IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

IRINGA DISTRICT REGISTRY

AT IRINGA

DC. CRIMINAL APPEAL NO. 81 OF 2022

(Originating from Criminal Case No. 123 of 202I in the District Court of Iringa at Iringa)

EMMANUEL GWANDU---------- APPELLANT

VERSUS

REPUBLIC---------- RESPONDENT

RULING

Date of Last Order: **28/04/2023**

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A. E. Mwipopo, J.

Iringa District Court convicted Emmanuel Gwandu, the appellant herein, for two counts of unnatural offence contrary to section 154 (1) (a) and (2) of the Penal Code, Cap. 16 R.E. 2019. It was averred in the particulars of the offence in the first count that on divers of dates in August, 2021, at the Mtwivila area within the District and Region of Iringa, the

appellant had carnal knowledge of A.N. (the name of the victim is concealed), a boy of 13 years, against the order of nature. In the second count, the particulars of the offence reveal that on the 27th of September, 2021, in the Mtwivila area within the District and Region of Iringa, the appellant had carnal knowledge of A.N., a boy of 13 years, against the order of nature.

After hearing prosecution and defence witnesses, the trial court convicted the appellant for both counts and sentenced him to serve life imprisonment. The trial Court also ordered the appellant to pay shilling 5,000,000/= as compensation to the victim.

The appellant was aggrieved by the decision of the District Court and filed the present appeal. The appellant raised five grounds of appeal in his petition of appeal as provided hereunder:-

1. *The trial court wrongly convicted and sentenced the appellant for the charged offences based on a defective charge sheet containing particulars of the offence not specific in terms of date and time when the alleged offence was committed, thus making it difficult for the appellant to make his defense.*

2. *That the learned trial Magistrate erred both in law and facts for holding that the appellant was adequately identified without considering that;*

(i) PW2 only mentioned the appellant at the earliest possible opportunity once PW1 beat him; thus, such evidence must be more credible and reliable.

(ii) A mere mention of the type of appellant hair is not sufficient identification evidence unless resolved by an identification parade.

3. *That, the learned trial Magistrate erred in law and facts for holding that PW4 proved the element of penetration without considering that;*

(i) PW4's findings that PW2 was sodomised are not medical findings but eyewitness evidence.

(ii) PW4's findings do not clearly explain how he identified old bruises in the victim's Anus, including that of August, 2021.

4. *That, the trial court contradicted itself by reaching this unfair judgment without totally evaluating the defence case, thus constituting an unfair trial.*

5. *That, the prosecution side failed to prove this case beyond reasonable doubt.*

On the hearing date, the appellant was present in person. In contrast, Ms. Veneranda Masai, State Attorney, represented the respondent. Both parties made their submissions, and the date of judgment was fixed.

While composing the judgment, I observed a fatal procedural irregularity that may vitiate the proceedings before the trial. The said irregularity is that the prosecution prayed to substitute the charge on 05.05.2022, the prayer which the trial Court granted. Then, the prosecution lodged a substituted charge containing two counts. The appellant was invited to plea to it, where he pleaded not guilty to both counts. When the charge was substituted, the three prosecution witnesses had already testified. The trial proceeded without informing the appellant of his right to recall these witnesses who had already testified for cross-examination. Failure to recall the three prosecution witnesses to be examined on the substituted charge contravened the provision of section 234 of the Criminal Procedure Act, Cap. 20 R.E. 2019. As the omission is fatal, the Court invited both parties to address the omission.

The appellant, a layperson, said that the omission to inform his right to recall for cross-examination those witnesses who had testified before the Court substituted the charge is fatal and has prejudiced him. He prayed for the Court to look at the irregularity and decide from there.

Mr. Majid Matitu, State Attorney who appeared for the respondent, said in addressing the Court that as this Court observed it, there is a fatal

irregularity in the proceedings of the trial Court. The charge was substituted on 05.05. 2022 to add one more count after three prosecution witnesses have already testified. The Court did not afford the appellant his right to recall those witnesses after substituting the charge. It contradicts section 234 (2) (b) of the Criminal Procedure Act, Cap. 20 R.E. 2019. The omission prejudiced the appellant as he did not get a chance to cross-examine those witnesses regarding the additional count in the charge. The counsel prayed for the Court to order for retrial of the case so that the appellant could get his right to a fair trial. He added that the offence has been rampant in society, and it is in the interest of justice that the case be retried. That ended both parties' submission to the Court on the omission.

As I stated earlier herein, I found procedural irregularity in the proceedings of the trial Court while composing the judgment. The anomaly is the failure to accord the appellant the right to recall witnesses who have already testified for cross-examination after the charge was substituted. The proceedings of the trial Court reveal that the appellant was initially charged with for unnatural offence contrary to 154 (1) (a) and (2) of the Penal Code, Cap. 16 R.E. 2019. Particulars of the offence alleged that on the 27th of September, 2021, at Mtwivila area within the District and Region of Iringa,

the appellant had carnal knowledge of A.N., a boy of 13 years, against the order of nature. The appellant pleaded not guilty to the offence, the preliminary hearing was conducted, and the prosecution brought three witnesses who testified before the trial Court. On 05.05.2022, the charge was substituted, and the new charge containing two counts of unnatural offence against the appellant was lodged. The appellant pleaded not guilty to both counts. The trial Court proceeded with the hearing of the case without affording the right to the appellant to recall for cross-examination those witnesses who had already testified when the charge was substituted.

The omission contravened the provision of section 234 of the Criminal Procedure Act, Cap. 20 R.E. 2019, which provides that:-

> *"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 a 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; all amendments made under the provisions of this subsection shall be made upon such terms as the Court shall seem just.*

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

From the above-cited provision, the trial Court needs to recall witnesses who had already testified for examination after substituting the charge.

As it was submitted by the counsel for the appellant, the omission is fatal since the appellant was denied his right to examine these witnesses who have already testified on the newly added count after the charge was substituted. This Court, in the case of **Republic vs. Jumanne Mohamed**

[1986] TLR 231, while discussing the effects of the omission to inform the accused person of his right under section 234 (2) (b), held that, I quote:-

> *"The accused person in this case was given no opportunity to exercise his right under subsection (2) (b) of the above section. It is not an answer to say that the accused did not demand to exercise those rights. How can one demand a right to the existence of which one is unaware? Where the accused is a layman or a lawyer who is not likely to know (sufficiently) the provision of section 234 (2) (b) of the Act, the Court of law is under a duty, in the interest of justice, to inform the accused of his right under the subsection and found out from him which right, if any, he proposes to exercise. The accused reply should be reflected in the record."*

I subscribe to the above-cited decision that the trial Court was obliged to inform the appellant of his right to recall witnesses who had already testified when the charge was substituted. His reply was supposed to be reflected on the record of the case. This was not done in this case. The omission has rendered the evidence of three prosecution witnesses (PW1, PW2 and PW3) to lose evidential value. Since the testimony of PW1, PW2 and PW3 has no evidential value, the only prosecution evidence remaining is that of PW4 (doctor) who examined the victim. The remaining evidence is not sufficient to convict the appellant. The remedy where the proceedings of

the trial Court are tainted with irregularity is for this Court to exercise its revisional powers and revise the decision of the trial Court and quash the proceedings. The Court of Appeal did the same in the case of **Ezekiel Hotay vs. Republic**, Criminal Appeal No. 300 of 2016, Court of Appeal Of Tanzania, at Arusha, (unreported). As the shortcomings in the procedure were done by the trial Court and considering the frequency and seriousness of the offence in our society, it would be in the interest of justice to order a retrial as the counsel for the respondent prayed.

Therefore, I revise and quash the trial court's proceedings and judgment, and its sentence is set aside. I order for the file to be reverted to the District Court immediately and for the appellant to be retried afresh by another Magistrate with requisite jurisdiction. The appellant is to remain in custody until he is brought to the trial Court for his new trial. It is so ordered accordingly. Right of appeal explained.

A.E. MWIPOPO

JUDGE

28/04/2023