IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

IN THE DISTRICT REGISTRY OF MUSOMA

MUSOMA

CONSOLIDATED CRIMINAL APPEALS No 48 AND 49 OF 2020

(Originating from Criminal Case No 119 of 2019 of the District Court of Musoma at Musoma)

JUMA JUMA .....APPELLANT

Versus

THE REPUBLIC .....1st RESPONDENT

AMOS NYAKANGARA..... 2nd RESPONDENT

JUDGMENT

11th May & 28tt May, 2020

Kahyoza, J

We, judicial officers commit procedural errors but not the extent demonstrated in this case. Juma Juma, and Amos Nyakangara (accused persons) were arraigned before the District Court of Musoma at Musoma with the offence of gang rape contrary to section 131A (1) and (2) of the Penal Code, [Cap 16 R.E. 2019] (the Penal Code). It was alleged that the accused persons, on 19th day of September 2019 at Machinjioni area within the District and Municipality of Musoma in Mara Region, had carnal knowledge of girl who will be referred to as XX or the victim of rape.

The accused persons pleaded not guilty to the charge. The prosecution lined up five witnesses namely **Pw1** the victim of rape, Prisca Ojija (PW2), Daniel Yoyo (PW3), Benadeth Macha (PW4) and G. 9421 PC Edwin (PW5). After a full trial one of the accused persons,

Juma Juma, (the appellant) was found guilty, convicted and sentenced to thirty (30) years' imprisonment. **Amos Nyakangara** was acquitted. Aggrieved with both conviction and sentence, the appellant petitioned to this Court with seven grounds of appeal. The Director of Public Prosecutors on the other hand, dissatisfied with the acquittal of **Amos Nyakangara,** also appealed to this Court. Both appeals were consolidated. **Amos Nyakangara** will also referred as the second respondent just for convenience.

Before the hearing commenced, the learned state Attorney for the first respondent informed the Court that the proceedings and subsequent judgment of the trial court imbued irregularities rendering them a nullity. The appellant and the second respondent did not substantially oppose the state attorney's submission.

The issues to be determined by this Court are two as follows: -

1. Are the proceedings and the subsequent judgment a nullity?
2. Should the accused persons be tried *de novo*?

The appellant and Director of Public Prosecutions (the DPP) instituted their appeals to this Court from the decision of the District Court of Musoma., the appellant raised seven grounds of appeal while the DPP raising three grounds of appeal. The appellant and the second respondent fended themselves and the DPP was represented by Mr. Temba, State Attorney.

Before the hearing commenced Mr. Temba took the floor and notified the Court that the proceedings and judgment had glaring irregularities rendering them a nullity. He submitted that the trial court did not read the charge to the accused persons when they were first

brought it on the 23/10/2019. The learned State Attorney argued further that, though on 4/11/2019, the prosecution prayed to substitute the charge, they record does not show if the accused persons were given a chance to comment on the prosecution's prayer. The record is also silent on whether the substituted charge was read over and explained to the accused persons. He submitted that the omission was fatal. To support his submission, he referred to the case of **Thuway Akonaay v. Republic** [1987] TLR 92, where the Court of Appeal had the following to state-

> *"It was mandatory the charge to be read over to the accused person, failure to do so renders a trial nullity".*

The learned State attorney further stated that when the matter came up for preliminary hearing on 5th November 2019 the trial court skipped once again to read the charge to the accused persons. As if that was not enough, the trial court failed to record the facts advanced by the prosecution and this was another irregularity.

The learned state attorney further argued that the trial court did not record the age of the victim, or inform the witnesses that they were entitled to have the evidence read to them as provided by section 210(3) of the **Criminal Procedure Act**, [Cap. 20 R.E. 2019] (the **CPA**).

He added that the trial court failed to cause the contents of the exhibits to be read to the accused persons after the same were cleared for admission.

There was yet another irregularity, the State attorney pointed out that the trial court overlooked to close the defense case. He submitted that on the 10/02/2020 the accused persons informed the trial court

that they had no more witness but the trial court did not close the defence case.

The state attorney pointed out another irregularity that the trial magistrate did not convict the appellant violating the provisions of section 235 of the **CPA**.

Lastly, the State attorney averred that the trial court did not consider the accused persons' defence at the time of composing its judgment.

The learned state attorney implored this Court to nullify proceedings, set aside the conviction and sentence, and order trial *de novo.* He contended that the prosecution has strong evidence against the accused persons basing on the evidence of the victim and other witnesses, to prove the accused was guilt.

In his reply, Amos Nyakangara stated that he did not take part in the commission of the offence and that the State Attorney submission is false. The appellant did have anything significantly to reply.

Are the proceedings and the subsequent judgment a nullity?

At the outset, I wish to state that the trial was a nullity. The trial court committed a number of procedural irregularities, which cannot be cured under section 388(1) of the CPA as I will demonstrate. The state attorney submitted that the trial court did not read the charge to the accused persons when they first brought before the court and when the charge was substituted. It is true that that the trial court skipped to read the charge to the accused persons. This was a serious omission. The record shows that the prosecution prayed to substitute the charge

sheet, without giving an opportunity to accused to comment on the prayer, the court granted the prayer. The trial court proceeded to record the accused persons' plea without reading the charge. If, the charge is lodged and admitted in the court, it is the duty of the court to summon the accused so that he can answer the charge in terms of section 228 (1) of the CPA which provides as follows:

> *"228 (1) The substance of the charge shall be stated to the accused person by the court, and he shall be asked whether he admits or denies the truth of the charge".*

Failure to read the charge to the accused is fatal. This was the position in **Naoche Ole Mbile v. Republic** [1993] TLR 253, where it was held that:

> *"One of the fundamental principles of our criminal justice is that at the beginning of the criminal trial the accused must be arraigned, i.e. the court has to put the charge or charges for him and required him to plead Non-compliance with the requirement of arraignment of an accused person renders the trial a nullity".*

The court has a duty to read the contents of the new charge to the accused once it allows the former charge to be substituted. Section 234 (1) of the CPA permits a charge to be amended or substituted. And, where the charge is so amended or substituted, it shall be the duty of the court to take a new plea in relation to the amended or substituted charge. In **Thuway Akonaay v Republic,** [1987] TLR 92 it was held that-

> *"It is mandatory for a plea to a new or altered charge to be taken from an accused person, as otherwise the trial becomes a nullity. (See also **Mussa Mbwaga v Republic**, CAT Criminal Appeal No. 39 of 2013)"*

For sake of clarity, I will reproduce the trial court's record on the date

the charge was amended. The record reads-

> *"DATE: 5.11.2019*
> *CORAM: V.T. BIGAMBO.RM*
> *PROSECUTOR: CHUWA- S/A*
> *ACCUSED: PRESENT*
> *INTER: MGAYA- RMA*
> *PP: The Case is hereby for PH*
> *1st accused: "not true"*
> *2nd accused: "not true"*
> *Court: EPGN"*

The record does not tell how many accused persons were before the court on that material date. The court did not record the prosecution's prayer to amend the charge nor call upon the accused to comment or read the charge to the accused persons. Failure to read a charge as said above was nullity. The case of **Aidan Mhuwa @ Joseph and another v. Republic,** Criminal Appeal No. 139 of 2014 (unreported) emphasized on the Court's stance stated in **Thuway Akonaay** above that-

> "*we are settled in our minds that failure by the trial court to perform its mandatory duty imposed on it by the provisions of section 234(2) (a) of the CPA is not a mere procedural lapse, but a fundamental irregularity going to the root of the case. The irregularity cannot be cured under section 388(1) of the CPA."*

It was submitted that the trial court violated the clear procedure of conducting the preliminary hearing. The trial court did not read the charge to the accused persons or record the facts stated by the prosecution. The record contains what the trial court called "*the memorandum of agreed facts and the memorandum of disputed facts.*"

It is unclear where the court obtained the facts. Section 192 of the CPA is clear, it imposes a duty on the trial court to explain the purpose of preliminary hearing to the accused. The court then, has to call upon the prosecution to read the facts, record the fact and read over to the accused.

The court has to prepare a memorandum of agreed facts and read them to the accused person and require him to reply so as to extract facts he agrees. Finally, the trial court prepares a memorandum of agreed facts, read it to the accused person and call upon both sides to endorse their signature on the memorandum of agree facts. Section 193 (3) reads

> 193.(3) *At the conclusion of a preliminary hearing held under this section, the court shall prepare a memorandum of the matters agreed and the memorandum shall be read over and explained to the accused in a language that he understands, signed by the accused and his advocate (if any) and by the public prosecutor, and then filed.*

The state attorney submitted that the trial court did not record the age of the witness. It is very vital for the trial court to record the age of victim or other witnesses. The court determines if a witness should be sworn in or not depending on his age. The court may skip to indicate the age of the witness by writing that he is an adult. It is imperative if that witness is child, his age must be indicated. In rape cases like the instant case, age of the victim is very important as it affects the magnitude of the sentence the court may impose. It is required to record the victim's age in rape cases in order to determine whether or not the offence committed is statutory rape. In the **Charles Makapi Vs. Republic**, Criminal Appeal No.85 of 2012 (unreported) where the

prosecution failed to prove the age of the victim, the Court of observed as hereunder-

> *'We have also noted that there is no proof of the age of the victim Monica d/o Charles (PW1) mentioned as a girl aged (10) years in the particulars of the alleged offence. Taking into account that this is a statutory rape, it is important or the prosecution to give a clear evidence of the age of the victim. Failure of that will create doubt as to the real age of the victim in this alleged statutory rape. The record in this case is completely silent on the issue of the age of the victim. Neither the victim herself nor her mother Ashura Rajabu (PW2) has specified on the issue of age of the victim."*

I further scrutinized the record and found as submitted, that the trial magistrate did not inform the witness that *he is entitled to have his evidence read over to him and if a witness asks that his evidence be read over to him.* The trial court violated the requirement of section 210 (3) of the **CPA**. The requirement is mandatory. The omission renders the evidence not credible. Consequently, the proceedings become a nullity. It states that-

> *S. 210(3) The magistrate **shall inform** each witness that he is entitled to have his evidence read over to him and if a witness asks that his evidence be read over to him, the magistrate shall record any comments which the witness may make concerning his evidence.*

The state attorney complained further that the trial court flouted the procedure for admitting documentary evidence. He contended that the trial court did not cause the contents of the exhibits to be read to the accused persons after the same were cleared for admission. I went through the record and found that after the prosecution's witness prayed to tender exhibit, the trial court granted the prayer and

admitted it. After the court had cleared the exhibit for admission and admitted it, the court did not invite the witness to read the contents of the exhibit to the accused persons. This omission was fatal, such exhibits cannot be acted upon. The accused persons were prejudiced by the omission as they were unable to grasp the contents of the exhibits. It has to be expunged from the court's record. This position was taken in **Issa Hassan Uki v R**, Cr. Appeal No. 129/2017, where the Court of Appeal held that

> *"It is fairly settled that once an exhibit has been cleared for admission and admitted in evidence, it must be read out in court."*

It was submitted by the State Attorney that the trial court did not consider the defence evidence. A close look at the trial court's judgment establishes that it (the trial court) did not consider and analyze the defence evidence. It stated-

> *"...people who run away but their names were mentioned by the victim, that was Juma and Kitukuru, Juma in his statement admitted to have committed this offence but the 1st accused seems, his statement was not taken by the police officer either the charge sheet has no name of Kitukuru, this means he was joined with the offence illegally, it follow(sic) therefore upon careful consideration of the evidence from both side(sic), I am fully satisfied that the prosecution has proved their(sic) case against 2nd only and again the prosecute(sic) have(sic) failed to prove the case against 1st accused, this will make(sic) me to hold that the offence of gang rape contrary to section 131(1) and (2) of the Penal Code will not stand, as since the 2nd accused is not guilty automatically the proper offence which the 2nd accused is supported(sic) to be charged with is the offence of rape contrary to section 130(1) and 131(1) of the Penal Code."*

It is a settled position of law that failure to consider the accused person's defence vitiates the conviction. See the case of **Siza Patrice V. R** Cr. Appeal No 19/2010**,** where the Court of Appeal observed that-

> *"The naked truth is that the trial magistrate did not consider the defence case at all. The learned judge fell into an error of upholding what was not decided. It is trite law that failure to consider the defence case is fatal and usually leads to a conviction being vitiated. See, for example,* ***Lockhart - Smith v. R.*** *[1965} E.A. 211 (TZ),* ***Elias Steven v. R****. [1982] TLR 313,* ***James Bulolo v. R****. [1981] TLR 283,* ***Hussein Idd & Another v. R.*** *[1980] TLR 283."*

There was yet another omission as submitted by the state attorney, that the trial court did not convict the appellant. It is axiomatic that the trial court skipped to the convict the accused person. It found the appellant guilty and after mitigation imposed a sentence. The Court of Appeal has held in cases without number that failure to convict rendered the judgment invalid. In **DPP v Ponda Issa Ponda**, Cr. Appeal No. 57/2015, the Court of Appeal held that-

> *"It is in this regard that in several decisions of this Court, it has been held that finding the accused guilty or not guilty alone is not sufficient as the trial court must go further to either convict or acquit and that failure to convict renders the judgment invalid (See* ***Shabani Idd Jololo and Three Others v. Republic****, Criminal Appeal No. 200 of 2006;* ***Aman Fungabikasi v. Republic,*** *Criminal Appeal No. 270 of 2008;* ***Jonathan Mlugyani v. Republic****, Criminal Appeal NO. 15 of 2011;* ***Fredrick Godson and Another****, v. Republic, Criminal Appeal No. 88 of 2012;* ***Mang'era Marwa Kubyo v. The Republic,*** *Criminal Appeal No. 320 of 2013 and* ***Fredy Mwakajilo V R,*** *Criminal Appeal No. 252 of 2011 (all unreported). It follows that even the proceedings and*

judgment that followed at the High Court could not be valid."

From the foregoing, I am of the firm view that the nature of the irregularities pinpointed out by the learned State Attorney, which were committed by the trial court, render the proceedings a nullity. Consequently, the conviction and sentence in respect of the appellant and the acquittal in respect of the second respondent are a nullity. I invoke powers of revision under section 373 of the **CPA**, to quash the proceedings and set aside the judgment and the sentence.

Should the accused persons be tried *de novo*?

Now, that I have quashed the proceedings and set aside the judgment and sentence, the issue is whether this Court should order a trial *de novo*. The State Attorney pleaded for an order for trial *de novo*. He submitted that the prosecution has enough evidence to establish the accused persons' guilt. It is trite law that a retrial may be ordered only when the original trial was illegal or defective, it will not be ordered where the conviction is set aside because of insufficiency of evidence or for the purposes of enabling the prosecution to fill in the gaps in its evidence at the first trial. This position was stated the famous case of **Fatehali Manji v. Republic** (1966) EA 343, where the Court considered the factors in deciding whether or not to order a retrial and stated thus-

> *"In general, a retrial may be ordered only when the original trial was illegal or defective, it will not be ordered where the conviction is set aside because of insufficiency of evidence or for the purposes of enabling the prosecution to fill in the gaps in its evidence at the first trial.... Each*

case must depend on its own facts and an order for retrial should only be made where the interest of justice requires it."

In **Mussa Rashid v. Republic,** Criminal Appeal No. 348 of 2009 the Court of Appeal stated in determining whether or not to order a retrial, the court has to consider the interests of both sides of the scale of justice. The Court of Appeal took into account fairness of the proceedings which involves a consideration not only of fairness to the accused person but also fairness to the public. It also referred to **Marko Patrick Nzumila & Another v. Republic,** Criminal Appeal No. 141 of 2010 CAT (unreported) where it previously held as under:

"Failure of justice (sometimes, referred to as miscarriage of justice) has equally occurred where the prosecution is denied an opportunity of conviction. This is because, while it is always safer to err in acquitting than punishment, it is also in the interests of the state that crimes do not go unpunished. So, in deciding whether a failure of justice has been occasioned, the interests of both sides of the scale of justice have to be considered."

Given the nature and seriousness of the offence the appellant and the second respondent are charged with, and the evidence on record, I am of the considered view that the scales of justice heavily tips on a retrial, a retrial is therefore inevitable.

In the upshot, having quashed the proceedings and set aside the

judgment and set aside the sentence of the trial court. I hereby order trial *de novo* before another magistrate

I further order Amos Nyakangara, the respondent in criminal Appeal No. 49/2020 who was on bail throughout the trial to remain under the same conditions of bail and produce himself on the 5th June, 2020 with a copy of this judgment to the regional National Prosecutions Office at 08.00am. He should not be put under custody today.

It is ordered accordingly.

J. R. Kahyoza
JUDGE
28/5/2020

Court: Judgment delivered in the presence of the appellant and the state Attorney via video link, while the second respondent was physically present. **Copies of the ruling supplied to the appellant this 4th day of June,2020**. B/C Catherine Tenga present.

THE HIGH COURT OF TANZANIA
MUSOMA

J. R. Kahyoza, J.
28/5/2020