

TANZANIA / JUDGMENT

NUHU JUDGMENT

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IN THE HIGH COURT OF TANZANIA (MWANZA SUB-REGISTRY) AT MWANZA CRIMINAL
APPEAL NO. 1541 OF 2024 (Originating from Criminal Case No. 58 of 2023 in the District Court of
Nyamagana at Nyamagana) NUHU NTISHIMBI @YOHANA.....
APPELLANT VERSUS REPUBLIC.....RESPONDENT

JUDGMENT

3rd & 10th March, 2025 KAMANA, J. On 3rd March, 2025 I set aside the conviction and sentence meted out against the appellant but I reserved my reasons for such a decision. Here are my reasons. Briefly, the accused was charged with an unnatural offence contrary to section 154(1) (a) of the Penal Code and sentenced to serve thirty years in jail. It was alleged by the prosecution that on 4th February, 2023 at the Mbugani area within Nyamagana District in Mwanza Nuhu Ntishimbi had carnal knowledge of one X against the order of nature. Remarkably, the victim was his wife and the incident took place a few hours after their marriage ceremony. 1 Aggrieved by such conviction and sentence, the appellant preferred an appeal that was premised on thirteen grounds. Of essence is the first ground in which the appellant assailed the trial court's judgment as it was founded on the variance between the charge sheet and the evidence adduced so far as the scene of the crime is concerned. The appellant asserted that while the charge sheet expressly stated that the incident took place in the Mbugani area, the prosecution led evidence that the incident took place in the TANESCO area. He held the view that such variance renders the charge unproved. Strengthening his stance, the appellant cited the cases of Mabula Limbe v. Republic, Criminal Appeal No. 563 of 2015-CAT (Unreported); and Issa Mwanjiku @White v. Republic, Criminal Appeal No. 175 of 2018-CAT (Unreported). Replying, Ms. Nayla Chamba, learned State Attorney prefaced by opposing the appeal. She then conceded that there was a variance between the charge sheet and the evidence. Despite her concession, Ms. Chamba, unwaveringly, tried to convince me that the variance is not fatal and is curable under section 284(3) of the Criminal Procedure Act, Cap. 20 [RE.2019]. When I hinted that section 234(3) is about the variance between the charge and the evidence with respect to the time when the alleged 2 offence occurred, the learned State Attorney quickly referred me to the case of Damian Luhele v. Republic, Criminal Appeal No. 501 of 2007- CAT (Unreported) in which the Court of Appeal held that the variance between the charge and the evidence as to the date when the offence was committed is curable under section 234(3). Fortified by that position, the learned Counsel asked this court to uphold the conviction and sentence. At this point, it is apposite to reproduce the provisions of section

234(3) as follows: '(3) Variance between the charge and the evidence adduced in support of it with respect to the time at which the alleged offence was committed is not material and the charge need not be amended for such variance if it is proved that the proceedings were in fact instituted within the time, if any, limited by law for the institution thereof.' My understanding of the provisions of section 234(3) is that a variance between the charge and the evidence concerning the time at which the offence was committed is irrelevant when it is proved that the proceedings were instituted within the time prescribed for the institution of the same. That being the case, the provisions of the said section have nothing to do with the variance between the charge and the evidence concerning the place where the offence was committed. I have read the case of *Damian Ruhele v. Republic* (Supra) which was decided on 2nd March, 2012. In the said case, the Court of Appeal held the view that the variance between the charge and evidence regarding the date when the offence was committed is immaterial and curable under section 234(3). With due respect to Ms. Chamba, the case of *Damian Ruhele v. Republic* (Supra) is irrelevant to the circumstances of this case. This is because in the cited case the variance was about the date when the offence was committed and not where the offence was committed as it is in this case. For the sake of argument, ten years later after the decision of the Court of Appeal in *Damian Ruhele v. Republic* (Supra), the Court of Appeal in the *Damas Mgova v. Republic*, Criminal Appeal No. 13 of 2022-CAT (Unreported) which was decided on 28th October, 2022 held that when the specific date is stated in the charge sheet as the date when the offence was committed, the prosecution is bound to prove that it was on that date when the offence occurred. The Court had this to state: 'It is settled law that it is the duty of the prosecution to prove the allegation as laid in the charge. In the *DPP v. 4 Yusufu Mohamed Yusuf*, Criminal Appeal No. 331 of 2014 (unreported), the Court stated that: "It is always the duty of the prosecution to make sure that; what is contained in the particulars or statement of the offence including the dates of when the offence was committed is proved and supported by the evidence and not otherwise." The Court went on to state that: 'Moreover, in *Mathias s/o Samwel v. The Republic*, Criminal Appeal No. 271 of 2009 (unreported) the Court held that: "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 time and place..." That being the position, I am of the considered view that when there is a variance between the charge and the evidence, the accused is denied a full understanding of the nature of the case he is facing. This situation, in my opinion, vitiates a fair trial. Reverting to the appeal at hand, X (PW2) testified that the appellant had carnal knowledge of her against the order of nature in the 5 TANESCO area. This evidence does support the charge sheet which states that the appellant had carnal knowledge of X against the order of nature in the Mbugani area. With this kind of evidence, the prosecution was supposed to amend the charge sheet to align it with the evidence. This could be done under section 234(1) of the CPA. The prosecution opted not to amend the charge sheet for that purpose. The failure to amend the charge sheet rendered it incurably defective. This means that the charge was not proved beyond a reasonable doubt whose effect is to allow the appeal. In this, I am fortified by the position of the Court of Appeal in the case of *Noel Gurth @Bainth & Another v. Republic*, Criminal Appeal No. 339 of 2013-CAT (Unreported) where the Court stated: 'Where there is a variation in the place where the alleged armed robbery took place, then the charge must be amended forthwith. If no amendment is effected, the 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.' Order accordingly. Right To Appeal Explained. DATED at MWANZA this 10th of March, 2025. 6 KS KAMANA JUDGE 7

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