IN THE COURT OF APPEAL OF TANZANIA
AT DAR ES SALAAM

(CORAM: MWARIJA, J.A., LEVIRA, J.A. And KIHWELO, J.A.)

CRIMINAL APPEAL NO.183 OF 2019

EMMANUEL THOMAS @ KASAMWA ..... APPELLANT
VERSUS

THE REPUBLIC .....RESPONDENT

(Appeal from the decision of the High Court of Tanzania atDar es salaam)

(Mutungi, J.)
dated the 9th day of May, 2019
in
Criminal Appeal No. 228 of 2018

.....

JUDGMENT OF THE COURT

28th June & 30th July, 2021

LEVIRA, J.A.:

The appellant, Emmanuel Thomas @ Kasamwa was arraigned before the District Court of Mkuranga, at Mkuranga facing a charge of attempted rape contrary to section 132 of the Penal Code, Cap 16 R.E. 2002, now R.E. 2019 (the Penal Code). The prosecution side called five witnesses to prove their case against the appellant. Upon closure of the prosecution case, the trial magistrate delivered a ruling on a case to answer as required by the law. It is worth noting that, upon going through the prosecution evidence adduced before her, the trial magistrate came up with a finding that there was no concrete proof that the appellant committed the offence of attempted rape with which he

was charged anda primafacie case was not established against him. Consequently, she withdrew the charge against the appellant and acquitted him under section 230 of the Criminal Procedure Act, Cap 20 R.E 2002, now R.E. 2019 (the CPA). However, she was of the view that since the court had powersto convict him of a cognate offence not previously charged with on the basis of the adduced evidence upon finding that it was proved as per section 304 of the CPA, she accorded the appellant a right to bring his defence in respect of the offence of grave sexual abuse contrary to section 138C (1) and (2) of the Penal Code, which he said, was supported by prosecution evidence. The defence side called three witnesses including the appellant himself.

At the end of the trial, the trial court satisfied itself that the charge of grave sexual abuse was proved beyond reasonable doubt. It convicted and sentenced the appellant to serve twenty years imprisonment and to compensate the victim Tshs. 300,000/=. He was aggrieved with both the conviction and the sentence. However, he unsuccessfully appealed to the High Court hence, the current appeal.

For obvious reasons that will shortly come into light, we shall not reproduce the factual background of this appeal and the grounds of appeal thereof. Suffices here to note that the appellant raised eight

grounds of appeal in his memorandum of appeal lodged in Court on 28th August, 2019.

At the hearing of the appeal, the appellant appeared in person and unrepresented via Court's video conference facility linked from Ukonga Central Prison. The respondent Republic was represented by Mr. Adolf Verandumi, learned State Attorney. When invited to address the Court in respect of the appeal, the appellant adopted his grounds of appeal and written submissions he filed in Court on 1st February, 2021. Thereafter, heopted to hear from the learned State Attorney as he reserved his right to make a rejoinder.

In reply, Mr. Verandumi at the onset supported the appeal though on a legal point different from the grounds raised by the appellant in his memorandum of appeal. He submitted that, having gone through the record of appeal he discovered that at page 22 and 23 there were some procedural irregularities committed by the trial magistrate. He argued that when the trial magistrate was giving a ruling on a case to answer, she found that the prosecution evidence did not prove the offence of attempted rape with which the appellant was charged.As a result, she acquitted him under section 230 of the CPA.

However, basing on the adduced prosecution evidence she was of the view that, the appellant ought to have been charged with grave sexual abuse under section 304 of the CPA. She made a finding that a primafacie case was established in respect of grave sexual abuse offence under section 138C (1) and (2) of the Penal Code, a procedure which Mr. Verandumi said, it was not proper. He argued further that, since the trial magistrate had already found that the evidence did not prove the charge, it was wrong to apply section 304 of the CPA to reduce the offence of attempted rape to grave sexual abuse as a cognate offence while it was not. He went on stating that section 304 of the CPA mentions offences which are cognate to rape under section 135, 140 and 158 of the Penal Code which do not include grave sexual abuse. As such, he said, grave sexual abuse is not a cognate offence of attempted rape.

Mr. Verandumi referred us to page 23 of the record of appeal where the trial magistrate indicated that the charge was re-read over and explained to the appellant but there is nothing on record indicating when was the charge brought and substituted by the court for the appellant to enter his plea. He argued that, since the appellant was already acquitted it was not possible for him to understand which

charge, he was required to enter his plea and defend taking into consideration that he was not represented.

Finally, he beseeched the Court under section 4 (2) of the Appellate Jurisdiction Act Cap 141 R.E. 2019 (the AJA) to nullify the proceedings of both, the trial court and the High Court, quash conviction and set aside the appellant's sentence.

Upon being prompted by the Court to state the proper procedure that could have been adopted by the trial court, Mr. Verandumi submitted that, the trial magistrate ought to have made a finding as to whether or not the appellant had a case to answer after receiving prosecution evidence. Thereafter, depending on the findings would either end there or in terms of section 231 of the CPA, proceed to invite the appellant to defend himself in case she found that he had a case to answer. Finally, she could determine the case. According to him, had it not been that the appellant was charged with attempted rape, the trial court could have invoked section 300 of the CPA to reduce the charge if it could see that the elements of the offence were not proved. Mr. Verandumi argued that section 304 used by the trial magistrate does not mention grave sexual abuse as a cognate offence of attempted rape. In

conclusion, he reiterated his initial prayer made under section 4(2) of the AJA.

In rejoinder, the appellant concurred with the submission by Mr. Verandumi and he added that, the charge against him was not proved. He as well implored the Court to quash conviction, set aside the sentence and set him free.

Having heard the parties' submissions and considering the record of appeal, we now proceed to determine whether there was any procedural irregularity committed by the trial court. If the answer will be in the affirmative, we shall also consider whether the appellant was prejudiced.

Sections 230 and 231(a) and (b) of the CPA provides for the procedure or steps to be followed after closure of the evidence in support of the charge.

Section 230 provides:

> *"Where at the closure of charge, it appears to the court that* ***a case is not made out against the accused person*** *sufficiently to require him to make a defence either in relation to the offence with which he is charged or in relation to any other offence of which, under the provisions of section 300 and 309 of this*

Act, he is liable to be convicted the court shall ***dismiss the charge*** *and acquit the accused person."*

[Emphasis added].

Whereas section 231(a) and (b) reads:-

> *"At the closure of evidence in support of the charge, if it appears to the court that* ***a case is made against the accused person*** *sufficiently to require him to make a defence either in relation to the offence with which he is charged or* ***in relation to any other offence of which, under the provisions of section 300 and 309 of this Act,*** *he is liable to be convicted the court shall again explain the substance of the charge to the accused and inform him of this right-*
>
> *(a) to give evidence whether or not on oath or affirmation, on his own behalf; and*
>
> *(b) to call witness in his defence, and shall then ask the accused person or his advocate if it is intended to exercise any of the above rights and shall record the answer; and the court shall then call on the accused person to enter on his defence save where the accused person does not wish to exercise any of those rights."*

In the light of the above quoted provisions, it is quite clearthat section 230 of the CPA is applicable in the circumstance where the court finds out that the case is not made out against the accused person sufficiently to require him to make a defence either in relation to the offence with which he is charged or in relation to any other offence under the provisions of section 300 and 309 of the CPA. In the current appeal, the trial magistrate having found that the evidence adduced did not establish the offence with which the appellant was charged misdirected herself whenshe proceeded to withdraw the charge and acquit him.Under the provision she relied upon she was required to dismiss the charge and acquit the appellant.More so as after acquitting the appellant,the trial magistrate did not end there but she as well attempted to follow the procedurestipulated under section 231 of the CPA having formed a view that a prima facie case on a cognate offence of grave sexual abuse was established against the appellant, but in vain.

It has to be noted thatthis provision (section 231 of the CPA) gives option to the trial magistrate in case he or she finds that a *prima facie* case has been established to require the accused to make a defence in relation to the offence predicated under the provisions of sections 300 to 309 of the CPA, he is liable to be convicted.The court is required to

explain the substance of the charge to the accused and inform him of his right to defend on oath or affirmation and to call witnesses.

As intimated above, the trial magistrate in the current appeal,wrongly withdrew the charge of attempted rape instead of dismissing it and acquitted the appellant in respect of that charge. However, while relying on section 304 of CPA she went further to state that the adduced evidence established a cognate offence, to wit, grave sexual abuse andrequired the appellant to enter his plea in respect of that offence.

We agree with Mr. Verandumi that, under the provisions of section 304 of the CPA, it was not proper for the trial magistrate to require the appellant to defend on grave sexual abuse. This is due to the fact thatthe said section provides for the specific provisions under which an accused can be convicted of the offence although he was not charged with. The offence with which the appellant was chargedwas by itself a lesser offence. At any stretch of imagination, lesser offence could not again be reduced to another lesser offence. As we have already said, grave sexual abuse is not cognate offence of attempted rape.Circumstances under which a cognate offence can be established are stated under section 300 of the CPA as follows:

"300 (1) where a person is charged with an offence consisting of several particulars, a combination of some only of which constitutes a complete minor offence, and such combination is proved but the remaining particulars are not proved, he may be convicted of the minor offence although he was not charged with it.

(2) Where a person is charged with an offence and facts are proved which reduce it to a minor offence, he may be convicted of the minor offence although he was not charged with it."

According to the above provision, unless the combination of some particulars which constitutes a complete minor offence is proved, the accused can be convicted of that offence. This entails that the determination and conviction on a minor offence will be entered after closure of the parties' case during composition of judgment or determination of a case. But in the current appeal it was not the case. The trial magistrate made a finding on the purported cognate offence immediately after closure of prosecution case and thereafter required the appellant to defend contrary to the dictates of the law.We perused the record of appeal, however we could not find the substituted charge except mere words of the trial magistrate at page 23 where she stated:

"Charge is (as per ruling of court dated 15/12/2017) re-read over and explained to the accused who maintained his plea of not guilty."

The above excerpt suggests that instead of reading and explaining the purported new charge, the trial magistrate re-read the ruling on a case to answer to the appellant and required him to plead thereto. Section 228(1) of the CPA requires substance of the charge to be stated by the court and the accused be asked whether he admits or denies the truth of it.

We are guided by the previous decision of the Court in **Richard EstomihiKimei and Another v. Republic,** Criminal Appeal No. 375 of 2016 (unreported) when the Court was determining the issue as to whether the High Court Judge was right in substituting the charge of rape and entered a conviction for gang rape under section 131A (1) of the Penal Code as an alternative offence to that of rape, with which the appellants were initially charged; while making reference to section 300 (1) of the CPA it stated as follows:

"Reading carefully, subsection 1 of section 300 of the CPA as quoted herein above, requires the substituted offence to be minor and cognate to

the offence that an accused was initially charged with".

According to the above decision if the offence is not cognate to the one with which the appellant was charged, it cannot be substituted withthe initial offence he was charged with. We subscribe tothe Article by David Gwynn Morgan titled***: "Invisible Alternatives"*** In East and Central Africaretrieved on 30th June, 2012from https://www.jstor.org/stable1744479where the author states thatthe essence of substituting charge in situations where the evidence by prosecution fails to establish the offence with which the accused was charged but he has certainly committed a criminal offence of a similar type to the offence charged with, is to ensure that he does not go unpunished. The author suggested that one possible safeguard against the danger of acquitting offenders in the circumstances is for the prosecution to put alternative charges in the charge sheet whenever they foresee the difficulties in proving the charge. But this was not the case herein as the appellant was charged with only one offence of attempted rape which is a lesser offence and there is no indication in the record of appeal that he was charged in alternative.

Section 304 (1) of the CPA which was referred by the trial magistrate in the current appeal provides that:

> *"Where a person is charged with an offence under section 130 or section 132 of the Penal Code and the Court is of the opinion that he is not guilty of that offence but he is guilty of an offence under section 135, 140 and 158 of the Penal Code, he may be convicted of that offence although he was not charged with it".*

The offences under sections 135, 140 and 158 mentioned above are distinct from grave sexual abuse which is created under section 138 C (1) and (2) all of the Penal Code. Since section 138C (1) and (2) is not among the provisions stated under section 304 of the Penal Code, the trial magistrate was not justified to require the appellant to defend in respect of the offence created under that provisionon the pretext that it was a cognate offence.

We observe that, when the High Court was dealing with the issue as to whether or not the appeal before it had merits it addressed the issue concerning the legality of the act of the trial magistrate to substitute the charge against the appellant. However, we note further

that it misdirected itself as to when the said substitution was made. At page 57 of the Record of Appeal, the learned High Court Judge had this to say:

> *"The court record reveals the appellant was originally charged for (sic) the offence of attempted rape contrary to section 132 of the Penal Code (supra). However, the court record reveals further that,* ***in the course of composing its judgment, the trial court appeared to be satisfied the case against the appellant was solemnly proved on the offence of Grave Sexual Abuse in terms of section 138C (1) and (2) (b) of the Penal Code.*** *Thusunder section 304 the trial court proceeded to substitute the charge".*
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> [Emphasis Added]

We are of the settled opinion that, even if it was true as stated by the learned High Court Judge that the substitution was made during composition of the judgment, which was not, still it was a misdirection on her part to hold that the trial magistrate was right to apply section

304 of the CPA to substitute the charge of attempted rape to grave sexual abuse. The reason being that grave sexual abuse is neitherone of the offences mentioned under that provision of the law nor a cognate offence of attempted rape. Equally, we hold the view that it was as well not justified for the appellant's conviction and sentence to be sustained in the circumstances.

It is our finding that there was a grave procedural irregularity and non-observance of the law which led to the appellant's unfair trial, conviction and sentence. In the circumstances we agree with Mr. Verandumi that the appellant was prejudiced because even the substitution of the charge which he was eventually required to make his defencewas not clear. In **Richard EstomihiKimei's case** (supra) the Court stated that the accused person is entitled to know with certainty and accuracy the exact nature of the substituted charge against him and must be accorded a right of defending himself in a sense and sprit of a fair trial. In the present appeal, as intimated earlier on, the trial magistrate re-read the ruling on a case to answer which at any rate could not be equated to the charge sheet. In other words, the appellant was not made aware of the particulars of the offence of grave sexual abuse for him to make a meaningful defence.

For the reasons stated above, we allow the appeal. In terms of section 4 (2) of the Appellate Jurisdiction Act, Cap 141 RE 2019 we nullify the proceedings of both lower courts, quash conviction and set aside the sentence. We order immediate release of the appellant from prison unless otherwise he is held therein for other lawful cause.

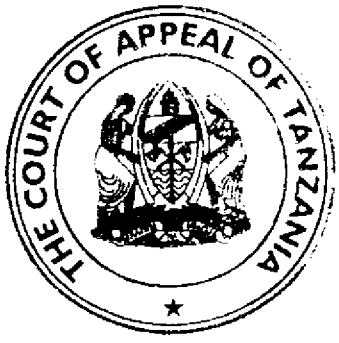
DATED at **DAR ES SALAAM** this 26th day of July, 2021

A. G. MWARIJA
JUSTICE OF APPEAL

M. C. LEVIRA
JUSTICE OF APPEAL

P.F. KIHWELO
JUSTICE OF APPEAL

The Judgment delivered this 30th day of July, 2021 in the presence of the appellant in person linked to the Court from Ukonga Prison via Video facility and Ms. Deborah Mushi, learned State Attorney for the Respondent/Republic is hereby certified as a true copy of the original.



S. J. KAINDA
DEPUTY REGISTRAR
COURT OF APPEAL