

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

IN THE DISTRICT REGISTRY OF BUKOBA

AT BUKOBA

CRIMINAL APPEAL NO. 40 OF 2022

(Originating from Criminal Case 35 of 2022 Resident Magistrate's Court of Bukoba)

CHRISTIAN CHARLES..... APPELLANT

VERSUS

REPUBLIC..... RESPONDENT

JUDGMENT

21st February and 10th March, 2023

BANZI, J.:

On 15th March, 2022, the Appellant was arraigned before the Resident Magistrate's Court of Bukoba charged with the offence of Grave Sexual Abuse contrary to section 138C (1) (a) and (2)(b) of the Penal Code [Cap. 16 R.E. 2019] ("the Penal Code"). It was alleged that, on 21st December, 2021 at Bunazi village, Kasambya ward, within Missenyi District in Kagera Region, the Appellant for his sexual gratification did rub his fingers on the vagina of victim, PW2 (name withheld to protect her identity) a girl aged three (3.5) years old without her consent. At the end of the trial, he was convicted and sentenced to twenty (20) years imprisonment with 12 strokes of cane and compensation order to pay the victim Tshs.2,000,000/=. Aggrieved with that decision, the Appellant under the services of Mr. Niyikiza

Seth, learned Advocate preferred an appeal before this Court challenging his conviction and sentence.

Briefly, the facts of the case leading to the conviction of the Appellant runs as follows; the victim and her mother (PW1) were staying within the same compound with the Appellant but in separate houses. On the date of incident, 21st December, 2021, PW1 left the victim and her sister at the house of her neighbour (PW3) and went to hospital as she was sick. After a while, PW3 went to church leaving the victim and her sister with the Appellant. According to the victim, the Appellant took her into his bedroom, undressed her and inserted his finger into her vagina. She felt pain and the Appellant told her not to tell her mother. When PW1 returned, she found her older daughter outside washing dishes. After enquiring on the whereabouts of the victim, PW1 was informed that, she was inside the Appellant's room. PW1 called the victim and the Appellant in vain and decided to enter into the Appellant's sitting room where she called them and it was when the Appellant came out of his bedroom with the victim while holding her hand.

Later during the night, PW1 came to realise about what happened to her daughter when the victim was unable to urinate due to pain. PW1 and PW3 examined and found her vagina with reddish colour and bruises. Upon being asked, the victim revealed that, it was the Appellant who caused it by

using his finger. After hearing that, PW1 called the Appellant and his wife while, PW3 called her husband and another neighbour namely Mama Beth. Upon being asked, the Appellant denied everything. However, after the victim was called and narrated what had transpired, the Appellant confessed and pleaded to be forgiven. On the following day, PW1 reported the incident to Kyaka police station where the victim was given PF3 and taken to Bunazi health centre. She was examined by PW5 who found small laceration on her vulva.

In his defence, the Appellant categorically denied to have committed the alleged offence. He claimed to be arrested on 21st December, 2021 around 11:00 hours while he was on his way from shamba. He also claimed to be tortured by police officers while he was under custody in an attempt to procure his confession. He maintained that; the case was framed up by PW1 due to their misunderstanding because they used to be lovers.

At the hearing, the Appellant was represented by Mr. Niyikiza Seth, learned Advocate while the Respondent had the services of Mr. Emmanuel Luvunga, learned Senior State Attorney. In the course of hearing, Mr. Seth raised an issue of law concerning non-compliance with section 234 of the Criminal Procedure Act [Cap. 20 R.E. 2022] ("the CPA").

Addressing that issue, Mr. Seth submitted that, after completion of testimony of PW1 and the victim (PW2), the charge was amended but PW1 and PW2 were not recalled to testify. Also, the trial magistrate did not inform the Appellant his right to recall witnesses who had already testified after alteration of the charge as required by law. He insisted that, this is a fatal irregularity which vitiates the proceedings as it was held in the case of **Omary Juma Lwambo v. Republic**, Criminal Appeal No. 59 of 2019 CAT at Dar es Salaam (unreported). On the way forward, he urged this court to nullify the proceedings after the amendment of the charge and consequently, quash the judgment and set aside the sentence and order. He urged this court not to order a re-trial because of weakness of prosecution evidence.

On his part, Mr. Luvunga admitted that, the witnesses were neither called to give their evidence afresh nor recalled to for further cross-examination. However, according to him, such failure is not fatal to the extent of vitiating proceedings because it is not mandatory requirement of the law considering that, the Appellant was called upon to plead on the amended charge. Besides, the amendment was about the date of incident and name of the Appellant which did not call for fresh testimony of PW1 and PW2. He prayed for an order of trial de novo from the amendment of charge in case the proceedings are declared a nullity.

I have carefully examined the proceedings of the trial court as well as submissions of both sides. Section 234 (1) of the CPA permits amendment or substitution of the charge at any stage of a trial where it appears that, the charge is defective either in substance or form. On what is done after amendment or substitution is provided under subsection (2) (a) to (c) as hereunder;

"(2) Subject to subsection (1), where a charge is altered under that subsection—

- (a) the court shall thereupon call upon the accused person to plead to the altered charge;*
- (b) the accused may demand that the witnesses or any of them be recalled and give their evidence afresh or be further cross-examined by the accused or his advocate and, in such last mentioned event, the prosecution shall have the right to re-examine any such witness on matters arising out of such further cross-examination; and*
- (c) the court may permit the prosecution to recall and examine, with reference to any alteration of or addition to the charge that may be allowed, any witness who may have been examined unless the court for any reason to be recorded in writing considers that the application is made for the*

purpose of vexation, delay or for defeating the ends of justice."

Dealing with the same section, the Court of appeal of Tanzania through the case of **Omary Juma Lwambo v. Republic** (*supra*) stated as follows:

*"Having heard the parties on the point of law concerning non-compliance with s. 234 (1) and (2) of the CPA, we are of the settled mind that the omission is fatal. **When a charge is substituted, the above stated provisions of the CPA require that the accused person should be called upon to plead and thereafter, be informed of his right to require a recalling of the witnesses who had testified to either give evidence afresh or be further cross- examined."***

It is clear from the settled position above that, after amendment or substitution of the charge, the accused must be called upon to plead and then, be informed his right to require the recalling of witnesses who had testified in order to give fresh evidence or be further cross-examined. In the matter at hand, on 1st June, 2022 when PW2 completed to testify, the prosecution prayed to amend charge under section 234 (1) of the CPA. After granting the prayer, the amended charge was read over to the Appellant who was called to plead and he pleaded not guilty. After recording the Appellant's plea, the trial court proceeded to adjourn the case to another hearing date.

On the next date, hearing proceeded with PW3. It is obvious from the record that, the trial court did not comply with the requirement of the law of informing the Appellant his right to require the recalling of witnesses who had testified in order to give fresh evidence or be further cross-examined. In another case of **Ezekiel Hotay v. Republic**, Criminal Appeal No. 300 of 2016 CAT at Arusha (unreported), it was held that:

"According to the preceding cited provision, it is absolutely necessary that after amending the charge, witnesses who had already testified must be recalled and examined. In the instant case, having substituted the charge the five prosecution witnesses who had already testified ought to have been re-called for purposes of being cross-examined. This was not done. In failure to do so, rendered the evidence led by the five prosecution witnesses to have no evidential value."

The same position was held in the case of **Balole Simba v. Republic**, Criminal Appeal No. 525 of 2017 CAT at Shinyanga (unreported) where it was stated that:

"...although the substituted charge was read over to the appellant, he was not subsequently addressed on his right to have the two prosecution witnesses who had already testified be recalled so as to give fresh evidence or be further cross examined..."

Given the shortcomings in the procedure regulating substitution of charge which with respect, missed the eye of the High Court, it cannot be safely vouched that the conviction of the appellant was without blemishes."

In the instant appeal, despite the amended charge being read over to the Appellant, but he was not subsequently addressed on his right to have the two prosecution witnesses namely, PW1 and PW2 who had already testified be recalled so as to give fresh evidence or be further cross examined. Since the provision of section 234 was violated, there was no way in which the proceedings of the trial court could stand as it was held in the case of **Godfrey Ambros Ngowi v. Republic**, Criminal Appeal No. 420 of 2016 CAT at Arusha (unreported).

Basing on authorities above, I hereby invoke the revisionary powers under section 372 of the CPA and nullify the proceedings of the trial court, quash the judgment and set aside the sentence and compensation order. On the way forward, ordinarily, after the proceedings have been nullified, what follows is an order for retrial depending on circumstances of each case. In the appeal at hand, learned counsel for the Appellant invited this Court not to order retrial due to weakness of the prosecution evidence. However, having carefully gone through the evidence adduced during the nullified trial and particularly the evidence of the victim, PW1 and PW3, and considering

the age of victim, I am convinced that an order of retrial is necessary and for the interest of justice.

For those reasons, I order expeditiously retrial against the Appellant before another Magistrate with competent jurisdiction. In the meantime, the Appellant shall remain in custody until he is sent to the trial court for his fresh trial.

It is so ordered.



I. K. BANZI
JUDGE
10/03/2023

Delivered this 10th March, 2023 in the presence of Mr. Niyikiza Seth, learned counsel for the Appellant who is also present and Mr. Amani Kyando, learned State Attorney for the Respondent. Right of appeal duly explained.



I. K. BANZI
JUDGE
10/03/2023