IN THE COURT OF APPEAL OF TANZANIA
AT TABORA

(CORAM: MBAROUK, J.A., LUANDA, J.A. And MZIRAY, J.A.)

CRIMINAL APPEAL NO. 484 of 2015

ZEBEDAYO MTETEMA..... APPELLANT

VERSUS

THE REPUBLIC.....RESPONDENT

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

(Mrango, J.)

Dated 28th day of September, 2015
in
DC Criminal Appeal No. 52 of 2015

JUDGMENT OF THE COURT

17th & 19th October, 2016

MBAROUK, J.A.:

The appellant was charged in the District Court of Kasulu at Kasulu with the offence of being in unlawful possession of firearm. He was convicted and sentenced to serve seven years imprisonment. Dissatisfied, he appealed to the High Court of Tanzania (Mrango, J) where his appeal was

dismissed in its entirety. Aggrieved, he has preferred this second appeal.

In this appeal, the appellant appeared in person, unrepresented. Whereas the respondent/Republic was represented by Ms. Upendo Malulu, learned State Attorney.

At the hearing, the appellant opted to allow the learned State Attorney to submit first and if the need arises he will respond later.

On her part, the learned State Attorney from the outset indicated to support the appeal for the reason that the charge sheet was defective. She submitted that as to the Statement of the Offence, the record shows that the enabling section of the law was written by hand and there is no initial (signature) or date when such an alternation was made. She further submitted that the requirement under the provisions of section 234 (1) and (2) (a) of the Criminal Procedure Act [CAP. 20 R.E. 2002] (the CPA) were not complied with. She added that, the record of proceedings is completely silent as

to when or whether there was an order of the court to make such alterations in the charge sheet. The learned State Attorney added that, it is doubtful as to who and when such an alteration was made without a clear order of the court as required by section 234(1) of the CPA. In support of her submission, the learned State Attorney cited our decision in **Amini Ismail v. Republic,** Criminal Appeal No. 178 of 2015 (unreported) where this Court quashed the conviction of the offence of rape and set aside the sentence because of the failure on the part of the prosecution to cite the specific paragraph of section 130(2) of the Penal Code.

Ms. Upendo, then urged the Court to find all the proceedings a nullity and therefore quash the conviction and set aside the sentence. She initially prayed for a retrial, but she later changed her mind when the Court reminded her on the presence of section 170(1) (a) of CPA which empowers a subordinate court to impose a sentence of imprisonment not exceeding five years save where a court convicts a person of an offence specified in any of the Schedules to the Minimum

Sentences Act which it has jurisdiction to impose such a sentence.

Taking into account the remission period as the appellant was sentenced to serve imprisonment on 17-1-2014, she said the remaining period may be very little or none at all. For those reasons, she prayed for the appellant be set free.

On his part, the appellant totally agreed with what was submitted by the learned State Attorney and had nothing to add.

Having heard the learned State Attorney and the appellant, let us begin by looking at section 135(a) (ii) of the CPA which states as follows:

"(a) (i) .....

(ii) ***the statement of the offence*** *shall describe the offence shortly in ordinary language avoiding as far as possible the use of technical*

terms and without necessarily stating all the essential elements of the offence and, if the offence charged is one created by enactment, ***shall contain a reference to the section of the enactment creating the offence;.***" [Emphasis added].

Looking at section 135 (a) (ii) of the CPA, it is a mandatory requirement that the statement of offence to contain a reference to the section of the enactment creating the offence. In the instant case, the section which created the offence was hand written without compliance with the requirements of section 234(1) and (2) (a) of the CPA which states that:

"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 that make such order for alteration of the 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 sub-section shall be made upon such terms as the court shall seem just.***

(2) Subject to subsection (1), where a charge is altered under that subsection-

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

[Emphasis added].

In the instant case, there is no order of the court to make the alterations seen therein. Also no signature and date when such alterations were made. It is very dangerous to rely on the unauthenticated alterations. Surely, the defect rendered the charge sheet incurably defective. We therefore

find all the proceedings before the trial court and the High Court a nullity; quash the conviction and set aside the sentence.

As to whether we should order a retrial or not, we are of the considered opinion that as far as the charged offence if proved would lead the appellant to serve a sentence of imprisonment not exceeding fifteen years or a fine exceeding shillings three million as per section 34(2) of the Arms and Ammunitions Act, Cap. 223 R.E. 2002. But the appellant was sentenced to seven years imprisonment, we find that, the trial magistrate was wrong for his failure to comply with the requirement of section 170(1)(a) of the CPA as his jurisdiction was to sentence the appellant to an imprisonment term of not exceeding five years only save if the offence is under the Schedules to the Minimum Sentence Act, which it was not.

We are of the opinion that, the proper sentence should have been that which do not exceed five years. Taking into account the remission period, it seems the appellant could

have been either out of prison or remain with a very little period to serve in prison.

In the circumstances and for the reasons stated above, we see it prudent to set the appellant at liberty unless otherwise lawfully held, which we hereby do.

DATED at **TABORA** this 18th day of October, 2016.

M. S. MBAROUK
JUSTICE OF APPEAL

B.M. LUANDA
JUSTICE OF APPEAL

R.E.S. MZIRAY
JUSTICE OF APPEAL

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

E.F. FUSSI
DEPUTY REGISTRAR
COURT OF APPEAL