

**IN THE COURT OF APPEAL OF TANZANIA**

**AT MOSHI**

**(CORAM: WAMBALI, J.A., KITUSI, J.A. And NGWEMBE, J.A.)**

**CRIMINAL APPEAL NO. 678 OF 2020**

**FRANK CHARLES @ SUMBUKA ..... APPELLANT**

**VERSUS**

**THE REPUBLIC ..... RESPONDENT**

**(Appeal from the Decision of the High Court of Tanzania at Moshi)**

**(Mkapa, J.)**

**dated the 20<sup>th</sup> day of November, 2020**

**in**

**Criminal Appeal No. 01 of 2020**

**.....**

**JUDGEMENT OF THE COURT**

02<sup>nd</sup> May & 9<sup>th</sup> May, 2024

**NGWEMBE, JA.:**

The appellant, initially appeared before the District Court of Mwanga at Mwanga (the trial court) on 7<sup>th</sup> September, 2018 to answer a charge of rape. According to the charge sheet, on 30<sup>th</sup> day of August, 2018 at about 19:00 hours at Sofe Kilomeni village the appellant had carnal knowledge of a girl aged 10 years who for the purpose of this judgement, we shall refer to as the victim or PW3 to conceal her true identity.

When the charge was read over and explained to him, he unequivocally denied it. Following his denial, a full trial was held in which the prosecution paraded five witnesses; Agnes G. Kimambo (PW1), Dominick Dickson (PW2), the victim (PW3), WP 6896 DC Agnes (PW4) and Mashika Elinazi (PW5). Also, the PF3 was tendered and admitted as exhibit P1.

Though the charge alleges that the offence was committed on 30<sup>th</sup> August 2018, save for PW4, the substance of the prosecution evidence suggests through the evidence from the victim (PW3) and PW1, that the offence of rape was committed by the appellant prior to 27<sup>th</sup> August, 2018 when the victim demonstrated mischievous behaviour at her school. Moreover, though PW3 did not disclose the specific date and time, she testified that she had sexual intercourse with the appellant at different places prior to the date she was interrogated by PW1, her school teacher on 27<sup>th</sup> August, 2018.

In his defence, the appellant denied generally to have committed the offence and stated that he did not know the victim until she was called to adduce her evidence against him during the trial. Moreover, he raised the claim of bad blood because of money that he owed TZS. 300,000.00 to PW2.

At the conclusion of the trial, the learned trial Resident Magistrate found the appellant guilty as charged, convicted and sentenced him to thirty

(30) years imprisonment. The appellant unsuccessfully, appealed against the conviction to the High Court sitting at Moshi.

Three grounds out of the eight grounds of appeal that the appellant presented to the High Court on first appeal, sought to fault the trial court's conclusion that there were apparent variances between the charge and the prosecution evidence. Indeed, in his written submission at the first appellate court, the appellant insisted that the charge sheet was defective because it was not supported by the evidence of the prosecution witnesses. He went on to cite the decision in the case of **Pastory Vs R** [1978] T.L.R. 63. The learned State Attorney who responded to the written arguments of the appellant opposed the ground of variances between the contents of the charge sheet and the evidence by relying on section 135 (a) (ii) of the Criminal Procedure Act (the CPA) that since the essential elements of the offence were included in the charge, then the alleged variances with the evidence were immaterial. The first appellate judge found the appeal to be without merit and dismissed it. Dissatisfied with the outcome of his appeal to the High Court, the appellant preferred this second appeal.

Before this Court, the appellant lodged two memoranda of appeal comprising a total of eleven (11) grounds of appeal. He also lodged written

submission to support his grounds of appeal. However, at the hearing of the appeal, it was apparent that the appeal can be determined on a single ground on the variance between the charge and the evidence on record regarding the date of the incident. We therefore will not reproduce the rest of the grounds herein.

The appellant appeared in Court unrepresented, while the respondent Republic was represented by Ms. Grace Madikenya, learned State Attorney assisted by Messrs. Peter Utafu and Philbert Mashurano, also learned State Attorneys.

When the appellant was invited to elaborate the thrust of the said single ground of appeal, he relied on his written submission and opted to make a reply after the learned State Attorney had responded to his complaint.

At the outset, Ms. Madikenya supported the appeal wholly, submitting that there were fundamental variances between the charge sheet and the prosecution evidence. She submitted that while the charge sheet indicates that the offence of rape occurred on 30<sup>th</sup> August, 2018 at 19:00 hours, save for PW4, the rest of the prosecution witnesses basically referred to the offence which was committed on an unknown date and time before 27<sup>th</sup> August, 2018. She further argued that, PW1, the head teacher of the victim's

school, testified that on 27<sup>th</sup> August, 2018 she was informed by the school discipline teacher that the victim had demonstrated abnormal behaviour. Particularly, PW1 testified that:

*"She was undressing boys, touching their private parts and using abusive words mostly on private parts. She knows those acts and words as at home she was having sex with her brother – Frank, who they live with."*

She submitted that following the disclosure, PW1 took liberty to interrogate the victim who disclosed that she had sexual intercourse with her brother Frank, meaning the appellant. Her testimony was supported by PW3 (the victim) who testified boldly that, she informed her teachers on 27<sup>th</sup> August, 2018 that she had sexual relationship with the appellant. Equally, PW5 an Assistant Medical Officer examined her on 3<sup>rd</sup> September, 2018 and observed that she was not a virgin as she had lost the hymen.

In this regard, Ms. Madikenya argued that, considering the evidence on record there are variances between the charge and the prosecution evidence. In the event she argued, the charge ought to have been amended in terms of section 234 (1) of CPA. She added that failure to amend the charge at the instance of the court and the prosecution rendered the case unproved. She

supported her submission with the case of **Emmanuel Kabelele Vs R** (Criminal Appeal 536 of 2017) [2021] TZCA 531 (23 September 2021, TANZLII).

In conclusion, she submitted that since the charge was not proved to the standard required by law, it followed that the prosecution case against the appellant was not proved. Hence, she urged the Court to find the appeal merited and set the appellant at liberty. The appellant had no rejoinder after the appeal was not contested by the respondent Republic.

After going through the proceedings of the trial court and that of the first appellate court, and upon careful consideration of the arguments by the parties on variances between the charge and evidence on record, we agree that as no amendment was effected as required under section 234 (1) of the CPA, the case against the appellant was not proved beyond reasonable doubt. The section provides as follows:

*"234 (1) where, at any stage of a trial, it appears to the court that the charge is defective, either in substance or form, the court may make such order for alteration of the charge either by way of amendment of the charge or by substitution or addition of a new charge as the court thinks necessary to meet the circumstances of the case unless, having regard to the*

*merits of the case, the required amendments cannot be made without injustice; and all amendments made under the provisions of this subsection shall be made upon such terms as the court shall seem just."*

The relevance of complying with the requirement of the above provision where there is apparent variance between the allegation in the charge and the evidence on record has been emphasized by the Court in several decisions. For instance, in **Abel Masikiti Vs R** [2015] T.L.R. 21 which was referred in **Emmanuel Kabelele Vs R** (supra), faced with an akin situation, the Court stated:

*"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 failure of justice will occur**" [Emphasis added].*

Variation on the date on which the offence was committed cannot in any event be treated as minor one, especially like in this case where a charge

provides a specific date and time. This was also the stance of the Court in **Ntobangi Kelya & Another Vs R** (Criminal Appeal 256 of 2017) [2021] TZCA 393 (23 August 2021, TANZLII) and **Said Musa Soweni Vs R** (Criminal Appeal No. 93 of 2020) [2022] TZCA 218 (22 April 2022, TANZLII). Particularly, in the latter, it was held that:

*"The law is settled that, a charge which is in material conflict with the witnesses' testimonies materially shakes credence of the prosecution case and renders the prosecution case not proved to the required standard."*

In this particular case, the charge sheet indicates categorically that the offence of rape was committed by the appellant on 30<sup>th</sup> August, 2018 at 19:00 hours. However, as alluded to above, the evidence of the victim (PW3) suggests that the offence was committed some days prior to 27<sup>th</sup> August, 2018 without showing the exact date. For clarity, she testified that: *"He was raping me in his room and sometimes in the farm and sometimes in the kraal/zoo"*. The same story was disclosed by PW3 to PW1, a primary school head teacher when she was interrogated on her mischievous misbehaviour shown to the school boys on 27<sup>th</sup> August, 2018. It is noteworthy that, based on the interrogation, PW1 notified PW2, the father of PW3 on what was going



on at his home. On the other hand, though PW4, a Police investigator, testified with emphasis that the offence of rape was committed on 30<sup>th</sup> August, 2018, there is no indication that she properly investigated the matter as that evidence was not consistent with that of PW3 and PW1. Had she investigated the alleged rape, she would have come up with specific date or period, since in view of the evidence of PW3 it would appear that rape might have occurred on diverse dates. Equally important, the evidence of PW5, an Assistant Medical Officer who examined the victim on 3<sup>rd</sup> September, 2018 and tendered exhibit P1 (PF3) could not give clue on the date in which the incident occurred.

We are alive to the general rule that, for the prosecution to establish the guilt of the accused, it must prove the offence as laid in the charge before the court. Proving the offence entails among other things, establishing that a wrongful act was committed by the accused on a particular date or on a certain period of time. Therefore, variation between the charge and the evidence on record eroded the prosecution case and thus the anomaly has to be decided in favour of the appellant because the charge was not amended in terms of section 234 of CPA to bring it into conformity with the evidence on record.

In the circumstances, we allow the single ground of appeal. Ultimately, we find merit in the appeal. Consequently, we quash the conviction and set aside the sentence. We further order an immediate release of the appellant from custody unless otherwise held for other lawful reasons.

**DATED** at **MOSHI** this 9<sup>th</sup> day of May, 2024.

F. L. K. WAMBALI  
**JUSTICE OF APPEAL**

I. P. KITUSI  
**JUSTICE OF APPEAL**

P. J. NGWEMBE  
**JUSTICE OF APPEAL**

Judgment delivered this 9<sup>th</sup> day of May, 2024 in the presence of the Appellant in person and Mr. Bora Msafiri Mfinanga, learned State Attorney for the Respondent/Republic, is hereby certified as a true copy of the original.



J. E. FOVO  
**DEPUTY REGISTRAR**  
**COURT OF APPEAL**

