IN THE COURT OF APPEAL OF TANZANIA

AT DAR ES SALAAM

(CORAM: MUGASHA, J.A., KEREFU, J.A. And MAIGE, J.A.)

CRIMINAL APPEAL NO. 370 OF 2019

RIZIKI JUMANNE.....APPELLANT

VERSUS

THE REPUBLIC.....RESPONDENT

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

(Ngwala, J.)

dated the 9th day of August, 2019
in
Criminal Appeal No. 97 of 2018

JUDGMENT OF THE COURT

2nd & 9th July, 2021.

KEREFU, J.A.:

This appeal stems from the decision of the District Court of Ilala at Samora Avenue in Dar es Salaam Region where the appellant, Riziki Jumanne was charged with the offence of unnatural offence contrary to section 154 (1) (a) of the Penal Code, [Cap. 16, R.E 2002] (the Penal Code). He was then sentenced to life imprisonment with twelve (12) strokes of the cane. It was alleged that on 13th day of September, 2016 at Kivule within Ilala District in Dar es Salaam Region, the appellant had carnal knowledge of a boy aged nine (9) years against the order of nature.

To conceal the victim's identity and for purposes of protecting his privacy, we shall henceforth refer him as 'AE' or simply 'PW1' as he so testified before the trial court.

To prove its case, the prosecution paraded six witnesses and tendered two documentary exhibits namely, the PF 3 (exhibit P1) and the identification parade register (exhibit P2), respectively. The appellant relied on his own evidence as he did not call any witness.

In brief, the prosecution evidence which led to the appellant's conviction as obtained from the record of the appeal is that, PW1, the victim testified that he was living with his mother Johari Ramadhani (PW2), father, two uncles, grandparents and his aunt Fatuma Ramadhani (PW4). He added that he was sharing the same bedroom with his grandfather and one Abdallah Shabani who was his relative. PW1 testified further that, when his grandfather was out, Abdallah used to sodomize him on several occasions until he became used to it. That, later when Abdallah left their home, someone else called Daniel, who stays away from their home, also sodomized him in the unfinished building but he did not reveal the ordeal to anyone as he was used to it.

PW1 went on to state that the appellant, whom he said he does not know his name, also used to sodomize him at the same building where Daniel sodomized him. He said that he used to go to the appellant's house to play with his fellow children. PW1 also described the appellant as the person who was making bricks and he used to see him at the place where *pweza* and *kachori* were being sold. He said that, since he likes *kachori,* the appellant used to buy *kachori* for him and in turn, sodomized him. PW1 added that the appellant used to sodomize him at around 19:00 hours and even later. That, after sodomizing him, he used to give him water to wash his anus and allowed him to leave.

PW1 testified further that one day his mother discovered that he was being sodomized and when she asked him who did it, PW1 mentioned the appellant and the two others. PW1 was thus taken to Kitunda Police Station and then to the hospital for medical examination.

The mother of PW1, Johari Ramadhani (PW2), testified that on 13th September, 2016, PW1 went to play and came back home at around 23:00 hours and when she asked him where he was, PW1 told her that he was playing with his friends. PW2 testified further that, her sister, Fatuma Ramadhani (PW4) asked her to inquire on the behaviour of PW1 because,

it was not normal for a child to go to play and come back home at night while clean. PW2 inspected PW1's anus and found that it was very wide. PW2 called PW4 who also examined PW1's anus. In her testimony, PW4 gave the same account of events as narrated by PW2 and she added that when they asked PW1 on who sodomized him, he mentioned Abdallah, Daniel and the appellant.

Upon receiving that information, PW1, PW2 and PW4 reported the matter to police and PW1 was taken to the hospital for medical examination by Dr. Tuli Fred (PW5), after obtaining a PF3. Upon examination, PW5 found PW1's sphincter wide and loose due to penetration by a blunt object. PW5 filled the PF3 which was tendered in evidence as exhibit P1.

At the police, they were also availed with an RB to arrest the three suspects but they only managed to arrest the appellant at the place where *pweza* and *kachori* were being sold and detained him in their house until when the police officers arrived and took him to police station. On 23rd September, 2016 A/Inspector Rachel Peter (PW3) conducted identification parade where PW1 identified the appellant as the person who sodomized him. PW3 tendered the identification parade register which was admitted in

evidence as exhibit P2. The case was investigated by WP. 2240 SSGT Bahati (PW6).

In his defense, the appellant denied any involvement in the commission of the offence. He said that he is a motorcycle rider and was arrested by three people who came at the place where he was parking the motorcycle. The said people introduced themselves as police officers, and asked him to accompany them and took him to their house where they detained him, while waiting for the police officer to arrive and take him to the police station. He said that he was astonished when PW1 said that he was the one who sodomized him. The appellant also disputed to buy any *kachori* for PW1.

After a full trial, the trial court accepted the version of the prosecution's case and the appellant was found guilty, convicted and sentenced as indicated above. Aggrieved, the appellant unsuccessfully appealed to the High Court where the trial court's conviction and sentence were confirmed. Still protesting his innocence, the appellant has knocked at the doors of this Court on a second appeal seeking to challenge the decision of the first appellate court. In the memorandum of appeal and the supplementary memorandum the appellant raised a total of sixteen (16)

grounds of complaint. However, for reasons that will shortly come to light we need not recite them herein.

At the hearing of the appeal before us, the appellant appeared in person, without legal representation, whereas the respondent Republic was represented by Ms. Dorothy Massawe, learned Senior State Attorney assisted by Ms. Neema Mbwana, learned State Attorney. The appellant adopted the grounds of appeal and opted to let the learned Senior State Attorney respond first but he reserved his right to rejoin, if need to do so would arise.

Upon taking the floor, Ms. Massawe, at the outset, informed the Court that they are opposing the appeal. However, upon further reflection and a short dialogue with the Court, she indicated that they are supporting the appeal on a point of law pertaining to the procedural irregularity as whether the appellant was convicted for the charge to which he had pleaded as required by law.

Submitting on that point, Ms. Mbwana argued that having perused the record of appeal, they realized that the original charge which the appellant was charged and pleaded to on 17th October, 2016 was amended on 04th October, 2017, after five prosecution's witnesses had already testified, but the appellant, who was before the trial court, was not called

upon to plead to the new or amended charge. It was the argument of Ms. Mbwana that such omission is fatal and an incurable irregularity in terms of section 234 (2) (a) of the Criminal Procedure Act, [Cap. 20 R.E. 2019] (the CPA). On that account, Ms. Mbwana submitted that the proceedings before the trial court as well as those at the first appellate court were a nullity. She thus implored us to nullify the aforesaid proceedings and judgments of both courts' below, quash the conviction and set aside the sentence meted out against the appellant. On the way forward, the learned State Attorney urged us to order a retrial.

On his part, this being a legal issue, the appellant did not have much to say other than supporting the submission made by Ms. Mbwana but he opposed a prayer for a retrial and instead, urged us to set him at liberty.

Having perused the record of appeal and considered the submission made by the parties, the main issue for consideration is whether the omission to call upon an accused person to plead to a new, altered or substituted charge renders the trial a nullity.

Pursuant to section 228 (1) of the CPA, it is a mandatory requirement of the law that when the accused person appears in court, he shall be asked whether he admits or denies the truth of the charge. The said section provides that: -

"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."

Furthermore, the law also, under section 234 of the CPA, allows charges to be altered or amended. However, section 234 (2) (a) of the same provision, as argued by Ms. Mbwana, imposes a duty on a trial court, after substituting a charge to take a new plea of the accused to a new or altered charge. Section 234 (2) (a) of the CPA provides that: -

"(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."*** *[Emphasis added].*

The above quoted provision is couched in a mandatory tone and does not give an option to the trial court not to comply with it. This Court in several occasions has interpreted the said provision and provided guidance on its applicability. For instance, in **Thuway Akonaay v. Republic** [1987] T.L.R. 92, the Court emphasized that: -

"It is mandatory for a plea to a new or altered charge to be taken from an accused person, failure to do so, renders a trial a nullity."

In that case the Court also quoted, with approval head notes from a decision in **Akbarali Damji v. Republic**, 2 T.L.R. 137 where it was also emphasized that: -

> *"The arraignment of an accused person is not complete until he has pleaded. Where no plea is taken, the trial is a nullity.* ***The omission is not an irregularity which can be cured*** *by section 346 of the Criminal Procedure Code (now section 388 (1) of the Criminal Procedure Act)." [Emphasis supplied].*

[See also the cases of **Athumani Mkwela and 2 Others v. Republic,** Criminal Appeal No.173 of 2010 and **Shabani isack @ Magambo Mafuru and Another v. Republic,** Criminal Appeals Nos. 192 & 218 of 2012 (both unreported)].

In the case at hand, it is on record that the appellant was arraigned and his plea was taken on 17th October, 2016 pursuant to section 228 (1) of the CPA. However, on 04th October, 2017, the charge was amended, but the appellant, though present in court, was not called upon to plead to the new or amended/substituted charge, hence non-compliance with the provisions of section 234 (2) (a) of the CPA.

Being guided by the above cited authorities, we are in agreement with the learned State Attorney that failure by the trial court to observe the requirement imposed under the said provision vitiated the entire trial hence renders the trial proceedings a nullity. So were the proceedings and judgment in the appeal before the High Court, as they stemmed from null proceedings.

That being the position, we hereby invoke the revisional powers under section 4 (2) of the Appellate Jurisdiction Act, [Cap. 141 R.E. 2019] (the AJA) and nullify the proceedings and the judgments of both the trial court and the High Court, quash the appellant's conviction and set aside the sentences imposed on him.

On the way forward, ordinarily, where the proceedings of the trial court have been nullified on appeal, the common practice and procedure is to order for a retrial as prayed by Ms. Mbwana. Nonetheless, there are some factors which have to be considered before an order for a retrial is made. The guidance, which in our view did sum up the criteria for ordering a retrial or not, was given in the case of **Fatehali Manji v. Republic** [1966] EA 343 when the Court stated 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 particular facts and circumstances and an order for retrial should only be made where the interests of justice require it and should not be ordered where it is likely to cause an injustice to the accused person.****" [Emphasis added].*

[See also cases of **Selina Yambi and Others v. Republic**, Criminal Appeal No. 94 of 2013 and **Salum & Another v. Republic,** Criminal Appeal No. 119 of 2015 (both unreported)].

Following the above authorities, we hasten to remark that this is not a fit case to make an order for a retrial. Upon dispassionately scrutinizing the entire evidence on record from either side, we were able to note other irregularities and unfolded deficiencies in the prosecution evidence which shade doubts that if given the opportunity there is likelihood for the prosecution filling in gaps. Certainly, there is no prosecution eye witness who testified to have seen the appellant sodomizing PW1 other than the

victim himself. The record bears out that both courts below were satisfied that PW1 was credible and reliable witness who could not be faulted. Both courts were satisfied that PW1 and the appellant were not strangers and PW1 positively identified the appellant. Specifically, at page 105 of the record of appeal the learned High Court Judge stated that: -

> *"I am satisfied that PW1 is actually a credible and reliable witness who could not be faulted by the appellant's complaints. This is so because, it is common ground that PW1 and the appellant are not strangers. It is also common ground that PW1 was the one who identified the appellant as the person who was sodomizing him. His credence gains more weight with the testimony of PW2 his mother who told the court that, in an attempt to arrest the appellant, they had at first arrested a wrong person, but PW1 told them he was not the one and pointed to them the right person. PW1 was also categorical in his testimony that it was the appellant who used to take him to an unfinished and unoccupied building after having bought him Kachori and thereafter he sodomized him."*

Having scrutinized the record of the appeal and specifically the evidence of PW1, the above narration is not supported by the record and it

is doubtful as whether PW1 made a positive identification of the appellant. We should let the testimony of PW1 before the trial court speaks for itself. At page 11 to 12 of the record of appeal PW1 testified as follows:

> *"Abdallah sodomized me several times, that I was used to it. He used to spay me with something after that I felt tired all over my body. Later on, Abdallah left at home. Thus, one Dan who lives a bit far from our home near Moshi bar sodomized me once in unfinished but roofed building. Dan is a young man...After Daniel, this man also sodomized me. I did not know his name but I used to go to their house to play with his young ones...that is when I knew this man. This man was making bricks he was taking me in the same building which Dan used to sodomize me...This man sodomized me as I like kachori, before he sodomized me, he was giving me kachori. He used to sodomize me at about 19:00 hours and sometimes after that time."*

From the extracted evidence of PW1 above, it is clear that the appellant was not known to PW1. However, PW1, who was the only prosecution eye witness and identifying witness, gave a general description of the appellant as the person who was making bricks although it turned out later that the appellant herein is a motorcycle rider. In addition, PW1 in

his evidence did not give a proper description of the appellant, such as his attire, physique and/or any special marks or symbols which enabled him to identify the appellant at the *pweza* place. This is cemented by the fact that, at the said *pweza* place, PW1 started to point to a different person who was, at first, picked by PW2 and PW4 as the culprit.

In addition, the identification parade's register which was admitted in evidence as exhibit P2 was un-procedurally handled as the same was not read out and/or explained to the appellant after its admission in evidence. Thus, the same deserves to be expunged from the record, as we hereby do, and as such, cannot support the PW1's dock identification.

It is also on record that PW1 testified to have been sodomized by Abdallah, his relative, for several times as they were sleeping together in the same bedroom but he failed to report the matter to PW2 and PW4 at the earliest possible. Furthermore, PW1 also testified to have been sodomized by Daniel in the same unfinished and unoccupied building, but again, he did not reveal the ordeal to anyone. In **Marwa Wangiti Mwita and another v. Republic** [2002] TLR 39, the Court stated that: -

> *"The ability of a witness to name a suspect at the earliest opportunity is an important assurance of his reliability, in the same way as unexplained delay or*

complete failure to do so should put a prudent court to enquiry."

It is therefore our considered view that, the act of PW1 of remaining silent to report such serious incident for all those days taints his credibility.

Having regard to these shortfalls and considering the guidance given in **Fatehali Manji** (supra), we do not find it appropriate to order for a retrial.

In the event, we order the immediate release of the appellant from prison forthwith unless he is held for some other lawful cause.

DATED at **DAR ES SALAAM** this 6th day of July, 2021.

S. E. A. MUGASHA
JUSTICE OF APPEAL

R. J. KEREFU
JUSTICE OF APPEAL

I. J. MAIGE
JUSTICE OF APPEAL

The Judgment delivered this 9th day of July, 2021 in the presence of the appellant in person and Ms. Neema Moshi, learned State Attorney for the respondent/Republic is hereby certified as a true copy of the original.

THE COURT OF APPEAL OF TANZANIA

S. J. KAINDA
DEPUTY REGISTRAR
COURT OF APPEAL