IN THE COURT OF APPEAL OF TANZANIA

AT ARUSHA

(CORAM: MJASIRI, J.A., MWARIJA, J.A., And MWANGESI, J.A.)

CRIMINAL APPEAL NO. 7 OF 2016

JACOB SIMON @ BABU SUZUKI ..... APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

(Appeal from the decision of the High Court of Tanzania at Moshi)
(Sumari, J.)

Dated 9th day of November, 2015
in
DC. Criminal Appeal No. 40 of 2014

JUDGMENT OF THE COURT

11th & 14th Dec. 2017

MJASIRI, J.A.:

In this appeal the main issue for determination and decision is whether or not the charge which was facing the appellant was defective.

In the District Court of Rombo at Mkuu the appellant, Jacob Simon @ Babu Suzuki was charged and convicted of unnatural offence contrary to section 154 (1) (a) (2) of the Penal Code, [Cap. 16, R.E. 2002]. He was sentenced to life imprisonment.

Being dissatisfied with the decision of the District Court, the appellant appealed to the High Court. His appeal to the High Court was not successful, hence his second appeal to this Court. The appellant presented a six – point memorandum of appeal which is summarized as follows:-

1. *The first appellate court erred in fact and law in holding that the case against the appellant was proved beyond reasonable doubt.*
2. *The first appellate court erred in fact and law in failing to conclude that the charge was defective, as there was a variance between the charge sheet and the evidence.*
3. *The first appellate court erred in fact and law when it failed to consider that there was no penetration.*
4. *The first appellate Judge erred in fact and law in failing to consider that prosecution evidence was incredible, contradictory and inconsistent.*
5. *The first appellate court erred in fact and law in failing to conclude that the appellant's defence did not raise a reasonable doubt.*
6. The conviction of the appellant was based on incredible, contradictory, inconsistent and uncorroborated evidence.

It was the prosecution case that between unknown dates of September, 2010, December, 2011, November, 2012 and 24th day of April,

2013 at Ubetu Village, within Rombo District in Kilimanjaro Region, the appellant did have carnal knowledge of one Lilian d/o Edes, a girl of 8 years, against the order of nature. The appellant completely denied the charge.

At the hearing of the appeal the appellant appeared in person without any legal representation and the respondent Republic had the services of Mr. Diaz Makule, learned State Attorney.

Before the commencement of hearing, the appellant sought leave of the Court to file two additional grounds of appeal namely:-

1. *The appellant's trial was not conducted in camera contrary to the requirements under the law.*
2. *The trial magistrate failed to inform the appellant of his rights after the close of the prosecution case.*

The learned State Attorney informed the Court that he did not support the conviction of the appellant due to the following reasons.

The charge is defective, and does not meet the requirements of section 132 of the Criminal Procedure Act, [Cap. 20, R.E. 2002]. The prosecution lumped four different charges in one count. There were four cumulative charges which should have been made under four different counts so that

the appellant would have been able to comprehend the nature of the charges against him. According to him it was as if there was no charge sheet and that the appellant has not been charged at all. He asked the Court to invoke section 4 (2) of the Appellate Jurisdiction Act [Cap. 141, R.E. 2002], the Act to quash the proceedings and judgments of both the trial court and the High Court and to set aside the sentence of life imprisonment meted out to the appellant. He relied on the case of **Mwambeja Njera v. Republic,** Criminal Appeal No. 109 of 2009 (unreported).

The appellant when asked to respond to the counsel's submissions stated that he agreed with his submissions.

We on our part, entirely agree with the learned State Attorney. It is evident from the record that the charge was lumped up together and the appellant ought to have been charged with four separate counts in order to clearly specify the nature of the charges against him.

We hereby reproduce the charge sheet for ease of reference.

NAME TRIBE OR NATIONALITY OF THE PERSON(S) CHARGED

Name : Jacob s/o Simoni @ Babu Suzuki

Tribe : Chagga

Age : 62years

Occupation : Peasant

Religion : Christian

Resident : Mreyai – Ubetu Usseri Village

OFFENCE SECTION AND LAW:
Unnatural offence c/s 154 (1) (a) (2) of the Penal Code [Cap. 16 R.E 2002]

PARTICULARS OF THE OFFENCE:
That Jacob s/o Simoni @ Babu Suzuki charged on between unknown date of September 2010, unknown date of December 2011, unknown date of November 2012 and on 24th day of April, 2013 at Ubetu Village within Rombo District in Kilimanjaro Region did have carnal knowledge of one Lilian d/o Edes, a girl of 8 years old against the order of nature.

.....

STATION: TARAKEA POL/C **PUBLIC PROSECUTOR**
DATE 30.7.2013 TKE/IR 384/2013

It is evident from the charge sheet that the appellant was being charged with a series of offences of similar nature, namely unnatural offences on divers unknown dates, on four different occasions. In terms of section 135 (2) of the Criminal Procedure Act [Cap. 20, R.E. 2002] the CPA, each of such offence (unnatural offence) ought to have been set out in a separate paragraph of the charge sheet, in a different count. That was not done. Instead the offences were lumped together in the charge sheet. In view of that, we agree with the learned State Attorney that the appellant did

not really know the charges he was facing as required under section 132 of the CPA which provides that:-

> *"132. Every charge or information shall contain and shall be sufficient if it contains, a statement of the specific offence or offences with which the accused person is charged, together with such particulars as may be necessary for giving reasonable information as to the nature of the offence charged."*

It is trite principle of fair trial that a person accused of an offence must know the nature of the charge facing him.

In the **Mwambeja Njera** case (supra) the Court stated thus:-

> *"Apart from the charge sheet giving the accused person a reasonable information as to the nature of the offences he is charged, it would also enable him to prepare his defence".*

The Court made reference to **Isidori Patrice v. Republic**, Criminal Appeal No. 224 of 2007 (unreported).

In **Isidori Patrice** (supra) the Court stated thus:-

> *"It is a mandatory statutory requirement that every charge in a subordinate court shall contain not only a statement of the specific offence with which the*

accused is charged but such particulars as may be necessary for giving reasonable information as to the nature of the offence charged. It is now trite law that the particulars of the charge shall disclose the essential elements or ingredients of the offence."

The Court stated further:-

"Accordingly the particular's in order to give the accused a fair trial in enabling him to prepare his defence, must allege the essential facts of the offence and any intent specifically required by law."

Looking at the circumstances of this case it is crystal clear that the charge is incurably defective. We are therefore of the firm view that the proceedings and judgments based on it are nullity and cannot be left to stand. See – **Shabani Rahisi v. Republic**, Criminal Appeal No. 209 of 2015 (unreported). We therefore in the exercise of our revisional powers vested in us under section 4 (2) of the Act, hereby quash the proceedings and judgments of both courts below and set aside the sentence of life imprisonment.

The next issue to be considered by us is whether or not we should order a re-trial.

In the instant case the appellant was sentenced to life imprisonment and has only served four (4) years imprisonment. We are of the considered view that the decision as to whether or not to order a retrial, depends on the consideration of the interest of justice.

In **Fatehali Manji v. Republic** [1966] EA 341 the then Court of Appeal for East Africa had this to say:-

> *"In general a retrial will be ordered only when the original trial was illegal or defective. It will not be ordered where the conviction is set aside because of insufficiency of evidence or for the purpose of enabling the prosecution to fill up gaps in its evidence at the first trial. Even where a conviction is vitiated by a mistake of the trial Court from which the prosecution is not to blame; it does not necessarily follow that a retrial shall be ordered;* ***each case must depend on its own facts and circumstances and an order of retrial*** **should only be made where the interest of justice require."**
>
> *[Emphasis ours]*

In the circumstances of this case, we are of the firm view that it will be in the interest of justice to order a retrial.

In arriving at our decision, we have considered the nature of the evidence on which the appellant's conviction was founded. We have also considered the fact that the appellant has been in prison for only four (4) years from the date of his first conviction by the trial court. See – **Kanuti s/o Kikoti v. Republic,** Criminal Appeal No. 7 of 2013 (unreported).

In view of what we have stated hereinabove, we are constrained to order that the record be remitted to the trial court for a retrial of the appellant as soon as practicable after the Director of Public Prosecutions has filed an appropriate charge sheet in accordance with the requirements under the law. The appellant to remain in custody pending the new trial.

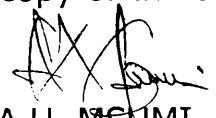
DATED at **ARUSHA** this 12th day of December, 2017.

S. MJASIRI
JUSTICE OF APPEAL

A.G. MWARIJA
JUSTICE OF APPEAL

S.S. MWANGESI
JUSTICE OF APPEAL

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



A.H. MSUMI
DEPUTY REGISTRAR
COURT OF APPEAL