

**IN THE COURT OF APPEAL OF TANZANIA**  
**AT DAR ES SALAAM**  
**(CORAM: MWARIJA, J.A., LEVIRA, J.A., AND MWAMPASHI, J.A.)**  
**CRIMINAL APPEAL NO. 59 OF 2019**

**OMARY JUMA LWAMBO..... APPELLANT**

**VERSUS**

**THE REPUBLIC..... RESPONDENT**

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

**(Mgetta, J.)**

dated the 21<sup>st</sup> day of September, 2019

in

**HC. Criminal Appeal No. 44 of 2018**

.....

**JUDGMENT OF THE COURT**

14<sup>th</sup> Jul & 3<sup>rd</sup> Sept, 2021

**MWARIJA, J.A.:**

In the District Court of Temeke, the appellant was charged with and convicted of unnatural offence contrary to section 154 (1) (a) and (2) of the Penal Code [Cap. 16 RE. 2002, now RE. 2019] (the Penal Code). According, to the amended charge, it was alleged that on 28/7/2016, at Tandika Azimio area within Temeke District in Dar es Salaam Region, the appellant did have carnal knowledge of one "S.J" (name withheld for the purpose of hiding his identity), a boy aged ten (10) years against the order of nature.

The appellant denied the charge and as a result, the case proceeded to a full trial at which, whereas the prosecution relied on the evidence of three witnesses including the victim who testified as PW1, the appellant was the only witness for his defence. The evidence of the prosecution witnesses was tendered before the charge was substituted on 27/10/2017. The original charge showed that the offence was committed on unknown date in January 2016 against a different child aged twelve (12) years who also, for the purpose of disguising his name, is hereby referred to as "R.H."

At the conclusion of the trial, the learned trial Resident Magistrate was satisfied that the charge laid against the appellant as per the amended charge had been proved beyond reasonable doubt. Eventually, the trial court convicted and sentenced the appellant to life imprisonment.

Aggrieved by the decision of the trial court, the appellant unsuccessfully appealed to the High Court hence this second appeal. In his memorandum of appeal, the appellant has raised seven (7) grounds of appeal. However, for the reasons which will be apparent herein, we will not consider those grounds of appeal.

As stated above, the evidence of the prosecution witnesses was based on the charge which was later amended. The amended charge was filed on 23/10/2017 after the prosecution had closed its case. From the record, after substitution of the charge, the provisions of s. 234 (a) and (b) of the Criminal Procedure Act [Cap. 20 RE. 2002, now RE. 2019] (the CPA) were not complied with. Neither was the appellant's plea taken afresh nor was he informed of his right to require that the witnesses or any of them be recalled to give evidence afresh or be cross-examined. We thus required the learned State Attorney to address us on the effect of that procedural irregularity.

At first Ms. Mushi, learned State Attorney who appeared for the respondent Republic submitted that the omission was not fatal because, according to her, the appellant was not prejudiced by the irregularity as he understood the nature of the charge. When the nature of the defects which resulted into amendment of the charge was drawn to her attention however, the learned State Attorney conceded that, since the nature of the variance between the charge and evidence did not only concern the date on which the offence was committed but also the victim of the offence, the omission to comply with the provisions of s. 234 (2) (a) and (b) was a fatal irregularity. She urged us to exercise the powers of

revision vested in the Court by s. 4 (2) of the Appellate Jurisdiction Act [Cap. 141 RE. 2019] (the AJA) and nullify the proceedings of the trial court from the date when the substituted charge was filed, quash the proceedings of the High Court, set aside the judgments of the two courts below and order a retrial.

The appellant, who appeared in person and without representation by a counsel, did not have any substantial reply submission to make. He urged us to consider that he is unknowledgeable in law and therefore, allow his appeal on the basis of his grounds of appeal.

Having heard the parties on the point of law concerning non-compliance with s. 234 (1) and (2) of the CPA, we are of the settled mind that the omission is fatal. When a charge is substituted, the above stated provisions of the CPA require that the accused person should be called upon to plead and thereafter, be informed of his right to require a recalling of the witnesses who had testified to either give evidence afresh or be further cross- examined. The provisions state as follows;

*" 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 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 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...”*

Before the substitution of the charge the particulars of the offence on which the appellant was arraigned, indicated that the victim was “R.M”, a boy aged 12 years and the offence was shown to have been committed on unknown date in January, 2016. In the substituted charge however, it is shown that the offence was committed against a different

person, "S.J." between the month of January and 28/7/2016. From the record, the substituted charge was neither read over to the appellant so that his plea could be taken nor was he informed of his right to require a recalling of the witnesses. What transpired on the date on which the charge was substituted is as follows;

*"27/02/2017*

*Coram: Hon. Mfanga -RM*

*PP: Violeth*

*CC: Hidaya*

*Accused: Present*

*Pros: For hearing. Pray to amend charge*

*sheet and close the prosecution.*

*Court: Prayer granted charge is hereby*

*amended.*

*Signed*

*Hon. Mfanga – RM*

*27/10/2017*

*Court: Prayer granted Prosecution case is*

*hereby closed.*

*Signed*

*Hon. Mfanga – RM*

*27/10/2017*

As can be gleaned from the above excerpt from the trial court's proceedings, the two conditions stipulated under s. 234 (2) of the CPA were not complied with. Although it would appear from the record that the appellant's plea was taken because of the words "*and read to accused who enters a plea of not guilty*", those words which appear on page 21 of the record (the typed proceedings) immediately after the words "*Prayer granted charge is hereby amended*", are hand written. The same words which also appear in the original record show that they were inserted by use of different ink. In our considered view, that raises doubt as to whether the appellant's plea was really taken. In any case, it is trite law that when a charge is read over to an accused person, his plea must be recorded as nearly as possible in the words used by him-see s. 228 (2) of the CPA which states as follows:

*"228 – (1) 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.*

*(2) If the accused person admits the truth of the charge, his admission shall be recorded as nearly as possible in the words he uses and the magistrate shall convict him and pass sentence upon or make an order against him, unless there appears to be sufficient cause to the contrary".*

As stated above, the omission to comply with the provisions of s. 234 (2) (a) of the CPA renders the proceedings a nullity. In the case of **Tluway Akonaay v. Republic** [1987] T.L.R 92, the Court had this to say on the effect of such an omission;

*"It is mandatory for a plea to a new or altered charge to be taken from an accused person, as otherwise the trial becomes a nullity."*

See also the cases of **Riziki Jumanne v. Republic**, Criminal Appeal No. 370 of 2019, **Balole Simba v. Republic**, Criminal Appeal No. 525 of 2017 and **Hassan Said Twalib v. Republic**, Criminal Appeal No. 91 of 2019 (all unreported). In the latter case, relying on *inter alia*, the cases of **Athumani Mkwela and 2 Others v. Republic**, Criminal Appeal No.



173 of 2010 and **Shabani Isack @ Magambo and Anr. v. Republic**, Criminal Appeal Nos. 192 and 218 of 2012 (both unreported), the Court similarly held that the omission renders the proceedings a nullity. In the said case, the Court had this to say:

*"Being guided by the above cited authorities, we are in agreement with the learned Senior 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."*

The above being the effect of a failure by a trial court to comply with s. 234 (1) and (2) of the CPA after substitution or alteration of a charge, we similarly find that, in this case, the omission rendered the proceedings which followed after the date of substitution of the charge, a nullity. In the exercise of the powers of revision vested in the Court by s. 4 (2) of the AJA therefore, we hereby nullify those proceedings. As a consequence, the judgment of the trial court as well as the proceedings and the judgment of the High Court are hereby quashed.

On the way forward, we order a retrial from the stage at which the charge was substituted on 27/10/2017. The appellant to remain in custody pending his retrial.

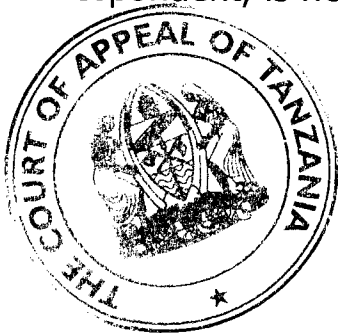
**DATED at DAR ES SALAAM this 2<sup>nd</sup> day of September, 2021.**

A. G. MWARIJA  
**JUSTICE OF APPEAL**

M. C. LEVIRA  
**JUSTICE OF APPEAL**

A. M. MWAMPASHI  
**JUSTICE OF APPEAL**

The Judgment delivered on this 3<sup>rd</sup> day August, 2021, in the presence of Appellant unrepresented- present in person linked - via video conference at Ukonga Prison and Ms. Edith Mauya, State Attorney for the respondent, is hereby certified as a true copy of the original.



  
B. A. MPEPO  
**DEPUTY REGISTRAR**  
**COURT OF APPEAL**