IN THE COURT OF APPEAL OF TANZANIA
AT SHINYANGA
(CORAM: WAMBALI, J.A., LEVIRA, J.A. And KAIRO, J.A.)
CRIMINAL APPEAL NO. 255 OF 2017

MAWEDA MASHAURI MAJENGA @ SIMON ..... APPELLANT

VERSUS

THE REPUBLIC .....RESPONDENT

(Appeal from the Judgment of the High Court of Tanzania at Shinyanga)

(Makani, J.)

dated the 2nd day of June, 2017
in
Criminal Sessions Case No. 80 of 2015

JUDGMENT OF THE COURT

9th & 18th August, 2021

LEVIRA, J.A.:

This is a second time Maweda Mashauri Majenga @ Simon, the appellant is appearing before the Court following the previous decision of the Court in Criminal Appeal No. 292 of 2014 ordering a retrial having found that, the High Court of Tanzania (Tabora District Registry) at Shinyanga (Songoro, J.) (the trial court) had committed procedural irregularities in Criminal Sessions Case No. 91 of 2010. Before the trial court, the appellant and 12 others who are not parties to this appeal were charged with murder contrary to section 196 of the Penal Code, Cap 16

R.E. 2002 [now R.E. 2019]. They all pleaded not guilty to the charge. However, trial could not take place against all of them as the Director of Public Persecutions (the DPP) entered *nolle prosequi* in respect of 5 accused persons. Therefore, the remaining 8 accused persons including the appellant went through a full trial which ended by finding only the appellant guilty. He was convicted and sentenced to death by hanging. Other accused persons were acquitted. Aggrieved by that decision, the appellant appealed to the Court where a retrial was ordered as introduced above.

In compliance with the order of the Court, the High Court of Tanzania at Shinyanga (Shinyanga Registry) sitting at Maswa (Makani, J.) vide Criminal Sessions Case No. 80 of 2015 retried the appellant. In its decision (subject of the current appeal) which was delivered on 2nd June, 2017, the High Court convicted the appellant of murder and sentenced him to suffer death by hanging.

Our thorough perusal of the record of appeal revealed at page 26 that, on 22nd May, 2017 during retrial the information for murder was duly served on the appellant and the same was read over and explained to him. He pleaded not guilty to the charge. It is important to note that the

information which was read over to the appellant was the same information which was initially lodged with the trial court on 16th August, 2011 before the retrial order by the Court. The said information was against all 8 accused persons who were initially charged including the 7 accused persons who were acquitted by the trial court. We think, it is equally important to note at the outset that in her judgment found at page 147 of the record of appeal, the learned High Court Judge stated categorically that, the accused (appellant herein) in collaboration with other villagers murdered the deceased (Nseka Tunge). In that sense, it is our observation that the learned Judge was referring to the other accused persons who were mentioned in the particulars of the offence in the previous information who were acquitted by the trial court before the appellant lodged Criminal Appeal No. 292 of 2014 alluded to above, which we think, was not proper. We say so because in reality, it was only the appellant who was retried and thus, in our considered view, any reference to the then accused persons be it in the information, evidence or judgment was made out of context.

Having observed that anomaly, at the hearing of the appeal, we *suo mottu* invited the parties to address us on it before considering the

grounds of appeal appearing in the Memorandum of Appeal presented before us. Thus, for reasons that will shortly come into light, we shall not reproduce the appellant's grounds of appeal. Suffices here to state that the appellant presented six grounds of appeal against the decision of the High Court. The appellant was represented by Mr. Jacob Mayala Somi, learned advocate, whereas the respondent, Republic had the service of Ms. Salome Mbughuni, learned Senior State Attorney who was assisted by Ms. Caroline Mushi, learned State Attorney.

Addressing the Court on the issue we raised *suo mottu*, Ms. Mbughuni admitted that the information which was read over to the appellant during retrial was the old one, a fact which she said, was not proper. According to her, the prosecution was supposed to amend the information to reflect only the appellant as an accused person, but that was not done. However, Ms. Mbughuni went on to throw a blame to the trial court stating that, in terms of section 276 (2) of the Criminal Procedure Act, Cap 20 R.E. 2019 (the CPA) it ought to have ordered amendment of the information, but it failed to do so. Hesitantly, she submitted further that even the prosecution side had the obligation to ensure that the information was amended under section 276 of the CPA.

Besides, she argued that the appellant was not prejudiced by such an anomaly because during retrial he understood that he was charged alone. In the circumstances, she prayed for the proceedings to be nullified, conviction quashed, sentence set aside and the Court to order a retrial of the appellant.

On his part, Mr. Somi partly supported the submission by Ms. Mbughuni in regard to the defectiveness of the information but opposed the prayer for a retrial. He argued that, it will be unfair for the Court to order a retrial of the appellant for the second time. Much as he agreed that it was wrong for the High Court to rely on the previous charge to prosecute, convict and sentence the appellant. It was his further argument that the appellant should not continue to be punished for what he referred as the prosecution's negligence.

We have judiciously considered submissions by the counsel for the parties and the record of appeal and we need to consider two issues, to wit; **one,** whether it was proper for the High Court to rely on the previous information while conducting a retrial and **second,** what is the way forward.

In resolving the first issue, we think we should state at the outset that circumstances of the current case are peculiar due to the reasons that, the appellant was initially charged with other accused persons who were acquitted by the first trial court however, when retried the particulars of the previous information which included those other accused persons were used to re-prosecute him without either amendment or substitution and the evidence which indicated that the offence was committed jointly with others was relied upon by the High Court to convict the appellant. Section 276 (2) of the CPA provides that: -

> *"Where before a trial upon information or at any stage of the trial it appears to the court that the information is defective, the court shall make an order for the amendment of the information as it thinks necessary to meet the circumstances of the case unless, having regard to the merits of the case, the required amendment cannot be made without injustice; and all such amendments shall be made upon such terms as to the court shall seem just."*

In the current case as introduced above, the High Court did not order amendment of the information having seen the citation and particulars of offence mentions names of other accused persons who were not arraigned

before her as required under the law. Though the retrial was conducted before the High Court at Shinyanga, the information which was relied upon by the trial High Court Judge reads as follows: -

"IN THE HIGH COURT OF UNITED REPUBLIC OF TANZANIA

AT TABORA REGISTRY

CRIMINAL SESSIONS CASE No. 91 0f 2010

REPUBLIC

VERSUS

1. ***JUMA S/O THEONEST @ NDIMILA***
2. ***TEME s/O ELIAS KAHEMA @ MAHUYENGA***
3. ***JOHN S/O KABOLE @ ATHUMAN***
4. ***MASALU S/O NDEGEISWA***
5. ***YOMBO S/O MALYATABU MASAMAKI @ ZEPHANIA***
6. ***MAWEDA S/O MASHAURI MAJENGA @ SIMONI***
7. ***SHIJA S/O GAGA NHINDILO @ SIMONI MWANAMATU***
8. ***BULEKELE S/0 KEYA KISINZA***

At the session to be held at ... on the...day of ... 20...the court is informed by the Director of Public Prosecutions on behalf of the Republic that ***JUMA S/O THEONEST @ NDIMILA, TEME S/O ELIAS KAHEMA @ MAHUYEMBA, JOHN S/O KABOLE @ ATHUMAN, MASALU S/O NDEGEISWA, YOMBO S/O MALYATABU MASAMAKI @ ZEPHANIA, MAWEDA S/O MASHAURI MAJENGA @ SIMON, SHIJA S/O GAGA MHINDILO @ SIMON MWANAMATO and BULEKELE S/O KEYA KISINZA*** *are*

jointly and together charged with the following offence that is to say:

STATEMENT OF THE OFFENCE

MURDER, *contrary to section 196 of the Penal Code [CAP 16 R.E. 2002]*

PARTICULARS OF OFFENCE

JUMA S/O THEONEST @ NDIMILA, TEME S/O ELIAS KAHEMA @ MAHUYEMBA, JOHN S/O KABOLE @ ATHUMAN, MASALU S/O NDEGEISWA, YOMBO S/O MALYATABU MASAMAKI @ ZEPHANIA, MAWEDA S/O MASHAURI MAJENGA @ SIMON, SHIJA S/O GAGA NHINDILO @ SIMON MWANAMATO and BULEKELE S/O KEYA KISINZA *on 30th day of May 2006 at about 00:05 hours at Kilalo Village within Bariadi District in Shinyanga did* ***MURDER*** *one* ***NSEKA D/O TENGE (WEO).***

Dated at Shinyanga this 16th day of August 2011.

Sgd
T.A. Vitalis
SENIOR STATE ATTORNEY"

The above extract is a clear evidence that apart from the title of the court, the particulars of offence did not support the statement of offence and the reality; in that, the appellant was the only accused person who was arraigned before the High Court during retrial. He was not charged jointly and together with anybody and thus the particulars of offence ought not to have indicated the names of other people who were not parties to

that retrial. However, according to the above information, it was indicated that the appellant was charged jointly and together with other people, a defect, which in our view, rendered the information void *ab initio.* We need to emphasize here that, the format and mode in which offences are charged are governed by sections 132 and 135 of the CPA. In terms of section 132 of the CPA, offences must be specified in the charge or information with necessary particulars. For easy of reference that section provides: -

> *"132. Every charge or information shall contain, and shall be sufficient if it contains, a statement of the specific offence or offences with which the accused person is charged, together with such particulars as may be necessary for giving reasonable information as to the nature of the offence charged."*

The law is settled that charge sheet is a foundation of criminal proceedings upon which a criminal case is built - See the case of **Rajabu Khamisi @Namtweta v. Republic**, Criminal Appeal No.578 0f 2019 and **Samwel Lazaro v. Republic**, Criminal Appeal No.68 0f 2017 (both unreported). Therefore, the learned trial Judge ought to have considered that since she was dealing with a single accused, the information was

defective and proceed to make an order for its amendment to meet the circumstances of the case as legally, she could not proceed without a base or foundation, but that was not done. Failure to do so at the commencement of the trial, in our considered view, had carried away her mind all along thinking that she was dealing with more than one accused person as it can be observed in the judgment at page 147 of the record of appeal where she stated: -

> *"The prosecution alleged that on 30/05/2006 at Kilalo village, Bariadi District, then Shinyanga Region; the deceased Nseka Tunge, who was the Ward Executive Officer (WEO),* ***was murdered by the accused in collaboration with other villagers*** *on allegations of theft of cotton pesticides in cooperation with one Richard Felix, the Village Executive Officer (VEO)."* [Emphasis added].

Moreover, at page 167 of the record of appeal the trial Judge continued: -

> *"When a group of people beat a single person with sticks, stones, clubs, spears and machetes the intention is not to punish but to kill."*

However, she concluded at page 170 of the record of appeal as follows: -

*"I am satisfied that the **acts by the accused person** were unlawful and were intended to take away the life of the deceased. In that respect, I hereby convict Maweda Mashauri Majenga @ Simon with the murder of Nseka d/o Tunge contrary to section 196 of the Penal Code."* [Emphasis added].

We wish to state that, despite the fact that the trial Judge's mind was swayed away by the said defective information, it was equally a responsibility of the prosecution side to make sure that they do not proceed with the information which was defective *abinitio.* In this regard, we wish to reiterate what was stated in **Sali Lilo v. Republic**, Criminal Appeal No. 431 of 2013 (unreported) that: -

*"We take this opportunity to remind the trial courts to take note of the observation made in the case of **Mohamed Komingo v. R** [1980] T.L.R. 279 that: "While it is the duty of the prosecution to file charges correctly, those presiding over criminal trials should; **at the commencement of the hearing make it a habit of perusing the charge as a matter of routine to satisfy themselves that the charge is iaid correctly, and if not to require that it be amended accordingly".*** [Emphasis added].

In the light of the above decision and having quickly glanced at the record of appeal, we find that the appellant in the present case was prejudiced and since the information was defective, it vitiated the whole proceedings against him. We agree with counsel for the parties that the proceedings and the decision of the trial High Court were a nullity.

The question that follows from the second issue is what is the way forward; whether we should order a retrial as prayed by the counsel for the respondent or release the appellant as prayed by his counsel. Circumstances under which a retrial can be ordered are well stated in a number of decisions including, **Fataheli Manji v. Republic** (1966) EA 341, **Merali and Others v. Republic** (1971) HCD 145, **Juma Mhagama v. Republic,** Criminal Appeal No 71 of 2011, **Shabani Abdallah v. Republic,** Criminal Appeal No. 255 of 2013 and **Samwel Lazaro v. Republic,** Criminal Appeal No. 68 of 2017 (all unreported) to mention but a few. In the former case, the defunct East Africa Court of Appeal held 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, each case must depend on its own facts and circumstances and an order for retrial should only be made where the interests of justice require it ...."

Furthermore, the principles for ordering a retrial featured in the case of **Ahamed Ali Dharamsi Sumar v. Republic** (1964) E.A. 481, in which the appellant challenged a retrial order issued by the High Court. The defunct East Africa Court of Appeal held that: -

"Whether an order for retrial should be made depends on the particular facts and circumstances of each case but should only be made when the interests of justice require it and where it is likely not to cause injustice to an accused."

Being guided by the above decision, we entertain no doubt in our mind that, having been charged under a fatally defective charge, the appellant was prejudiced. This is because, it is as good as there was no charge laid down against him; as we stated so in the case of **Mussa Nuru @ Sahuti v. Republic**, Criminal Appeal No.66 of 2017 that: -

"...since the charge sheet was incurably defective, there is no charge upon which the Court could order a retrial against the appellant."

Similarly, having considered the defectiveness of the information laid down against the appellant, we think, ordering a retrial in the circumstances of this case is tantamount to causing injustice to him. It is settled position that a fatally defective charge cannot commence a lawful trial – See **Oswald v. Republic,** Criminal Appeal No. 153 of 1994; **Hassan Jumanne @ Msigwa v. Republic,** Criminal Appeal No. 290 of 2014 and **Sylvester Albogast v. Republic,** Criminal Appeal No. 309 of 2015 (all unreported).

We are settled in our mind that in the present case the information was incurably defective. The appellant was entitled to face charges that indicated that he was solely responsible for the commission of the offence to make him prepare the defence. We are satisfied that the particulars in the information alleging commission of the offence with others who were not at the trial must have embarrassed and prejudiced the appellant in his defence. Therefore, we decline the invitation by Ms. Mbughuni who implored us to order a retrial. Consequently, we invoke our revisional jurisdiction under section 4(2) of the AJA and we proceed to nullify

proceedings of the High Court in Criminal Sessions Case No. 80 of 2015, quash the appellant's conviction and set aside the sentence. We order immediate release of the appellant unless otherwise he is lawfully held in prison.

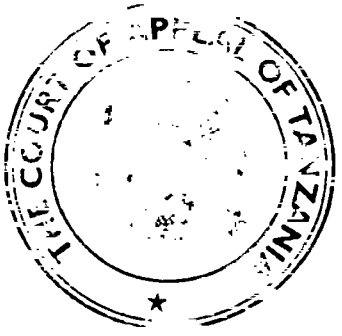
DATED at **SHINYANGA** this 16th day of August, 2021.

F. L. K. WAMBALI
JUSTICE OF APPEAL

M. C. LEVIRA
JUSTICE OF APPEAL

L. G. KAIRO
JUSTICE OF APPEAL

The judgment delivered this 18th day of August, 2021 in the presence of Mr. Jacob Mayala Somi, learned counsel for the appellant and Ms. Salome Mbughuni, learned Senior State Attorney for the respondent/Republic is hereby certified the true copy original.



D. R. LYIMO
DEPUTY REGISTRAR
COURT OF APPEAL