

**THE UNITED REPUBLIC OF TANZANIA  
JUDICIARY  
IN THE HIGH COURT OF TANZANIA  
(DISTRICT REGISTRY OF MTWARA)  
AT MTWARA**

**CRIMINAL APPEAL NO.72 OF 2021**

*(Originating from Lindi District Court Criminal Case No. 52 of 2021)*

**ISSA OMARI MAGWIRA AND 4 OTHERS..... APPELLANTS**

**VERSUS**

**THE REPUBLIC.....RESPONDENT**

**JUDGMENT**

Muruke, J

On unknown date in July 2021 the second appellant at different times communicated with 1<sup>st</sup>, 3<sup>rd</sup> 4<sup>th</sup> and 5<sup>th</sup> Appellant to be able to facilitate unlawful immigrants, two of them from Ethiopia, to enter different parts of United Republic of Tanzania. They were arrested and charged on 14<sup>th</sup> September 2021, at Lindi District Court at Lindi. Upon charge being read over, by prosecution, they both pleaded guilty to all the three counts, thus sentenced to 20 years' imprisonment, to each of the accused on the same day.



Being dissatisfied, they filed present appeal raising two grounds in the petition of appeal.

- (i) That the trial Magistrate erred in law and fact by not taking into consideration mitigation factors and consequently imposed harsh sentence.
- (ii) Trial Magistrate erred in law and fact, convicting the appellants basing on the defective charge and equivocal plea of guilt.

On the date set for hearing, appellants were represented by Emmanuel Ngongi an advocate, and Enosh Kigoryo State Attorney, represented respondent. Appellant counsel submitted in all the two grounds that charge was defective, court should quash conviction, and set aside sentence. On other hand respondent counsel, only replied ground one on defective charge, on his brief, direct to the point submission he said:-

***Respondent is not objecting the appeal, on account of defectiveness of charge, although on different reasons not one's articulated by appellant's counsel. According to the records, there were only one charge sheet. Looking at the charge sheet, appellants were charged with none existing Law. On statement of offence in both counts refers section 46 (1) (a) of the Immigration Act Cap 54 R.E 2016. There is no revised edition of 2016. If there was any, amendments charge sheet should have been said. Section 135(a) (ii) of CPA has been violated. There was no charge sheet arranged known to law, leaved against the accused now appellant at the trial court. On those circumstances, let the court nullify the proceedings, quash conviction and set aside sentence, then re – trial be ordered.***

Appellant counsel conceded to the respondent counsel submission, and argued this court just to leave his client free.



As correctly submitted by Learned State Attorney, once charge is defective, trial is a nullity. Court of Appeal in Criminal Appeal No 448/2015 in the case of **Fred William Chonde Vs. at Dar es salaam**, Mugasha J.A, held at page 12 of the judgment while making reference to Criminal Appeal No 253 of 2013 (unreported) that,

*Being found guilty on defective charge based in wrong and/or non – existing provisions of the law, it cannot be said that the appellant was fairly tried in the court below .... In view to the foregoing short comings, it is evident that the appellant did not receive a fair trial in court. The wrong and/or non – citation of the appropriate provisions of the Penal Code under which the charge was preferred, left the appellant un aware that he was facing a serious charge of rape...*

The above is the decision of the highest Court of Law, in Tanzania, thus fully bound, subscribe and find refuge on the same. In the case ay hand, the charge was preferred under non existing law, it is sad to the prosecution, on such serious case. Equally so, trial court ought to be satisfied before embarking on the trial by making requisite order in terms of section 234 (1) of Criminal Protective Act Cap 20 R.E 2019. Under those circumstances, no charge sheet known to law, that was read for the accuseds now appellants to plead.

Thus, I nullify, the proceedings and judgment in Criminal Case Number 52/2021 of District Court of Lindi at Lindi. I order trial de novo with immediate effect based on a proper charge in accordance, with the law. The appellants shall remain in custody at Lindi pending re – trial.



In the events of conviction, the period spent by the appellants behind bars should be considered in imposing sentence.



**Z. G. Muruke**

**Judge**

**29/07/2022**

Judgment delivered in the presence of Emmanuel Ngongi for the appellant and Wilbroad Ndunguru for the respondent.



**Z. G. Muruke**

**Judge**

**29/07/2022**