IN THE COURT OF APPEAL OF TANZANIA
AT DAR ES SALAAM

(CORAM: LILA, J.A., SEHEL, J.A. And LEVIRA, J.A.)

CRIMINAL APPEAL NO. 180 OF 2018

ADAM ANGELIUS MPONDI..... APPELLANT

VERSUS

THE REPUBLIC.....RESPONDENT

(Appeal from the Judgment and Decree of the High Court of Tanzania at Dar es Salaam)

(Luvanda, J.)

dated the 14th day of June, 2018
in
HC Criminal Appeal No. 231 of 2017

.....

JUDGMENT OF THE COURT

18th August, & 19th October, 2020

SEHEL, J.A.:

In the District Court of Ulanga at Mahenge, the appellant, Adam Angelus Mpondi, was charged and convicted with unnatural offence contrary to section 154 (1) (a) and (b) of the Penal Code, Cap. 16 R.E 2002. He was alleged to have carnal knowledge against the order of nature with one SM (the victim's name is withheld in order to hide his identify and we shall be referring him as PW1). The appellant was sentenced to life imprisonment.

Dissatisfied, he lodged his first appeal at the High Court of Tanzania at Dar es Salaam (the first appellate court). That appeal was dismissed. Thus, he has preferred this second appeal.

The facts giving rise to the appellant's conviction and sentence are straight forward. On 2nd June, 2016 at around 11:00 hours, PW1 together with his two friends, Frank Abdallah Kiluta (PW1) and Sharifu were heading to Gerezani to buy fruits. On their way they met with the appellant who grabbed PW1's hand and told PW2 and Sharifu to wait for PW1. He took PW1 to the forest, undressed him and had carnal knowledge of him against the order of nature. PW1 raised an alarm which was responded to by his two friends who were waiting for him. The two friends ran back home in order to tell his mother but at home they found his sister one, Zena d/o Maulid (PW3). They told PW3 of what they saw.

Upon receipt of the information, PW3 went with two friends of PW1 to the forest where they found the appellant having carnal knowledge with PW1 against the order of nature. PW3 tried to help PW1 by holding the appellant but he bit her on her shoulder and run away. PW3 took PW1 to the police station at Mahenge whereby they were issued with PF3 and went to the hospital for medical examination.

Maliki Seleman (PW4), a Senior Assistant Medical Officer, examined PW1 and found that the anus was loose and there were bruises but there was no blood or any discharge. He concluded that something like blunt object had entered inside his anus. He then recorded his results in the PF3 which was tendered and admitted as Exhibit P1.

The appellant did not give his evidence because he jumped bail. He absconded after the reception of PW3's evidence. The record of appeal shows that the appellant started to be absent on 24th November, 2016 when the case was called for hearing and reception of evidence of the fourth prosecution witness. On that date, because he was absent, the hearing was adjourned to 14th December, 2016. On 14th December, 2016 the appellant was still at large thus the prosecution proceeded with its case in his absence. After the receipt of PW4's evidence, the prosecution closed its case and the trial court issued a date for delivering a judgment, that is, 15th December, 2016.

On 15th December, 2016 the judgment was delivered in absence of the appellant as he was still at large.

The proceedings of the trial court shows that on 27th December, 2016 the appellant was before the trial court where the Public Prosecutor

requested for the trial court to read the judgment in the presence of the appellant. The appellant was recorded to have told the trial court that he was ready. In that regard, the judgment that convicted and sentenced the appellant to life imprisonment was read in his presence.

As alluded earlier, his appeal to the first appellate court was dismissed hence the present appeal. On 9th October, 2019 the appellant lodged a memorandum of appeal comprised of the following seven grounds that:

1. *That, your lordships, the learned first appellate Judge erred in law and fact to uphold conviction without noticing that the charge was fatal defective for:*
    a) *It was wrongly drafted for duplicity contrary to mandatory provision of section 133 (2) of Criminal Procedure Act, (Cap.20, R.E.2002).*
    b) *It was illegally drafted by police without being directed to the respective trial court as shown in page 1 of court records.*
2. *That, the learned 1st appellate Judge erred in law and fact to uphold appellant's conviction in case that was unfairly conducted with fatal irregularities as:-*
    a) *The memorandum of disputed/undisputed facts was not recorded and signed by parties contrary to mandatory provision of CPA, Cap.20, R.E. 2002.*

b) The ruling for case or no case to answer was not delivered after closure of prosecution case contrary to mandatory provision of CPA, Cap.20, R.E. 2002.

3. *That, the learned 1st appellate Judge erred in law and fact to uphold appellant's conviction without considering that material witnesses like arresting officer and investigating police officer or police who issued PF3 were not procured to testify as:-*
    a) If the incident was real reported as alleged and the suspect was mentioned and/or described to initiate his manhunt.
    b) If the appellant was suspected and then arrested in connection with this offence.
    c) If the investigation was conducted and revealed that the victim was real hijacked and then sodomised by the appellant as testified by PW.3.
4. *That, the learned first appellate Judge erred in law and fact to uphold appellant's conviction while the same was not accorded opportunity to show cause after being re-arrested, and the right to be heard (enter his defence) contrary to our URT constitution, article 13 (6) (a).*
5. *That, the learned first appellate Judge erred in law and fact to uphold appellant's conviction without properly analyzing and evaluating prosecution evidence, which is wanting as:-*
    a) PW.3 failed to mention and describe the suspect when she reported the crime to police while she was not familiar with the appellant.

b) PW.4's oral evidence was unreliable as he failed to explain his credentials to support his position as Doctor/Medical assistant.

6. *That, the learned first appellate Judge erred in law and fact to uphold appellant's conviction without assessing veracity of PW.1 and PW2's oral evidence and come to the conclusion that they were taught by PW.3 to tell lies as they failed to properly described the appellant. Hence their evidence was incredible and unreliable.*
7. *That, the learned first appellate Judge erred in law and fact to uphold appellant's conviction in a case that was proved to the speck of doubt.*

Sometime later, he filed a supplementary memorandum of appeal also contained seven points as follows:

1. *That, your lordships, the learned Appellate Judge erred in law and fact by holding the conviction against the appellant erroneously failure to assess, to evaluate and to analyze the prosecution evidence tendered before the trial Court by both parties i.e PW1, PW 2, PW 3, PW 4 and DW 1 at page 34-35 lacked the point of fact and determination in absentia of the critical analysis on the prosecution evidence contrary to the procedure of law.*
2. *That, your lordships, the learned Appellate Judge erred in law and fact by upholding conviction while failure to determine that, the trial court erred in law to convict the appellant while the charge is incurable defective as it was opened c/s 154 1 (a) and (b) of the penal Code Cap 16 Vol.1of the laws RE.2002, the nature of the*

charged offence paragraph (b) of subsection (1) to section 154 Cap 16 (Supra) Cater for any person who has Carnal knowledge of an animal contrary to the procedure of law.

3. *That, your lordships, the learned Appellate Judge erred in law and fact by upholding the conviction while failure to determine that, the trial court erred in law to convict the appellant relied on the discredited and unproceduraliy testimonies of PW1 (Victim) who was aged 9 years old and PW2 a child of tender age 6 years to page 10 line 13- 18, page 12 line 8-9 while the trial court failed to conduct voiredire test to justify that whether PW1 and PW2 possesses sufficient intelligence to understand the nature of an oath and duty of speaking the truth contrary to the procedure of law.*
4. *That, your lordships, the learned Appellate Judge erred in law and fact by upholding the conviction while failure to determine that, the trial court erred in law to convict the appellant while the prosecution side failed to tender before the trial court any purported document including birth certificate and clinical card to prove the age of the victim whether is 9 years old contrary to the PF 3 exh. P 1 estimated age is 7 years old at Page 18 contrary to the procedure of law.*
5. *That, your lordships, the learned Appellate Judge erred in law and fact by upholding the conviction while failure to determine that, the trial court erred in law to convict the appellant relied on exh. P1 (PF3) which was unprocedurally tendered by PW4 at page 15 line 15 while the trial court erroneously failed to give an opportunity to the accused/appellant to object the tendering of exp.1 contrary to the procedure of law stipulated in criminal proceedings, though the trial*

court did neither re-summoned PW4 to be cross – examined by the accused/appellant after his arrest nor exh.P1 was read over aloud the contents to determine its credibility before relied upon as a basis of conviction contrary to the procedure of law.

6. *That, your lordships, the learned Appellate Judge erred in law and fat by upholding the conviction while failure to determine that, the trial court erred in law to convict the appellant relied on the discredited testimonies of PW1, PW2, PW3 and PW 4 while the trial court deprived of an opportunity to the appellant to cross – examine PW4 MALIKI s/o SULEMAN @ MISSIRU (SAMO) his qualification at page 19 as it failed to re- summon PW 4 (SAMO) who unprocedurally stated to have examined PW1 (Victim) and filed the PF3 exh.1 contrary to the procedure of law which require the victim of rape to be examined by full medical Doctor.*
7. *That, your lordships, the learned Appellate Judge erred in law and fact by upholding the conviction while failure to determine that, the trial court erred in law to convict the appellant while erroneously failure to address the accused/appellant after his arrest in terms of law in the ruling of a Prima facie case to enable the appellant to prepare his defense after the prosecution case marked closed failure by the trial magistrate to explain to the accused/appellant the options available to him in giving his defense at page 16 line 4 contrary to the procedure of law.*

At the hearing of the appeal, the appellant appeared in person unrepresented, via video link conference from Ukonga Prison whereas the respondent/Republic was represented by Ms. Cecilia Mkonongo, learned Senior State Attorney assisted by Ms. Salome Assey, learned State Attorney.

The appellant opted to adopt his two sets of memoranda of appeal and requested for the learned Senior State Attorney to respond to his grounds of appeal while reserving his right to rejoin, if need would arise.

Before the learned Senior State Attorney proceeded with her response, we asked her to focus on two issues raised by the appellant in his grounds of appeal as we noted that the two issues would suffice to depose the whole appeal. The first issue was in respect of the first ground of appeal that the charge was defective for containing two separate offences in one count. The second issue is found in the fourth ground of appeal and it relates to the non-compliance of section 226 (2) of the Criminal Procedure Act, Cap. 20 R.E 2019 (the CPA).

Responding to the complaint on the defective charge, Ms. Mkonongo conceded that the charging provisions cited in the charge have two distinct offences. She pointed out that according to the charge which is appearing at

page 1 of the record of appeal sections 154 (1) (a) and (b) were both cited in one count. She said, sections 154 (1) (a) of the Penal Code prescribes an offence to a person who has carnal knowledge with a human being against the order of nature whereas subsection (1) (b) of section 154 of the Penal Code caters for a person who has carnal knowledge of an animal. In that respect, she conceded that the charge was duplex. However, she was of a strong view that it did not prejudice the appellant because the charging offence was cited in the statement of offence as required by section 132 of the CPA and the particulars of offence informed the appellant that he was being charged with an offence of having carnal knowledge against an order of nature to a child and not an animal. She added, even the evidence led by prosecution was to the effect that the offence was committed to a person and not to an animal and that when PW1, PW2 and PW3 were testifying the appellant was in court thus he had opportunity to cross-examine the prosecution witnesses. In so far, the learned Senior State Attorney believed, in such a circumstance, the appellant understood the charge leveled against him thus he was not prejudiced. With that understanding, Ms. Mkonongo contended that the defect is curable under section 388 of the CPA. To

cement her argument, she referred us to the case of **Chala Sanjwala v. The Republic**, Criminal Appeal No. 97 of 2014 (unreported).

On the complaint that the trial magistrate did not comply with section 226 (2) of the CPA, she conceded that after the appellant was re-arrested the trial magistrate did not ask the appellant as to why he did not enter appearance. She pointed out that the words used in the provisions of section 226 (2) of the CPA are "*upon being satisfied*" which connotes that the trial magistrate has to be satisfied with the reasons of the absence of the accused in order for him/her to make a sound decision on whether the conviction should stand or be set aside and the accused person be given a chance to mount his defence. She contended that the trial magistrate could have only known the reasons of the absence of the appellant by giving him a chance to explain away his absence but in the present appeal the record shows that the appellant was not given such an opportunity. She referred us to page 23 of the record of appeal where the appellant after his re-arrest was brought before the trial magistrate and the prosecution informed the trial magistrate that the matter was coming for reading a judgment to the appellant. The appellant was recorded to say he was ready. Thereafter, the judgment was read in his presence. With evidence on record, the learned Senior State

Attorney contended the appellant was not given a chance to explain away his absence.

She also faulted the findings of the High Court where it stated that the accused person had a chance to say something but did not say. She argued that the record of proceedings does not bear that as when the appellant was brought before the trial court he was not asked as to why he was absent instead the already prepared judgment was read to him. With that flouting of procedure, Ms. Mkonongo urged us to invoke our revisional powers under section 4 (2) of the Appellate Jurisdiction Act, Cap 141 of 2019 by quashing the proceedings of the High Court, the two judgments of the lower courts and set aside the sentence. She then concluded that since the two grounds suffice to dispose the whole appeal she did not see the need of responding to other grounds of appeal.

In his rejoinder, the appellant welcomed the positive submission made by the learned Senior State Attorney and prayed to be set free from prison custody.

Having heard the submission by the learned Senior State Attorney and gone through the two sets of memoranda of appeal, the written submissions

filed by the appellant and the record of appeal, we are in agreement with Ms. Mkonongo that the two grounds of appeal suffice to dispose this appeal.

We wish to start with the complaint that the trial magistrate failed to comply with section 226 (2) of the CPA after the appellant was re-arrested and brought before him. For better appreciation of the appellant's complaint, we reproduce the text of section 226 (2) of the CPA as follows:

> *"226 (2) Where the court convicts the accused person in his absence,* ***it may set aside such conviction, upon being satisfied that his absence was from causes over which he had no control and that he had a probable defence on the merit.*** *" (Emphasis supplied).*

The above provision of the law vests a discretionary power to the trial magistrate either to set aside or not the conviction of the accused person who was convicted *in absentia*. The conviction can only be set aside and the proceedings be re-opened after the trial magistrate had satisfied himself on the reasons of the absence of the accused and that the accused had probable defence on the merit. Nonetheless, the law is silent on how the trial magistrate should exercise his discretionary powers. However, as rightly submitted by the learned Senior State Attorney, the wording *"upon being*

satisfied" means that the trial magistrate or judge has to inquire from the accused person in order to know the reason and be satisfied on whether *his absence was from causes over which he had no control and that he had a probable defence on the merit.*

This Court has repeatedly emphasized on the need of the trial magistrate or judge to exercise a discretionary power enshrined under section 226 (2) of the CPA by affording a right to be heard to the re-arrested accused person who was convicted and sentenced *in absentia*. This accords to the accused person a chance to explain away the reason of his absence and for the trial court to assess whether the absence was due to causes beyond the control of the accused and that he had a probable defence on the merit. (See the cases of **Olonyo Lenuma and Lekitoni Lenuna v. The Republic** [1994] TLR 54, **Marwa Mahende v. The Republic** [1998] TLR 249, **Severine Kimatare v. The Republic**, Criminal Appeal No. 279 of 2006, **Loning'o Sangau v. The Republic,** Criminal Appeal No. 396 of 2013, **Magoiga Magutu @ Wansima v. The Republic**, Criminal Appeal No. 65 of 2015 and **Mohamed Abubakar v. The Republic**, Criminal Appeal No. 273 of 2015(all unreported).

For instance, in **Marwa Mahende v. The Republic** (supra) where the appellant was convicted and sentenced *in absentia* by the District of Court of Tarime at Tarime after he had absconded bail during the trial and his appeal before the High Court was partly successful as the sentence was reduced, the Court noted that the record of appeal did not indicate as to what happened after the appellant's re-arrest. As such, it reaffirmed the position stated in **Olonyo Lenuma and Lekitoni Lenuna v. The Republic** (supra) as follows:

> *"In our view the sub-section (that is section 226 (2) of the CPA) is to be construed to mean that an accused person who is arrested following his conviction and sentenced in absentia should be brought before the trial court first, and not to be taken straight to prison.... The need to observe this procedure assumes even greater importance bearing in mind that by and large accused persons of our community are laymen not learned in the law, and are often not represented by Counsel. They are not aware of the right to be heard which they have under the sub-section. It is, therefore, imperative that the law enforcement agencies make it possible for the accused person to exercise this right by ensuring that the accused, upon his arrest, is brought before the*

Court which convicted and sentenced him, to be dealt with under the sub-section."

It follows that the accused person should be brought to court after his re-arrest and be given a chance to explain away his absence as to why he has absconded himself during trial.

In the case of **Magoiga Magutu @ Wansima v. The Republic** (supra) the appellant escaped while he was being transported from the trial court to the remand custody. In that regard, his trial continued and he was convicted and sentenced while so absent. Later on he was arrested and brought before the trial court. The trial magistrate invited the public prosecutor to address it first and thereafter gave a chance to the accused person to make a response. It did not first ask the accused person as to why he was absent. This Court found that procedure adopted by the trial magistrate was contrary to the dictates of section 226 (2) of the CPA. It said:

"The appellant was, and still is a layman. The ...excerpt does not show the learned trial magistrate taking the first initiative to address the appellant to account for his absence, and determine whether he had a probable defence on merit. He instead allowed the public prosecutor to address the court first. We think the trial magistrate should have first addressed the appellant

about his right to be heard under sub-section (2) of section 226 of the CPA."

The Court went further by saying:

"It seems to us the phrase 'he had a probable defence on the merit' in section 226 (2) of the CPA bear a special duty which trial magistrates have towards the lay accused persons who missed out the chance to testify in their own defence. Here, the law impliedly expected the learned trial magistrate to specifically make a finding whether even from the perspectives of the evidence of PW1, PW2 and PW3; the trial court can glean out some semblance of probable defence for the benefit of the lay accused person. The lay appellant should have been informed conviction in absentia if the appellant showed that his absence from the hearing was from causes over which he had no control and that he had a probable defence on the merit. It was intimidating to the appellant for the learned trial magistrate to allow the public prosecutor to first furnish in detail how the appellant had jumped from the prison van whilst on transit to prison."

In the present appeal, the record of 27th December, 2016 when the appellant was brought before the trial court is as follows:

"27/12/2016
CORAM: *M.J Mahumba-DRM*

PP: *D/C Keneth*
CC: *Tresphory Rugenge*
ACCD: *Present*
Pros: *The matter comes for reading a judgment in the presence of the accused person who had been arrested*
Accused: *I am ready*
Court: *Judgment read in the presence of the accused person after being arrested.*

Sgn: M. J. Mahumba
DRM
27/12/2016"

From the above, it is patently clear that the trial magistrate did not take trouble to ask the accused person on why he was absent. The trial magistrate ought to have exercised his discretionary power by giving a chance to the accused person to explain away his absence in order for him to be satisfied if the accused had justifiable reasons for his absence. If there was justifiable cause then the conviction and sentence could have been set aside and continue to hear a defence, if there is probable defence on the merit. With due respect to the holding of the first appellate court, we see nothing suggesting that the appellant was given such a chance to explain his absence. The answer he gave to the trial court that he was ready for judgment suggests that he knew nothing of his right to explain away his absence. Had he been asked to provide the reason for his absence, he could

not have responded that way. Instead, he would have given his explanation on why he did not appear during the conduct of his trial.

This Court has, now and then, held that failure by the trial court to comply with section 226 (2) of the CPA in finding out the cause of the accused's absence during the trial vitiates the proceedings of the trial court which was conducted in his/her absence. (See **Loning'o Sangau v. The Republic** (supra)).

In the present appeal we have shown that the trial magistrate did not comply with the requirement under section 226 (2) of the CPA. As such, the proceedings conducted during the appellant's absence are a nullity. In that regard, we find merit in the fourth ground of appeal.

We now turn to determine the complaint regarding duplicity of a charge. On this the learned Senior State correctly observed that the charge contained two separate offences in one count. It is gathered from the record of appeal that the appellant was charged with one count only. Nonetheless in that one count, he was charged with unnatural offence contrary to sections 154 (1) (a) (b) of the Penal Code. Subsection (1) (a) of section 154 of the Penal Code prohibits a person to have carnal knowledge with another person against the order of nature whereas section 154 (1) (b) of the Penal Code

prohibits a person to have carnal knowledge with an animal. Obviously, the two sections deals with two separate offences. When a charge is contained with two separate offences in one count is said to be duplex. (See the case of **Director of Public Prosecutions v. Morgan Maliki and Another**, Criminal Appeal No. 133 of 2013 (unreported)). Therefore, the appellant in this appeal was faced with a duplex charge. What then is the consequence of combining two separate offences in one count?

The learned Senior State Attorney was of the firm view that the combination of the two offences did not embarrass and/or prejudice the appellant hence the defect is curable under section 388 of the CPA as it was done by this Court in its various decision including the case of **Chala Sanjwala v. The Republic** (supra). With due respect to her submission, the holding in that case was to the effect that the anomalies noted in the charge sheet were not curable under section 388 of the CPA. Of course, in that appeal the Court dealt with the issue of a defective charge sheet. However, the defects were not about the charge sheet being duplex rather it was in respect of wrong citation of the charging provision and the particulars of the offence did not disclose as to whom the actual violence or pistol used was directed to.

This Court in the case of **Issa Juma Idrisa and Another v. The Republic**, Criminal Appeal No. 218 of 2017 (unreported) lucidly dealt with and discussed the effect of a charge being duplex. It first considered different prevailing positions on the effects of a charge sheet in various decisions of the former Court of Appeal for Eastern Africa including that of **R. v. Mongela Ngui** [1934] EACA 152 (CAK) as cited in the case of **Horace Kiti Makupe v. Republic** [1989] eKLR, and then it stated:

> *"In our jurisdiction, as alluded to above, an omnibus charge offends the principle of fair hearing and the usual consequence has been to quash the proceedings and judgments of the iower courts....the Court in unambiguous words held that the anomaly renders the charge fatally defective....the reason given was that an accused person must know the specific charge (offence) he is facing so that he can prepare his focused defence which, in the event of a duplex charge, cannot be accomplished. We think such a position is in line with the decision of the former Court of Appeal for Eastern Africa in* ***R. vs. Mongela Ngui*** *(supra) that in determining whether the defect is fatal and incurable, we should find out whether the charge under consideration embarrassed or prejudiced the accused such that he could not arrange for a focused and proper*

defence. That is the yardstick we set in the case of ***Jumanne Shaban Mrondo vs. Republic****, Criminal Appeal No. 282 of 2010 (unreported) where we stated that the fatality of any irregularity is dependent upon whether or not it occasioned a miscarriage of injustice."*

Flowing from that position, we look in the present appeal. We have alluded herein that the appellant absconded himself during the hearing of the prosecution case. Therefore he did not mount his defence. We have also shown that he was not accorded a right to be heard on why he was absent. Since, we have found that the trial magistrate did not exercise his powers under section 226 (2) of the CPA, under normal circumstances, we could have quashed the proceedings conducted during his absence and set aside its judgment with a direction that the appellant be brought before the trial court and be dealt with in accordance with the provisions of section 226 (2) of the CPA or as may deem fit by the Director of Prosecution Prosecutions (See the case of **Loning'o Sangau v. The Republic** (supra)).

However, since the charge which the appellant stood was duplex as it contains two separate offences in one count then it will be a fallible exercise for the trial magistrate to deal with the appellant in accordance with section

226 (2) of the CPA on a fatally defective charge. For this reason, we cannot make an order of the remission of the case file to trial magistrate.

For the above stated reasons, we do hereby allow the appeal. Consequently, we quash the conviction and set aside the sentence imposed on the appellant and we order for his immediate release from prison custody unless he is otherwise being held for some other lawful purpose.

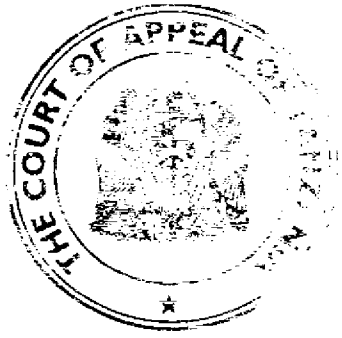
DATED at **DAR ES SALAAM** this 15th day of October, 2020.

S. A. LILA
JUSTICE OF APPEAL

B. M. A. SEHEL
JUSTICE OF APPEAL

M. C. LEVIRA
JUSTICE OF APPEAL

The Judgment delivered this 19th day of October, 2020 in the presence of the Appellant in person and Ms. Ashura Mnzava, State Attorney for the respondent/Republic, is hereby certified as a true copy of the original.



S. J. Kainda
DEPUTY REGISTRAR
COURT OF APPEAL