

**IN THE HIGH COURT OF TANZANIA
DAR ES SALAAM DISTRICT REGISTRY
AT DAR ES SALAAM**

CRIMINAL APPEAL NO. 33 OF 2016

**(Originating from the decision of Ilala District Court in
Criminal Case No. 819 of 2010)**

JUSTINE CHIKUMBI.....APPELLANT

Versus

REPUBLIC.....RESPONDENT

JUDGEMENT

B.R. MUTUNGI, J:

At Ilala District Court (the trial court) JUSTINE CHIKUMBI (herein shall be referred as the appellant) was charged and convicted with the offence of attempt to commit unnatural offence to one MAGWINA S/O VICENT (the victim) contrary to section 155 and 281 of the Penal Code [Cap. 16 R.E 2002]. Following the said conviction, the appellant was sentenced to serve life imprisonment in jail. The appellant is

aggrieved with the said conviction and sentence, hence this appeal.

In the instant appeal, the appellant has raised five (5) grounds of appeal which in my view fall into one fold that the trial magistrate erred in law by convicting him while the alleged offence was not proved on the required standard of proof in criminal cases.

The facts leading to the instant appeal are as follows; the victim (PW1) alleged that on 6/9/2010 the appellant committed an unnatural offence against him. The appellant had tied him with a rope and forced him to sleep on the bed. That he then smeared oil in his buttocks. The victim had been promised to be given money by the appellant and as he went to his house the appellant sodomized him. During the night the victim's relatives by the names Rajab and Abernago did call out for the appellant, and as he got out they found the victim naked in the appellant's house. These

people informed SAID ALLY OMARY (PW2) and later the victim's father (VICENT FRANCIS-PW3) of the alleged incident. The matter was reported to the police station for further action. The matter was investigated by DSGT FREGONIC (PW6), who interrogated him and the appellant denied to have committed the alleged offence. Later the victim was sent to hospital and issued with a PF3. This was after Dr. CHIKU SIMBA (PW5) had conducted a medical examination on the victim and found the victim's anal part open infected with schistosomiasis. The PF3 was admitted as Exhibit P.1.

In his defense the appellant strongly denied to have committed the alleged offence. He went further by testifying to the effect that he had been arrested on 6/9/2010 and sent to Stakishari Police Station on 13/9/2012, thereafter he was arraigned in court for trial on the alleged offence.

At the end of the trial the appellant was convicted as charged and sentenced to serve life imprisonment, hence this appeal.

When this appeal was called for hearing, the appellant appeared in person and defended himself while Celina Katange, learned State Attorney appeared for the respondent. Basically, the appellant in his submission prayed the court to consider his grounds of appeal. He went further by submitting his conviction was not compatible with the adduced evidence at the trial court. He explained that the charge was attempting to commit unnatural offence whereas the adduced evidence appeared to suggest he had "*committed*" the said offence. Hence, he argued that, he was unaware of what offence he was facing at the trial court. Moreover, the appellant submitted that, the adduced evidence indicates he was arrested by the ten-

cell leader but the said leader was not called as a witness to testify during the trial.

In reply, Celina Katange State Attorney supported the appeal on the basis that, the testimony of PW1 and PF3 reflected the appellant had sodomized the victim. To the contrary the charge sheet against the appellant indicated, the appellant attempted to do so. On this account, she was of the view, the said irregularity is not curable under section 388 of the Criminal Procedure Act [Cap.20 R.E 2002]. She referred this court to the case of **MAREKANO RAMADHANI VERSUS REPUBLIC, CRIMINAL APPEAL NO. 202 OF 2013 (CAT-AR) (UNREPORTED)**. In conclusion, Celina Katange concurred with the appellant that, he was not in the position to know the charge facing him. The learned Attorney prayed the appeal be allowed.

At this juncture the issue is whether the appeal has merit as prayed by the appellant.

Going through the entire court record and submissions from both camps, I straight away agree with them that the appeal has merit. As correctly submitted by the appellant and Celina Katange learned State Attorney, the evidence adduced in totality was proving that the appellant committed unnatural offence to the victim, but the charge sheet indicates the appellant attempted to do so. In my view this is a very serious error which is incurable at this stage. It is now settled in our Criminal Jurisprudence that given such a scenario, the appellant is viewed to have been unaware of the charge facing him.

In the case of **SIMON ABONYO VERSUS REPUBLIC, CRIMINAL APPEAL NO. 144 OF 2005 (CAT-MWZ) (UNREPORTED)** at page 6 the Court of Appeal had this to say on the importance of a charge;

'The importance of proving the offence as alleged in the charge hardly needs to be over

emphasized. From the charge, the accused is made aware of the case he is facing with regard to the time of incident and place that he would be able to marshal his defense.' [Emphasis is mine]

The same holding was propounded in the case of **Kichala Mirang Versus Republic [1983] T.L.R 158**

In my settled opinion, considering the above position of law it is crystal clear that the appellant was denied a fair trial, since he was unable to marshal his defense against the charge he was facing. It is concluded by the court that this must have occasioned a miscarriage of justice on the part of the appellant.

The court is alive with the procedure that, the trial Magistrate during the trial before its completion had the powers to amend the charge sheet under **section 234 (1) of the Criminal Procedure Act (supra)** so as to ensure the

adduced evidence is compatible with the charge sheet.

Section 234 (1) of the Criminal Procedure Act (supra) states;

*'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 the 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 the amendments made under the provisions of this subsection shall be made upon such terms as to the court shall seem just.'* [Emphasis is mine]

In the case of **Republic Versus Salehe Ruhuna [1973] L.R.T 83**, whereby Sir Philip Biron, J (as he then was) interpreted the word at '**any stage of the trial**' as used in the above section and stated;

*'A trial Magistrate may, in certain circumstances amend the charge, **but not when a trial has been completed**...where a charge is altered, the court shall thereupon call upon the accused to plead to the altered charge...'*
[Emphasis is mine]

Despite the available remedy the Honourable Magistrate in the trial court did not utilize the same. I am of the settled mind that, he ought to have been aware of the said irregularity.

The learned State Attorney had merely submitted that the appeal be allowed due to the said irregularity but I must go further before jumping into the last conclusion since the appellant faced a very serious offence which attracts a heavy sentence. Deliberating on the adduced evidence on record I find the prosecution evidence cannot warrant a conviction on the alleged offence. The witnesses including Abernigo and Rajab who allege to have seen the

appellant and the victim naked at the scene of crime, as well as the ten-cell leader were not called by the prosecution side to testify during the trial. PW2 and PW3 simply, narrated what they were told hence their testimonies remain as hearsay evidence which is not admissible in evidence.

In the up short, I find even a retrial order would be against the interest of justice, consequently the appellant is entitled to a release. In the event, I hereby quash the judgment and proceedings of the trial court and order the appellant be released with immediate effect unless held for some other lawful cause. The result being that the appeal is accordingly allowed.

It is so ordered.


B.R. MUTUNGI

JUDGE

15/3/2018

Read this day of 15/3/2018 in the presence of the appellant
and Lilian Rwetabura for the Respondent.


B.R. MUTUNGI

JUDGE

15/3/2018

Right of Appeal Explained.




B.R. MUTUNGI

JUDGE

15/3/2018