IN THE COURT OF APPEAL OF TANZANIA
AT DAR ES SALAAM

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

CRIMINAL APPEAL NO. 91 OF 2021

ALLY NGALEBA ..... APPELLANT

VERSUS

THE REPUBLIC..... RESPONDENT

(Appeal from the decision of the Resident Magistrate Court of Dar es Salaam with Extended Jurisdiction at Kitusu, Dar es Salaam)

(Mwilapwa, PRM EXT. JUR.)

Dated the 28th day of September, 2020
in
Ext. Jur. Criminal Appeal No. 8 of 2020

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JUDGMENT OF THE COURT

20th September & 20th October, 2022

WAMBALI, JA.:

On 5th March 2018, the appellant, Ally Ngaleba appeared before the District Court of Ilala at Samora Avenue, Dar es salaam in Criminal Case No. 128 of 2018, where he stood charged with the offence of rape contrary to sections 130 (1) (2) (e) and 131 (1) of the Penal Code [Cap. 16 R.E. 2002] (now R.E. 2022) (the penal code). It was alleged in the particulars in support of the charge that, on 29th January, 2018 at Kinyerezi King'azi area within

Ilala District in Dar es salaam Region, the appellant had carnal knowledge of "IA", "a girl aged 9 years old". The appellant contested the allegation, hence a full trial was held.

To support its case, the prosecution sought the assistance of four witnesses; namely, Irene Andrew (PW1), a girl aged 9 years old (PW2), who for the purpose of protecting her identity we will refer her as "PW2" or "the victim", Theresia Fabian Makame (PW3) and W. 5051 DCPL Happiness. In addition, a Police Form No. 3 (PF3) was tendered and admitted as exhibit P1.

On his part, the appellant defended himself as DW1 and summoned three witnesses, namely, Salum Abdallah Lwambo (DW2), Mvungaja Sakina (DW3) and Rashid Shabani Malika (DW4) to support his defence.

As it were, at the end of the trial, the trial magistrate considered the totality of the evidence received, including the appellant's story, and concluded that the evidence against him was overwhelming. He found as a fact, that the appellant raped PW2 on the material day, hence he recorded a guilty verdict, convicted and sentenced him to life imprisonment.

The appellant's attempt to upset the findings of the trial court was in vain, as his appeal, the subject of this appeal was dismissed in its entirety

by the Principal Resident Magistrate with Extended Jurisdiction who presided over the proceedings at the Resident Magistrate Court of Dar es salaam at Kisutu (the first appellate court). As a result, he has approached the Court to contest the decision of the first appellate court. The dissatisfaction of the appellant with the decision of the first appellate court is vividly expressed through the substantive and supplementary memoranda of appeal comprising sixteen (16) grounds of appeal. However, for the reason to be apparent shortly, we do not find it important to either revisit the detailed analysis of the facts of the case or reproduce the respective grounds of appeal herein.

At the hearing, the appellant appeared in person, unrepresented, whereas Ms. Deborah Mushi assisted by Ms. Veronica Mtafya, both learned State Attorneys, appeared for the respondent Republic.

Before we considered the appellant's grounds of appeal, we inquired from the parties whether the trial court's proceedings which led to his conviction and sentence were procedurally fair. We posed the question because according to the record of appeal, at the trial, though the appellant pleaded to the charge in which he was alleged to have raped Irene Andrew (PW1), an adult aged 28 years old it is apparent that he was ultimately

convicted for committing the alleged offence against PW2, a girl aged 9 years old contrary to section 130 (1) (2) (e) and sentenced to life imprisonment under section 131(3) of the Penal Code.

Responding, Ms. Mushi outrightly conceded that the trial court's proceedings were a nullity because before the conviction of the appellant was entered, the charge sheet in which he pleaded not guilty was not formally amended or substituted to remove the name of PW1 and replace it with that of PW2, the alleged victim, who featured in the evidence on record. She elaborated that though according to the record of appeal there is an indication that on 11th June, 2018, someone crossed the name of PW1 and replaced it with that of PW2 using a pen and signed. He contended that the procedure which was adopted by trial was not proper. She argued further that in terms of section 234 (1) of the Criminal Procedure Act [Cap. 20 R.E. 2022] (the CPA), the trial court was supposed to cause an amendment to the charge sheet to cure the defects before it convicted the appellant. As that was not done, she argued, the charge sheet remained defective, and as such, it cannot be cured under the provisions of section 388 of the CPA. In her submission, the omission is incurable at this stage because throughout the trial, the appellant stood charged with an allegation of raping PW1 who

was not the victim of rape. She maintained that the charge sheet could not have been simply rectified by crossing the name of PW1 and replacing it with that of PW2 as it was done in the present case without a formal order of the court.

Ms. Mushi therefore submitted that owing to the defectiveness of the charge, the entire proceedings of the trial and first appellate courts are a nullity as miscarriage of justice was occasioned to the appellant.

In the circumstances, the learned State Attorney urged the Court to nullify the proceedings of both the trial and first appellate courts, quash conviction and set aside the sentence imposed on the appellant, and hereby order his immediate release from custody.

The learned State Attorney's submission was strongly supported by the appellant, who similarly urged us to release him from custody on the contention that he did not commit the offence he was charged with at the trial court. He emphasized that the first appellate court wrongly concurred with the findings of the trial court amid the defective charge.

It is apparent from the record of proceedings of the trial court that, the charge sheet which was read over and explained to the appellant on 5th March, 2018 indicates that he was alleged to have committed the offence of

rape against Irene Andrew (PW1). Though the particulars of said charge shows that PW1 is aged 9 years, on the contrary, the record shows that PW1 who testified at the trial is aged 28 years old. It is therefore clear that the charge contained not only false particulars of the name of the alleged victim but also her age. It is unfortunate that though it seems the defect with regard to the name of the alleged victim was noted by the prosecution and the trial court, on 11th June 2018, there is no evidence on record that the trial court formally ordered an amend of the charge the name of PW1 was simply crossed and replaced with that of PW2, more importantly, the person who crossed the name signed and indicated that the date to be 11/6/2018 as required by section 234 (1) of the CPA before the conviction of the appellant what is on record is that. For purpose of clarity, the said section provides:

> *"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 as to the court shall seem just."

There is no doubt that the provisions of section 234 (1) of the CPA takes into consideration the fact that, the charge presented by the prosecution at the trial court may be defective either in form or substance, and that it may require the intervention of the court to order the requisite amendment, alteration or substitution to bring it into conformity with the law. It is in this regard that in **Sylvester Albogast v. The Republic,** Criminal Appeal No. 309 of 2015, the Court made reference to its previous decision in **Leonard Raphael and Another v. The Republic,** Criminal Appeal No. 4 of 1992 (both unreported) in which it was observed that:

"This is not however, to say that prosecutors cannot make mistakes in drafting charges. But where there are such mistakes, the law has provided a solution to the effect that prosecutors and those who preside

over criminal trials are reminded that when, as in this case, in the course of trial the evidence is at variance with the charge and discloses offence which is not laid in the charge, they should invoke the provisions of section 234 of the CPA and have the charge amended in order to bring it in line with the evidence."

[See also **Mohamed Kamingo v. The Republic** [1980] T.L.R. 279 which was also followed in **Salililo v. The Republic,** Criminal Appeal No. 431 of 2013 and **Said Msusa v. The Republic,** Criminal Appeal No. 268 of 2013 both (unreported)].

Furthermore, in **Kali s/o Kulwa @ Nyangaka v. The Director of Public Prosecutions,** Criminal Appeal No. 6 of 2019 (unreported), the Court stated as follows:

"We are of the considered opinion that, once a charge is lodged any amendment or alteration to be made on it, it must be with the prior permission of the court under the above quoted section, and when an amendment is effected then the altered charge

must be read over to the accused person for him to plead."

The Court then concluded that:

> *"We are satisfied that the charge upon which the appellant was tried, convicted and ultimately punished with a term of thirty years imprisonment, was incurably defective and cannot be saved with the provisions of section 388 of the CPA. As the charge, upon which the validity of the trial depended was defective as observed, no competent appeal could have proceeded or stemmed from such proceedings".*

As rightly submitted by the learned State Attorney, it is regrettable that the so called amendments to the charge was casually effected in total disregard of the requirements of the law stated above. In an akin situation, the Court in **Mathias s/o Samwel v. The Republic,** Criminal Appeal No. 271 of 2009 (unreported) held that:

> *"....We think, it is also important that when specific name of the victim is stated in the charge sheet there*

should be no variance of the name of the victim which has appeared in the charge sheet with that which has happened in the evidence in the proceedings, otherwise, that will create doubts as to who was the actual victim."

We are settled that the observation of the Court applies in the circumstances of the case at hand. We hold this firm view, because considering the particulars in the charge sheet and the evidence on record, it is not easy to ascertain who was the actual victim between PW1 and PW2.

From the foregoing analysis and discussion on the position of the law, considering the record of appeal placed before us, , it is not disputed that the trial court's record of proceedings bears no evidence that the purported amendment was legally effected on 11th June, 2018 as required by section 234(1) of the CPA. Therefore, the charge is incurably defective. Thus, as the charge remains defective, the omission cannot be saved by the provisions of section 388 of the CPA as miscarriage of justice was occasioned on the part of the appellant. It is apparent that from the onset, the appellant participated at the trial knowing that he was charged of raping PW1 and not PW2 though in the end he was convicted for offending the law against PW2.

We harbour no doubt that the appellant was prejudiced and embarrassed in preparing his defence. Ultimately the trial was not fair.

In the result, we entirely agree with Ms. Mushi and hereby invoke the provisions of section 4(2) of the Appellate Jurisdiction Act [Cap. 141. R.E. 2019], to revise and nullify the proceedings of both the trial and first appellate courts, quash conviction and set aside the sentence imposed on the appellant. Consequently, we order the immediate release of the appellant from prison custody unless otherwise held for other lawful causes.

DATED at **DAR ES SALAAM** this 20th day of October, 2022

F. L. K. WAMBALI
JUSTICE OF APPEAL

Z. N. GALEBA
JUSTICE OF APPEAL

L. G. KAIRO
JUSTICE OF APPEAL

The Judgment delivered this 21st day of October, 2022 in the presence of Appellant connected via Video facility from Ukonga Prison, and in the presence of Mr. Faraji Nguka, State Attorney for the Respondent is hereby certified as a true copy of the original.

F. A. MTARANIA
DEPUTY REGISTRAR
COURT OF APPEAL