

IN THE HIGH COURT OF ZANZIBAR

AT TUNGUU

CRIMINAL APPEAL No. 67 OF 2022

(Appeal from the Criminal Case No. 206 of 2019 of the Regional Magistrate Court for Zanzibar at Vuga, Hon. Simgeni, RM)

KHAMIS JUMA ISSA.....APPELLANT

VERSUS

DIRECTOR OF PUBLIC PROSECUTIONS.....RESPONDENT

JUDGMENT

26th February & 25th March, 2024

A. I. S. Suwedi, J

This appeal, which contains 4 grounds grievances, has raised so many issues but to me I found one issue significant making the appeal to have merit. Ground one of appeal tabled before this Court is:

Kwamba, mheshimiwa Hakim wa Mahkama ya Mkoa Vuga alijipotosha sana katika maamuzi mabaya ya kisheria kwa kuto kuwapa haki yao mashahidi iliyomo katika kifungu cha sheria.

The grounds literally blamed the trial Court for not giving rights to the witnesses, and so at the beginning I asked myself as to what legal rights was not given to the witnesses? I came to know exactly what was meant during the hearing of the appeal where by on that day the appellant represented by

the learned counsel Rajab Ngwatu and the respondent appeared through Mr. Annuwar Saadun, learned Principal State Attorney.

Submitting that ground, counsel Ngwatu stated that during the hearing before the trial Court there was amendment of the charge but the substituted charge was not read over to the appellant which is against section 219 (2) (3) (4) of the Criminal Procedure Act, No. 7 of 2018. The omission caused the trial not to be fair on the side of the appellant since the former charge which was read became in-existing. He quoted a case of **Albanus Aloyce & Another v. R**, Criminal Appeal No. 283 of 2015 (unreported) at page 5. He concluded that the mistake done caused the entire proceedings, conviction and sentence to be nullity. Having heard this submission, I have come to understand that the trial Court infringed the appellant's right under section 219 (supra).

With regard to this point, Mr Saadun conceded that there was an amendment of the charge done after PW1 and PW2 testified and the same was not read over. He commented the change done was just a sir name of the victim. He also admitted that section 219 (3) requires a charge to be read after amendments. However, he said that the defect is not fatal, hence it can not nullify the proceedings. If this court found the defect to fatal, the remedy is trial denovo if the evidence adduced is seem to be strong.

Counsel Ngwatu objected the prayer for the reason that the respondent will have time to rectify their mistakes.

After having summarised what parties said with regard to the ground one, now a brief facts leading to this appeal. Originally, the appellant arraigned before the Regional Magistrate Court with two counts. One, Abduction of Boy contrary to section 113 (1) (b) of the Penal Act, No. 6 of 2018 and two, Defilement contrary to section 115 (1) (b) of the Penal Act (supra). It has been stated by the respondent that between June, 2018 and February, 2019, at about 01:00 pm at Kwarara, in the West "B" District within the Urban West Region of Unguja, the appellant took **Raas** (a name for the purpose of this judgment only), a boy of 14 years, who is under care of his parents from his home to the appellant house without consent of his parents. As for the second count, it was asserted that between the same duration, same time and in the same area, the appellant had carnal knowledge of a stated boy.

After hearing of the evidence, the Court found the appellant not guilty to the charge of Abduction but convicted him to the charge of Defilement of a Boy and sentence him to serve 8 years imprisonment and to pay TZS 900,000/- compensation to the victim.

The case before the trial started with the charge sheet filed on 02/07/2019 and read over the appellant on the same who denied it. Hearing

of the respondent's witnesses started on 14/08/2019 and on that date two witnesses (PW1 and PW2) were heard. Records further show that on 28/08/2019 the charge sheet was substituted and the same was accepted. The hearing of PW3 proceeded instantly without reading the new charge sheet as claimed by the appellant. I further read the two charge sheets and found the respondent changed the Sir name of PW1.

Section 219 (2) of the Criminal Procedure Act (supra) says:

219 (2) Where, at any stage of a trial before the close of the case for the prosecution, it appears to the prosecutor that the charge is defective, either in substance or form, the prosecutor may apply for a permission of the court to alter the charge.

The law set a mandatory requirement after the changing the charge sheet under subsection (3) of section 219 that:

(3) Where a charge is altered as aforesaid, the court shall thereupon call upon the accused person to plead to the altered charge.

In the instant appeal, the trial Court did not accorded that right to the appellant. The proceedings show that:

Pros:

We pray to emend our charge so as to appear instead of accordingly.

Sgd: Haroub Sheikh Pandu
R.M
28/08/2019

Court:

New amended Charge Sheet admitted

Sgd: Haroub Sheikh Pandu
R.M
28/08/2019

Accused:

Why they never amend before

Sgd: Haroub Sheikh Pandu

R.M

28/08/2019

**PW3: MWANAKHAMIS ISSA MUSSA, 56 YEARS (F), ISLAM,
SWORN AND STATES**

.....

The piece of proceedings appears in the typed record, is what it is in the original record. This is clear that the mandatory requirement was not followed. For this I am agreeing with counsel Ngwatu that the appellant right was infringed. As I said earlier that the respondent changed the Sir Name of PW1, this is to say that earlier the appellant was charged with someone else and later the charge stated another person. In this particular situation, it was necessary to read the new charge sheet.

Besides, the appellant had another right accompanied by the substitution of the indictment as the respondent had already presented two witnesses. Section 219 (4) says:

219 (4) Where a charge is altered under this section 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.

This was also not done, the appellant was never given the chance to say whether the two witnesses already testified (PW1 and PW2) to be called

again or not. The defect is fatal and not as said by Mr Saadun that the mistake is not fatal.

In the case of **Tluway Akonaay v. Republic** [1987] T.L.R 92, on the effect of such an omission, the Court said that:

It is mandatory for a plea to a new or altered charge to be taken from an accused person, as otherwise the trial becomes a nullity

Also in the case of **Omary Juma Lwambo v. R**, Criminal aPPEAL no. 59 of 2019 (unreported) where by the situation was like in the instant appeal that the Charge was substituted and the new charge was not read to the appellant. The Court said that:

.....the omission to comply with the provisions of s. 234 (2) (a) of the CPA renders the proceedings a nullity.

The provision cited is mutatis mutandis to section 219 (3) of the Criminal Procedure Act, No 7 of 2018 earlier quoted.

In the case of **Ngalaba Luguga @ Ndalawa v. R**, Criminal Appeal No. 66 of 2019 (unreported), the Court said that with regard to the omission:

In the same vein, the appellant in the instant case did not enter a fresh plea following the amendment done, as such, he was not accorded a fair trial to the charge he was convicted of. Legally, a conviction emanating from an unfair trial is a nullity.

The Court finally nullified the proceedings and judgment of the trial Court and also quashed the conviction and set aside the sentence meted on the appellant.

The omission done by the trial Court renders the proceedings, judgment, conviction and sentence nullity. Being guided by the above cited authorities, I have no other way save for passing through this door. This stand put me in a position to see no need of looking at other grounds of appeal since ground one is sufficient to dispose the entire appeal.

Therefore, from the reason, given I am exercising powers under section 359 of the Criminal Procedure Act, No. 7 of 2018 by nullifying the proceedings and the judgment of the Regional Magistrate Court. I am also setting aside the conviction and sentence given to the appellant.

Upon reading the evidence adduced, I have noted that the evidence was enough to establish the offence earlier convicted. I thus, ordering retrial before another Magistrate.

DATED at TUNGUU ZANZIBAR this 25th day of March, 2024

A handwritten signature in blue ink, appearing to read 'A. I. S. Suwedi', is written over a faint circular stamp.

A. I. S. Suwedi

JUDGE