

TANZANIA / JUDGMENT

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IN THE HIGH COURT OF TANZANIA

- AT NWANZA APPELLATE JURISDICTION (Tabora registry) (HC) CRIMINAL APPEAL NO. 403 OF 1976
- (C/F. Misc. Cr. Cse. No. 66 of 1976) ORIGINAL CRIMINAL CASE NO. 898 OF 1975 OF THE DISTRICT COURT OF SHINYANGA DISTRICT AT SHINYANGA Before: M.G.C. Kajeri 1 Esq., Resident Magistrate. A.S.P. JOIJ CHRYSOSTON MASELE Appellant (Original Accused) versus THE REPUBLIC Respondent I (Original Prosecutor) CHARGE: 1st Ct: Corrupt transaction c/s 3 (1) and 3(a) of the Prevention of Corruption Act No. 16 of 1971. 2nd Ct: Corrupt transaction c/s 3(1) and 3(a) of the Prevention of Corruption Act No. 16 of 1971, J U D G M E N T. SISYA J: The two appellants 1 A.S.P. John Chrysoston Masele and No. B 768 D/Sgt. Salum, were jointly charged with and convicted, in the District Court of Shinyanga, of two counts of corrupt transaction contrary to Section 3(1) and 3(a) of the Prevention of Corruption Act, No. 16 of 1971. They were each sentenced to concurrent terms of imprisonment of three years on each count. They are now applying and their appeals are consolidated. At the hearing of the appeals Mr. Rugarabamu, learned Counsel for appellant Masele made an application to add another ground of appeal to the nine already filed in his petition of appeal. In making the application Mr. Rugarabamu said that he picked up the said ground of appeal after going through the proceedings in the lower court which were received by him. Relatedly, the learned State Attorney, Mr. Massaba, had no objection to the application which was consequently allowed. The ground of appeal in question conveniently marked No. 10 is:- * "Non compliance with the proviso to Section 209(1) of the Criminal Procedure Code was a fatal irregularity which was highly prejudicial to the appellant"! When the appellants first appeared in the District court their
- ... * ... /2 0 (2) pleas were taken to the charge which then as laid read:- "First Count: Statement of Offence Corrupt transaction C/S 3(1) and 3(a) of the Prevention of Corruption Act No. 16 of 1971." Particulars of Offence A.S.P. John Chrysoston Masele and No. 768 D/Sgt. Salumu members of the Tanzania Police Force employed by the Tanzania Government and hence agents for the purposes of the Corruption Act jointly charged on an unknown date in March, 1975 at Naganzo within Shinyanga District, Shinyanga Region corruptly solicited Sh.2,000/= from one NDEREKO SAIDA NTARIMBO and one NANGI NIHIJA as a reward for

being helpful to the said NDEREKO SAID NTARIMBO 'and NANGI AHIJA in a case in which they were charged and convicted of trading without a licence to wit, Criminal Case No. 117/75, Shinyanga District Court. Second Count: Statement of Offence Corrupt transaction c/s 3(1) and 3(a) of the Prevention of Corruption Act No. 16 of 1971- Particulars of offence A.S.P. John Chrysoston Masele and No. 768 D/Sgt. Salum, members of the Tanzania Police Force employed by the Tanzania Government and hence agents for the purposes of the Corruption Act jointly charged on or about the 30th day of March, 1975 at Maganzo within Shinyanga District, Shinyanga Region corruptly accepted cash Shs.1 1 000/= from one NANGI MIHIJI, AND NDEREKO SAIDA (Sic) NTARINBO in a case which they were both charged and convicted of trading without a licence to wit Criminal Case No. 117/75, Shinyanga District Court". Trial commenced on 8/4/76 with appellant Masele who p incidentally, appeared as the first accused in the lower court, being represented by a learned Advocate, Mr. Rugarabam. By 9/4/76 five witnesses had given evidence on the prosecution side and Mr. Pinda, learned State Attorney asked for an adjournment because they were intending to call many more witnesses. The

- application was granted by the learned trial Magistrate and the case was adjourned to 17th June, 1976 with a mention date in respect of. Trial however, did not proceed on 17/6/76 as previously arranged. Instead it proceeded on 10/8/76 in the absence of 'sr. Rugarabamu, learned Advocate for appellant Masele and Mr. Pinda, the State Attorney, who had originally led the prosecution. Two witnesses, the sixth and seventh, gave evidence, and then the Public Prosecutor applied for an adjournment so that arrangements would be made for the State Attorney to come and continue with the prosecution in the case. 13 (3) Appellant Masele objected to this application whereupon the learned trial Magistrate gave himself until the following day to decide and on that day i.e. 11/8/76 he ordered that trial should continue. At that juncture the learned Public Prosecutor made a successful application to withdraw the old charge and substitute a fresh one. The fresh charge as laid reads:- "First Count: Statement of Offence Corrupt transaction c/s 3(1) and 3 (a) of the Prevention of Corruption Act, No. 16 of 1971- Particulars of Offence A.S.P. John Chrysoston Masele and No.768 D/Sgt. Salum Members of the Tanzania Police Force employed by the Tanzania Government and hence agents for the purposes of the Corruption Act jointly charged on unknown date in March, 1975 at Maganzo within Shinyanga District, Shinyanga Region did corruptly solicit (Sic) Shs.2,000/= from one NDEKELO SAIDA NTARIJI30 and one NANGI MIHIJI as a reward for being helpful to the said NDEKELO SAID NTARIMBO and NANGI MIHIJI, in a case in which NDEKELO SAIDA NTAFIN30 and KIJA MALALE were charged and convicted of Trading without a licence to wit; Shinyanga Criminal Case No. 117/1975. Second Count: Statement of Offence Corrupt transaction c/s 3(1) and 3(a) of the Prevention of Corruption Act No. 16/1971 Particulars of offence A.S.P. John Chrysoston Masele and No. B. 768 D/sgt Salum Members of the Tanzania Police Force employed by the Tanzania Government and hence agents for the purpose of the Corruption Act jointly charged on or about the 30th day of March, 1975 at Maganzo within Shinyanga District, Shinyanga Region corruptly accepted cash Shs. 1,000/= from NDEKERO SAIDA NTARINBO

and one NANGI MIHIJA as a reward for being helpful to the said NDEKEPO SJ..II:.

NTLRIMBO and NANGI NIHIJA in a case in which NDEKRO SAIDJ. NTARIMBO and KIJA M1,.LALÉ were charged and convicted of Trading without a licence to wit: Shinyanga Criminal Case No.117/75 11 . The learned trial Magistrate very correctly called, upon the two appellants to plead to the said "fesh ch.:rge". Consequently pleas of "Not Guilty" in respect of both counts for both accused 1 ' were entered. Thereafter, the Prosecutor informed the court that he had the witnesses whereupon, without further ado, the trial continued. The eight witness gave evidence and was followed by the ninth witness before the roseóuticn closed its case. No where on the record of the proceedings in the lower court is it shown tht the learned trial Magistrate informed the appellants 'a . S C S 0 . /4 (4) of their right to have all the seven witnesses, who hoc' testified prior to the substitution of the charge, or any of them recalled as laid down in the second proviso to section 209 (1) of the Criminal procedure Code. Section 209 of the Criminal Procedure Code reads and I quote:- "209. - (1) Where, at any stage of a trial, it appears to the court that the charge is defective, either in substance or inform, the court may make such order for the alteration of the charge either by way of amendment of the charge or by the 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, and §11 amendments made under the provisions of this Sub- section shall be made upon such terms as to the Crurt shall seem just: Provided that, where a charge is altere6 as aforesaid, the Court shall thereupon call upon the recused person to plead to the altered charge: Provided further that, where a charge is altered under this sub-section, thô 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 In arguing out this appeal before me Mr. Rugarabamu for appellant Masele, quite conveniently, started with the tenth ground of appeal. He argued that as. the wording of the original charge was not different from the "fresh Charge" the substitution was not necessary. The validity of this argument is unquestionable. Although the learned trial Magistrate did not specifically point it out, I nevertheless, entertain no doubt whatsoever in my mind that in substituting a new charge for the original one he, i.e. the trial Magistrate, acted or, at least, purported to act under Section 209 of the Criminal Procedure Code. However, this court has consistently held that the necessary prerequisite to the application of section 209 of the Criminal Procedure Code at all is that the charge should be defective. This was decided as far back as 1963 in the case of hAULIDI. LBDULLAH CHENGO V. REPUBLIC (1964) E.A. 122 wh.ch I was referred to by the learned State Attorney, Mr. Masabcz to whom I feel indebted. The same construction to the provisions of section 209 of the Criminal Procedure Code was held to be good a decade later by Kwikima Ag. J. (as he then was) in the case of SOSPETER NY.M13W1;. and J..NOP. V. REPUBLIC (1964) LRT 40 wherein it was held, inter alia, that "before a court can invoke S. 209(1) Criminal Procedure Code, Cap. 20, by calling for or permitting the substitution of the charge, it is essential that a trial court should on its own accord, or through amicus curiae, who may not necessarily be the prosecutor, be aware of a

defect in substance or in form, and satisfy itself that the original charge is defective'. 00006 0.15 I)r (5) It was held further in the case that "where a substitution of a charge is neither called for, nor in accordance with the laws the conviction can only be null and void". On the other hand the learned State Attorney, Mr. Masaba, in answer to Mr. Rugarabamu's submission on this aspect of the case said that the original charge wrongly described NANGI MIHIJA as one of those who; was involved in Shinyanga Criminal Case No.117/75. This, argued Mr. Massaba, amounted to a defect and for this the learned trial Magistrate was therefore perfectly entitled to accept the substitution. In support of his argument on as to the meaning of the word "defective" Mr. Nassaba referred me to Chong's case which I have cited earlier in this judgment. In that case Sir Ralph Windham C.J. (as he was) made reference to an English provision, Section 5(1) of the Indictments Act, 1915 upon which, His Lordship observed, our Sections 260(2) and 209(1), Criminal Procedure Code, are based. His Lordship also quoted a passage from the Judgment of the English Court of Criminal Appeal in the Case of P v. POPL (1951) 1 K.3. 53 wherein the word "defective" was construed (at page 54). It reads:- "The argument for the appellants appeared to involve the proposition that an indictment, in order to be defective, must be one which in law did not charge any offence at all and therefore was bad on the face of it. I do not take that view. In our opinion, any alteration in matters of description, and probably in many other respects, may be made in order to meet the evidence in the case so long as the amendment causes no injustice to the accused person". This meaning is so clear that I adopt it as mine. In the instant case as can clearly be seen from the charges as quoted by me..hereinabove the name of Kija Malale was substituted for that of Nangi Mihija as the person with whom Ndereko Saida Ntarimbo was charged and convicted for trading without a licence in Criminal Case No. 117/75, in order to "meet the evidence in the case", no doubt. There was therefore, to my mind, need for an alteration in matters of description. In short, I am satisfied that there was a defect in the original charge which called for an amendment and that the same was done without injustice to the appellants. Mr. Rugarabamu contended further that since his client did not have his advocate at the time the charge was amended it was the duty of the trial Magistrate to inform the appellant of his right to have any of the witnesses who had already testified recalled. The appellant had, according to Mr. Rugarabamu, a right to be so informed and failure on the part of the learned Trial Magistrate to do so was prejudicial to the appellant. It means there was an irregularity which was fatal in that the conviction was null and void. /6 I (6) The learned State Attorney, Mr. Massaba, conceded that the learned trial Magistrate failed to comply with the second proviso of Section 209(1) of the Criminal Procedure Code, in as much as he was aware that it has been held that a breach of the said proviso nullifies the proceedings. However, Mr. Mossoba urged this court to revisit the decision and change the law. In support of his submission Mr. Massaba contended that fault or irregularity here is merely technical inasmuch as if the law on this aspect of the matter is rigidly adhered to we may end up by having its application occasioning a failure of justice.. To my mind, Mr. Massaba's argument, with respect, is not without substance.' A good example is this very instant case. Here we have two Police Officers, one of them being a fairly Senior Officer. Whatever is the case both of these appellants know or at least are expected to know the

provisions of the Criminal Procedure Code. That being so why, it may be asked, did they not on their own, ask the learned trial Magistrate to recall the witnesses after the substitution? Can it, really, be argued with force, that these two appellants did not sleep upon their rights when they kept mute after the charge had been substituted? As was remarked by Biron J., with which remark, I most respectfully agree, in the case of *D.P.P. V. Mienda Saicli Kia*, Criminal Appeal No. 96 of 1976 (Dar es Salaam Registry and to my knowledge unreported), "Justice should not be defeated on account of the inefficiency (and I would add and inexperience) of the Police or of the Prosecution or even of the court." However, the cases in which it has been held that the omission to inform the accused of their right to recall those witnesses who had already testified at the time of the substitution or amendment of the charge nullifies the conviction are legion, and the law is also clear and this was applied in a recent case of *R. JPHJcNI 1, 11NYISHEHE and ABEL KASEREGERA V. REPUBLIC*, Criminal Appeal No. 48 of 1976 (Dar es Salaam Registry, unreported) in which my learned brother Samatta Ag. J. found that although the evidence against the appellants was "fairly incriminating", the omission by the trial court to advise the appellants of their right under the second proviso to Section 209 (1) of the Criminal Procedure Code was fatal to the convictions. In the event although I would be happier if Section 209 (1) of the Criminal Procedure Code were amended in order to accommodate the fears expressed by Mr. Massha, the learned State Attorney and a few of my own I would rather adhere to the construction of S. 209 (1) Criminal Procedure Code as this court has so far given to it. I (7) In the event, for failing to comply with the second proviso to Section 209 (1) of the Criminal Procedure Code the proceedings in the lower court against these appellants were null and void and they are, hereby so declared. In all the circumstances of the case I choose to refrain from making any order for retrial leaving it to the prosecution to take whatever steps they deem fit. In the final result I allow these appeals. The purported convictions are quashed and the sentences passed on them are set aside. It is hereby directed that both appellants be released forthwith from prison unless they are otherwise being lawfully held. Delivered in open court at Tabora this 17th February, 1977. Tabora, H. E. D. 'SISYA, 17th February, 1977 JUD Gb.. Mr. Rugarabamu for Chrisoston Maselo. Mr. Kwikima for Salum Kapiga. Mr. Massaba for Republic. /.

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