IN THE COURT OF APPEAL OF TANZANIA
AT IRINGA

(CORAM: MZIRAY, J. A., MWAMBEGELE, J. A. And MWANDAMBO, J. A.)

CRIMINAL APPEAL NO. 367 OF 2017

THE DPP ..... APPELLANT

VERSUS

RAJABU KIBIKI ..... RESPONDENT

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

(Sameji, J.)

dated the 30th day of September, 2016
in
DC. Criminal Appeal No. 42 of 2016
.....

JUDGMENT OF THE COURT

6th & 13th May, 2020

MWANDAMBO, J.A.:

The District Court of Njombe tried and convicted Rajabu Kibiki, the respondent, with unnatural offence and sentenced him to serve a 30 years' jail term. On appeal, the High Court sitting at Iringa found the evidence on which the trial court relied in convicting him did not prove the charge against him to the standard required in criminal cases. It allowed the appeal. The respondent's conviction was quashed and the

sentence meted out to him set aside. Not amused, the Director of Public Prosecutions (the DPP) has preferred this appeal.

The facts which resulted in the arraignment and conviction of the respondent gleaned from the record of appeal are as follows: Samson Malile (PW1) a boy aged 19 years at the time, visited his grandfather, William Mgunda (PW2) at a village called Ikangasi in Njombe District on 12th December, 2015. PW1 met the respondent who was staying in PW2's house as a house boy. In the night of the material date, PW1 and the respondent shared a bed room in PW2's house. Apparently, PW1 was suffering from epilepsy. It appears that the respondent offered a solution to PW1's problem by prescribing to him a treatment which entailed him (the respondent) having carnal knowledge of PW1 against the order of nature to which the epileptic consented. The respondent thus had carnal knowledge of PW1 in the room they shared. After the act, the respondent told PW1 to repeat the same thing somewhere in the grave yard to complete the dose. The record shows that the duo went to the grave yard around 9.00 p.m. where they stayed until 2.00 a.m. on 13th December 2015 during which the respondent is said to have had anal intercourse

with PW1. After completing the "treatment", PW1 was told to go back home alone.

PW1 returned to his grandfather crying as a result of pains from the "treatment" at the instance of the respondent. Upon arrival at that awkward hour in the night, PW1 disclosed the ordeal to his grandfather who reported the matter to a village chairman (PW3). Subsequently, the respondent was arrested by village militiamen and taken to the police for further action and ultimately his arraignment in the District Court on two counts of unnatural offence contrary to section 154 (1) (a) of the Penal Code [Cap. 16 R.E. 2002] to which he pleaded not guilty.

The trial court found the prosecution evidence through four witnesses proved the case against the respondent beyond reasonable doubt and convicted him as charged followed by a sentence of thirty years' imprisonment. On appeal, the High Court sitting at Iringa, allowed the appeal, quashed the conviction and set aside the sentence. The High Court (Sameji, J. as she then was) arrived at that conclusion being satisfied that apart from a number of irregularities in the proceedings before the trial court which it declared a nullity, the prosecution had not

proved its case beyond reasonable doubt. Not amused, the DPP has preferred the instant appeal predicated on 5 grounds of complaint. Notably, the appellant faults the first appellate court for holding as it did that the case against the respondent was not proved to the required standard; beyond reasonable doubt. Other grounds fault the first appellate court for nullifying the judgment of the trial court and holding that there was no competent appeal before it and proceeding to allow the appeal. However, for reasons which will become apparent shortly, we will not delve into the merits in any of the grounds of appeal.

At the hearing of the appeal, Mr. Adolf Maganda, learned Senior State Attorney, appeared for the appellant. The respondent who was served through substituted service by publication did not appear. Despite the respondent's non appearance, hearing of the appeal proceeded in his absence pursuant to rule 80 (6) of the Tanzania Court of Appeal Rules. Before the learned Senior State Attorney rested his submissions on the merits of the appeal, the Court enquired from him on the propriety and the effect of the trial court determining the case containing two counts into one in the course of composing its judgment.

Mr. Maganda was quick to concede that despite the trial proceeding to finality on the basis of two counts, the trial magistrate combined the two counts into one in the course of composing the judgment. Mr. Maganda argued that that was irregular because the offence which the respondent stood charged with was committed on two different dates and that is why the prosecution preferred a charge on two counts. The learned Senior State Attorney concluded that the approach adopted by the trial magistrate was fatal to the judgment attracting the Court's exercise of its revisional power under section 4 (2) of the Appellate Jurisdiction Act, [Cap. 141 R.E. 2019] (the AJA). Mr. Maganda invited the Court to nullify the judgment of the trial court and direct that a fresh judgment be composed on the basis of two courts before the same magistrate failing which, another one with competent jurisdiction.

It is common ground that despite the offence being one of carnal knowledge against the order of nature, the prosecution preferred a charge containing two counts because the offence was alleged to have been committed on 12th and 13th December, 2015. It is equally plain that the trial was conducted on the basis of two counts and the

respondent marshaled his defence on both counts. Nonetheless, the learned trial magistrate preferred one count to two in the determination of the case. The following is what he said in his judgment:-

> *"I have carefully gone through the charge and heard the evidence in [the] case [at] hand. I have noted one legal aspect that demands my corrective touch that is [;] the charge.*
>
> *It appears to this court that the commission of the alleged offences began on 12/12/2015 at/about 21:00 hours and ended on 13/122015 at/about 02:00 hours in the same night. So, it discloses that there was continuation of the commission of the offence from 12/12/2015 to 13/12/2015 [on] the same night. That being so, basing on my understanding I am of the view that the accused person should have been charged with one count in the circumstances. I prefer one count to two counts. I therefore combine both counts to form one count."* [at page 37 of the record].

As shown above, Mr. Maganda readily conceded that the trial magistrate strayed into an error by combining the counts on his own

motion thereby vitiating the judgment. With respect, we are inclined to agree with the learned Senior State Attorney. We note from page 51 of the record, the anomaly was brought to the attention of the first appellate court and indeed the learned first appellate judge reflected it in her judgment at page 58 of the record of appeal. However, the first appellate court did not address itself to the issue perhaps because, if we may hazard a guess, the combination of the two counts in the manner the trial court did was inconsequential. Mr. Maganda argued that the combination was fatal and so we have to determine the issue in this appeal.

To appreciate Mr. Maganda's submissions and answer the issue whether the combination of two counts into one by the learned trial magistrate valid, we find it compelling to reproduce section 234(1) and (2) of the Criminal Procedure Act [Cap. 20 R.E. 2019] (the CPA) which stipulates:-

"234 *(1) 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 all amendments made under the provisions of this subsection shall be made upon such terms as to the court shall seem just.

(2) Subject to subsection (1), where a charge is altered under that subsection–

(a) the court shall thereupon call upon the accused person to plead to the altered charge;

(b) the accused may demand that the witnesses or any of them be recalled and give their evidence afresh or be further cross-examined by the accused or his advocate and, in such last mentioned event, the prosecution shall have the right to re-examine any such witness on matters arising out of such further cross-examination; and

(c) the court may permit the prosecution to recall and examine, with reference to any alteration of or addition to the charge that may be allowed, any witness who may have been examined unless the court for any reason to be recorded in writing considers that the application is made for the purpose of vexation, delay or for defeating the ends of justice."

It will be clear from the above provision that amendment of the charge on account of defect in substance or form is permissible at any stage of the trial. In our view, the phrase "at any stage of the trial" does not extend beyond the trial of the case say, during the composition of the judgment as it were. In any event, where it is desirable to amend the charge, the trial court is empowered to make an order for its alternation either by way of amendment of it or by substitution or addition of a new charge as the trial court may think fit. Apparently, for whatever good reason the trial court had, it failed to pay regard to the dictates of the provisions of section 234 (1) of the CPA. In the circumstances, we are inclined for agree with the learned Senior State Attorney that the approach adopted by the learned trial magistrate was, with respect, highly irregular and incurably fatal. Unfortunately, the irregularity eluded the scrutiny of the first appellate court despite the attention being drawn to it by the respondent Republic in the course of hearing the appeal.

Fortunately, the application of section 234 of the CPA has been discussed in various cases by this Court albeit on facts not necessarily identical to the present ones. In **Sylvester Albogast v. R**, Criminal

Appeal No. 309 of 2015 (unreported), the appellant was charged with rape contrary to section 130 (1), (3) of the Penal Code. The particulars of the offence indicated that the appellant had unlawful carnal knowledge of a girl aged 17 years without her consent. The judgment of the trial court indicated that the appellant was charged with rape c/s 130(2) (e) and 131(1), (3) of the Penal Code as amended by the Sexual Offences Act No. 4/1998. That was at variance with the charge to which the appellant pleaded and on whose basis the trial proceeded. Like in the instant appeal, the first appellate court did not address itself to the variance. The Court found the indication in the trial court's judgment that the appellant was charged under sections 130(1) (2) (e) and 131 (1) and (3) of the Penal Code amounted to an amendment of the charge contrary to the dictates of section 234 of the CPA. The Court had the following to say:

> *"It is important to note here that in the present case, the trial court altered the charge after seeing that it was defective in both the substance and form which is squarely covered under subsection (1). If that is the case, subsection (4) requires that the defence be made aware*

because an accused person thereby retains the right to recall witnesses, whereas such right is also reserved for the prosecution in subsection (5). So, it was not a matter to be taken at the whims of the trial magistrate alone. (See also ***GODFREY RICHARD vs R,*** *Criminal Appeal No. 365 of 2008 (unreported). So, it was highly irregular, for the trial court to have amended the charge at the judgment stage. In No* ***A.5204 WRD VIATORY PASCHAL vs R,*** *Criminal 12 Appeal No. 195 of 2006 (unreported), this Court held that such a judgment was a nullity."* [at p. 12&13].

The position in the instant appeal is that the trial magistrate purported to amend the charge in the course of composing judgment by combining two counts into one. So, unlike in **Sylvester Albogast** (supra) where the trial court amended the charge which was defective in form and substance, the charge in this appeal was not defective either in form or substance. All what the trial court did was to combine the counts allegedly because the offence was committed at different times on the same night which did not attract preferring two counts.

Nevertheless, the net effect is the same; there is no authority on a trial court to amend a charge at the judgment stage and where such is done as it were, the same is fatal for violating the provisions of section 234 of the CPA.

In conclusion, since we have held that the trial court acted in contravention of section 234(1) of the CPA, the amendment of the charge was fatal to the judgment. Invoking our power under section 4(2) of the AJA, we nullify the judgment of the trial court, quash the conviction and set aside the sentence imposed against the respondent. Since the appeal to the High Court emanated from a judgment which was a nullity, such appeal was incompetent rendering the proceedings before that court also a nullity and so the eventual judgment and the order allowing the appeal and acquitting the appellant. We also nullify the proceedings in the High Court as well. Going forward, considering that the ailment in the proceedings before the trial court is limited to the judgment, we do not think it appropriate to take the same route we took in **Sylvester Albogast** (supra) in which we nullified the entire proceedings of the courts below because the charge was defective in form and substance vitiating the entire trial. Instead, we direct the trial

court to compose a fresh judgment based on two counts appearing in the charge sheet. The judgment shall be composed by the same magistrate unless it is impractical to do so for compelling reasons in which case the same shall be composed by another magistrate of competent jurisdiction.

Order accordingly.

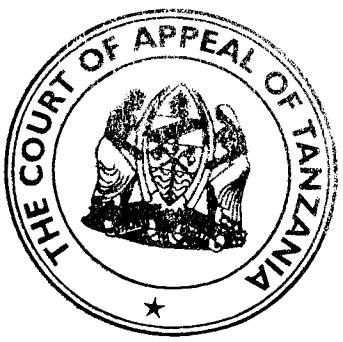
DATED at **IRINGA** this 12th day of May, 2020.

R. E. S. MZIRAY
JUSTICE OF APPEAL

J. C. M. MWAMBEGELE
JUSTICE OF APPEAL

L. J. S. MWANDAMBO
JUSTICE OF APPEAL

The Judgment delivered this 13th day of May, 2020 in the presence of Ms. Pienzia Nichombe, learned State Attorney for the Appellant and the Respondent is absent nowhere to be traced is hereby certified as a true copy of the original.



E. F. FUSSI
DEPUTY REGISTRAR
COURT OF APPEAL