IN THE COURT OF APPEAL OF TANZANIA
AT IRINGA

CRIMINAL APPEAL NO. 139 OF 2014

(CORAM: MSOFFE, J.A., KAIJAGE, J.A., And MMILLA, J.A.)

AIDANI MHUWA @ JOSEPH
AIDAN NCHEMEKA ..... APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

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

(Teemba, J.)

dated the 19th day of April, 2012

in
(DC) Criminal Appeal No. 2 of 2013

JUDGMENT OF THE COURT

30th June & 2nd July, 2014

KAIJAGE, J.A.:

Initially, on 7/5/2010, the appellant pleaded not guilty to a charge preferred in respect of fourteen (14) counts. The 1st and the 2nd counts relate to, respectively, giving false information to a person in public service contrary to section 122 of the Penal Code and false pretences contrary to sections 130 and 35 of the said code. In the 3rd to 14th counts the appellant stood charged with obtaining money by false pretences contrary to section 302 of the Penal Code. Almost a year later, on 9/3/2011, the former charge

was substituted with a fresh charge to add new dates on which the offences in respect of the 13th and 14th counts were allegedly committed.

It is common ground that a fresh charge was not read over to the appellant for him to plead thereto. Notwithstanding that fundamental procedural irregularity, the trial court proceeded with a purported trial and convicted the appellant of all the counts. He was consequently sentenced to six (6) months and twelve (12) months imprisonment on the 1st and 2nd counts, respectively, and on each of the 3rd to 14th counts he was sentenced to three (3) years imprisonment. The sentences were ordered to run concurrently. Aggrieved, he appealed to the High Court at Songea where the appeal was dismissed on all counts save the 1st count. Still aggrieved, he has now come to this Court on a second appeal.

Before us, the appellant appeared in person, unrepresented. The respondent Republic was represented by Mr. Shabani Mwegole, learned State Attorney.

When the appeal was called on for hearing, we asked the parties herein to give their views on whether or not the appellant was tried and convicted

for the charge to which he had pleaded to in terms of section 234 of the Criminal Procedure Act, Cap 20 R.E 2002 (the CPA).

Submitting on the legal issue we raised, Mr. Mwegole conceded that the new charge after substitution, was not read over to the appellant for him to plead thereto. He further conceded that the law requires that after substitution, a new charge ought to be read over to the accused person (s). However, Mr. Mwegole contended that in this case the irregularity was curable under section 388 (1) of the CPA.

Responding to Mr. Mwengole's submission, the appellant maintained that he did not plead to a new charge after substitution and that failure of justice had been occasioned thereby. He urged us to give him justice in accordance with the law.

The law as it presently stands, allows charges to be altered or amended. A trial court is enjoined under section 234 of the CPA to take a new plea after substitution. That section provides:-

> *"S.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 a 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 deem just.*

(2) subject to subsection (1), where a charge is ***altered*** *under that subsection –*

(a) ***the court shall thereupon call the accused person to plead to the altered charge;"***

[Emphasis is ours.]

In this case, we are settled in our minds that failure by the trial court to perform its mandatory duty imposed on it by the provisions of section 234 (2) (a) of the CPA is not a mere procedural lapse, but a fundamental procedural irregularity going to the root of the case. The irregularity cannot be cured under section 388 (1) of the CPA. (See, for instance, **SHABANI ISACK @ MAGAMBO MAFURU AND ANOTHER V. REPUBLIC;** Criminal Appeal No. 192 & 218 of 2012 (unreported). While on this, we are also fortified by the decision in **TLUWAY AKONNAY V. REPUBLIC;** [1987] TLR 92. In that case, this Court held:-

"It is mandatory for a plea to a new or altered charge to be taken from an accused person, failure to do so renders a trial a nullity."

In the light of the foregoing, we hold that the appellant's trial was a nullity. In the exercise of our revisional powers under section 4 (2) of the Appellate Jurisdiction Act Cap. 141 R.E. 2002 we nullify and quash all the proceedings conducted before and the judgments of both courts below. The appellant's convictions are quashed and the sentences set aside. Considering the fact that the appellant might have served a bigger portion of the concurrent sentences, we hereby leave upon the wisdom of the Director of Public Prosecutions to decide on how best to proceed against the appellant.

DATED at IRINGA this 1st day of July, 2014.

J. H. MSOFFE
JUSTICE OF APPEAL

S. S. KAIJAGE
JUSTICE OF APPEAL

B. M. MMILLA
JUSTICE OF APPEAL

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

Z. A. MARUMA
DEPUTY REGISTRAR
COURT OF APPEAL