IN THE COURT OF APPEAL OF TANZANIA

AT IRINGA

(CORAM: WAMBALI, J.A., SEHEL, J.A. And MAIGE, J.A.)

CRIMINAL APPEAL NO. 514 OF 2020

MOHAMED JUMA NANIYE .....APPELLANT

VERSUS

THE REPUBLIC .....RESPONDENT

(Appeal from the decision of the High Court of Tanzania

at Iringa)

(Matogolo, J.)

Dated the 25th day of September, 2020

in

RM Criminal Appeal No. 13 of 2020

JUDGMENT OF THE COURT

22nd & 29th March, 2023

WAMBALI, J.A.:

The appellant, Mohamed Juma Naniye has appealed to the Court to contest the decision of the High Court of Tanzania at Iringa (the first appellate court) in Criminal Appeal No. 13 of 2020. The said decision upheld the findings of the Court of the Resident Magistrate of Njombe at Njombe (the trial court) that found the appellant guilty for contravening the provisions of section 46 (1) (g) and (2) of the Immigration Act, Cap. 54 R.E. 2016 (the Act). It is noted that upon conviction, the appellant was sentenced to pay fine of TZS. 20,000,000.00 (twenty million) or to serve twenty (20) years imprisonment in default. The trial court also

ordered that the motor vehicle which was involved in the commission of the offence be returned to the owner, one Siame, a Zambian, through RIDDER COMPANY LIMITED to proceed with the journey to Nakonde One Stop Border Post.

Basically, it was alleged in the particulars of the charge that on 16th February, 2020 at Makambako area, being a driver of motor vehicle with Chassis Number SNC11-102113 make NISSAN TIIDA, the appellant was found transporting eight prohibited immigrants within the United Republic of Tanzania without permit. The appellant denied the allegation, hence a full trial ensued. The prosecution case was supported by two witnesses, namely, Twalibu Waziri Kaanga (PW1) and STG Godfrey Muchwelezi (PW2) together with three exhibits; movement sheet, driving license and cautioned statement of the appellant which were admitted as P1, P2 and P3 respectively.

Essentially, it was the evidence of PW1 that on 16th February, 2020 while they were in a usual patrol with his fellow Immigration Officers and Tanzania Revenue Authority officials at Makambako area within Njombe Region, they arrested the appellant transporting eight prohibited immigrants using Nissan TIIDA motor vehicle. It was further testified by PW2 that when the appellant was interrogated in connection with the

commission of the offence, he admitted and recorded a cautioned statement which was admitted as exhibit P3. The prosecution, therefore, contended, through that evidence that, the case was proved beyond reasonable doubt.

The appellant was the only witness to support his defence. He testified that on the material date, he was on a journey driving motor vehicle, made Nissan Tiida with registration number SN 11-102113 to Tunduma. However, when he reached at Iringa Region, he took some passengers on the way to Mbeya. He testified further that when he reached Makambako check point, he stamped the relevant documents and proceeded with the journey, but he was later arrested by immigration officers who told him that he carried prohibited immigrants. In response, he told the respective officers that he did not know if those he carried were prohibited immigrants.

At the conclusion of the trial, the trial magistrate formed a firm opinion that the prosecution case was proved to the required standard and that; the appellant's defence did not raise reasonable doubt to charges levelled against him. He thus convicted and sentenced him as stated above.

It is noteworthy that at the High Court, apart from the appellant's appeal, the Director of Public Prosecutions (the DPP) cross appealed against the trial court's order which directed that the motor vehicle used in the commission of the offence be returned to the owner. Nonetheless, though the cross-appeal was in effect allowed, the first appellate judge was of the considered view that the order sought by the DPP was difficult to implement. He reasoned that its implementation would require the motor vehicle which had crossed the border to Zambia to be returned to Tanzania, a matter that would have required protracted diplomatic procedures between the two countries. Basically, it was the view of the first appellate judge that the order had been overtaken by events.

In this appeal, the appellant initially lodged a substantive memorandum of appeal consisting of four grounds. Later, upon engaging an advocate to represent him, in terms of rule 73 (1) of the Tanzania Court of Appeal Rules, 2009, he lodged a supplementary memorandum of appeal containing one ground; making a total of five grounds of appeal. However, at the hearing, the learned advocate abandoned the first ground in the substantive memorandum of appeal. The remaining four grounds can thus be paraphrased and rearranged as hereunder:

1. *That the honorable judge of the first appellate court erred in law in affirming the decision of the trial court without considering that, the charge sheet preferred against the appellant was defective.*

2. *That the honorable judge of the first appellate court erred in law in holding that the evidence of PW1 was corroborated by that of PW2 while he had discounted the cautioned statement which was the subject of his substantive evidence.*

3. *That the honorable judge of the first appellate court erred for not according the appellant's defence appropriate weight and as a result he dismissed the appeal on the alleged weakness of the defence.*

4. *That the honorable judge erred to hold that the prosecution case was proved beyond reasonable doubt.*

At the hearing of the appeal, Mr. Jally Willy Mongo, learned advocate represented the appellant whereas Ms. Pienzia Nichombe, learned Senior State Attorney, appeared for the respondent Republic.

Submitting in support of the first ground of appeal, Mr. Mongo stated that the charge laid against the appellant was incurably defective because though the statement of the offence indicated the charged offence as "transportation of illegal immigrant", the section of the law,

that is, section 46 (1) (g) and (2) of the Act, concerned transportation of prohibited immigrant. In this regard, he argued that as the particulars of the offence indicated that he was accused of transporting prohibited immigrants, the same was not consistent with the statement of the offence. He emphasized that it is trite law that the charge and the particulars must be consistent to enable the accused understand the nature of the offence he stands charged in order to prepare a meaningful defence. To this end, he submitted that prosecutors are supposed to be aware that framing of the charge must comply with that requirement of section 135 (1) of the Criminal Procedure Act, Cap 20 R.E. 2022 (the CPA).

He submitted further that the offence of transportation of illegal immigrant is covered under section 46 (1) (c) of the Act and is not the same as the offence of transportation of prohibited immigrant created under section 46 (1) (g) of the same Act. In the circumstances, Mr. Mongo submitted that, though the Act does not define the term "illegal immigrant," for the purpose of section 46, its import is not the same as "prohibited immigrant" which is defined under sections 3 and 23 of the Act. To support his argument, he made reference to the decision of the Court in **Christopher Steven Kikwa v. The Republic**, Criminal

Appeal No. 126 of 2020 [2022] TZCA 57; [24 February, 2022; TANZLII], where it was stated that:

> *"It is noteworthy that the Act does not define the expression "illegal immigrant" for the purpose of section 46 of the Act. However, we think the said phrase must be construed to mean an alien immigrant who has violated any of the conditions of entry or residence in the United Republic specified by Part V of the Act, of which section 28 (1) of the Act prohibits entry without passport, permit or pass...."*

Mr. Mongo concluded his submission by contending that according to the record of appeal, since, despite being charged with the offence of transportation of prohibited immigrants, the appellant was made to believe, according to the statement of the offence, facts of the case and facts not in dispute that the offence he faced was transportation of illegal immigrants and that is what he was convicted of according to page 43 of the record of appeal, the charge sheet laid against the appellant was incurably defective. He thus urged the Court to allow the first ground of appeal and hold that the charge against the appellant was not proved.

In reply, Ms. Nichombe, argued that the omission to indicate in the charge sheet the phrase "illegal immigrant" instead of "prohibited

immigrant" as per the penal section stated above is curable under section 388 (1) of the CPA because the same did not prejudice the appellant. She contended that the particulars of the charge clearly indicated that the appellant was accused of transporting prohibited immigrants consistent with the offence section, that is, section 46(1) (g) and (2) of the Act and not illegal immigrants. She stated further that the proceedings also show that the evidence of the prosecution witnesses and the appellant's defence on record concerned the offence of transportation of prohibited immigrants and not illegal immigrants. In the circumstances, she argued that the particulars in support of the charge informed the appellant that he was accused of committing the offence of transportation of illegal immigrants as he also defended himself against that offence. She thus maintained that the omission is curable and cited the decision of the Court in **Jamali Ally @ Salum, The Republic** Criminal Appeal No. 52 of 2017 [2019] TZCA 32; [28 February, 2019, TANZLII], to support his stance.

With regard to the meaning of the term "illegal immigrant", the learned Senior State Attorney was of the view that, though the Act does not define it, it can still fit into the meaning of prohibited immigrant prescribed under paragraph (h) of section 23(1) of the Act. She argued that under that provision, prohibited immigrant includes; "**a person**

whose presence in or entry into Tanzania is unlawful under any other law for the time being in force."

In the end, she strongly contended that the omission is curable under the provisions of the CPA stated above.

Having heard the contending submissions by the counsel for the parties on this ground, the crucial question for our determination is whether the defect in the charge which was laid against the appellant is curable.

We propose to start our deliberation by reproducing the provisions of section 46 (1) and (2) of the Act which states:

> *"46 – (1) A person who-*
>
> *a) smuggles immigrants;*
> *b) hosts illegal immigrants;*
> ***c) transports illegal immigrants;***
> *d) finances, organizes or, aids the smuggling of immigrants;*
> *e) facilitates in anyway the smuggling of immigrants into the United Republic or to a foreign country;*
> *f) commits any fraudulent act or makes any false representation by conduct, statement or otherwise, for the purpose of entering into, remaining in or*

departing from, or facilitating or assisting the entrance into, reside in or departing from the United Republic: or;

g) transports any prohibited immigrants within the United Republic of Tanzania,

commits an offence and on conviction, is liable to fine of not less than twenty million shillings or imprisonment for a term of twenty years.

(2) In addition to the penalty imposed for the commission of an offence under this section, the court may on its own motion or on the application by the Attorney General, order confiscation and forfeiture to the Government of-

a) all proceeds and properties derived from the commission of the offence of smuggling immigrants; or

b) anything used for purposes of committing or facilitating the commission of the offence of smuggling immigrants."

[Emphasis added]

In the present appeal, having scrutinized the record of appeal, there is no doubt that the statement of the offence shows that the charge concerned transportation of "illegal immigrants" while the offence

section, that is, section 46 (1) (g) and (2) related to transportation of prohibited immigrants. On the other hand, the particulars clearly show that the appellant was charged with the offence of transportation of prohibited immigrants as per the offence section.

In this regard, we are satisfied that considering the nature of the trial court's proceedings, the appellant's trial was fair as the minimum standards which have to be complied with at the trial were substantially met.

At this juncture, it is instructive to make reference to the decision in **Regina v. Hanley** (2005) NSWC CA 126, (a case from New South Wales Court of Criminal Appeal) quoting Smith, J. in **R. v. Prosser,** (1958) VR 45 at page 48 which was also referred by the Court in **Mussa Mwaikunda v. Republic** [2006] T.L.R. 387. In that case, the standards were stated to include the following matters:

(a) to understand the nature of a charge;

(b) to plead to the charge and to exercise the right of challenge;

(c) to understand the nature of the proceedings, namely, that it is an inquiry as to whether the accused committed the offence charged;

(d) to follow the course of proceedings;

(e) to understand the substantial effect of any evidence that may be given in support of the prosecution; and

(f) to make a defence or to answer the charge.

It is in this regard that in **Dastan Kayanda & Others v. The Republic** [1980] T.L.R. 23, the Court stated that since in the course of the trial the appellants were made fully aware of what the particulars of the charge were, and they knew what the prosecution was alleging against them, they suffered no prejudice or injustice. The defect was therefore held to be curable under section 346 of the Criminal Procedure Code which is in *parimateria* with section 388 (1) of the CPA.

Similarly, in **Jamali Ally @ Salum v. The Republic**, (supra) the complaint of the appellant was on non-citation and citation of inapplicable provisions of law. After reviewing and considering the trial court's proceedings, the Court stated that:

> *"It is our finding that the particulars of the offence of rape facing the appellant, together with the evidence of the victim (DW1) enabled him to appreciate the seriousness of the offence facing him and eliminated all possible prejudices. Hence, we are prepared to conclude that the irregularities over non-citations and citations of*

inapplicable provisions in the statement of the offence are curable under section 388 (1) of the CPA".

Equally, in the case at hand, we are also prepared to conclude that the reference to the offence of "transportation of illegal immigrants" in the statement of offence while the section creates the offence of "transportation of prohibited immigrants" did not materially prejudice the appellant and thus the omission is curable under section 388 (1) of the CPA. We hold this view because; **firstly,** as can be gleaned from the particulars of the charge, the offence of transportation of prohibited immigrant is vividly disclosed against the appellant. For avoidance of doubt, the particulars stated:

> ***"MOHAMED S/O JUMA NANIYE,*** *on the 16th day of February, 2020 at Makambako area within the District and Region of Njombe, being a driver of Motor vehicle with Chassis Number SNCII-102113 MAKE NISSAN TIIDA did transport Prohibited Immigrants to wit:* ***MWAJAM S/O SONOLE, WENDIM S/O AYELA, SIMON S/O REGESA, DEGEVA S/O WELJAIM, MTIKU S/O MOLOLO, NASSOR S/O ABDALLAH, SAMWEL S/O ABDALLAH*** *and* ***TAFESA S/O WALDEI*** *within the United Republic of Tanzania without permits".*

From the particulars, in our view, the date of the alleged commission of offence, the nature of the offence, that is, transportation of prohibited immigrants, and the names of the persons he was alleged to transport within the United Republic of Tanzania were clearly disclosed to enable the appellant to understand the offence he stood charged with.

Secondly, the evidence of (PW1), the immigration officer, which remains on record, after the first appellate court discounted the cautioned statement of the appellant that was recorded by PW2, is essentially in respect of the offence of transportation of prohibited immigrants as reflected at page 12 of the record of appeal.

Thirdly, according to the same record of appeal, it is plainly clear that in his defence, the appellant defended himself against the offence of transportation of prohibited immigrants. This is evidenced by the appellant's testimony during examination in chief where he stated that:

> *"... I was arrested by immigration officers who told me that I carried prohibited immigrants. I don't know them if they were immigrants who were prohibited. I was taken to Makambako for further legal actions".*

In the circumstances, we are of the view that even the reference by the trial court's magistrate in the judgment that the appellant was

charged with "transporting illegal immigrant" was unfortunate. We say so because, while the trial magistrate made reference to transportation of "illegal immigrants", he cited the offence section as 46(1) (g) and (2) of the Act. However, later he reproduced the provisions of paragraph (c) of the same section and disregarded paragraph (g) which concerns prohibited immigrants. Indeed, in the end, he concluded that the appellant was guilty as charged and convicted him accordingly. For clarity, we deem it appropriate to reproduce the relevant part of the trial court's judgment as reflected at page 43 of the record of appeal thus:

> *"The accused is charged with the offence of transporting illegal immigrants contrary to section 46 (1) (g) and (2) of the Immigration Act Cap 54 R. E. 2016 which states that:*
>
> *A person who transports illegal immigrants commits an offence and on conviction is liable to a fine of not less than twenty million shillings or imprisonment of twenty years.*
>
> *...It is on the foregoing; this court found him guilty for the offence charged ... I convict him ..."*

Thus, since according to the record of appeal the offence section related to the transportation of prohibited immigrants, the omission in the charge is, therefore, in respect of the reference to the word "illegal"

instead of "prohibited", the same is curable as stated above. In the event, we hold that the decision of the Court in **Christopher Steven Kikwa v. The Republic** (supra) relied upon by the appellant's counsel to urge us to find that the charge is incurably defective is inapplicable in the circumstances of this appeal.

In the result, we dismiss the first ground of appeal.

With regard to the second ground of appeal, Mr. Mongo submitted that according to the record of appeal as reflected at page 70, the first appellate judge had discounted the cautioned statement of the appellant (exhibit P3) on the ground that it was illegally relied in evidence and could not be acted upon in considering the appeal before him. Surprisingly, he argued, the first appellate judge later on wrongly made refence to exhibit P3 and held that in that statement, the appellant admitted to have committed the offence charged. The learned advocate for the appellant was specifically concerned with the following observations reflected in the following paragraphs of the first appellate court's judgment at page 71 of the record of appeal:

> *"He said in his cautioned statement he admitted to have committed the offence. But the owner of the motor vehicle did not know that he carried passengers as he did not even inform him about*

the passengers. The appellant disclosed further that the motor vehicle got an accident at Chalinze. The same was to be received at Nakonde border post by the company known as Ridder.

With such evidence by the appellant the later did not give meaningful defence. In actual fact what he stated is an admission that he committed the offence. He alleged that he did not know if they were prohibited immigrants. But he admitted that he was not authorised to carry passengers in the motor vehicle which was a transit good as he admitted that he committed the offence to carry those passengers."

To this end, Mr. Mongo submitted that the appellant was highly prejudiced by the observations, reasoning and conclusion of the first appellate judge as it influenced the decision to dismiss his appeal and hence upholding the trial court's finding on conviction and sentence. He therefore prayed that the second ground of appeal be allowed.

On the other hand, in the course of his submission, before he argued in support of the third and fourth grounds of appeal, Mr. Mongo raised another matter relating fundamental procedural irregularity in the judgments of both the trial and first appellate courts, which in his opinion, prejudiced the appellant. He contended that the irregularity

intended to be raised rendered the proceedings of the two courts below a nullity. He thus sought leave to argue the point of law. We accordingly granted him the requisite leave as there was no objection from Ms. Nichombe.

He submitted that according to the record of appeal, during the examination in chief of PW1 at the trial court, he did not testify on the status of the accusation that faced the alleged eight prohibited immigrants and the respective verdicts. However, during cross-examination by the appellant's counsel, he stated that the said immigrants had already been sentenced to serve six months imprisonment or to pay fine of TZ. 500,000.00. He added that, it was also surprising that, in his judgment, the trial magistrate went further than the said statement of PW1 and mentioned the case number, the date of delivery of the judgment and the offence with which the prohibited immigrants were charged. He specifically made reference to the relevant part where the trial magistrate stated as follows:

> *"The Ethiopian citizen who were passengers in the said motor vehicle were already sentenced to pay fine Tshs. 500,000/= (five hundred thousand shilling) or to serve six months in jail in the case number 33 of 2020 on 20/02/2020. On the offence of unlawful presence in United Republic*

of Tanzania without having in possession of valid permits or pass..."

It is noted that after that statement and brief consideration of other matters on why the appellant carried the prohibited immigrants, the trial magistrate answered the first issue of whether the appellant transported illegal immigrants in the affirmative.

Mr. Mongo therefore contended that the fact that the reproduced facts were not part of the prosecution evidence on record, the same prejudiced the appellant. He added that unfortunately, the unsubstantiated evidence was supported by the first appellate judge without ascertaining whether it was part of the trial court's recorded evidence as required by law. To support his contention, he referred us to page 72 of the record of appeal where the first appellate judge stated:

"The appellant is not disputing to be found transporting the eight persons in his motor vehicle. There is no dispute that those Ethiopians who had no any permit of entry to Tanzania. They even pleaded guilty to the charge of unlawful entry to Tanzania. They were convicted and sentenced. The allegation of lack of knowledge that they were Ethiopians and thus

prohibited immigrants appears to be an afterthought."

In the circumstances, Mr. Mongo prayed that as the trial was rendered a nullity, the proceedings of both courts below be nullified, conviction quashed and sentence set aside resulting in the release of the appellant from custody.

In response to the submission with regard to the second ground of appeal, though Ms. Nichombe conceded that the first appellate judge made reference to exhibit P3 which he had earlier on discounted from consideration, she contended that he did not use the said statement to confirm the trial court's findings on conviction and sentence of the appellant. On the contrary, she argued, the first appellate judge relied on the evidence of PW1 on record, to reach his conclusion. In her view, the appellant was not prejudiced by the reference to the cautioned statement by the first appellate judge. In essence, she urged us to dismiss the second ground of appeal.

On the other hand, responding to the raised point of law, Ms. Nichombe agreed that the irregularity was fatal. She submitted that having regard to the facts which were added by the trial court magistrate and the first appellate judge in their judgments though not supported by the evidence on record, there is no doubt that the

appellant was prejudiced. In her submission, the proceedings of both the trial and first appellate courts were rendered a nullity.

In the circumstances, she urged us, in terms of section 4 (2) of the Appellate Jurisdiction Act, Cap 141 R.E. 2019 (the AJA), to revise and nullify the proceedings of both courts below, quash conviction and set aside the sentence imposed on the appellant.

As to the way forward, she beseeched us to order a retrial in the interest of justice as the prosecution will manage to prove its case beyond reasonable doubt.

In rejoinder, though Mr. Mongo supported Ms. Nichombe on the consequences of the miscarriage of justice occasioned to the appellant, he argued that considering the weakness in the remaining evidence of PW1, a retrial will enable the prosecution to fill in the gaps in its case. He argued that according to the factual setting on record, there is no evidence to prove that the appellant committed the offence charged. On the contrary, he reiterated his earlier submission that the appellant be released from custody.

For our part, with regard to the contending submissions of the counsel for the parties in respect of the second ground of appeal, we are settled that considering the magnitude and the import of the

reference by the first appellate judge to the cautioned statement (exhibit P3) which he had earlier on discounted, the appellant was prejudiced. According to the record of appeal, it cannot be denied that the observations by the first appellate judge influenced his decision to dismiss the appellant's appeal. We, therefore, respectfully, disagree with the learned Senior State Attorney that no miscarriage of justice was caused to the appellant by the first appellate judge's reference and remarks made in his judgment in respect of the discounted cautioned statement. We thus allow the second ground of appeal.

On the other hand, regarding the raised irregularity, we entirety agree with both counsel that the inclusion by both courts below of the facts which were not part of the evidence on record, prejudiced the appellant as far as the outcome of the trial and first appeal were concerned. This is not the first time the Court is confronted with this kind of situation as in **Richard Otieno @ Gullo v. The Republic,** Criminal Appeal. No. 367 of 2018 [2021] TZCA: 124 [14 April, 2021; TANZLII], the Court observed that:

> *"The law is clear and settled that court's decisions must be based on the evidence on record presented before it."*

In that decision, the Court made reference to the decision in **Attanas Julias v. The Republic,** Criminal Appeal No. 498 of 2015 (unreported) where it was stated that:

> *"The second anomaly noted is the act of the trial resident magistrate to include in his judgment, facts which are not reflected in the recorded evidence in the proceedings... We are inclined to join hands with the contention of the counsel for both sides that, the irregularity was fatal and did vitiate the entire proceedings of the trial court".*

For similar stand, see also the decision of the Court in **Shija Sosoma v. The DPP,** Criminal Appeal No. 327 of 2017 [2019] TZCA 390; [07 November 2019; TANZLII] and **Monde Chibunde @ Ndishi v. The Republic,** Criminal Appeal No. 328 of 2017 [2019] TZCA 401; [08 November, 2019; TANZLII].

Moreover, in **Yustine Robert v. The Republic,** Criminal Appeal No. 329 of 2017 [2019] TZCA 391; [08 November, 2019; TANZLII], faced with an akin situation, the Court adopted the reasoning and observation of the defunct East African Court of Appeal in **Okethi Okale and Other v. Republic** [1965] EA 55 and stated as follows:

> *"In every criminal trial a conviction can only be based on the weight of actual evidence adduced and it is dangerous and inadvisable for the trial*

judge to put forward a theory not canvassed in evidence or in counsel's speeches."

Thus, based on the above observation and considering the circumstances of the appeal before it, the Court in **Augustine s/o Nandi v. The DPP,** Criminal Appeal No. 388 of 2017 [2020] TZCA 160; [31 March, 2020; TANZLII] remarked and held that:

> "In *the instant case, since it is evident in the record of appeal and as was rightly argued by both counsel that the trial judge added extraneous matters which did not feature in evidence adduced by witnesses, we agree with them that it was a fatal irregularity which vitiated the whole proceedings and the judgment thereof."*

Applying the above exposition of the law to the circumstances of this case, we entirely agree with both counsel that the addition and reference by the trial and first appellate courts to the factual matters which were not part of the recorded evidence from the parties occasioned miscarriage of justice on the part of the appellant and indeed rendered the proceedings a nullity.

It is, therefore, improper to introduce and rely on the facts or statements in the judgment of the court of law which are not part of the

evidence on record as the party who is affected may not be in a position to impeach the purported facts outside the trial.

In the circumstances, in the case at hand, there is no doubt that the act of the trial court which was supported by the first appellate court of making reference and addition of the facts not part of the evidence on record, prejudiced the appellant and rendered the proceedings of both courts below a nullity.

The next question for consideration is the way forward. We are alive to the contending arguments of the counsel for the parties on this matter. However, we have closely examined the record of appeal amid the anomaly pointed out with regard to the improper reliance on the cautioned statement which had been expunged as per the complaint in ground two which we have allowed and the remaining evidence on record in respect of PW1. In this regard, considering the factual setting with emphasis to the unsubstantiated evidence of PW1, we are of the considered view that a retrial will not be in the interest of justice contrary to the submission of the learned Senior State Attorney. We agree with the appellant's counsel that a retrial will enable the prosecution to reshape its case and fill the outstanding gaps.

In the result, we invoke the provisions of section 4 (2) of the AJA 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.

In the event, as it is superfluous to deal with the remaining two grounds of appeal, we order the immediate release of the appellant from custody unless his incarceration is for other lawful causes.

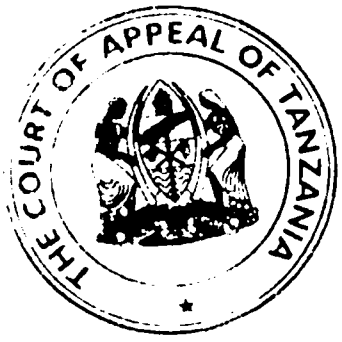
DATED at **IRINGA** this 29th day of March, 2023.

F. L. K. WAMBALI
JUSTICE OF APPEAL

B. M. A. SEHEL
JUSTICE OF APPEAL

I. J. MAIGE
JUSTICE OF APPEAL

The Judgment delivered this 29th day of March, 2023 in the presence of appellant in person and Ms. Magreth Mahundi, learned State Attorney for the respondent Republic, is hereby certified as a true copy of the original.



G. H. HERBERT
DEPUTY REGISTRAR
COURT OF APPEAL