IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

IN THE DISTRICT REGISTRY OF DODOMA

AT DODOMA

DC. CRIMINAL APPEAL NO.116 OF 2021

(Originating from District Court of Singida at Singida in Criminal Case No. 168 of 2020)

SHABAN S/O RAJAB.....1ST APPELLANT
HAMISI SHABANI.....2ND APPELLANT

VERSUS

THE REPUBLIC .....RESPONDENT

JUDGMENT

Date of last Order: 27/7/2022

Date of Judgment: 28/7/2022

Mambi, J.

In the District Court of Singida Hamis Shabani, the appellant and his collegue Shabani s/o Rajab were jointly charged with an offence of gang rape c/s 131A(1) (2) (3) of the penal code cap 16 [R.E 2019] and unnatural offence c/s 154 (1) (a) of the penal code Cap. 16 [R.E 2019]. The appellant Hamisi Shabani and his collegue Shaban Rajab were on the 27th day of August, 2020 alleged to have raped and Hamis Shaban had carnal knowledge against the order nature with one Magrath d/o Amin. Both Hamis Shabani and Shaban Rajab were

convicted and sentenced. While Hamisi Shabani (appellant) was sentenced to life imprisonment, Shaban Rajab who was 17 years old was ordered to serve one year conditional discharge.

Aggrieved, the appellant has lodged Criminal Appeal in this Court to challenge the conviction and sentence of the trial court basing on about twelve similar grounds of appeal.

While the appellant in this case appeared unrepresented, the Republic was represented by the learned Senor State Attorney Mr. Chaula.

During hearing, the appellant adopted all his grounds of appeal.

Responding to the grounds of appeal, the learned State Attorney Mr. Chaula for the Republic, submitted that, he has noted some irregularities from the trial records.

He argued that the proceedings at the trial court was tainted with irregulaties as one of the accused was a child of 17 years old. He argued the proceedings show that the social welfare was not involved during trial of the accused (Shabani Rajab) who was 17 years old.

Having summarised submission from both the appellant and prosecution, I now revert to the appeal at hand. Before going through the appeal, I have keenly perused the records from the trial court. I have also considered the submission from the prosecution. The key issue here that needs to be answered is whether there were irregularities at the trial court that were not observed by the trial court.

My perusal and findings from the records reveals that that, one of the accused (Shabani Rajab) who was the child of 17 years was charged the same as an adult person contrary to the provision of the law seem to be convicted on his own plea of guilty.

The records shows that there were some irregulaties on proceedings of the trial court as the court did not call the social welfare to appear during the whole proceedings that involved the accused who was a person of 17 years old. Indeed the trial court conducted the whole proceeding without the precence of social welfare until the accused who was 17 years old was convicted and sentenced. As I observed and alluded earlier failure for the trial court to call the social welfare during trial that involved a child was contrary to the provisions of the law. This omission caused injustice to the accused who was 17 years old. The proceedings at the trial court were done in contravention of the laws governing trial that involve children. This in the end makes both the proceedings and the Judgment to be fatally detective.

From my findings and observations, it clearly shows that the trial magistrate failed to properly conduct proceedings by improperly proceeding without the presence of the social welfare. See **Furaha Johnson Vs. R.** Criminal Appeal No. 452 of 2015.

From my findings and observations, it clearly shows that the absence of social welfare made the accused who was a child unaware of his charges. In this regard the charge sheet read to the accused was not properly understood by him.

It is the trait law that all facts on the charge sheet has to be read out to the accused and the accused has to state if he admits all those essential elements of the offence charged. The magistrate must record what the accused has said, as nearly as possible in his own words, and then formally enter a plea of guilty. In my view failure to involve the social welfare when the charge sheet was read to the child of 17 years old denied the accused right to properly understand the contents of charge sheet. ***Adan v Republic (1973) EA 445***, cited by the case of ***Khalid Athumani v. R, Criminal Appeal NO. 103 OF 2005***, (unreported), it was explained that:

> *"When a person is charged, the charge and the particulars should be read out to him, so far as possible* ***in his own language****, but if that is not possible,* ***then in a language which he can speak and understand****. The magistrate should then explain to the accused person all the essential ingredients of the offence charged. If the accused then admits all those essential elements, the magistrate should record what the accused has said, as nearly as possible in his own words, and then formally enter a plea of guilty. The magistrate should next ask the prosecutor to state the facts of the alleged offence and, when the statement is complete,*

should give the accused an opportunity to dispute or explain the facts or to add any relevant facts. If the accused does not agree with the statement of facts or asserts additional facts which, if true, might raise a question as to his guilty, the magistrate should record a change of plea to "not guilty" and proceed to hold a trial. If the accused does not deny the alleged facts in any material respect, the magistrate should record a conviction and proceed to hear any further facts relevant to sentence. The statement of facts and the accused's reply must, of course, be recorded."

In view of the above findings, it can confidently be concluded that, failure to involve the social welfare leaves doubt as to whether the accused who was the child properly pleaded basing on the particulars of the offence against him. In my view the social welfare was in the better position to provide guidance and social welfare to the accused who was the child under the law of child Act, 2009.

Now having observed those serious irregularities, the question before me is to determine what should be the best way to deal with this matter in the interest of justice. In my considered view the best way to deal with this matter is by way of revision. In this regard I wish to invoke section 272 and 273 of the Criminal Procedure Act, Cap 20

[R.E.2019] which empowers this Court to exercise its revision powers to examine the record of any criminal proceedings before any subordinate court for the purpose of satisfying itself as to the **correctness**, **legality** or **propriety** of any finding, sentence or **order** recorded or passed. This is in accordance with section 372 of the Act. Section 373 further empowers the court that in the case of any proceedings in a subordinate court, the record of which comes to its knowledge, the High Court may in the case of conviction, exercise any of the powers conferred on it as a court of appeal by sections 366, 368 and 369 and may enhance the sentence. The Court is also empowered in the case of any other order other than an order of acquittal to alter or reverse such order.

I wish to refer section ***372*** of the Criminal Procedure Act, Cap 20 [R.E.2019] as follows:

> ***"372.*** *The High Court may call for and* ***examine*** *the record of any criminal proceedings before any subordinate court for* ***the purpose of satisfying itself as to the correctness, legality or propriety of any finding, sentence or order recorded or passed,*** *and as to the regularity of any proceedings of any subordinate court.*
>
> Furthermore, section 373 of the same Act provides that:

"(1) In the case of any proceedings in a subordinate court, the record of which has been called for or which has been reported for orders or which otherwise ***comes to its knowledge****, the High Court may–*

(a) in the case of conviction, exercise any of the powers conferred on it as a court of appeal by sections 366, 368 and 369 and may enhance the sentence*; or*

(b) in the case of any other order other than an order of acquittal, ***alter or reverse such order****, save that for the purposes of this paragraph a special finding under subsection (1) of section 219 of this Act shall be deemed*

not to be an order of acquittal.

(2) No order under this section shall be made to the prejudice of an accused person unless he has had an opportunity of being heard either personally or by an advocate in his own defence; save that an order reversing an order of a magistrate made under section 129 shall be deemed not to have been made to the prejudice of an

accused person within the meaning of this subsection.

(3) ...

(4) Nothing in this section shall be deemed to preclude the High Court converting a finding of acquittal into one of conviction where it deems necessary so to do in the interest of justice

(5)...."

Reading between the lines on the above provisions of the law empower this Court wide supervisory and revisionary powers over any matter from the lower courts where it appears that there are illegalities or impropriety of proceedings that are likely to lead to miscarriage of justice. Reference can also be made to other laws. In this regard I will refer section 44 (1) (a) and (b) of Magistrates Courts Act Cap 11 [R.E. 2019] which clearly provides that:

"44 (1) In addition to any other powers in that behalf conferred upon the High Court, the High Court–

(a) ***shall exercise general powers of supervision over all district courts and courts of a resident magistrate*** *and may, at any time, call for and inspect or direct the inspection of the records of such courts and give such*

directions as it considers ***may be necessary in the interests of justice,*** *and all such courts shall comply with such directions without undue delay;*

(b) may, in any proceedings of a civil nature determined in a district court or a court of a resident magistrate on application being made in that behalf by any party or of its own motion, if it appears that there has been an error material to the merits of the case involving injustice, revise the proceedings and make such decision or order therein as it sees fit:"

From the above findings and reasoning, I hold that from the above provision of the law including various decision by the court, this court is right in exercising its supervisory and revisionary power on the matter at hand as noted by the learned State Attorney. The law is clear it is proper for this court to invoke revisional powers instead of appeal save in exceptional cases.

In the circumstances I am satisfied that the trial, conviction and sentence to the appellants (Shaban Rajab and Hamis Shaban) was not properly done as the trial court failed to notice some irregularities which lead to injustice on the part of the first accused person at the trial court. In my view where there are more than one accused jointly charged with the same offence, and joining trial, the court

misdirects itself as to the proer legal procedure on one of the accused, all proceedings and judgment against all accused becomes defective and nullity.

In other words, all proceedings and judgment against all the accused persons were fataly defective with no any legal enforecement.

Having observed the irregulaties or the trial against the first accused the question is, what will be the fate of the second accused who is now the appellant. The question at this juncture would now be, having observed such irregularities, would it be proper for this court to order retrial or *trial de novo?*. There are various authorities that have underlined the principles and circumstance to guide court in determining as to whether it is proper to order retrial or *trial de novo* or not.

I wish to refer the case of ***Fatehali Manji V.R, [1966] EA 343,*** cited by the case of ***Kanguza s/o Machemba v. R Criminal Appeal NO. 157B OF 2013,*** where the Court of Appeal of East Africa restated the principles upon which court should order retrial. It said:-

> *"...in general a retrial will 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 purpose of enabling the prosecution to fill up gaps in its evidence at the first trial; even where a conviction is vitiated by a*

mistake of the trial court for which the prosecution is not to blame, it does not necessarily follow that a retrial should be ordered; each case must depend on its particular facts and circumstances and an order for retrial should only be made where ***the interests of justice require it and should not be ordered where it is likely to cause an injustice to the accused person...***"

Having observed those irregularities that are incurable will it be justice to remit the file back for proper conviction?. In this regard I will refer Section 388 (1) of *the Criminal Procedure Act*, Cap 20 [R.E.2019] and see what would be the proper order this court can make in the interest of justice. It is a settled law that failure to comply with the mandatory requirement of the law, is a fatal and incurable irregularity, which renders the purported judgment incapable of being upheld by the High Court in the exercise of its appellate jurisdiction. In my view an order for retrial would be more justice and in the interests of justice I do so. I am of the considered view that, an order for retrial will not cause any likely of injustice to the appellant.

In the circumstances I therefore remit the file back to the trial court for it to properly deal in line with the legal requirement under the relevant laws. Where it appear that the trial magistrate has ceased

jurisdiction for one reason or another, in terms of section 214 (1) of the CPA another magistrate should be assigned the case to proceed with the matter. Both the Trial Court should consider this matter as priority and deal with it immediately within a reasonable time to avoid any injustice to the appellant resulting from any delay. It should be noted that all appeals that are remitted back for proper conviction or sentencing need to be dealt expeditiously within a reasonable time.

With regard to the position of the appellant (second accused) I order him to remain in custody pending the outcome of the matter. The first accused namely Shaban s/o Rajab and the appellant (Hamis Shaban) be summoned to appear before the trial court for trial de novo. Depending on the outcome of the new judgment, the appellant shall be at liberty to start afresh the process of appeal.

A.J. MAMBI

JUDGE

28/07/2022

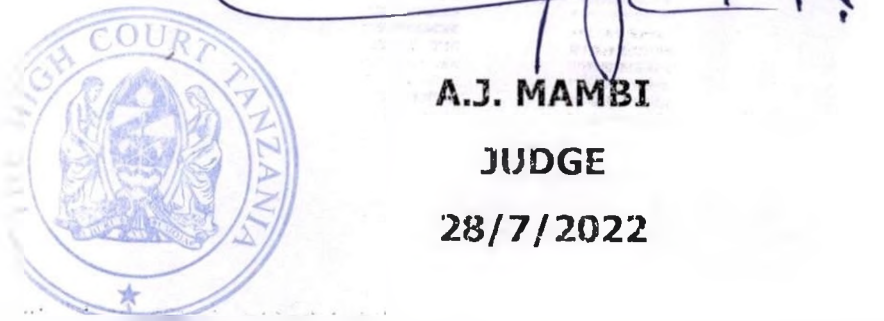
Judgment delivered in Chambers this 27th day of July, 2022 in presence of both parties.

A.J. MAMBI

JUDGE

28/7/2022

Right of Appeal explained.



A.J. MAMBI

JUDGE

28/7/2022