IN THE COURT OF APPEAL OF TANZANIA
AT MOROGORO

(CORAM: MKUYE, J.A., KAIRO, J.A. And MLACHA, J.A.)

CRIMINAL APPEAL NO. 650 OF 2023

HUSSEIN MUSTAFA.. APPELLANT

VERSUS

THE REPUBLIC .... RESPONDENT

(Appeal from the decision of the High Court of Tanzania at Morogoro)

(Hassan, J.)

Dated the 28th day of January, 2023

in

Criminal Appeal No. 13 of 2021

JUDGMENT OF THE COURT

10th & 21st June, 2023

KAIRO, J.A.:

Hussein Mustafa, the appellant, was charged in the District Court of Morogoro with the offence of rape contrary to sections 130 (1) (2) (e) and 131 (3) of the Penal Code, Cap 16, R.E. 2002 (now R.E. 2019) (the Penal Code). It was alleged in the particulars of the offence that, on diverse dates between September, 2019 to October, 2019 at Mawenzi Chaka bovu area within the municipality and District of Morogoro in Morogoro Region, the appellant had carnal knowledge of a girl child of 9 years of age. For the purpose of this judgment, we shall refer her as the "victim" or "PW2" to

conceal her true identity. The accused pleaded not guilty to the charge and the case went to a full trial.

To prove its case, the prosecution called four witnesses who were the mother of the victim (PW1), the victim (PW2), a doctor who examined the victim (PW3), the victim's class teacher (PW4) and the victim's friend (PW5). The prosecution also tendered two exhibits which were the original clinic card of the victim (exhibit P1) tendered by PW1 and PF3 (exhibit P2) tendered by PW3.

The defence side had two witnesses who were the appellant (DW1) and the appellant's friend (DW2) with no exhibit.

To understand what transpired, we find it appropriate to narrate the background, albeit briefly, that resulted to this appeal:

It all started on 16th October, 2019 when a victim, the girl child of nine years of age went to her school as usual, but did not come back home. Her mother, (PW1) searched for her in vain, and decided to report the matter to the police after enquiring her whereabout from the victim's class teacher and informing the street chairperson. The police promised to work on it and told PW1 to come back the next day.

On 17th October, 2019, PW1 was phoned by the Head Teacher of the victim's school and was requested to go to school immediately. On arrival, she found the victim there and she was informed that the victim was found by peoples' militia (sungusungu) loitering at night and they took her to the police station. The police took the victim to her school, and that's why the Head Teacher called PW1.

PW1 then took the victim to the police station where the incident was reporteted. She was questioned as to why she did not return home the previous day, but they did not get much clue from her. The police advised PW1 to talk to her in a friendly way so that she can open up, and they left to go home.

To get to know what was behind the curtains, the victim's class teacher (PW4) instructed two pupils to befriend the victim, and it worked perfectly. Through these planted friends, it was discovered that, the victim and her friend, one Zaituni (PW5) used to go to Chakabovu area where they were being raped. PW4 informed PW1 on that discovery. PW1 probed more information from the victim who this time opened up and told her mother that, during break times, she used to go to Chakabovu area with her friend Zaituni to a person called Otawa. The victim further revealed that, Otawa used to insert his penis into her vagina and after the ordeal, Otawa would

give her TZS. 400.00 with instruction to give TZS. 200.00 to Zaituni and warned not to reveal the incident to anyone. According to victim, Otawa would rape her this day and next day would be Zaitun's turn.

PW1 requested the victim to take her to the scene of incident, which she did. After being shown Otawa, the rapist who is the appellant herein, she went to report to the police who set a trap and managed to arrest the offender and took him to Morogoro Central Police at Morogoro. On the next day, she was given a PF3 for examination. The doctor who examined her (PW3) confirmed that, the victim was raped.

The appellant was then arraigned to court to answer the charge of rape. He denied to the charge and after a full trial, the court found him guilty as charged and sentenced him to serve life imprisonment. He was not amused and unsuccessfully appealed to the High Court to challenge both the conviction and sentence.

Still determined to protest his innocence, the appellant is before this Court armed with 9 grounds of appeal as follows:

1. *That, both lower courts erred in law and fact in upholding the appellant's conviction based on the evidence of PW2 (victim) whose testimony was barely incredible, improbable, untruthful and unreliable to*

warrant the appellant's conviction beyond all reasonable doubt.

2. *That, both lower courts erred in law and fact in upholding the appellant's conviction based on the evidence of PW1, PW2, PW4 and PW5 whose testimonies were in material contradictions in respect of the whereabouts of PW2 (victim) in the days she disappeared at her home and how the ordeal was revealed by PW4 (teacher).*
3. *That, both lower courts erred in law and fact in upholding the appellant's conviction based on defective charge sheet as the names mentioned in the evidence were not the names of the appellant, hence no amendment was sought to cure the anomaly.*
4. *That, both lower courts erred in law and fact in upholding the appellant's conviction when the mode and/or methods used to apprehend the appellant was improper as PW2 (victim) did not give any prior graphic descriptions of her assailant such as morphological appearance, height, skin colour, clothing etc. before going to arrest the suspect for avoidance of arresting innocent person.*
5. *That, both lower courts erred in law and fact in upholding the appellant's conviction without drawing an adverse inference to the prosecution for the failure to trace and parade the said LATIFA who reveal the PW2's assailant to PW4 (according to PW5) to testify in*

court on whether or not the said OTAWA named by PW1, PW2 and PW5 and HUSSEIN named by PW4 was the appellant the omission which cast doubt on the prosecution case.

6. *That, both lower courts erred in law and fact in upholding the appellant's conviction without reappraising the prosecution evidence by making a critical assessment, evaluation, analysis and determination on its credibility, truthfulness and reliability against the appellant.*
7. *That, both lower courts erred in law and fact in upholding the appellant's conviction without sufficiently considering the defence evidence and weighing the same with that of the prosecution.*
8. *That, both lower courts erred in law and fact in upholding the appellant's conviction based on the evidence of PW2 (victim) and PW5 whose age was tender without sufficiently complying with the provisions of section 127 (2) of the Evidence Act, Cap 6 R.E. 2022, the omission which renders their evidence a nullity.*
9. *That, both lower courts erred in law and fact in upholding the appellant's conviction in a case where the prosecution did not prove its charge beyond reasonable doubt against the appellant as required by law.*

When the appeal was called for hearing, the appellant appeared himself, unrepresented. On the other hand, Ms. Upendo Shemkole, Learned Senior State Attorney teamed up with Mses Rosemary Mgenyi and Veronica Chacha, both learned State Attorneys represented the respondent Republic.

When invited to amplify the grounds of appeal, the appellant prayed to adopt the grounds in his memorandum of appeal and his written statement of arguments in support of the appeal lodged on 5th October, 2023. He further sought the indulgence of the Court to let the learned State Attorney respond first, reserving his right to make a rejoinder later, if the need would arise.

Ms. Chacha submitting on behalf of her colleagues, started by declaring the respondent's stance to oppose the appeal. She went on to submit that, the respondent has noted that, some of the grounds in the memorandum of appeal were neither raised nor determined at High Court, which was the first appellate Court. She mentioned them to be grounds number 4 and 5. As such, they cannot be discussed in this appeal, being new grounds, and thus, implored the Court to reject them.

The appellant, being unrepresented lay person, left the matter to the wisdom of the Court.

Having traversed the grounds of appeal filed in the High Court appearing at page 67A of the record of appeal, we satisfied ourselves that grounds number 4 and 5 have been raised in this Court for the first time, as such, are new. It is a settled principle of law that the Court is mandated to decide on matters which have already been decided by the High Court as correctly submitted by Ms. Chacha. There is a plethora of decisions in this regard; like **Abdul Athuman vs Republic** [2004] T.L.R. 151 and **Juma Manjano vs DPP**, Criminal Appeal No. 211 of 2009 [2012] TZCA 52 (1 March 2012) TANZLII to mention but a few. On that account, we desist to determine them.

Ms. Chacha went on submitting that, the respondent shall respond to the remaining grounds, that is: 1, 2, 3, 6, 7, 8 and 9 in the following order: 2, 3, 8, 6 & 7 jointly 1 & 9 jointly.

Starting with ground number 2, the appellant faults the High Court to uphold the decision of the trial court to mount conviction against him basing on the evidence of PW1, PW2, PW4 and PW5 which according to him, was loaded with contradictions as regards where the victim was, on the days she disappeared from her home and how did PW4 discovered the ordeal.

In her reply, Ms. Chacha conceded to the presence of the contradictions in that aspect. She elaborated that, PW5 in her testimony

stated that, she was told by PW1 that the victim did not sleep at home for a week. On the other hand, PW1 testified that the victim disappeared for a single day. According to her, the said contradictions did not go to the root of the offence committed, insisting that the victim was categorical that, the person who raped her was the appellant whom she managed to positively identify him at the dock.

The learned State Attorney went on to submit that, the victim further showed to PW1 the office of the appellant at Chakabovu area where the appellant used to rape her. It was also her submission that, the information was corroborated by PW5 who used to escort the victim to the scene of crime which according to her, proved that it was the appellant who raped her. To wind up, she insisted that the stated contradictions are too minor to dent the prosecution case, and beseeched the Court to find the ground without merit. She cited to us the case of **January Casian Mallya vs The Republic**, Criminal Appeal No. 288 of 2020 [2023] TZCA 17966 (14 September, 2022) TANZLII, to fortify her arguments.

Reacting to ground number 3, Ms. Chacha agreed to the appellant's complaint that, the appellant's name as it appears in the charge is different from the name referred to him by the prosecution witnesses. She elaborated that, the appellant's name as per charge is Hussein Mustafa. However, PW2

mentioned the person who raped her by the name of Otawa and identified him at the dock. Ms. Chacha contended that, the dock identification made by the victim coupled with the victim's act to lead to where the appellant was found and apprehended, was sufficient to confirm that, in fact, Hussein Mustafa is also called Otawa, despite the names difference pointed out.

In her further move to convince the Court that the disparity is not fatal, Ms. Chacha argued that, the appellant did not object to be referred to by the name of Otawa when identified at the dock by the victim, nor did he cross examine the victim on that aspect. She argued that, the principle is long settled that, failure to cross examine on any particular point suggests acceptance of that particular piece of evidence. On that account, Ms. Chacha argued that Otawa is also the appellant's name and thus the ground is without substance.

Ms. Chacha refuted the appellant's complaint in ground number 8 that the High Court erred to uphold the appellant's conviction basing on the evidence of PW2 and PW5 whose evidence was taken in contravention of section 127 (2) of the Evidence Act, Cap 6 R.E. 2022, being the children of tender age. It was her contention that the provision was complied with as both of the children promised to tell the truth and referred the Court to pages 17, 18 and 37 for verification of her argument. She maintained that,

the provision only needed the tender age child to promise to tell the truth and not lies, to which according to her, both PW2 and PW5 did accordingly. She added that, the trial court was also satisfied with their credence, and thus, prayed the Court to find the ground unmerited.

Responding to grounds number 6 and 7 which the learned State Attorney addressed them jointly, the complaint by the appellant was to the effect that, the first appellate court upheld the decision without sufficiently consider the defence evidence. On this Ms. Chacha argued that, though it was true that the trial court only considered the defence of DW1, but the High Court rectified the anomaly by stepping into the shoes of the trial court and considered the defence of both of DW1 and DW2 before finding the appellant guilty and upheld the trial court's decision. She thus implored the Court to dismiss the ground for want of substance.

Regarding grounds number 1 and 9, the complaint by the appellant is to the effect that, the prosecution failed to prove the case beyond reasonable doubt, the complaint which Ms. Chacha contended to be meritless. She elaborated by listing the factors that are required to be proved in the offence of rape as follows; **one,** penetration; **two,** age of the victim and **three,** the perpetrator. Amplifying on each factor, Ms. Chacha argued that, the victim was firm in her testimony that she was penetrated by Otawa

and narrated the whole incident. Further to that, the evidence of the doctor who examined her (PW3) and exhibit P2 she tendered, confirmed that the victim was penetrated.

Coming to the age of the victim, Ms. Chacha submitted that, it was PW1, her mother who told the trial court that the victim was born on 14th June, 2010 at page 12 of the record of appeal and further tendered a clinical card which shows the victim's date of birth admitted as exhibit P1 appearing at page 50 of the record of appeal. She also added that, even when PW2 was testifying, she stated her age to be 9 years.

Resting her argument regarding that factor, Ms. Chacha concluded that, the evidence verified that the victim was a child of tender age which, according to the provisions of section 131 (3) of the Penal Code, the sentence to a person raping a child under 10 years is life sentence, and thus, correctly imposed.

As regards the perpetrator, Ms. Chacha repeated PW2 testimony when mentioning Otawa to be the person who raped her and how he lured her while in the company of PW5 (pages 14-16 & 19 of the record of appeal). She went on submitting that, PW2 further identified and pointed out the rapist at the dock. Besides, he was the one who lead them to the place where Otawa was living. She referred the Court to page 20 of the record of

appeal for verification. Ms. Chacha concluded that, all the said pieces of evidence proved the factors needed to prove the offence the appellant was charged of, and it was her contention that, the prosecution therefore proved the case to the hilt. On that account, she beseeched the Court to uphold the decision of the lower courts and dismiss the appeal.

When probed as to what is the practice in the circumstances where variation of a charge and evidence is noted, Ms. Chacha correctly submitted that, an amendment is to be done and the charge substituted accordingly. She, however, hastened to add that, though in the case at hand the requirement was not effected, she implored the Court to rely on the dock identification done by the victim together with the fact that it was the victim who led the police and PW1 to where the appellant was living. She also added that, the appellant did not deny the name nor cross examined PW2 on that aspect. She, thus, pleaded to the Court to find that the case against the appellant was proved to the required standard and dismiss the appeal in its entirety.

The appellant had nothing to rejoin but reiterated his prayer to find his grounds meritorious, allow this appeal and set him free.

Having thoroughly scanned the record of appeal and hearing the rival arguments from both sides, the main issue for our determination is whether or not this appeal is meritorious.

From the outset, we wish to put it clear that, we shall only discuss grounds 3 and 8 above for the reason to become apparent later in this judgment.

Starting with ground 8 wherein the court is faulted on the non-compliance with section 127 (2) of the Evidence Act before recording the evidence of PW2 and PW5 which was later relied on by the trial court to mount conviction. The complaint was vehemently refuted by the respondent as she argued that, both of the witnesses promised to tell the truth and not lies.

The issue for our determination therefore is whether their evidence was taken in contravention of section 127(2) of the Evidence Act.

Our starting point is section 127 (2) which provides as hereunder:

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

We further wish to quote the excerpt from the trial court's conclusion following the testimony of PW2 appearing at page 18 of the record of appeal and also, the trial court's conclusion following PW5 testimony appearing at page 137 of the record of appeal which are almost similar, for easy understanding of the discussion to follow.

For PW2 the excerpt reads:

> *"**Court:** After examining the witness the court has observed that **she does not know the nature of oath and telling the truth** and due to that, the court has asked her to promise to tell the truth and not lies and she said;*
>
> ***WITNESS** "I promise to tell the truth and not lies before this court"*
>
> ***Court:** The witness has promised to tell the truth and not lies, s.127 (2) of TEA [Cap 6 R.E. 2019] complied with".*

For PW5 the excerpt reads:

> *"**Court:** Since the witness seems **not to know the nature of oath and telling the truth,** this court has asked her to promise to tell the truth before this court and not lies, she said:*
>
> ***PW5:** "I promise to tell the truth before this court and not to tell lies*

Section 127 (2) of the Evidence Act Cap 6 R.E. 2019 complied with".

It was the argument of Ms. Chacha that both PW2 and PW5 have promised to tell the truth and not lies before the court. Hastily looking, that is the impression one gets. However, on our part, we have been disturbed by the conclusion of the trial magistrate which we think is contradictory within itself. The trial court after examining PW2 and PW5 was of the view that they did not know the nature or rather essence of telling the truth. Despite that, the witnesses promised to tell the truth and not lies. To say the least, the conclusion of the examining magistrate exercised our minds greatly and we are of the view that, the witnesses' promises were not compatible with, nor support the magistrate's conclusion, with much respect to the learned State Attorney. It does not augur well that one minute, the witness does not know the essence of telling the truth, but next minute promises to tell the truth. On that account, we think, PW2 and PW5 testimonies ought to have been discounted and further expunged from the record for failure by the trial court to correctly and properly address itself on section 127 (2) governing the competency of a child of tender age. [See: **Kimbute Otiniel vs Republic,** Criminal Appeal No. 300 of 2011 [2014] TZCA 155 (11 February 2014) TANZLII. The consequence of our finding shall be pronounced later.

Regarding ground 3, the complaint is hinged on the variance between the charge and the evidence adduced as regards the name of the appellant. Ms. Chacha conceded to the pointed-out flaw and further agreed that, no amendment to the charge was effected to harmonize the names and cure the pointed out difference. She however argued that, the anomaly was not fatal to vitiate the proceedings as seems to be suggested by the appellant for the reason that; **one**, it was the victim who mentioned Otawa to be the name of the person who raped her, **two**; the victim made dock identification of the said Otawa when testifying, **three**; the appellant did not object when he was referred by the name of Otawa by the prosecution witnesses including PW2 and PW5 who used to go together to the scene of crime; and **four**; the appellant did not cross examine the victim nor other prosecution witnesses on that aspect, the omission which she submitted to be an acceptance of the said name despite being different from the one in the charge.

Indeed, there is variance between the charge and evidence as regards the name of the appellant, as rightly pointed out by the appellant and admitted by Ms. Chacha. Our scrutiny of the record of appeal reveals that, the appellant's name as per charge was Hussein Mustafa. However, PW1,

PW2, P5 referred the appellant by the name of Otawa when giving evidence (pages 16, 19, 20, 40 and 41). The interlocutory issue to determine in this ground is whether the variance is fatal, to which we do not hesitate to answer in affirmative.

The Court has consistently maintained the position that variance of the charge and evidence calls for an amendment of the concerned charge forthwith, otherwise failure of justice will occur. [See: **Issa Mwanjiku @ White vs Republic**, Criminal Appeal No. 175 of 2018, [2020] TZCA 1801 (6 October, 2020) TANZLII, **Justine Kakuru Kasusura @ John Laizer vs Republic**, Criminal Appeal No. 175 of 2010 [2016] TZCA 328 (9 May 2016) TANZLII and **Kandola Paulo @ Kadala vs Republic**, Criminal Appeal No. 61 of 2017 [2018] TZCA 625 (8 March 2018) TANZLII.

In the matter at hand, the charge sheet was not amended as required in terms of section 234 (1) of the Criminal Procedure Act, Cap 20 R.E. 2022 (the CPA), despite the stated variance. In **Kandola Paulo @ Kadala** (supra) quoting the case of **Ryoba Mariba @ Mungare vs Republic**, Criminal Appeal No. 74 of 2003 (unreported), the Court, in akin situation observed as follows:

> "... *if there is a variation in the dates, then the charge must be amended forthwith and the accused explained*

his right to require the witness 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, failure of justice will occur".*

Likewise in the case of **Issa Mwanjiku @ White** (supra), the similar principle was extended to a situation where there was a variance of the items stolen as per charge sheet and the evidence adduced in the trial. We think, in the case at hand, the stated principle is also applicable in these circumstances into which there is variation of the charge and the evidence adduced as regards the name of the appellant. Since no amendment of the charge was effected in terms of section 234 (1) of the CPA, we are with firm view that, there was failure of justice as the charge on the aspect of the name of the offender was not proved.

We are aware that Ms. Chacha has argued that the anomaly was not fatal as the appellant was identified in the dock. However, with respect, we do not subscribe to the said argument and the reason is not farfetched: It is a long-settled position of the law that, dock identification which was not preceded by an identification parade is evidentially valueless. [See: **Yosiala Nicholaus Marwa and 2 Others vs The Republic**, Criminal Appeal No. 193 of 2016 [2019] TZCA 147 (9 April2019) TANZLII and **Taiko Lengei vs**

The Republic, Criminal Appeal No. 131 of 2014] [2015] TZCA 288 (25 February 2015) TANZLII. In the same vein, the dock identification by PW2 in this matter was worthless evidence as the same was not preceded by identification parade. It goes therefore that, the failure to cross examine by the appellant was inconsequential in the circumstances of this case due to presence of the pointed-out anomaly, as such, we find the ground with substance and we allow it.

As a way forward, the Court has been consistent that, since the anomaly renders the charge unproved, the appellant is entitled to an acquittal as a matter of right to avoid failure of justice to occur. [See: **Kandola Paulo @ Kadala** (supra)]. We still maintain the said stance.

We are further aware that, the remedy for the failure to abide with Section 127 (2) pointed out above was to expunge PW2 and PW5 testimonies. However, having in mind that the case was a nonstarter for the variation of the charge and evidence, we think expunging them is a futile exercise.

Accordingly, we allow the appeal. We further quash the conviction against the appellant and set aside the sentence imposed on the appellant. We also order for the release of the appellant from prison forthwith, unless held for some other lawful reason.

Since the ground suffices to dispose of the appeal, continuing determining other grounds of appeal serves no purpose.

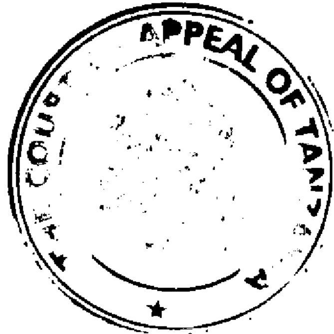
DATED at **DAR ES SALAAM** this 21st day of June, 2024.

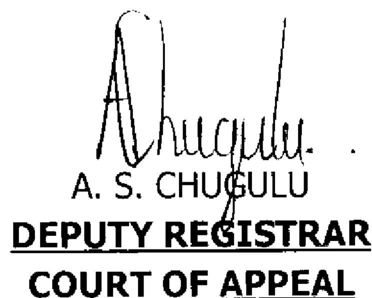
R. K. MKUYE
JUSTICE OF APPEAL

L. G. KAIRO
JUSTICE OF APPEAL

L. M. MLACHA
JUSTICE OF APPEAL

The Judgment delivered this 21st day of June, 2024 in the presence of the Appellant in person vide video link from remand prison Morogoro and Ms. Daria Sanga, learned State Attorney for the Respondent/Republic vide video link from the High Court of Tanzania at Morogoro, is hereby certified as a true copy of the original.





A. S. CHUGULU
DEPUTY REGISTRAR
COURT OF APPEAL