elaborated in **Erasto John Mahewa vs. Republic** (Criminal Appeal No. 287 of 2020) [2023] TZCA 17678 TANZLII whereby it was stated that:

> *"It is trite law that, the allegations contained in the charge must be supported by the prosecution account so as to prove the charge beyond reasonable doubt. The variance between the charge and the evidence adduced can be remedied before the end of the trial by invoking the provisions of section 234 (1) of the Criminal Procedure Act [CAP 20 R.E 2022] to amend the charge for cases triable by the subordinate courts like the present one. Where the variance remains unchecked, the adverse effect is that the prosecution case will be rendered not proved."*

See also; **Thabit Bakari vs. Republic** (Criminal Appeal 73 of 2019) [2021] TZCA 259 TANZLII and **Abel Masikiti vs. Republic** (supra).

In the foregoing, I find that the two issues have successfully proved that the prosecution failed to discharge its burden to prove the charge beyond reasonable doubt. I will thus refrain from

addressing the remaining issues as these two issues sufficiently dispose this appeal.

However, prior to making necessary orders, I wish to address the prayer made by Mr. Boniphace for the appellants to be acquitted. An acquittal is a right that can only be offered by a trial court having found a party without a case to answer or after the court finds a party not guilty after full trial. Thus, such order cannot be issued by this court sitting as an appellate court. An appellate court can only quash the decision of the lower court, set aside its orders and make necessary orders thereto.

In the upshot, I allow the appeal, quash the conviction of the appellants and set aside their sentences. I order for their immediate release from prison custody, unless held for some other lawful cause.

Dated and delivered at Moshi on this 18th day of March 2024.

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
MOSHI DISTRICT REGISTRY

X

L. M. MONGELLA
JUDGE
Signed by: L. M. MONGELLA