THE COURT OF APPEAL OF TANZANIA AT MWANZA (CORAM: LUBUVA J.A, MROSO, J.A, RUTAKANGWA, J.A) CRIMINAL APPEAL NO. 144 OF 2005	SIMON ABONYO .. APPEALLANT VERSUS THE REPUBLIC .. RESPONDENT (Appeal from the judgement of the High Court of Tanzania at Mwanza) Masanche,J. H.C Criminal Appeal No. 28 of 2003	It is not proper for a Court to convict an accused person of the crime which it is not known when it took place and which is not supported by evidence of the person who is alleged to have witnessed the accused commit that offence. See Mwita Nyamhanga V. Republic [1992] TLR 118

IN THE COURT OF APPEAL OF TANZANIA
AT MWANZA

(CORAM: LUBUVA, J.A., MROSO, J.A., And RUTAKANGWA, J.A.)

CRIMINAL APPEAL NO. 144 OF 2005

SIMON ABONYO ..... APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

(Appeal from the Judgment of the High Court of Tanzania at Mwanza)

(Masanche, J.)

dated the 9th day of May, 2004
in
HC Criminal Appeal No. 28 of 2003

JUDGMENT OF THE COURT

13 & 16 March 2007

LUBUVA, J.A.:

The District Court of Musoma convicted the appellant, Simon Abonyo of the offence of rape contrary to sections 131 (1) and 131A (1) of the Penal Code as amended by the Sexual Offences Special Provisions Act No. 4 of 1998.

The facts as established at the trial were that the appellant lived at Iringo Street within the Township of Musoma. The complainant, Jesca Philas (PW2), aged 13 years lived with her mother (PW3) in a house near the appellant's in the same street. The prosecution case was that on 11th September, 2000 at about 4 p.m. the appellant raped PW2.

At the trial, the complainant, PW2, gave evidence among other witnesses. She testified that on unspecified dates, she had sexual intercourse with the appellant on three occasions without her consent. On the first instance, she was given by the appellant

shillings 50/=, the second instance 70/= and on the third instance the appellant gave her 100/=. PW2 did not inform her parents of what the appellant was doing to her until after the third occasion when one Pili, apparently a child of a co-tenant with the appellant informed the parents of PW2. Hilos Clephas (PW3), the mother of the complainant (PW2) also testified. According to her, the appellant was her neighbour. On 9.9.2000, she was informed that her daughter PW2 was seen having sexual intercourse with the appellant. She took PW2 to the police station where PF.3 was issued for PW2 to be taken to the hospital for medical examination.

Dr. William Dishon (PW4), also testified. His evidence was to the effect that on 11.9.2000, PW2 was brought to him. He examined her and that his findings as indicated in the PF.3 Exhibit P.1 were that PW2 had lost her virginity as there was no hymen. There were also mild bruises on the "perenium and both labia minora" which according to the Doctor's opinion indicated that there was penetration after sexual intercourse. However, the Doctor was

unable to find spermatozoa in the vagina because the examination was conducted more than 72 hours after sexual intercourse.

Another witness who testified at the trial was E.2837 P/C Venance (PW1). In his evidence the policeman stated that on 12/9/2000 when he was on duty at the police station, PW3 came to the police station together with PW2. He further stated that PW3 reported that PW2 had been raped by the appellant. He issued PF.3 for medical examination and then he arrested the appellant the same day at Fishpak (T) Limited.

In his defence, the appellant denied having had sexual intercourse with PW2. He narrated the sequence of events leading to his arrest on 12/9/2000 at his place of work. On arrival at the police station, he found PW3 together with her daughter PW2. He went on to state that while at the police station PW2 alleged that he had had sexual intercourse with her (PW2) three times. Apparently suggesting that the evidence of PW3 was not reliable, he alleged that he had a quarrel with PW3, the mother of PW2 in connection with a water tape.

The trial magistrate believing in the evidence of PW2 and the fact that the appellant was prepared to have the matter settled out of court, convicted the appellant as charged. His defence was rejected.

On appeal to the High Court, the appeal was dismissed. Like the trial magistrate, the learned judge was of the view that the case against the appellant had been proved. He took into account the fact that PW2 was a credible witness and that her (PW2) evidence had been corroborated by the PF.3. The learned judge also considered the fact that the appellant was prepared to negotiate and have the matter settled out of court.

The appellant is still dissatisfied and has preferred this second appeal.

In this appeal before us, the appellant was unrepresented. On the other hand, the respondent Republic was represented by Mr. Bulashi, learned State Attorney. Mr. Bulashi indicated that he was not resisting the appeal. He said he was conceding grounds No. 1 and No. 6 of the memorandum of appeal filed by the appellant. If

we understood him correctly, he said he was not supporting the conviction against the appellant on two main grounds. **First,** that there is no evidence to show that rape took place on 11.9.2000 as alleged in the charge sheet. He submitted that the evidence of PW2 is to the effect that she had had sexual intercourse on unspecified dates. There is no mention of the 11th September, 2000. **Secondly,** that the only witness by the name of Pili who allegedly saw the appellant having sexual intercourse with PW2 did not testify. This, he said, raises doubt on the prosecution case which he further stated should be resolved in favour of the appellant.

The central question is when was the alleged offence of rape take place. The charge categorically shows that it was on 11.9.2000. On this, the evidence of the complainant (PW2) does not mention any specific date. In her evidence, PW2 says that the appellant had had sexual intercourse with her on three occasions. No specific date is mentioned in her evidence. In this regard, the mother of the complainant, PW3, does not also mention the specific date when the alleged rape took place. For her part, it was on 9/9/2000 when she

came to know of the alleged rape. So, from the evidence of PW2 and PW3 the date of the alleged rape is not shown. It would follow therefore that the offence which as alleged in the charge took place on 11.9.2000 is not supported by the evidence adduced at the trial.

The importance of proving the offence as alleged in the charge hardly needs to be over emphasized. From the charge, the accused is made aware of the case he is facing with regard to the time of the incident and place so that he would be able to marshall his defence. In **Mwita Nyamhanga v. Republic (1992) TLR 118,** the Court considered the proper way of framing charges in cases of murder regarding the date of offence. In that case the appellant was charged with murder. It was alleged that he had inflicted a cut wound on a person who later died of tetanus. Apart from other grounds on which the appeal was determined for instance, the cause of death, the Court also held that the date of the charge is that of the unlawful act and not of the death. In the instant case, the situation is even worse. Unlike in the situation in the **Mwita** case (supra) where at least the evidence showed the date when death took place,

in this case, the evidence does not show any date at all when the alleged rape took place.

Furthermore, the PF.3, Exhibit P1 also does not assist the evidence for the prosecution. The Doctor (PW4) was clear in his report. On 11.9.2000 when PW2 was brought to him for medical examination it was already 72 hours or about three days after the alleged sexual intercourse. In our view, the medical examination apart from showing that the offence took place earlier than 11.9.2000 contrary to the date shown in the charge, it also casts doubts on the credibility of the witnesses PW2 and PW3. It raises the question why the delay on the part of the parents of PW2 including PW3 in bringing their child, the victim of the alleged rape to the hospital for medical examination?

With such doubts unresolved, we are, with respect, in agreement with the learned State Attorney in his decision not to support the conviction which he said was not supported by the evidence.

Accordingly, the appeal is allowed, conviction quashed and sentence set aside. The appellant is to be released from custody forthwith unless otherwise lawfully held.

DATED at MWANZA this 16th day of March, 2007.

D. Z. LUBUVA
JUSTICE OF APPEAL

J. A. MROSO
JUSTICE OF APPEAL

E.M.K. RUTAKANGWA
JUSTICE OF APPEAL

I certify that this is a true copy of the original.

(S. M. RUMANYIKA)
DEPUTY REGISTRAR