

TANZANIA / JUDGMENT

RASHID PAUL THOMAS MPAREE VS REPUBLIC

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THE JUDICIARY OF TANZANIA IN THE HIGH COURT OF UNITED REPUBLIC OF TANZANIA
MOSHI SUB REGISTRY AT MOSHI DC CRIMINAL APPEAL NO. 23524 OF 2024 (Originating from
Criminal Case No. 54 of 2023 of Hai District Court at Hai) RASHID PAUL THOMAS @ MPAREE
..... APPELLANT VERSUS REPUBLIC RESPONDENT

JUDGMENT

16/01/2025 & 19/02/2025 SIMFUKWE, J. Rashid Paul Thomas @ Mparee, the appellant herein was charged and convicted by the District Court of Hai at Hai on two counts: Rape contrary to sections 130(1)(2)(e) and 131(1) of the Penal Code [Cap 16 R.E 1 2022] and Unnatural offence contrary to section 154(1)(a) and (2) of the Penal Code [Cap 16 R.E. 2022]. On the count of rape, the prosecution alleged that on 19th June 2023, at Bomang'ombe Secondary School area within Hai District in Kilimanjaro region, the appellant had carnal knowledge of one NIM (not her real name), a girl of 17-years-old. The particulars on the second count of unnatural offence stated that on the same date, time and place, the appellant had carnal knowledge of the same girl against the order of nature. The background of the matter is that it was around 22:00hrs when PW1 the victim, while at her usual workplace assisting a food vendor (Mama Lishe), met customers who needed food services. One of the customers was the appellant herein. The customers informed the victim that the person who needed food was someone else. Upon being informed of this, the victim's employer, PW2 allowed the victim to take the food to the intended customer. It was stated that the victim was accompanied by the appellant, who was driving a tricycle with a companion, while the victim was on foot. The 2 victim stated that after a short distance ahead, the appellant and his companion grabbed her, forced her into the tricycle, and took her to Bomang'ombe Secondary School area. Upon reaching the location, the victim claimed that she was assaulted and ordered to remain silent. She was threatened by the appellant who had a knife, while his accomplice, identified by the victim as 'Ras', was holding a screwdriver. It was alleged that, the appellant forcefully undressed the victim while also removing his own trousers, as his accomplice controlled the victim. The appellant then proceeded to rape the victim and later sodomised her. The victim stated further that she experienced severe pain and cried out, but the attackers did not stop. After the appellant had finished, he grabbed the victim's hand, allowing his accomplice to rape and sodomize her. After they were done, they left the scene. The victim

explained that she was only able to wear a skirt without a skintight or underwear, as she was bleeding. She walked to the roadside, where she sought help from a passing vehicle that took her back to her workplace. The victim informed her employer (PW2) about her tragedy. Then, PW2 called her husband, who went and took the victim to the police station and later to hospital for medical examination. 3 At the hospital, the victim was attended by PW3, the Doctor. PW3 stated that he received the victim in a distressed condition, as she was crying and struggling to walk properly. When asked what had happened, the victim explained that she had been raped by tricycle drivers. PW3 explained further that he found bruises on the victim's labia majora and minora. She was bleeding from her vagina, which appeared open with no hymen, and the vaginal walls also had bruises. In addition, there was a discharge mixed with blood. According to PW3, also, the victim's anus had bruises. PW3 told the trial court that the examination showed that the victim was penetrated in her vagina and her anus. PW3 tendered a PF3 which was admitted as exhibit P1. The appellant jumped bail, as a result, the matter proceeded ex parte. The trial court was satisfied that the prosecution's evidence was sufficient to prove the two counts against the appellant beyond reasonable doubt. Finally, the trial court convicted the appellant and sentenced him to thirty

(30) years imprisonment on each count. After delivery of judgment, the appellant was apprehended and the trial court required him to show cause. Upon showing cause, the trial court proceeded to pronounce the judgment and sentenced him. Dissatisfied 4 with the conviction and sentences, the appellant filed this appeal on the following grounds:

1. The learned trial magistrate strayed into error of Law when she failed to note that the charge was defective and there was material variance of the charge and evidence adduced.
2. The learned trial magistrate erred in law and factual analysis when she failed to note that the circumstances and condition favouring a proper and correct identification were not conducive.
3. The learned trial magistrate erred in law and factual analysis when she failed to note that the question of familiarity will only hold if the conditions prevailing at the crime scene are conducive for correct and proper identification, if the conditions are not conducive then the question of familiarity will not rise at all.
4. The learned trial magistrate erred in law and factual analysis when she failed to appreciate the fact that appellant was never recognized as the perpetrator of the incident. 5
5. The learned trial magistrate erred in law and factual analysis when she failed to note that the conditions prevailing at the crime scene might appeal ideal but that is no guarantee against untruthful evidence.
6. The learned trial magistrate erred in law and factual analysis when she failed to note that essential prosecution witnesses were never summoned to testify.

7. The learned trial magistrate erred in law and factual analysis when she made remarks in her judgement which are not reflected in the evidence adduced.
8. The learned trial magistrate erred in law and factual analysis when she relied on weak, contradictory, inconsistency, with material discrepancies and uncorroborated prosecution evidence.
9. The learned trial magistrate erred in law and factual analysis when she failed to note that the charge against the appellant was not proved beyond reasonable.
10. The learned trial magistrate erred in law and factual analysis when she failed to note that the offences 6 happened on the same transaction, so it was not appropriate to order the sentence to run consecutively. The appellant prayed the appeal to be allowed, conviction be quashed and sentence be set aside. At the hearing of the appeal, the appellant, being unrepresented, adopted his grounds of appeal. On the other hand, the respondent was represented by Ms. Bora Mfinanga, a learned State Attorney, who filed written submission in reply. At the outset, the learned State Attorney supported the first, second, third, fourth, and ninth grounds of appeal and disputed the rest of the grounds. Ms. Bora argued the second, third and fourth grounds collectively and the first and ninth grounds of appeal were argued collectively. On the first and ninth grounds of appeal she conceded that there is a variance between the charge sheet and adduced evidence on both the statement of the offence and particulars of the offence. It was explained among other things that the charge sheet shows that the victim was raped and sodomised by the appellant. At the same time, PW1 the victim 7 testified that she was raped and sodomised by two people (the appellant and another person who is at large). Cementing the consequences of the variance, the learned State Attorney cited the case of Gerold Moris Hugo vs Republic (Criminal Appeal No. 204 of 2016) [2017] TZCA 246 (10 July 2017) in which the Court of Appeal insisted that the charge sheet in a criminal trial is the foundation of the prosecution's case and provides a road map of what to expect from prosecution witnesses during the hearing. Another reference was made to the case of Seleman Makumba v. Republic, Criminal Appeal No. 94 of 1999 [2006] TLR 379 TZCA which held that in sexual offences the best evidence comes from the victim. It was emphasized that in the case at hand evidence from the victim shows that the offence was committed by the appellant in collaboration with another man who is still at large. The same was not reflected in the charge sheet. The learned State Attorney was of the view that on the first count the appellant could have been charged with Gang Rape contrary to sections 130, 131, 131A (1) and (2) of the Penal Code (supra). That, the particulars of the offence also should have indicated that the appellant committed the offence with another person 8 who was still at large. That would give the appellant a road map on what to expect from the prosecution witnesses during the trial and how to defend himself. Regarding the second count, it was submitted that the statement of the offence was proper against the appellant but the particulars of the offence failed to indicate that the appellant committed the offence together with another person who is still at large. Ms Bora asserted that the prosecution ought to have sought leave of the court to amend the charge under section 234(1) of the

Criminal Procedure Act [CAP 20 R.E 2022] which was not done. She argued that this omission was fatal and prejudicial to the appellant. Relying on the case of *Abel Masikiti v. Republic*, Criminal Appeal No. 24 of 2015, she suggested that such variance between the charge and the evidence warrants an acquittal to the appellant. In conclusion, Ms. Bora submitted that, due to the noted material variance, the prosecution failed to prove the case against the appellant beyond reasonable doubt. She urged the court to allow the first and ninth grounds of appeal. 9 On the second, third, and fourth grounds of appeal on the issue of improper identification; Ms. Bora submitted that the evidence of visual identification did not meet the required standard for a conclusive and reliable identification of the appellant at the scene of crime. She referred at page 11 - 15 of the trial court typed proceedings, where PW1 and PW2 testified that the incident occurred at 22:00 hours. However, they failed to specify the source and intensity of the light in the area that enabled them to identify the Appellant. It was contended further that, although the witnesses stated that the appellant and the other man were regular customers, they had interacted with them several times on that material date, and even mentioned the registration number of the tricycle which they went with, such factors alone were insufficient to constitute proper identification. The learned State Attorney buttressed her submission by citing the case of *Waziri Amani v. Republic* [1980] T.L.R 280, in which the Court of Appeal held that no court shall act on visual identification unless there are no possibilities of mistaken identity and the court is fully satisfied that proof before it is watertight. In the instance case, it was alleged that PW1 and PW2 failed to specify whether there was any source of light or its 10 intensity on the night of the incident. It was further argued that PW1, the victim, did not explain how she managed to identify the Appellant and the other person when they took her to Bomang'ombe Secondary School. In addition, Ms. Bora cited the case of *Wilson Elisa @ Kiungai vs Republic* (Criminal Appeal 449 of 2018) [2022] TZCA 629 (13 October 2022) in which the appellant was implicated to have committed rape at night when it was dark. The witnesses did not mention the source of light or the intensity of the said light. The victim knew the appellant before the incident, the victim and the appellant spent more than 30 minutes and she mentioned the appellant as her assailant at the earliest opportunity. The learned State Attorney acknowledged that the cited case may apply to our case. However, she distinguished it from the instant case stating that in our case the appellant was not properly identified. Ms. Bora insisted that since the appellant was not properly identified, the second, third, and fourth grounds of appeal have merit and should be allowed. In her final remarks, the learned State Attorney expressed her concern in disputing the rest of the grounds of appeal. However, she said that there was no merit in discussing the disputed grounds on the reason that the 11 respondent had already supported the appeal. She urged the court to allow the appeal and set aside the conviction and sentence. I have considered submission of the learned State Attorney, as well as the grounds of appeal raised and adopted by the appellant. According to the lower court records, given the fact that the learned State Attorney supports several grounds of appeal, the issue for determination is whether the conceded grounds of appeal are sufficient to dispose of this appeal. On the first and ninth grounds of appeal, it has been conceded that there was a variance between the charge sheet and the evidence on record. That, the charge

sheet indicated that the offence of rape was committed by the Appellant alone, while evidence on record suggests the offence of gang rape, as it was alleged that the rape was committed by the Appellant and another man who is at large. The law is clear on the legal implications of a variance between the evidence on record and the charge sheet. There are a plethora of authorities supporting this principle, including those cited by the learned State Attorney. For instance, the cases of Emmanuel Kabelele vs Republic (Criminal Appeal 536 of 2017) [2021] TZCA 531 (23 September 12 2021), TANZLII; Mohamed Kaningo vs The Republic [1980] T.L.R 279 and the case of Said Musa Soweni Vs Republic (Criminal Appeal No. 93 of 2020) [2022] TZCA 218 (22 April 2022, TANZLII) just to mention few. The Court of Appeal, when faced with a scenario similar to the present one, in Salim Abdallah Maganga vs Republic (Criminal Appeal No 285 of 2020) 2023 TZCA 17680 (2 October 2023) Tanzlii at pages 4 to 5, it stated as follows: “The learned Principal State Attorney submitted that the charge which is the foundation of the case was fatally defective for being at variance with the evidence on the record. She assigned two reasons to support her view, First, while the appellant was charged with the offence of rape, the evidence of PW1 suggests that, she was raped by the appellant and the bus conductor in succession. Such evidence, she submitted, was relevant in proving the offence of gang rape under 131A (1) of the Penal Code and not the offence in question. She submitted, therefore, the trial was unfair as the appellant was prevented from appreciating the nature and implications of the offence, he was facing... In the premises, she submitted, the charge was not proved beyond reasonable doubt. She prayed thus that; the appeal be allowed. We have closely followed the submissions by the learned Principal State Attorney and carefully examined the record of appeal in line with the appellant's complaint in the third ground of appeal. With respect, we are in agreement with her that, the charge which is the foundation of the case was materially at variance with the evidence adduced by the prosecution. As the record shows, the offence laid down in the charge is not the same as that which is portrayed in the evidence. As we said, the appellant was charged with the offence of rape contrary to section 130 (2) (a) and 131(1) of the Penal Code. Conversely, the victim's evidence suggests that she was raped by the appellant and a bus conductor not a party to this appeal. In effect, the evidence points out to an offence of gang rape under section 131A (1) of the Penal Code. This is a separate offence having its own ingredients and punishment different from the offence at issue. Despite that, the trial court continued with the trial and ultimately convicted the appellant without the charge being amended. Obviously, therefore, the omission was prejudicial to the appellant as he was rendered unable to know the nature and seriousness of the offence he was facing. In a similar situation we held so in Marekano Ramadhani v. R, Criminal Appeal No. 201 of 2013 (unreported).” Emphasis added. In line with the cited authority, in the present case, as correctly submitted by Ms. Bora, the appellant was charged and convicted of the offences of rape and unnatural offence, contrary to sections 130(1)(2)(e), 131(1), and 154(1)(a) and (2) of the Penal Code (supra), respectively. However, during the trial, the prosecution's evidence, particularly the testimony of PW1 (the victim), indicated that the victim was subjected to rape and sodomy by both the appellant and another person named ‘Ras’, 15 who was not part of the case. The discrepancy constitutes a material variance, which affects the prosecution's

case by failing to prove the offence of rape beyond reasonable doubt. It goes without saying that the available evidence is in respect of the offence of gang rape, which have different ingredients of the offence and attracts a different punishment. As stated in the cited authority, this variance prejudiced the appellant, as he was unable to fully comprehend the nature and seriousness of the offence he was facing. Despite this variance, the prosecution and the court proceeded with the trial without amending the charge sheet contrary to section 234(1) of Criminal Procedure Act (supra), to align with the adduced evidence. The omission rendered the charge sheet defective, leading to a miscarriage of justice. On the issue of identification of the appellant, without wastage of time, as rightly conceded by both parties, the adduced evidence in respect of how the appellant was identified by PW1 and PW2 was not watertight as required by the law. Given the fact that the two offences were said to have been committed at 22:00hrs, disclosure of source and intensity of light 16 was of utmost importance. The cited cases of Waziri Amani v. Republic (supra) and Wilson Elisa Kiungai v. Republic (supra) are relevant. Based on the foregoing findings, this court is convinced that the 1st, 2nd, 3rd, 4th and 9th grounds of appeal have merit and suffice to dispose of the appeal. Accordingly, the conviction is hereby quashed, and the sentences imposed on the appellant on both counts are set aside. I hereby order immediate release of the appellant from custody unless he is otherwise lawfully held. Appeal allowed. It is so ordered. Dated and delivered at Moshi this 19th day of February 2025. X S. H. SIMFUKWE
JUDGE Signed by: S. H. SIMFUKWE 19/02/2025 17

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