IN THE COURT OF APPEAL OF TANZANIA

AT SHINYANGA

(CORAM: MKUYE, J.A., GALEBA, J.A., And KAIRO, J.A.)

CRIMINAL APPEAL NO. 136 OF 2018

MARIKO JIDENDELE ..... APPELLANT

VERSUS

THE REPUBLIC..... RESPONDENT

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

(Makani J.)

dated the 13th day of April, 2018
in
DC. Criminal Appeal Case No. 114 of 2016

.....

JUDGMENT OF THE COURT

8th& 22nd July, 2022

MKUYE, J.A.:

In the District Court of Maswa at Maswa, the appellant Mariko Jidendele faced a charge of unnatural offence contrary to section 154 (1) (a) of the Penal Code [Cap 16 R.E. 2002; now R.E. 2022]. It was alleged that, on 8th January, 2016 at about 10:30 hours at Nyabubinza village within Maswa District in Simiyu Region, the appellant did have carnal knowledge of one A. s/o R. (name withheld to conceal his identity) against the order of nature. In order to prove the case, the prosecution marshalled six (6) witnesses while for the defence, the appellant was the sole witness who testified. Also, the prosecution tendered two (2) documents which were admitted as

exhibits P1 and P2. After a full trial, the appellant was convicted and sentenced to life imprisonment. His appeal at the High Court was unsuccessful. Still undaunted, the appellant has preferred this appeal on six (6) grounds of appeal, which for a reason that will shortly come to light, we do not intend to reproduce them.

At the hearing of the appeal, the appellant appeared in person without any representation; whereas the respondent Republic was represented by Ms. Verediana Peter Mlenza, learned Senior State Attorney assisted by Mr. Jukael Reuben Jairo and Ms. Rehema Sakafu, both learned State Attorneys.

When availed an opportunity to amplify his grounds of appeal, the appellant in the first place prayed to the Court to adopt them and exercised his option to let the learned State Attorneys respond to the grounds first, while reserving his right to rejoin later, if need would arise.

At the outset, Ms. Mlenza declared their stance by stating that they supported the appeal but on a different ground from those raised by the appellant. She contended that on 14th January, 2016, when the appellant was arraigned before the trial court for the first time to answer the charge, he complained that he did not know

Swahili language. Then, upon appointment of Mathias Charles and sworn as an interpreter, the appellant was able to enter his plea. The learned Senior State Attorney went on submitting that, on 29th January, 2016 four witnesses, that is, PW1, PW2, PW3 and PW4 testified with the aid of the interpreter. However, on 17th February, 2016 when PW5 and PW6 testified until the prosecution closed its case there was no interpreter who was provided. It was submitted further that even the address to the appellant in terms of section 231 of the Criminal Procedure Act [Cap 20 R.E. 2022] (the CPA) was conducted without the interpreter.

Ms. Mlenza submitted further that, during defence on 11th March, 2016, the hearing proceeded with the aid of the interpreter, one, Mathias Charles who was appointed and sworn by the trial court following the appellant's complaint that he did not know Swahili language. Nevertheless, the learned Senior State Attorney went on submitting that, at the delivery of the trial court's judgment, the hearing of the appeal before the first appellate court and when the judgment of the High Court was delivered the record does not show that the interpreter was provided.

Ms. Mlenza was of the view that, in the circumstances where the interpreter was involved in some instances but not in others, it amounted into a procedural irregularity which vitiated the proceedings as the appellant was not accorded with his right of fair trial, more so, when taking into account that, it is a cardinal principal that a person cannot be condemned without being fairly heard.

In this regard, she implored the Court to invoke section 4 (2) of the Appellate Jurisdiction Act [Cap 141 R.E. 2019] (the AJA) and nullify the proceedings of the trial court from page 18 or 16 of the record of appeal when the matter was heard without the aid of the interpreter as well as the proceedings of the High Court and its judgment, quash the conviction and set aside the sentence meted out against the appellant and order a retrial since there is sufficient evidence to do so.

Before the appellant could respond, and in order to avoid from falling into the trap the two courts below fell into of not providing an interpreter, we appointed, one, Benjamin Daudi Dotto as an interpreter from Swahili language to Sukuma language and vice versa. Upon being sworn as required by law, he interpreted what was submitted by the learned Senior State Attorney in Sukuma

language to the appellant who after having understood what was translated to him, he concurred with her submission. However, as for the way forward, he being a lay person, left it to the Court to determine.

We have examined the record of appeal and considered the submissions of both parties and, we think, the issue for this Court's determination is whether the issue raised by Ms. Mlenza is tenable.

The issue relating to the provision or otherwise of the interpreter to the accused who does not understand the evidence given in a language not understood by him is governed by section 211(1) of the CPA. The said section stipulates as follows:

> *"211(1) Whenever any evidence is given in a language not understood by the accused and he is present in person, it shall be interpreted to him in open court in a language understood by him."*

Basically, the above cited provision makes a mandatory requirement for the accused to whom it appears to the court that he does not understand the evidence given in a language not understandable to him to be provided with an interpreter who will

assist him/her to understand the proceedings of his case in the language he understands.

The provisions of section 211 (1) of the CPA were interpreted in the case of **Dastan Makwaya and Another v. Republic,** Criminal Appeal No. 179 of 2017 (unreported), where this Court stated that:

> *"Section 211(1) of the CPA requires that, whenever it appears an accused person does not understand the language spoken during the proceedings of the case, an accused person should be provided with an interpreter so as to enable him understand the proceedings of his case. The omission not to comply with the requirements of section 211(1) of the CPA renders the proceedings of the case null and void."*

As regards the consequences of failure to comply with section 211 (1) of the CPA or rather to provide the interpreter, this Court in the case of **Joachim Ikwechukwu Ike v. Republic,** Criminal Appeal No. 272 of 2016 (unreported) while citing the case of **Mpemba Mponeja v. Republic,** Criminal Appeal No. 256 of 2009 (unreported) stated in no uncertain terms that:

> *"We have perused the record and noted with concern that at times an interpreter was*

provided and at times not. We consider this to be fundamental breach of the appellant's right to understand and follow up proceedings of the case against him. It was a fatal omission."

[See also **Lekani Lokondorotu and Another v. Republic,** Criminal Appeal No. 338 of 2015 (unreported)].

In this case, we agree with Ms. Mlenza's line of argument. Having gone through the record of appeal, we have observed that, on 14th January 2016 when the charge was read over to the appellant, he pleaded that *"I do not know Swahili language."* Then, the trial court noted that the interpreter was required whereupon it appointed one Mathias Charles who was an Office Attendant at Maswa District Court and upon having been sworn as required by law, the appellant entered a plea of not guilty and the matter proceeded with preliminary hearing to its conclusion with the aid of the interpreter. It is also notable that on 29th January, 2016 the trial court appointed one Tabu Lushinge (the Court Clerk) to be the court interpreter. On that date four (4) witnesses testified as shown at pages 7 to 18 of the record of appeal with the aid of the said interpreter. However, on 17th February, 2016, which was the date scheduled for continuation of the hearing, the record is silent as to

whether or not there was an interpreter although it is clear that PW5 testified as shown at pages 18 to 20 of the record of appeal. Also, on 3rd March, 2016 PW6 testified (See pages 21 to 22) without the interpreter and that is when the prosecution closed its case and the trial court gave its ruling on a case to answer which appears to have been also delivered in the absence of the interpreter. Similarly, as was correctly submitted by the learned Senior State Attorney, it is apparent from page 24 of the record of appeal that the appellant was addressed in terms of section 231 of the CPA and his response thereof were conducted in the absence of the interpreter.

However, on 11th March, 2016 when the appellant was subjected to affirmation before giving his defence evidence, he again complained that he did not know Swahili language and it is in record that Mathias Charles who was initially appointed, was reappointed and sworn and thus the appellant testified with the aid of an interpreter (see page 25 of the record of appeal).

That was not the end, the record shows that the trial court's judgment was delivered on 30th March, 2016 but it is not shown if the interpreter was present. It appears that even the High Court fell into the same trap because it is not shown in the record of appeal if the

interpreter was involved in the High Court's proceedings particularly during the hearing of the appeal and when the judgment was delivered on 13th April, 2018.

As it is, it quite clear that in this case the interpreter was provided in certain times and at times was not provided. Incidentally, no reasons are shown in the record why interpretation was done in some incidences and in other incidences was not done. In an akin situation in the case of **The DPP v. Hanna Pondo Kasambala,** Criminal Appeal No. 464 of 2017 (unreported), the Court observed that:

> *"In the case at hand, the trial court wrongly assumed that the respondent only required an interpreter at the stage of her defence while she was not so provided when she was called upon to plea to the charges and when the prosecution testified."*

The Court, then, declared that the omission was a fatal omission which vitiated the proceedings.

Eventually, applying the principle stated in the above cited case of **Hanna Pondo Kasambala** (supra) as well as the case of **Dastan Makwaya and Another** (supra) and **Joachim Ikwechukwu Ike**

(supra), it is our considered view that failure to comply with section 211 of the CPA was a fundamental breach of the appellant's right to understand the proceedings of the case he was facing which omission was fatal. The anomaly vitiated the entire proceedings which renders the proceedings together with the resultant judgments null and void. Unfortunately, this anomaly went unnoticed by the High Court.

In this regard, we agree with Ms. Mlenza that the omission committed by the trial magistrate amounts to a fatal irregularity which vitiated the appellant's right of fair trial. It, therefore, renders the proceedings from page 18 of the record of appeal up to the end a nullity.

Consequently, by virtue of the revisional powers bestowed on us under section 4 (2) of the AJA, we hereby nullify the proceedings of the trial court from page 18 of the record of appeal and the proceedings of the High Court together with the resultant judgments of the two courts below, we quash the conviction and set aside the sentence imposed on the appellant.

As to the way forward, we equally agree with Ms. Mlenza that the order for a retrial would be ideal. Having perused the entire

record of appeal and considered the circumstances of this case, we think, the interest of justice requires that an order for the retrial should be issued.

In the event, having nullified the proceedings to the extend we have stated and judgments of both two courts below, quashed the conviction and set aside the sentence imposed on the appellant, we order for a retrial according to law from page 18 of the record of appeal until the conclusion of the matter.

It is so ordered.

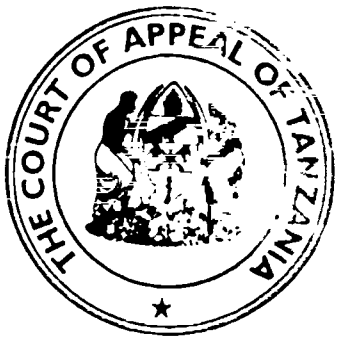
DATED at **SHINYANGA** this 22nd day of July, 2022.

R. K. MKUYE
JUSTICE OF APPEAL

Z. N. GALEBA
JUSTICE OF APPEAL

L. G. KAIRO
JUSTICE OF APPEAL

The judgment delivered this 22nd day of July, 2022 in the presence of the appellant in person, and Ms. Caroline Mushi, State Attorney for the Respondent/Republic is hereby certified as a true copy of the original.



W. S. Ng'humbu
DEPUTY REGISTRAR
COURT OF APPEAL