IN THE COURT OF APPEAL OF TANZANIA

AT SONGEA

(CORAM: NDIKA, J.A., KEREFU, J.A., And RUMANYIKA, J.A.)

CRIMINAL APPEAL NO. 526 OF 2021

DIRECTOR OF PUBLIC PROSECUTIONS.....APPELLANT

VERSUS

FRANCE DOMINICUS CHIWANGU @ SHARO.....RESPONDENT

(Appeal from the Decision of the High Court of Tanzania at Songea)

(Madeha, J.)

dated the 27th day of October, 2021

in

DC Criminal Appeal No. 14 of 2021

JUDGMENT OF THE COURT

23rd & 24th August, 2023

KEREFU, J.A.:

This appeal stems from the decision of the District Court of Nyasa at Nyasa in Ruvuma Region where the appellant, France Dominicus Chiwangu @ Sharo was charged with two counts, to *wit*, burglary and stealing contrary to sections 294 (1) (a) (b) (2), 258 (1) and 265 of the Penal Code, Cap. 16 (the Penal Code) respectively. On both counts it was alleged that on 16th day of June, 2021 at Tingi Village within Nyasa District in Ruvuma Region, the appellant did break and entered into a house used by the

Catholic Church sisters with an intent to steal and he did steal one 24 inches flat screen television make Ceanis valued at TZS 280,000.00, Deck make Singsung valued at TZS 70,000.00, one decoder of Azam valued at TZS 170,000.00, a computer keyboard valued at TZS 140,000.00, USB Cable valued at TZS 10,000.00, one adopter valued at TZS 40,000.00 and cash money amounting to TZS 30,000.00 all make a total of TZS 740,000.00 the property of the Roman Catholic Church. Having pleaded guilty to the charge, he was convicted and sentenced to serve a term of twenty (20) years in prison in respect of the first count and seven (7) years for the second count.

Aggrieved, the respondent appealed to the High Court where he raised four grounds of complaints; **one**, that the sentence imposed on him was excessive and the trial court failed to send it for confirmation; **two**, that all exhibits were unprocedurally admitted in evidence; **three**, the trial court erred in law and fact to convict and sentence the respondent without examining his consciousness if he knew what he admitted and its consequences; and **four**; failure by the prosecution to prove its case beyond reasonable doubt.

Having heard the parties and while composing the judgment the learned trial Judge found that there was no valid conviction for the first appellate court to uphold or dismiss the appeal. Subsequently, the learned High Court Judge nullified the entire proceedings of the trial court and ordered for a retrial before another Magistrate. Aggrieved by that decision, the appellant has preferred the current appeal on the following two grounds:

(1) That, the first appellate court erred in law for holding that there was no valid verdict thus the respondent was not found guilty without inviting parties to address her on that issue; and

(2) That, the first appellate court erred in law by nullifying the proceedings of the trial court with an order for a retrial.

At the hearing of the appeal, the appellant, the Director of Public Prosecutions was represented by Mr. Edgar H. Luoga, learned Principal State Attorney assisted by Ms. Sabina Silayo, learned Senior State Attorney whereas the respondent appeared in person.

In his submission, Mr. Luoga faulted the procedure adopted by the learned High Court Judge of raising a new issue on the conviction and/or

non-conviction of the respondent *suo motu* in the course of composing the judgment without according the parties right to be heard on it. It was his argument that, the proper procedure which was supposed to be adopted by the said Judge, after she had discovered that the respondent was not convicted, was to invite the parties to address her on that issue and determine it in accordance with the law. It was the argument of the learned Principal State Attorney that the omission committed by the learned High Court Judge is fatal and has contravened the principles of natural justice on the right to be heard, hence occasioned a miscarriage of justice to the parties. To support his proposition, he cited the case of **Director of Public Prosecutions v. Rajabu Mjema Ramadhani**, Criminal Appeal No. 223 of 2020 [2023] TZCA 45 [23 February 2023; TanzLII]. He then urged us to quash the decision of the High Court, remit the record for it to compose a fresh judgment after it has accorded the parties the right to be heard on that issue which was raised *suo motu* by the learned Judge.

In response, the respondent, being a lay person, did not have much to submit on the issue raised by the learned Principal State Attorney. He mainly contended that, although the learned High Court Judge had nullified the entire proceedings of the trial court and ordered for a retrial, nothing

has happened to-date and he is still in the custody without any justification. He however, finally decided to leave the matter to the Court to decide.

In his brief rejoinder, Mr. Luoga referred us to pages 32 to 33 of the record of appeal and clarified that the respondent is still under custody in accordance with the High Court's Order issued on 27th October, 2010 where the learned High Court Judge, having nullified the trial court's proceedings and ordered for retrial, she also ordered that the appellant should remain in custody awaiting the retrial of his case.

Having considered the submissions made by the parties in the light of the record of appeal before us, we agree with the submission of the learned Principal State Attorney that it was not proper for the learned High Court Judge to raise a new issue *suo motu,* in the course of composing the judgment and decide on it without according the parties the right to be heard. We respectfully, agree with him because it is evident at page 32 of the record of appeal that the issue of conviction and/or non-conviction of the respondent was not among the four grounds of appeal raised by the respondent in the petition of appeal filed on 13th August, 2021 in the High Court. It is also not in dispute that the said issue was introduced by the

learned High Court Judge in the course of composing the judgment contrary to the law and principles of natural justice on the right to be heard.

Basically, cases must be decided on the issues or grounds on record and if it is desired by the court to raise other new issues either founded on the pleadings or arising from the evidence adduced by witnesses or arguments during the hearing of the appeal, those new issues should be placed on record and parties must be given an opportunity to be heard by the court.

This Court has always emphasized that the right to be heard is a fundamental principle of natural justice that should be observed by all courts in the administration of justice. Article 13 (6) (a) of the Constitution of the United Republic of Tanzania, 1977 provides that:

> *"When the rights and duties of any person are being determined by the court or any other agency, that person shall be entitled to a fair hearing and to the right of appeal or other legal remedy against the decision of the court or of the other agency concerned."*

Therefore, a denial of the right to be heard in any judicial proceedings would vitiate the entire proceedings. Together with the authorities cited by the learned Principal State Attorney on this aspect, we wish to add the

cases of **Mbeya – Rukwa Autoparts and Transport Ltd v. Jestina George Mwakyoma** [2003] T.L.R 251, **Deo Shirima & Others v. Scandinavian Express Service Ltd** (2009) 1 EA 127 and **Abbas Sherally and Another v. Abdul S. H. M. Fazalboy,** Civil Application No. 33 of 2002 (unreported). In the latter case the Court emphasized that:

> *"The right of a party to be heard before adverse action is taken against such party has been stated and emphasized by courts in numerous decisions.* ***That right is so basic that a decision which is arrived at in violation of it will be nullified,*** *even if the same decision would have been reached had the party been heard, because the violation is considered to be a breach of natural justice." [Emphasis added].*

In the instant appeal, it is evident that parties were not accorded the right to be heard and address the court on the new issue which was raised by the learned High Court Judge, *suo motu,* when composing the judgment. Therefore, the learned High Court Judge arrived at its finding in contravention of the parties' right to be heard. Such omission amounted to a fundamental procedural error which occasioned a miscarriage of justice to the parties. Consistent with the settled law, the resultant effect is that, such finding cannot be allowed to stand. It was a nullity. In the circumstances,

since we have held that finding a nullity, we hereby quash the judgment of the High Court and set aside the subsequent orders arising therefrom.

Consequently, we allow the appeal and remit the case file to the High Court for it to accord the parties the rights to be heard on the issue raised by the learned Judge *suo motu* when composing the judgment and the grounds of appeal and thereafter, compose a fresh judgment in accordance with the law.

DATED at **SONGEA** this 24th day of August, 2023.

G. A. M. NDIKA
JUSTICE OF APPEAL

R. J. KEREFU
JUSTICE OF APPEA

S. M RUMANYIKA
JUSTICE OF APPEAL

The Judgment delivered this 24th day of August, 2023 in the presence of Mr. Frank Sarwat, State Attorney for the Appellant and France Dominicus Chiwangu @ Sharo Respondent, is hereby certified as a true copy of the original.

G. H. HERBERT
DEPUTY REGISTRAR
COURT OF APPEAL