IN THE COURT OF APPEAL OF TANZANIA

AT IRINGA

(CORAM: MUSSA, J.A., WAMBALI, J.A., and KOROSSO, J.A.)

CRIMINAL APPEAL NO. 468 OF 2016

1. SIMON KITALIKA
2. MOHAHED SAID } ..... **APPELLANTS**
3. MARY VITUS TEMU

VERSUS

THE REPUBLIC ..... **RESPONDENT**

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

(Sameji, J.)

Dated the 30th day of September 2016

in

DC Criminal Appeal No. 28 of 2016

JUDGMENT OF THE COURT

7th & 15 May, 2019

KOROSSO, J.A.:

Before the Court is a second appeal. The appellants, Simon Kitalika, Mohamed Said and Mary Vitus Temu appealed to this Court being aggrieved by the Order for retrial by the High Court (Sameji J., as she then was). On appeal, the High Court, after re-evaluating the evidence and law

applicable, nullified proceedings and judgment of the trial court, quashed the conviction and set aside the imposed sentence of conditional discharge of twelve months and ordered for retrial. Originally, the appellants, were jointly charged and convicted of the offence of Stealing by agent contrary to section 273(b) and 258 of the Penal Code, Cap 16 Revised Edition 2002 (the Code), in the District Court of Mufindi.

During the hearing of this appeal, the 1st, 2nd and 3rd appellants were represented by Mr. Maurice Mwamwenda, learned Advocate, and the respondent Republic was represented by Ms. Pienzia Nichombe learned State Attorney. At the start of hearing, the appeal by the 1st appellant was marked abated. This was after the Court was satisfied with the fact that the 1st appellant is dead, in view of the submitted certificate of death of the 1st appellant, and also the fact that the appeal before the Court was against an order within the boundaries of Rule 78(1) of the Tanzania Court of Appeal Rules, 2009 (the Rules). Thereafter, hearing of the appeal for the 2nd and 3rd appellants proceeded.

At this juncture it is pertinent to briefly present the background to the allegations against the appellants. The facts of the case are that, on the 15th of February 2014, Mr. Herman Sembua (PW1) and his wife, guided

by two brokers, that is, the 2nd and 3rd appellants, purchased from one Mzee Kitalika (the 1st appellant), a plot of land Block J. No. 428, situated at Changarawe, Sabasaba area. The agreed purchase price was Tshs. 5,000,000/-, and on directives from the 1st appellant the purchasers (PW1 and PW2) handed the money to the 2nd and 3rd appellants. The said transaction was documented as revealed in Exhibit P2 and in fact not denied by the appellants in their defence at the trial court and argued that it was a valid transaction since the 1st appellant had requested them to assist him to get buyers for the disputed plot.

The purchaser (PW1), proceeded to follow-up for an "Offer" for the purchased plot at the Lands office and it was then that information reached them that the real owner of the purchased plot was not the person they had purchased from (1st appellant) but it was someone by the name of Charles Kumbemba and. The purchasers (PW1 and PW2) thereafter, queried the brokers (the 2nd and 3rd appellants) on this development, who assured them the said plot of land was owned by the 1st appellant, from whom they had purchased the plot. When the purchasers started construction on the purchased plot of land, they received a stop order from the Land and Housing Tribunal, and it is there, that they met Charles

Kumbemba, who showed them documents he had to prove ownership of the disputed plot of land, that is, Block J. No. 428. The purchaser (PW1) requested to be refunded the money paid for the disputed plot from the appellants. Unfortunately, they were not refunded, and the matter was reported to the police, leading to the arrest of the appellants and then the case in the trial court, which is now subject to this appeal.

The case for the defence was that of conceding to the disputed transaction and exchange of money related to the disputed plot of land, but saying every matter was in order since, for the 2nd and 3rd appellant, they only acted as brokers to the sale having been requested by the 1st appellant (as he then was) to find buyers for his plot of land and therefore did not commit any criminal offence. The appellants also challenged the competency of the charges against them, saying it did not reveal essential matters such as the names of the complainants.

The trial Magistrate, upon hearing and assessing the evidence, delivered a judgment on the 5th of February 2016, where the three appellants were convicted as charged, and sentenced. The trial Magistrate also ordered the appellants to pay back to the identified victims of the

transaction, that is, PW1 and PW2, Tshs. 5,000,000/- within specified time of 30 days.

The appellants preferred an appeal to the High Court, where upon considering and re-evaluating the evidence on record, the High Court judge, nullified the entire proceedings of the trial court, quashed conviction and set aside the sentence imposed by the trial court and ordered for a retrial. The High Court also observed that, determination on whether or not to prefer fresh charges against the appellants or leave the parties concerned to proceed to settle the matter out of court, was left in the hands and wisdom of the Director of Public Prosecutions (DPP).

Being aggrieved by the orders of the first appellate court, the appellants filed a memorandum of appeal with only one ground of appeal, that;

"*The Order is unsustainable in law*".

At the hearing of the appeal, the appellant counsel made oral submissions stating that the order for retrial issued by the appellate High Court judge, is unsustainable and wrong, since if left to stand, will occasion injustice to the appellants. The counsel also stated that, although the

appellants have no quarrel with the quashing of the conviction and setting aside the sentence imposed, and also with the reasons stated for reaching that position as set out in the Judgment of the High Court, they were of the view that the High Court order for retrial was not proper. The appellants' counsel reasons for this position were twofold. First, that the trial court was not the proper forum to adjudicate the charges against the appellants, since in effect, they were founded on a land dispute. The second reason being that, in view of the anomalies discerned by the appellate High Court judge, emanated from the trial court, where the order for retrial was to be executed, if sustained, it will provide the prosecution with an opportunity to fill the various discerned gaps in the prosecution case, a situation which is not ideal, as this should not be the consequence upon an order for retrial by a court, a position buttressed in various decisions of this Court. The counsel cited the case of **Jafason Samwel vs. Republic**, Criminal Appeal No. 105 of 2006 (unreported) to cement his assertion.

On the issue regarding the failure of the appellate judge to provide an opportunity for the appellants and respondents to submit to the court on whether or not there was a procedural error by the trial magistrate in

application of section 214 of the Criminal Procedure Act Cap 20 R.E. 2002 (the CPA) during the trial, the learned appellants' counsel contended that this act was un-procedural on the part of the first appellate judge. Contending further that the High Court judge, should not have made a determination on this issue, whilst the appellants and the respondent were not invited to submit. That this should be considered another anomaly in the procedure undertaken by the High Court judge, since it denied the parties the right to be heard on a pertinent issue, before determination by the Court.

The appellants counsel further contended that, having regard to all the anomalies in the trial Court as found by the High Court judge and presented in the judgment of the court, for justice to be done in this case, this Court, should proceed to allow the appeal by the appellants, quash and set aside the order for retrial, acquit the appellants and set them at liberty.

On the part of the respondent Republic, the learned State Attorney, from the outset, registered the respondent's objection to the appeal. Submitting that they supported the quashing of the conviction and setting aside of the sentence, and the order for retrial by the first appellate court. Arguing that bearing in mind the anomalies found in the proceedings of the

trial court, an order for retrial was the available option and that if a retrial is not done, it will occasion injustice on the part of the respondents, especially since the trial court made a finding that the prosecution proved their case to the standard required.

The learned State Attorney referred the Court to the decision of the defunct Court of Appeal for East Africa, in **Fatehali Manji vs. The Republic** (1966) EA 343, where in the said case, the Court, provided guidance on determination of proper situations when a retrial can be ordered by an appellate court. The learned State Attorney when asked by the Court, whether the cited holding in **Fatehali Manji's case** (supra), does not defeat the respondent stated position, the learned State Attorney did not find so, stating if a retrial is ordered, the respondents will have the right to amend the charges which have been found to be defective, and that this will not in any way defeat the essence of the guiding principles for ordering a retrial in the cited holding. Thus she implored the Court to dismiss the appeal as without merit and leave the order for retrial by the High Court. Arguing that, such an order will also address any procedural errors by the appellate High Court Judge, such as, in determining that the trial court erred in execution of section 214 of the CPA, without having first

invited the appellants and respondent or a relevant counsel to submit on the issue.

When given an opportunity to submit a rejoinder, the learned counsel for the appellants reiterated his submission in chief, and sought the Court to also take into consideration the holding in the case cited by the counsel for the respondent Republic, that is, **Fatehali Manji's case** (supra) in the appellants favour, and find that the situation in this case does not warrant a retrial to be ordered. That the Court proceed to nullify the High Court decision and order that the appeal be heard afresh.

Having gone through the records and heard the counsel for the appellants and the respondent, we start by presenting the findings by the first appellate judge when deliberating the relevant appeal giving rise to the current appeal, as can be found on page 72 of the Court records. We import the contents of the relevant paragraphs:

> *"All in all this case has a number of defects and I do agree with Mr. Mwamenda that the prosecution side never proved the case beyond reasonable doubts as the case was succumbed by eccentric procedures amounting to serious irregularities hence confusing*

and null and void ab initio. Some of those defects/irregularities include:-

(a) Charge sheet was defective for indicating two different offences:

(b) Non-compliance with section 214(1) of the Criminal Procedure Act, (supra)

(c) Admission of exhibit P1 which was objected by the appellant without conducting an inquiry as required by the law;

(d) Proceedings not well prepared (errors on the face of the record).

In view of the above findings, I am constrained to hold that, the so called judgment of the trial court on record is not a judgment at law. There was no judgment of the trial court form which an appeal could be preferred to the High Court".

We are of the view that, all the identified so called defects by the Hon. High Court judge, go to the root of the competence of trial court proceedings, and that some of highlighted anomalies if proved may render the trial proceedings defective and thus incompetent. At the same time, these anomalies are what led to the judgment and orders of the High Court which have been challenged by the appellants in the appeal before this

Court. Therefore, for reasons which will be apparent herein, we will start by considering and determining one of the anomaly found by the High Court, that is, whether or not the charge is defective and the consequences thereof. We find this to be important, because without doubt, criminal proceedings are initiated by a charge and determination of the competence of a charge is important in order to proceed any further on any other matters for determination in the appeal before the Court.

The issue on whether or not the charge is defective as found by the High Court judge, is an issue that was not disputed by the parties. On the part of the appellants, it was a ground for appeal, and on the part of the respondents, the learned State Attorney conceded in this Court on the fact that the charge was defective. The concession by the Republic, can also be traced back from the records whereby during the hearing of the appeal in the High Court, at pg. 60 of the records of appeal, Mr. Mwandalama, Learned Senior State Attorney, stated:

> *"on the charge sheet, it is obvious that the same is defective, that it contains two offences stealing by agent and false pretence".*

This position by the respondent was reiterated during the hearing of this appeal, in this Court, where the learned State Attorney representing the respondent, when submitting on this appeal stated, that it is true, that if a retrial is ordered they will move to amend the charges which the High Court made a finding to be defective. In effect thus implying that, the charge is defective. Thus from this, it is clear that, the appellants and the respondent all agree with the finding of the High Court judge, that the charge is defective.

We have also had time to examine the charge, and it is clear that the particulars of the offence, present elements which do not relate to the charge of Stealing by Servant c/s 273(b) and 258 of the Code. The particulars of the offence in the relevant charge sheet, state that; the appellants "*by false pretence*" and "*with intent to defraud*" "*did steal 5,000,000/-*" which has been "*entrusted to them to buy a plot*" which in fact "*they knew that it is not true*".

Section 132 of the CPA specifies that offences must be specified in the charge with necessary particulars. It states:

> "*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 charges, together with such particulars as may be necessary for giving reasonable information as to the nature of the offence charged".

When considering section 273(b) of the Code, the offence of Stealing by agent envisages a person stealing of something capable of being stolen (under section 258 of the Code, "*which has been entrusted to that person by another person to retain in safe custody*" or "*received by a person for or on account of another person*". This can be discerned from the sample charges or forms stating offences in information found in the Second Schedule of the Criminal Procedure Act, Cap 20 RE 2002. The offence of Stealing by agent, does not envisage "*false pretence*" or "*intent to defraud*". The elements of "*false pretence*" and "*intent to defraud*" are found in offences expounded under Chapter XXX1 of the Code.

Therefore, without doubt, the particulars of the offence having included "*false pretence*" and "*with intent to defraud*" components which do not relate to the offence of Stealing by Agent is an anomaly. Thus, we wish to emphasize that the absence of sufficient particulars constituting offences of Stealing by Agent, expounds that the appellants were not made to understand the nature of charge facing them and rendering the charge

against the appellants in the trial court to be defective. A finding also made by the first appellate judge. Thus, we find no need to depart from the finding of the High Court, that the charge is defective.

We also note that, the High Court judge, upon making this finding, and that the defective charge was a serious irregularity, never proceeded further to address the consequences and how this specific irregularity affected the trial. We find that, with due respect, had the appellate High Court judge moved to consider and resolve the consequences of a defective charge in the circumstances pertaining, and also considered whether the defect in the charge is curable or not, and to what extent the defects in the charge prejudiced the trial, conviction and sentence meted to the appellants, will in effect have meant also addressing the competence of the trial, and she would there and then have finalized the appeal without moving to other matters before it, including assessment of evidence.

We are mindful of a litany of authorities of this Court that have dealt with the effect of a defective charges and the fact that there is clarity in that each case has to be decided on its own facts and circumstances. In **Mussa Mwaikunda vs R**, Criminal Appeal No. 174 of 2006 (unreported), the Court followed the path taken in the case of **Uganda vs Hadi Jamal**

[1964] E.A. 294. In this latter case it was held that a charge which did not disclose any offence in the particulars of offence was manifestly wrong and could not be cured under section 341 of the Criminal Procedure Code (the equivalent of our section 388 of the Act).

Having considered the position of the law as stated above, and having regard to the particulars of the charges against the appellants, and in view of the finding already made above, that the particulars of the charges do not in any way disclose the essential elements or ingredients of the offence for which the appellants were charged with, we are decidedly of similar views as what was held in **Mussa Mwaikunda vs R** (supra), that where the charge is fatally defective and the defect in the charges against the appellants is incurable, without doubt leads to no other conclusion but that the appellants were prejudiced and unfairly tried by the trial court.

This being the position, we move to consider what is the way forward in this appeal with the above findings. The appellants have urged this Court to nullify the order of the High Court, while the respondent has contended that the only remedy available is for the Court to confirm the decision of the High Court to quash conviction and set aside sentence by

the trial Court and order for the trial to start afresh. The order of the first appellate court was an order for a retrial as already alluded to hereinabove.

There are various decisions of this Court on when it is suitable to order a retrial. The cited case by the respondents, that is, **Fatehali Manji vs Republic** (supra) provide well-articulated guidelines on whether or not and when to order a retrial. The guidelines have been adopted by this Court in various decisions. Such as in the case of **Sultan Mohamed vs. Republic,** Criminal Appeal No. 176 OF **2003,** (unreported). There is also **Timoth Sanga and another vs. Republic,** Criminal Appeal No. 80 of 2015, (unreported). **Said Mohamed Mwanatabu @ Kausha and another vs. Republic**, Criminal Appeal No. 161 of 2016, (unreported).

In **Fatehali Manji vs Republic** (supra), the question before the Court was whether the order for retrial by the High Court was justified or not, and it was held that:

> *"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 for which the prosecution is not to blame, it does not necessarily follow that a retrial should be ordered; each case must depend on its own facts and circumstances and an order for retrial should only be made where the interests of justice require it".

Bearing in mind the circumstances where a retrial is the best option as highlighted in the cited cases above and applying this to the current appeal. Having considered all the facts pertaining in this appeal, we differ with the views expressed by the learned State Attorney and the finding by the first appellate Judge that under the circumstances, the only option available is to order a retrial. We are of the view that to require the appellants to stand trial again would be unfair under the circumstances, since it will accord the respondent an opportunity to lead evidence which did not feature at the original trial. A retrial may also provide an opportunity for the prosecution to fill the gaps in evidence and even amend the charges, a possibility also not discounted by the learned State Attorney appearing for the respondent when submitting before this Court, which is not the aim of an order for retrial.

In **Mayala Njigailele v. The Republic**, Criminal Appeal No. 490 of 2015 (unreported). In that case, the Court stated as follows:

> "*Normally an order of retrial is granted, in criminal cases, when the basis of the case namely, the charge sheet is proper and is in existence. Since in this case the charge sheet is incurably defective, meaning it is not in existence, the question of retrial does not arise*".

From this, it is clear that in cases such as an appeal before us, where a charge is fatally defective, it will be an exercise in futility to order a retrial and this is because, as stated further by the Court in **Mayala Njigailele v. The Republic** (supra); "*a retrial is normally ordered on assumption that the charge is properly before the court*".

In the event having in mind to the aforesaid, we find that having decided that the proceedings of the trial court were based on a fatally defective charge, and meaning that the charge not being properly before the court, and thus the said proceedings are a nullity, so are consequentially, the proceedings of the High Court in the appeal and cannot be cured.

We therefore invoke the provisions of section 4 (2) of the Appellate Jurisdiction Act [CAP 141 R.E. 2002]. We hereby nullify the entire proceedings and judgment of the trial court and the High Court in DC Criminal Appeal No 28 of 2016, as it stemmed from a nullity. We further quash the conviction and set aside the sentence and orders meted out against the 1st and 2nd appellants. The appellants are henceforth set free unless otherwise held lawfully.

DATED at **IRINGA** this 14th day of May, 2019.

K. M. MUSSA
JUSTICE OF APPEAL

F. L. K. WAMBALI
JUSTICE OF APPEAL

W. B. KOROSSO
JUSTICE OF APPEAL

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

A.H. MSUMI
DEPUTY REGISTRAR
COURT OF APPEAL