

**IN THE HIGH COURT OF TANZANIA  
(DODOMA DISTRICT REGISTRY)  
AT DODOMA  
DC CRIMINAL APPEAL NO. 27 OF 2022**

**JUMANNE FRANCIS.....APPELLANT**

**VERSUS**

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

**(Originating from the District Court of Kondoa at Kondoa)**

**In**

**Criminal Case No. 120 of 2019**

.....

**JUDGMENT**

Date of Last Order: 24<sup>th</sup> October, 2023

Date of Judgement: 14<sup>th</sup> November, 2023

**SARWATT, J.**

JUMANNE FRANCIS (“the appellant”) is aggrieved by the decision of the District Court of Kondoa at Kondoa (“trial court”) whereby he was convicted for the offence of incest contrary to section 158(1) of the Penal Code [Cap 16 R.E 2002] (now R.E 2022) where he was sentenced to serve thirty (30) years imprisonment. The appellant is now before this Court by way of appeal, seeking the Court to quash the conviction and sentence imposed on him with the ultimate goal of being set to liberty.

In his petition of appeal, the appellant has packed a total of six grounds, including the 5<sup>th</sup> ground that the charge sheet was substituted two times and was deprived of his right to call back the prosecution witnesses to start afresh, which I find it desirable to determine the same first as it goes to the root of the case.

When the appeal was called for hearing, the layperson appellant appeared in person and adopted his grounds of appeal to form submissions supporting the appeal in the Court.

The Respondent, in the service of Ms. Patricia Mkina, the learned State Attorney, contested the appeal. For the 5<sup>th</sup> ground, she contended that it was an obligation to the appellant to advance a prayer to the trial court to call back the prosecution witnesses subsequent to the substitution of charge.

The records are clear, as alleged by the appellant, that the charge was substituted twice as it appears on the typed proceedings under pages 11 & 12 and pages 34 & 35, as evidenced herein below;

(Page 11 & 12)

***"S/A** – We pray to substitute the charge sheet u/s 234(1)  
of the CPA [Cap 20 R.E 2002]*

**COURT** – Prayer is granted new charge is read over and explained to accused person who is then asked to plea thereto:-

**Accused:** It is not true your honor.

**COURT:** EPNG

SGD: F. R. MHINA – RM

11/11/2019”

(Page 34 & 35)

**S/A** – We pray to substitute the charge sheet u/s 234(1) of the CPA Cap 20 R.E 2002

**ACCUSED** – I have no objection

**COURT:** Prayer is granted. Now charge is read over and explained to accused person who is then asked to plea thereto: -

Accused – it is not true

**COURT:** Enters a plea of not guilty.

SGD: F. R. MHINA – RM

14/7/2019”

Section 234 of the Criminal Procedure Act provides for the avenue of the substitution of charge as correctly referred by the prosecution. Among other things, it gives the accused a right to plead to the altered charge and

demand for the witnesses to be recalled to give their evidence afresh for cross-examination on the newly substituted charge as provided under subsection 234(2)(a)(b) &(c);

*"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 person may demand that the witnesses or any of them be recalled and give their evidence afresh or be further cross examined by the accused person 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"*

Examining this position of the law together with the above-quoted excerpt on what transpired before the trial court during the hearing, it is

evident that the trial court on all two occasions only exercised its duty of reading the altered charge to the appellant who entered a plea of not guilty without informing the appellant the available option of recalling the prosecution witnesses who had testified before the charge was substituted.

Therefore, this Court shall examine if such omission is fatal. To answer this issue, I will be guided by the holding of the Court of Appeal in the case of **Ezekiel Hotay Vs. The Republic, Criminal Appeal No. 300 of 2016, Arusha**, which, on page 7, while referring to the provision of section 234 of the Criminal Procedure Act, had the following to say;

*"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. Given the shortcomings in the procedure, which with respect the High Court failed to detect, we are not inclined to vouch that the appellant's conviction was safe.**"*

[Emphasis Added]

Also, in the case of Omary **Juma Lwambo v the Republic, Criminal Appeal No. 59 of 2019**, the Court of Appeal, having encountered a similar issue, stated the following;

*"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.**"*

[Emphasis Added]

With regard to the above position of the law, it is clear to my mind that the trial Court's flout to inform the appellant of his right to recall the prosecution witnesses who had already testified is fatal and vitiates the proceedings initiated before the trial court.


That said, this Court do hereby invoke her revisionary power under section 372(1) of the Criminal Procedure Act [Cap 20 R.E 2022] and finds

that the trial proceedings, conviction, and sentences against the appellant nullity and accordingly the same are quashed and set aside accordingly.

Consequently, the appellant shall be released forthwith from prison unless otherwise there was a lawful cause. I have hesitated to order the retrial due to the circumstances of this case, where there are a lot of gaps left by the prosecution, and ordering a retrial is to enable the prosecution to fill up the gaps in the previous trial.


Ordered accordingly.



  
**S. S. SARWATT**  
**JUDGE**  
**14/11/2023**

**Dated at Dodoma** this 14<sup>th</sup> day of November, 2023



  
**S. S. SARWATT**  
**JUDGE**  
**14/11/2023**