

**IN THE COURT OF APPEAL OF TANZANIA
AT MBEYA**

(CORAM: JUMA, C.J., MZIRAY, J.A. And MKUYE, J.A.)

CRIMINAL APPEAL NO 311 OF 2017

JAFARI S/O RAMADHANI..... APPELLANT

VERSUS

THE REPUBLIC.....RESPONDENT

**(Appeal from the Judgment of the High Court of Tanzania
at Mpanda)**

(Hon. Sambo, J.)

dated the 12th day of February, 2016

in

Criminal Appeal No. 25 of 2015

JUDGMENT OF THE COURT

07th & 8th November, 2019

JUMA, C.J.:

The appellant, JAFARI RAMADHANI, was tried by the District Court of Nkasi at Namanyere (A.B. Mwanjokolo-RM) on a charge of attempt to commit an unnatural offence contrary to section 155 of the Penal Code, Cap. 16. The particulars of the offence were that at midnight of 26th November 2014, in the lockup room of the Namanyere Police Station in

Nkasi District, he attempted to have carnal knowledge of one Fulgence s/o Mwanakatwe against the order of nature.

In his very brief decision, the trial magistrate (A.B. Mwanjokolo—RM) determined that the prosecution had proved beyond reasonable doubt that the appellant, had attempted to commit the unnatural offence as charged. He convicted the appellant and sentenced him to serve twenty years in prison.

The appellant's first appeal was heard by the High Court at Sumbawanga (Sambo, J.). In dismissing the first appeal, the learned Judge relied on the weight of the evidence of the eye-witnesses and concluded that the appellant committed the offence.

In this second appeal the appellant preferred eight grounds to fault the dismissal of his appeal by the first appellate court.

When the appeal was called for hearing on the 7th November 2019, the appellant appeared in person and placed reliance on his grounds of appeal. The learned Senior State Attorney Mr. Fadhili Mwandoloma and learned State Attorney Ms. Safi Kashinde Amani, appeared for the Respondent DPP.

Ms. Amani informed us that she was supporting the appeal on the ground that the record of appeal suffers from several procedural improprieties, which vitiates the entire proceedings of the trial and first appellate High Court.

The first fatal defect according to Ms. Amani, appears on page 3 of the record of appeal where the charge of attempt to commit unnatural offence for which the appellant was supposedly convicted for; was not read out to the appellant as is mandatorily required by section 228 (1) of the Criminal Procedure Act, Cap. 20 R.E. 2002 (the CPA). Failure to read out the charge, she submitted, makes the entire proceedings in the trial district court and in the first appellate court nullity. The relevant section 228(1) of the CPA states:

"228. -(1) The substance of the charge shall be stated to the accused person by the court, and he shall be asked whether he admits or denies the truth of the charge."

Moving on to the second fatal defect, Ms. Amani referred us to the evidences of prosecution witnesses appearing on pages 7 to 9 of the record of appeal. These witnesses, were not examined upon oath or

affirmation. This was in contravention of what section 198(1) of the CPA which provides:

"198.-(1) Every witness in a criminal cause or matter shall, subject to the provisions of any other written law to the contrary, be examined upon oath or affirmation in accordance with the provisions of the Oaths and Statutory Declarations Act."

Ms. Amani also referred to the position this Court has taken in **JUMA ISMAIL & ROLACOS COSMAS V. R.**, CRIMINAL APPEAL NO. 501 OF 2015 and **ELIKO SIKUJUA & JANUARY JUMA V. R.**, CRIMINAL APPEAL NO. 367 OF 2015 (both unreported) concerning the consequences which must befall the evidence of witnesses who were not examined upon oath or affirmation. In urging us to nullify the proceedings of the two courts below the learned State Attorney specifically sought the support of a legal position staked in **ELIKO SIKUJUA & JANUARY JUMA V. R.** (supra), where the Court reiterated that: *"This Court has, time without number, taken the stance that where the testimony of a witness is taken without oath or affirmation, the resultant account from the witness is not worth the name: 'Evidence', and that the same can only be discarded (see, for*

instance, unreported cases in Criminal Appeal No. 10 of 2008-Godi Kasenegeia Vs The Republic; Criminal Appeal No. 54 of 2008-Minja Sigore Vs The Republic; Criminal Appeal No. 300 of 2008-Membi Steyani Vs The Republic; Criminal Appeal No. 284 of 2008-Athumani Bakari Vs The Republic; and Criminal Appeal No. 264 of 2010-Anthony Mwita and Two Others Vs The Republic."

Standing by the above authorities, the learned State Attorney urged us to find that because the witnesses subject of this appeal was not examined upon oath or affirmation, the record of appeal before us lacks any evidence to convict the appellant.

The third defect which Ms. Amani pointed out to us, is inherent in the Judgment of the trial court appearing on page 12 of the record of appeal. This judgment, she submitted, is defective in so far as it does not contain the point or points for determination, the decision thereon and the reasons for the decision is mandatorily required of valid judgments under section 312 (1) of the CPA.

In light of the above defects, Ms. Amani urged us to resort to the Court's power of revision under section 4(2) of the Appellate Jurisdiction

Act Cap 141 R.E. 2002 (the AJA) and quash all the proceedings of the two courts below. Because the appellant has been in prison from 8/12/2014 to the date of hearing of this appeal (7/11/2019), she urged us to set the appellant free.

When called in to reply, the appellant could only but support the submissions of the learned State Attorney.

On our part, we agree with Ms. Amani that this appeal has merit in light of the fatal procedural irregularities she has outlined.

The duty of the trial subordinate courts to read out to the accused persons substance of the charge, and to require him to state whether he admits or denies the truth of the charge is mandatory under section 228 (1) of the CPA which states:

"228. -(1) The substance of the charge shall be stated to the accused person by the court, and he shall be asked whether he admits or denies the truth of the charge."

The defect of failure to state the substance of the charge to the appellant when his trial began on 8/12/2014, is very apparent on the face

of page 3 of the record of appeal. The record only shows the appellant's apparent response of "*Sio kweli*" ("Not true) with nothing to show if the substance of the charge was read out to the appellant by the trial court. It is also not clear whether the appellant was asked if he admitted or denied the truth of the charge of attempt to commit unnatural offence that was read out. We can only but agree with Ms. Amani that the mandatory provisions of section 228 (1) of the CPA were not complied with. This defect alone vitiates all the subsequent proceedings in the trial and first appellate courts.

The learned State Attorney is also correct in pointing out that evidences of all the prosecution witnesses were recorded without oath or affirmation thereby contravening section 198 (1) of the CPA. The record shows the following:

*"PW1- Fulgence s/o Mwanakatwe, fipa, Isale, peasant, 28yrs, **Christian.***

XXD of PW1 by PP

.....

*PW2-Joseph Mwanafyale, Kyusa, Namansi village, peasant, 55 yrs, **Christian.***

XXD of PW2 by PP

.....

*PWIII-Viela s/o Bundala, Sukuma, Maji ya moto, Peasant, 35 yrs,
Christian.*

XXD of PWIII by PP

.....

PWIV- F6868 D/C Kuleba of CRIME NKASI

XXD of PWIV by PP.” [Emphasis added].

As it is clear from above excerpts from the proceedings, the trial magistrate recorded religion without indicating whether these witnesses were examined upon oath or affirmation. It seems clear to us, recording of the religion of a witness does not meet the threshold examination upon oath or affirmation required under section 198 (1) of the CPA. Religion is, but an indication of type of oath or affirmation a witness of a given religion can take. The Oaths and Affirmations Rules, GN No. 125 of 1967 (made under section 8 of the Oaths and Statutory Declarations Act, Cap 34 R.E. 2002) has prescribed distinct types of oaths for witnesses who are Christians; and Affirmations for witnesses who are Muslims, Hindus or Pagans testifying in courts other than in the Primary Court:

"1. Oath by a Christian:

A Christian shall, subject to the provisions of paragraph 4, be required either to hold the New Testament in his right hand or to hold the right hand uplifted and in either case to repeat the following:

"I swear that what I shall state shall be the truth, the whole truth and nothing but the truth; so help me God".

2. *Affirmation by a Moslem:*

A Moslem shall be required to repeat the following:

"Wallahi, Billahi, Ta "Allah": I solemnly affirm in the presence of the Almighty God that what I shall state shall be the truth, the whole truth and nothing but the truth".

3. *Affirmation by a Hindu:*

A Hindu shall be required to repeat the following:

"I solemnly affirm in the presence of the Almighty God that what I shall state shall be the truth, the whole truth and nothing but the truth".

4. *Affirmation by pagans, persons objecting to making an oath, or persons professing any faith other than the Christian, Moslem or Hindu faith:*

"I solemnly affirm that what I shall state shall be the truth, the whole truth and nothing but the truth".

At very least the trial magistrate should have indicated that the witnesses were either "**sworn**" for Christians; or "**Affirmed**" for Muslims or Hindu.

We next move onto to the "judgment" of the trial court which convicted the appellant and sentenced him to serve twenty (20) years imprisonment which appears on page 12 of the record of appeal:

".....

PP

I pray for the date of judgment.

Sgd

A.B, Mwanjokolo—RM

08/12/2014

The accused person stand charged with the offence referred to as attempt to commit unnatural offence c/s 155 of the Penal Code [Cap. 16 R.E. 2002].

According to the evidence before this (sic) it is clear that the accused person commit (sic) the offence although he is only trying to beat about the bush.

In his defence, he has actually stated nothing and it seems he is a habitual offender even the way he defends his case.

According to the caution statement tendered in this court, the accused confessed himself to have committed the crime. In this matter, the prosecution side proved the case beyond reasonable doubt. Therefore, the accused person is found and guilty (sic) and convicted as charged.

Sgd

A.B, Mwanjokolo—RM

08/12/2014"

We agree with the learned State Attorney what the trial court purports to be the judgment, falls short of the mandatory conditions set by section 312 (1) of the CPA which states:

*"312.-(1) Every judgment under the provisions of section 311 shall, except as otherwise expressly provided by this Act, be written by or reduced to writing under the personal direction and superintendence of the presiding judge or magistrate in the language of the court and **shall contain the point or points***

for determination, the decision thereon and the reasons for the decision, and shall be dated and signed by the presiding officer as of the date on which it is pronounced in open court.”[Emphasis added].

We agree with Ms. Amani that the judgment of the trial magistrate was shallow, to say the least. It did not contain points for determination, the decision thereon and lacked any reasons for the decision, as provided under Section 312 (1) of the CPA. To that extent, that judgment denied the appellant his right to a fair trial in respect of not being informed of evidential basis for his conviction for the attempt to commit unnatural offence.

As a result of the foregoing fatal procedural irregularities, this appeal calls for our intervention by exercising our power of revision under section 4(2) of the AJA. We quash all the proceedings in the trial and first appellate courts. We also set aside the conviction and sentence which the first appellate court had confirmed.

We agree with Ms. Amani that having already served five out of twenty years in prison, a new trial shall not serve the best interests of

justice. In the result, we shall allow this appeal and set the appellant free unless if otherwise lawfully held.

DATED at **MBEYA** this 8th day of November 2019.

I. H. JUMA
CHIEF JUSTICE

R. E. S. MZIRAY
JUSTICE OF APPEAL

R. K. MKUYE
JUSTICE OF APPEAL

The Judgment delivered on this 8th day of November, 2019 in the presence of the Appellant in person, unrepresented and Mr. Ofmedy Mtenga learned State Attorney for the respondent is hereby certified as a true copy of the original.


A.H. MSUMI
DEPUTY REGISTRAR
COURT OF APPEAL