IN THE COURT OF APPEAL OF TANZANIA
AT DAR ES SALAAM

(CORAM: MASSATI, J.A., ORIYO, J.A. AndMWARIJA, J.A.)

CRIMINAL APPEAL NO. 205 OF 2008

1. **SALEHE RAMADHAN JUMA**
2. **OMARI ABDALLAH KINDAMBA**
3. **MWINSHEHE SULTAN NDOVU** **.....APPELLANTS**
4. **FAIDA SULTANI @ WAKUBANGIZA**
5. **MOHAMED DIWANI MSHINDO @KIMBUNGA**

VERSUS

THE REPUBLIC.....RESPONDENT
(Appeal from the decision of the High Court of Tanzaniaat Dar es Salaam)

(Luanda, J.)

dated the 4thday of April, 2003
in
Criminal Sessions Case No. 2 of 1996

JUDGMENT OF THE COURT

10th February & 9th March, 2016

MWARIJA, J.A.:

The five appellants together with other seven persons were charged in the High Court of Tanzania with two counts. The information contained in the record of appeal does not disclose the offence and the section of the law under which the 1st count was preferred. It only contains particulars of the offence, that on or about 19/02/1995 at Tabata area within Kinondoni District, Dar es Salaam

region, the appellants and those other persons did murder one Gadiel Igla Mduma. In the 2nd count, they were charged with murder contrary to section 196 of the Penal Code [Cap 16. R.E. 2002] (the Penal Code), the particulars of the offence being that, on the same date and place, the charged persons murdered one Winfrida Rwenyangira.

At the trial, the prosecution relied on the evidence of nine witnesses. It also relied on documentary evidence which included cautioned and extra-judicial statements of the appellants. On their part, the appellants and those other persons relied on their own evidence in defence. They all denied to have committed the offence charged. After a full trial, the High Court was satisfied that the prosecution had sufficiently proved the 1st count against the appellants. It proceeded to convict and sentence them to suffer death by hanging. On their part, the persons who were jointly charged with the appellants were acquitted for lack of sufficient evidence to convict them. As for the second count, the trial court was not convinced by the tendered evidence. It found the appellants and the seven other persons not guilty and proceeded to acquit them.

The background facts of the case which led to the trial and subsequent conviction of the appellants can be briefly stated as follows: On 19/02/1995 in

the night, the house of Gadiel Mduma (the deceased) was invaded by bandits who had the intention of stealing from therein. It is apparent from the evidence that the deceased confronted the bandits so as to prevent them from achieving their intention. In the process, he was shot with a bullet which caused his death. It is an indisputable fact that in the same night, one Winfrida Rwenyangira was also shot dead. The evidence is however silent as regards the circumstances under which she was shot and killed.

After the incident, on the next day that is on 20/02/1995, the 2nd appellant who had gone for treatment at Muhimbili Hospital was arrested. The said appellant went to the Hospital for treatment of a wound he suffered on his abdominal cavity. The doctor who received him, Dr. Mordetarih Robinson Mkaina (PW 3), suspected the cause of the wound to be a gunshot. According to his evidence, he questioned the appellant who admitted to have been shot with a bullet giving explanation that he was shot by robbers who wanted to rob him of his motorcycle. Since the said appellant did not have the necessary police form (P.F.3), PW3 required those who escorted him (the 2nd appellant) to go to police so as to obtain that form. The exercise took the appellant's relatives unnecessarily too long a time thus increasing PW3's suspicion. He directed that

the police should be informed. Upon the information, police officers arrived at the Hospital and questioned the 2nd appellant. According to the prosecution evidence, the appellant admitted that he was wounded with a bullet at the scene of crime. It was also the prosecution's evidence that when the other appellants were interrogated, they confessed that they invaded the house of the deceased on the material night, thereby killing him in the process of stealing. Cautioned statements of the 1st, 2nd and 3rd appellants as well as extra-judicial statements of the 4th and 5th appellants were tendered and admitted in evidence as exhibits. It was on the basis of that evidence the appellants were convicted and sentenced as stated above. Aggrieved by conviction and sentence, they have appealed to this Court.

Through their respective learned Advocates, the appellants filed separate memoranda of appeal containing a total of eight grounds. Whereas however, other grounds are common to all the appellants, others though different, are basically related. In sum, the grounds boil down to four as follows:

1. That the trial court erred in failing to find that the prosecution did not prove the case against the appellants beyond reasonable doubt.

2. That the trial court erred in basing the appellant's conviction on the evidence of cautioned and extra-judicial statements which were wrongly recorded.
3. That the trial court erred in convicting the appellants on the confession evidence which was neither obtained voluntarily nor corroborated.
4. That the trial court erred in failing to consider the defence of the 5th appellant.

In this appeal, the 1st appellant was represented by Mr. Mpale Mpoki, learned counsel while the 2nd appellant was represented by Mr. Majura Magafu, learned counsel. As for the 3rd and 5th appellants they were advocated for by Mr. Kenedy Fungamtama, learned counsel while the 4th appellant had the services of Ms. Helen Mrema, learned counsel. On its part, the respondent Republic was represented by Mr. Nassoro Katuga assisted by Ms. Mossie Kaima, learned State Attorneys.

At the commencement of hearing, Mr. Katuga raised a point of law concerning a defect in the information filed by the prosecution in the trial court. He pointed out that the 1st count of the information does not contain

the statement of the offence. He argued that the defect renders the information fatally defective because, by failing to disclose the statement of the offence, the appellants were not made to properly understand the nature of the charge which they were facing.

Mr. Mpoki agreed with the learned State Attorney that the omission prejudiced the appellants and that therefore, the defect rendered the information fatally defective. The learned counsel submitted further that the stated defect is not the only irregularity in the record of appeal having the effect of vitiating the proceedings. He pointed out that although it is shown in the proceedings that the Deceased's postmortem report and the cautioned statement of the 3rd appellant were admitted in evidence as exhibits, the same are not contained in the record of appeal.

According to the learned counsel, in the absence of those documents, which were vital to the prosecution case, this Court cannot rightly uphold the finding by the trial Court that the case against the appellants was proved beyond reasonable doubt. He stressed that since the prosecution case was mainly founded on the 3rd appellant's cautioned statement, non-availability of the said statement in the record of appeal is a fatal defect.

The learned advocates for the 2nd- 5th appellants supported the arguments put forward by Mr. Mpoki, learned counsel. On his part, Mr. Magafu added that he did unsuccessfully raise before the High Court, the issue concerning the defect of the information. He thus maintained his stand that the defect is indeed fatal. He agreed that since the postmortem report is missing from the record, it is only by way of presumption that this Court can uphold the finding that the tendered evidence established the cause of death and that the offence was committed by the appellants. Supporting Mr. Magafu's argument, Mr. Katuga stated in his rejoinder submission that, it is probably because the information did not contain the statement of the offence in the 1st count, that the trial court did not state in the judgment, the section of the law under which the appellants were convicted.

To appreciate the nature of the defect in the 1st count on which the appellants were convicted, we hereby reproduce it as framed by the prosecution. It reads as follows:

> *"FIRST COUNT:*
>
> *STATEMENT OF OFFENCE:*

MWINSHEHE SULTAN NDOVU, RAMADHANI AMIRI SALEHE, YUSUFU ABDALLAH FUKA, JUMA OMARI IBRAHIMU @ KINGOSOMO, OMARI ABDALLAH KINDAMBA, SALEHE RAMADHANI JUMA, MOHAMED DIWANI MISHINDO@KINDUNGA VANDAME, SHUKURU MATITU @ CHAKULAPECHE, ABDUL MHAGAMA @ SUBO, RUTH MTENDA SIMIONI, JOSEPH KUNIBERT KIOKA, and HABIBU TWAHA BOMBA on or about the 19th day February, 1995 at Tabata within District of Kinondoni, Dar es Salaam, Region murdered one Gadiel Igla Mduma."

There is no gain saying that what is stated under the heading *"Statement of Offence"* is not the statement disclosing the offence and the section of the law under which the charge was preferred. What is provided under that heading is actually the statement giving the particulars of the offence. It is obvious therefore, that the 1st count does not contain the statement of offence.

It is a mandatory requirement under s.135 (a) (i) and (ii) of the Criminal Procedure Act [Cap. 20 R.E. 2002] (the CPA) that a charge or an information must contain the statement and the section creating the offence charged. The provision states as follows:

> *" 135. The following provisions of this section shall apply to all charges and information and, notwithstanding any rule of law or practice, a charge or an information shall, subject to the provisions of this Act, not be open to objection in respect of its form or contents if it is framed in accordance with the provisions of this section:-*
>
> *(a) (i) a count of a charge or information shall commence with a statement of the offence charged, called the statement of offence.*
>
> *(ii) The statement of 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.

We could have found out from the original record whether or not the omission might have resulted from an error in the typing and preparation of the record of appeal. The record has however been missing and unavailable despite concerted efforts of the Court's registry to trace it since 17/06/2013 when hearing of the appeal was adjourned for the first time because of unavailability of the original record. As the record of appeal stands, the statement of the offence and the section of the law under which the 1st count was preferred were not disclosed. The information was therefore rendered defective for failure to comply with the above stated provisions of s. 135 of the C.P.A.

The issue which arises is whether the defect renders the information incurably defective. Happily, the court has had the occasion of considering, in a number of cases, the effect of an omission to state a proper section of the law under which a charge was brought. In the case of **Nasoro Juma Azizi v. Republic,** Criminal Appeal No. 58 of 2010 (unreported), a situation which is somehow

similar to the present case happened. The appellant and another person were charged with and convicted of the offence of gang rape contrary to section 131 A (1) and (2) of the Penal Code, the provisions which do not create the offence charged. Section 130 of the Penal Code which creates the offence was not cited. On appeal this Court considered the effect of the omission and held as follows:

> *"From the wording of section 131A, it is obvious that the provision does not create a separate offence, but only different category of rape.... It must always therefore be read in conjunction with the principal section 130 which creates and defines the offence of rape. This section 130 should therefore have been referred to as one creating the offence. This is missing in this case. In* ***MOHAMED KANINGU v. R.*** *(1980) TLR 279 this omission was held to have rendered the charge incurably defective."*

The issue was also considered in the case of **Marekano Ramadhani v. The Republic**, Criminal Appeal No. 202 of 2013 (unreported). The appellant

was charged with the offence of rape. The charge was preferred under sections 130 and 131 of the Penal Code as amended by Act No. 4 of 1998. In the statement of the offence, none of the paragraphs (a) - (e) of section 130 (2) providing for description of the offence, was mentioned. From the particulars of the offence, paragraph (e) of s.130 (2) should have been cited because of the allegation that the victim was a girl aged 14 years. The Court found that the defect in the charge sheet could not be cured under s.388 of the CPA because the appellant was not made to properly understand that he was being charged with statutory rape.

In the case at hand, it is not only the section creating the offence which is not contained in the 1st count. The statement is completely omitted. The omission is, obviously, of a serious consequence. It renders the information fatally defective.

In his submission, Mr. Mpoki submitted that apart from the defect in the 1st count of the information, the record of appeal is tainted with other irregularities. He pointed out that the record has a problem of missing documents which, according to the proceedings, were tendered and admitted in evidence; the postmortem report of the Deceased and the cautioned statement

of the 3rd appellant. Since the finding that the information is incurably defective suffices to dispose of the appeal, we do not find it necessary to consider that aspect of the learned counsel's argument.

Having found that the nature of the defect rendered the information fatally defective because it contravened the mandatory provisions of s. 135 (a) (i) and (ii) of the CPA, in exercise of the powers of revision conferred on the Court by s. 4 (2) of the Appellate Jurisdiction Act [Cap 141 R.E. 2002], we hereby quash the proceedings of the lower Court and set aside the conviction and sentences imposed on the appellants.

That said and done, the remaining matter for our consideration is whether or not, we should order a re-trial. Having considered the circumstances of the case, particularly the fact that the original record was "lost" from the custody of the court where it should ordinarily have been kept in safe custody, we find it proper to leave it to the discretion of the Director of Public Prosecutions to decide whether or not to commence fresh proceedings against the appellants. If he so decides he shall do so within a reasonable time. Meanwhile, the appellants shall immediately be released from prison unless otherwise lawfully held.

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DATED at DAR ES SALAAM this 7th day of March, 2016.

S.A. MASSATI
JUSTICE OF APPEAL

K.K. ORIYO
JUSTICE OF APPEAL

A.G. MWARIJA
JUSTICE OF APPEAL

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

E.F. Fussi
DEPUTY REGISTRAR
COURT OF APPEAL