**IN THE COURT OF APPEAL OF TANZANIA**
**AT DAR ES SALAAM**

**(CORAM: MWARIJA, J.A., KOROSSO, J.A., And KEREFU, J.A.)**

**CRIMINAL REVISION NO. 05 OF 2019**

**1. GHARIB IBRAHIM @MGALU**
**2. OMBA HERI NOAH**
**3. FARUKU OMARY @ ASENGA** } **..... APPLICANTS**
**4. F. 1205 PC MUHIDIN SADIKI MHINA**
**5. HAMIDU IDDI GWAKULA**

**VERSUS**

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

**(Revision from the Judgment of the High Court of Tanzania at Dar es Salaam)**

**(Madeha, J)**

**dated the 25th day of March, 2019**
**in**
**Criminal Appeal No. 262 of 2018**

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## RULING OF THE COURT

14th & 30th August, 2019

**KEREFU, J.A.:**

The aim of this '*suo motu*' revision proceedings is to establish whether there were irregularities, illegalities, improprieties and or errors worth correction by this Court in order to avert a miscarriage of justice towards the parties in respect of the Judgment of the High Court of Tanzania at Dar es Salaam (Madeha, J) dated 25th March, 2019 in Criminal Appeal No. 262 of 2018. The said appeal emanated from the decision of the District Court of Ilala at Samora, where the accused,

namely Gharib Ibrahim @ Mgalu, Omba Heri Noah, Faruku Omary @ Asenga, F. 1205 PC Muhidin Sadiki Mhina and Hamidu Iddi Gwakula, herein to be referred as 1st, 2nd, 3rd, 4th and 5th applicants respectively, were together and jointly charged with two counts namely, conspiracy and armed robbery under sections 384 and 287A of the Penal Code, Cap.16 R.E 2002 *('the Code')*.

At the trial, when the charge was read over and explained to the applicants, they all denied the charge, whereupon the prosecution paraded six (6) witnesses and tendered two (2) documentary exhibits. In a nutshell, the prosecution case as narrated by Mohamed Said (PW1), the victim was to the effect that, on the 26th August, 2013 at around 21:00hrs while PW1 was at his house with his wife and the child, he heard the door of his house being knocked, he asked his wife, Fatuma Juma (PW3) to open the door, but she declined, as she was having supper with her child. PW1 went to open the door and saw two people, who were not familiar to him, but welcomed them and before they took their seats, they told him that they wanted money. The said people took 20,000 USD after threatening PW1. PW1 testified further that, though the incident took place at night, he managed to identify the bandits through electricity

light. After the incident the two bandits ran away, but with the help of Ramadhani Muhanga (PW2) they were able to arrest the 3rd accused, now the 3rd applicant. The 2nd accused, who is now the 2nd applicant, was arrested by other people who came to assist PW1. After being arrested and brought back to PW1's house, PW1 told the bandits that he wants his money back. The 3rd applicant called one of his colleagues over the phone and told him that, "*Naomba rejesha mzigo maana hapa tumebanwa*". The 3rd applicant then promised PW1 that the money will be returned after 30 minutes. While waiting for the money, PW1's gate was knocked and there came three people who introduced themselves as police officers. They said, they came to take the accused, but the 3rd applicant said, "*Achana na mambo hayo ya uaskari. Tumeisha kwama, hawa wape haki yao tuondoke.*"

After uttering that statement, they were suspected to be among the bandits, as they even failed to produce police identity cards and were not in uniform. As such, they were all arrested at the scene of crime except the 5th applicant who managed to run away. Later, the police officers arrived and took them (1st, 2nd, 3rd and 4th applicants) to Msimbazi Police Station. According to the testimony of Tupendane Saguda Ledemira

(PW5), the 5th applicant was arrested on 3rd September, 2013 and identified on 4th September, 2013 during the identification parade organized by PW6. The testimony of PW1 was strengthened by the testimonies of PW2 and PW3 though, with some inconsistencies and discrepancies.

The matter went to a full trial and finally the trial court was impressed and accepted the version of the prosecution's case and the applicants were found guilty, convicted and sentenced to respective jail sentences, *to wit,* two (2) years and thirty (30) years imprisonment terms for the 1st and 2nd counts, respectively. The said sentences were to run concurrently.

Aggrieved by both the conviction and sentence, the applicants preferred an appeal before the High Court. In the Petition of Appeal, the applicants submitted separate grounds, which were finally consolidated to six (6) grounds of appeal which for reasons that will shortly come to light, we need not recite all of them herein.

Before the commencement of hearing of the appeal, the counsel for the 1st, 3rd, 4th and 5th applicants raised two legal issues, **one,** *that, the Judgment of the trial court was given by the trial Magistrate who did not*

*have the jurisdiction to entertain the matter as there was non-compliance with section 214 (1) of the Criminal Procedure Act, Cap. 20 R.E 2002 ('the CPA')* and **two**, *that, the applicants were charged on a defective charge.*

Upon its deliberations, the High Court (Madeha, J) decided to disregard the submission by the counsel for the applicants on the first issue, as she reasoned that the applicants were duly represented by an advocate. On the second issue the High Court though, found that the charge was defective, but decided to invoke the provisions of section 234 (1) of the CPA and directed the prosecution side to amend the charge sheet. It is also on record that the High Court was in agreement with the submission by the counsel for the applicants that there was no tangible evidence submitted to support prosecution's case against the applicants as all exhibits, though submitted to Msimbazi Police Station, were not tendered before the trial court.

After making those observations above, the learned first appellate Judge ordered the prosecution side to re-call the witness who seized property from the scene of crime to tender them as exhibits. She then concluded her Judgment. For purposes of appreciating this revisional

proceedings, we think it is instructive to reproduce what exactly transpired in the holding of the High Court herein below:-

> *"In view of the aforesaid hereby nullify the judgement of the trial court in Criminal Case No. 262 of 2013 District Court Ilala and remit the case records to the trial court. PW4 D 8932 D/CPL Humud to be re-called to tender the same exhibit collected to (sic) the scene of crime and comply with section 38 (3) of the CPA to show the documentation or proper trail, showing the seizure, custody, control, transfer, analysis and of exhibits and to tender the said exhibit, charge sheet to be amended to the proper provision of the law and to write the judgement in accordance with the law, for the time being the appellant (sic) shall be kept at remind (sic) or custody. Appeal struck out. Order accordingly."*

Upon receiving the above High Court's Judgement, the counsel for the applicants via his letter dated 5th April 2019 with *Ref. No. RCA/GEN/CJ/VOL.III/19/1* drew the attention of the Hon. Chief Justice on the matter by expressing that, the decision has created confusion on the part of the applicants, as they are in a dilemma on which proper cause of action to pursue. That, though they are aggrieved by the said decision they cannot appeal to this Court or lodge an application for revision, because their appeal before the High Court was struck out and the court

remitted the file to the trial court for the charge to be amended and PW4 be re-called for purposes of tendering exhibits, which was among the grounds argued during the hearing of the appeal. Consequently, His Lordship directed the opening of these revisional proceedings, *suo motu* hence this application before us.

At the hearing of the application, the 1st, 3rd, 4th and 5th applicants were represented by Mr. Nehemiah Nkoko, learned counsel, while the 2nd applicant fended for himself, unrepresented and the respondent was represented by Ms. Anita Sinare, the learned State Attorney.

Submitting in support of the application, Mr. Nkoko stated that the decision of the High Court is ambiguous and unsustainable. He cemented on this point by elaborating that, despite the fact that the High Court observed several irregularities in the trial court's proceedings it proceeded to give the above orders. He argued further that, the learned first appellate Judge after agreeing that the charge was defective she was required to end there, nullify the trial court's proceedings and acquit the applicants, but not to order a retrial. To buttress his position he referred to **Simon Kitalika and 2 Others v. The Republic,** Criminal Appeal No. 468 of 2016, (unreported) at page 18 where the Court cited with approval

the case of **Mayala Njigailele v. The Republic,** Criminal Appeal No. 490 of 2015 (unreported). It was the strong argument of Mr. Nkoko that, since the charge was found to be fatally defective, it was wrong for the learned Judge to order for its amendment and a retrial.

On the issue of non-compliance with section 214 (1) of the CPA, Mr. Nkoko blamed the High Court for disregarding his submission on this matter. He emphatically argued that, it was mandatory for the predecessor Magistrate to assign reasons for the re-assignment, as to why he was unable to complete the trial and the successor Magistrate to address the applicants on the same to determine the way forward. According to him, since this was not done, the successor Magistrate did not have the jurisdiction to entertain the matter. He said, before the High Court they cited several decisions of the Court on this matter including **Hamisi Milaji v. The Republic,** Criminal Appeal No. 541 of 2016 at page 9 (unreported), where the Court after it had observed that there was non-compliance with section 214 (1) of the CPA declined to remit the file to the trial court for retrial as it reasoned that, the same will allow the prosecution side to fill in gaps identified in their evidence, which will not serve the interest of justice.

Mr. Nkoko submitted further that, Ms. Mosie, who represented the respondent before the High Court, conceded that non-compliance with section 214 (1) of the CPA was fatal, but argued that section 214 (1) is similar to section 299 (1) of the CPA. He said, Ms. Mosie relied on the authority in **Charles Bode v. The Republic**, Criminal Appeal No. 46 of 2016, where this Court discussed non-compliance with section 299 of the CPA by the High Court Judge and decided that the applicant was not prejudiced by the omission as they were dully represented by an advocate. Mr. Nkoko disagreed with the first appellate Judge for taking inspiration from that decision, as he said, in that decision the Court dealt only with section 299 and not 214 as claimed by Ms. Mosie. Mr. Nkoko spiritedly argued that, it was wrong for the learned Judge to find that the two sections, i.e section 214 (1) and 299 were similar, while in actual fact they are different.

Mr. Nkoko also referred us to pages 45 – 46 and 208 – 210 of the record of revision and argued that, the learned first appellate Judge found that though, PW4 testified that all items used in the commission of the offence were collected from the scene of crime, but the same were not tendered as exhibits. He said, the learned Judge instead of deciding that

the prosecution has failed to prove the offence during the trial, she wrongly ordered for PW4 to be recalled to tender the said exhibits. Mr. Nkoko lamented that, it is not the duty of the court to assist the prosecution side to fill in the gaps in their case. To elaborate on this point he cited the decision of this Court in **Emmanuel Saguda @ Sulukuka and Sahili Wambura v. The Republic,** Criminal Appeal No. 422 "B" of 2013 at page 9-10 (unreported).

Mr. Nkoko also referred us to page 211 of the record of revision and argued that in her decision, the first appellate Judge, among other things, ordered the trial court to rewrite the judgement in accordance with the law. He contended that, there was no ground of appeal to that effect and the applicants were not accorded the right to be heard on the said matter. He said, if such move will be allowed, justice will not be done to the applicants. He said, currently given the ambiguity and irregularities in the High Court's Judgement the applicants are not clear on their status, whether they are remandees or inmates. Finally, he urged us to exercise powers vested in the Court by section 4 (3) of the Appellate Jurisdiction Act, Cap. 141 R.E. 2002 ('the AJA') and nullify the proceedings of the two courts below, set aside the respective decisions and set the applicants free.

On his part, the second applicant appreciated the submission made by Mr. Nkoko and added that, the first appellate Judge went astray by invoking section 234 (1) of the CPA without first nullifying the trial court's proceedings. On the issue of non-compliance with section 214 (1) of the CPA, the second applicant said, was not addressed as required by that section as decided in **Abeid Seif Mbwana v. The Republic,** Criminal Appeal No. 85 of 2017 (unreported). He finally prayed us to grant the application and set him free.

In response, Ms. Sinare concurred with the submission made by Mr. Nkoko and the second applicant. She emphasized that, the High Court's Judgement is ambiguous and tainted with errors and irregularities. She added that, though the first appellate Judge heard the appeal on merit, but at the end she, unprocedurally, decided to strike it out. She also emphasized that, it was wrong for the learned first appellate Judge to order for the recalling of the PW4 under section 38 (3) of the CPA which is irrelevant in the circumstances. On the issue of amendment of the charge, Ms. Sinare argued that, the learned Judge was supposed to ask herself if the noted defects have occasioned injustice on the accused persons. She however, noted that the amendment of the charge is normally done at the stage of the trial and not at the appeal. In totality

she submitted that, the High Court's Judgement is problematic and cannot be implemented.

On our part, after going through the record of the revision and listening to the submission by the parties, among others, we wish to state that the main issue for our determination is whether the Judgement and orders given by the High Court are legally maintainable. We will mainly concentrate on key issues which we think will dispose of the matter. Therefore, issues that will guide our discussion are *whether it was correct and proper for the High Court to:-*

*(1) order for the amendment of the charge after detecting that the said charge is defective for being based on non- existent provisions of the law;*

*(2) disregard the issue of non-compliance with section 214(1) of the CPA by the trial court;*

*(3) remit the file to the trial court for retrial and recalling of PW4 to tender exhibits collected at the scene of trial after it had already made a finding that there was no tangible evidence to support the prosecution's case; and*

*(4) strike out the appeal after it had heard and determined it on merit.*

Starting with the first issue there is no doubt that the High Court determined the propriety or otherwise of the charge preferred against the applicants. We find this issue to be important, as in criminal proceedings, it is the charge sheet that lays the foundation of the trial. Therefore, a determination of the competency of a charge is crucial in ascertaining on whether to proceed with the trial proceedings or not. However, our call here is not to determine whether or not the charge is defective, but rather whether it was correct for the learned first appellate Judge to order for the amendment of the charge after detecting that the same is defective.

It is on record that the High Court found that, the charge on which the applicants were charged with was defective for non citation of the proper provisions of the law. The said issue was not disputed by the parties and they all argued that, after arriving to the conclusion that the charge was defective as it was based on non-existent provisions of the law, the High Court was supposed to nullify the trial court's proceedings, but not to order for its amendment or even a retrial. To determine the appropriate remedy which was supposed to be pronounced by the High Court we find it apposite, to highlight on the appropriate stage the court can order for the amendment of a charge sheet.

Pursuant to section 234 (1) of the CPA, which was as well considered by the High Court, the charge can be amended at the stage of the trial. The said section provides that:-

> "*Where at* ***any stage of a trial, it appears to the court that the charge is defective, either in substance or form, the court may 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* ***aii amendments*** *made under the provisions of this subsection shall be made upon such terms as to the court shall seem just.*" [Emphasis added].

As per the above section, it is clear that the appropriate stage to order for the amendment of a charge is during the trial. This is to ensure that justice is done to the accused, because upon filing of the amended charge, it is the amended charge which guides the trial proceedings and the accused must be required to plead afresh and may demand the witnesses to be recalled and give their evidence afresh or be further cross-examined, (See section 234 (2) (a) and (b) of the CPA). We are therefore in agreement with the submission by Ms. Sinare that, it was

unprocedural for the learned first appellate Judge to order for the amendment of the charge at the level of the appeal, while evidence was already adduced and tendered before the trial court on the original charge and if such orders are made, the trial court's proceedings has to be nullified, which was not the case herein.

We need to emphasize that, at the stage of appeal, upon finding that the charge used before the trial court is defective, the appellate court is only expected to consider if the noted defects have occasioned injustice to the accused and vitiated the trial, conviction and sentence meted against them and whether the said defects are curable under section 388 of the CPA or not. Unfortunately, in the matter at hand, the learned first appellate Judge did not address herself into the said issues and we are therefore, settled that the orders for amendment of the charge she made at the level of appeal without first nullifying the current trial court's proceedings are legally un-maintainable.

As for the second issue, it is also on record that, the High Court disregarded the submission by Mr. Nkoko on the non-compliance with section 214 (1) of the CPA by the trial Magistrates and accepted the submission made by Ms. Mosie that section 299 (1) and 214 (1) of the CPA are similar. With due respect, going by canon of statutory

construction and direct interpretation of the two sections, it is clear that, section 299 (1) is in respect of trials conducted at the High Court, while section 214 (1) applies to trials conducted at the subordinate courts.

We are mindful of litany of authorities of this Court where section 214 (1) was strictly interpreted and settled that, it is mandatory for the predecessor Magistrate to record the reasons on why the case is re-assigned to the other Magistrate to avoid chaos in the administration of Justice. We appreciate the authorities cited by the parties on this matter but we wish to add the case of **Richard Kamugisha @ Charles Samson and Five Others v. R**, Criminal Appeal No. 59 of 2002 referred in **Salimu Hussein v. R,** Criminal Appeal No. 3 of 2011, (both unreported) where the Court succinctly held that:-

> *"...where a trial is conducted by more than one magistrate, the accused should be informed of his right to have the trial continue or start afresh and also the right to recall witnesses. The word used in section 214 (1) of the Criminal Procedure Act, 1985 is 'may' which indicates discretion but in view* ***of the fact that the right to a fair trial is fundamental, the court has an obligation to conduct a fair trial in all respects...".*** *(Emphasis added).*

From the foregoing authorities, it is therefore well settled principle of the law that, where a trial is conducted by more than one magistrate; the accused should be informed of his right to have the trial continue or start afresh and also the right to recall witnesses. In the case at hand, the successor Magistrate did not assign reasons for taking over the conduct of the case from the predecessor Magistrate. Furthermore, there is nothing in the trial court's record suggesting that the applicants were addressed on that issue. It is also on record that, though the first appellate Judge ruled out in general terms that the applicants were represented by an advocate, but this finding is not supported by the record, as it is indicated that, the 2nd applicant fended for himself, unrepresented. This indeed was a procedural irregularity on the face of the record and it was again, with due respect, wrong for the learned first appellate Judge to disregard that matter. Like on the other irregularity, even on the said omission still the first appellate Judge was expected to ask herself as to whether the said omission had vitiated the trial and occasioned a miscarriage of justice to the applicants. Again, regrettably, the learned first appellate Judge did not address herself to that issue.

The third issue need not detain us much as it is on record that the learned first appellate Judge ordered for a retrial and recalling of PW4 to tender exhibits seized at the scene of crime after she had already made her findings that, the charge was defective and the prosecution side had not adduced tangible evidence and tender exhibits alleged to have been seized. This indeed, if done, would have amounted to assist the prosecution side to fill in gaps identified in their evidence.

At this juncture, we find it pertinent to highlight on when it is appropriate, feasible and justifiable for the appellate court to order for a retrial. It is settled in our jurisdiction that, after arriving to a conclusion that the charge before the trial court was incurably defective and no tangible evidence adduced against the accused, the appellate court has no option, but to set the appellant free. We are mindful that there are various decisions on this matter including **Fatehali Manji v. The Republic**, (1966) EA 343; **Mayala Njigailele v. The Republic,** Criminal Appeal No. 490 of 2015 and **Said Mohamed Mwanatabu @ Kausha and Another v. The Republic**, Criminal Appeal No. 161 of 2016 (both unreported). Specifically, in **Mayala Njigailele**, the Court held that:-

> *"Normally an* ***order of retrial is granted in criminai 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.*** *" [Emphasis added].*

Likewise, when there is no tangible evidence to prove the charge against the accused, the retrial cannot be ordered as the conviction is no longer valid. Thus, a retrial can only be ordered when there is strong evidence on the prosecution's case. In **Emmanuel Saguda @ Sulukuka** (supra) this Court after finding that there was no tangible evidence adduced during the trial stated that:-

> *"...the Government trophies found in possession of the appellant were required to be tendered in court as exhibits. This was not done...the appellant did not have any opportunity to see the actual trophies and did not have an opportunity to raise an objection.* ***It is well established practice in cases where witnesses are required to testify on a document or object which would subsequently be tendered as exhibit that the procedure is not simply to refer to it theoretically as was the case here,*** *but to have it physically produced and referred to by the witness before the court either by display or describing it and then have it admitted as an exhibit...****In view of***

***the fact that the charge against the appellants were not proved...the conviction of the appellants on both counts is no longer valid."***
[Emphasis added].

Following the above authorities, we are settled that an order for a retrial meted by the first appellate Judge was not feasible in the case at hand, as the charge sheet herein is incurably defective, hence no charge upon which the court could order a retrial against the applicants. Indeed, in the case at hand, the charge against the applicants was not proved and as such, their conviction on both counts is no longer valid. In totality the trial was vitiated and the matter was not fairly adjudicated and had obviously prejudiced the applicants. We are therefore in agreement with the submission by the parties herein that the trial was unprocedurally handled contrary to fair trial and due process. Therefore, the High Court orders for retrial and recalling of PW4 to tender exhibits are legally un-maintainable.

The last issue is on the striking out of the appeal after the learned first appellate Judge had heard and determined it on merit. This issue is also straight forward and should not detain us. There is countless number of decisions where this Court has lucidly elaborated on this matter. For

instance in **Ngoni Matengo co-operative Marketing Union Ltd v Ahmahomend Osman** [1959] E.A. 577 at page 580, the erstwhile East African Court of Appeal, among others stated that striking out of an appeal or application implies that there was no proper appeal or application before the court capable of being disposed of. That position was restated in **Joseph Mahona @ Joseph Mboje @ Maghembe Mboje and Another v. Republic,** Criminal Appeal No. 215 of 2008 (unreported) where the Court categorically stated that:-

> *"In the instant case, the matter before the High Court was not dismissed but struck out. That implies according to* ***Ngoni-Matengo*** *(supra) the matter was incompetent which means there was no proper appeal capable of being disposed of.* ***The established practice is that, the appellant in an appeal which has been struck out is at liberty to file another competent appeal before the same court..."*** *[Emphasis supplied].*

See also **Emmanuel Luoga v. Republic,** Criminal Appeal No. 281 of 2013 and **Yahya Khamis v. Hamida and 2 Others**, Civil Appeal No. 225 of 2018 (both unreported), where again the Court discussed the distinction between *'striking out'* and dismissing an appeal.

In the case at hand, since the appeal before the High Court was not declared incompetent, but heard and determined on merit, it was unprocedurally for the learned first appellate Judge to strike it out and at the same time remit the file to the trial court for a retrial. In the event, we are again constrained to find out that, all orders made by the learned first appellate Judge on this matter are legally unmaintainable.

It is therefore our settled view that, since the applicants were arraigned for a non- existing offence under the law, the trial was a nullity and so was the appeal before the High Court, because it stemmed on a nullity charge. In the premises, we grant the application.

We hereby invoke the revisional powers under section 4 (3) of the AJA and nullify the entire proceedings of the District Court of Ilala and set aside the judgment in *Criminal Case No. 283 of 2013* dated 3rd November 2015. The entire proceedings of the High Court which arise from the Judgment of the trial court are also hereby nullified and the resultant judgment issued by Hon. Madeha, J on 25th March, 2019 in *Criminal Appeal No. 262 of 2018* is set aside. We also quash the conviction and set aside the sentence imposed on the applicants. Consequently, we order for

the immediate release of the applicants, unless held for some other lawful cause. It is so ordered.

**DATED** at **DAR ES SALAAM** this 26th day of August, 2019.

A. G. MWARIJA
**JUSTICE OF APPEAL**

W. B. KOROSSO
**JUSTICE OF APPEAL**

R. J. KEREFU
**JUSTICE OF APPEAL**

The Ruling delivered this 30th day of August, 2019 in the presence of Mr. Nehemia Nkoko, Counsel for the 1st, 3rd, 4th and 5th Applicants and 2nd appellant, Omba Heri Noah, present in personal and Mr. Venance Mkonongo, State Attorney for the Respondent/Republic is hereby certified as a true copy of the Original.

THE COURT OF APPEAL OF TANZANIA

E. Y. MKWIZU
**SENIOR DEPUTY REGISTRAR**
**COURT OF APPEAL**