

TANZANIA / JUDGMENT

jafari so ramadhani vs republic

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IN THE COURT OF APPEAL OF TANZANIA AT MBEYA fCORAM: JUMA, C.3.. MZIRAY. 3.A. And MKUYE. J J U CRIMINAL APPEAL NO 311 OF 2017 JAFARI S/O RAMADHANI..... APPELLANT VERSUS THE REPUBLIC.....RESPONDENT (Appeal from the Judgment of the High Court of Tanzania at Mpanda) (Hon. Sambo, 3.) dated the 12th day of February, 2016 in Criminal Appeal No. 25 of 2015 JUDGMENT OF THE COURT 07*” & 8“ November, 2019 JUMA, C.3.: The appellant, JAFARI RAMADHANI, was tried by the District Court of Nkasi at Namanyere (A.B. Mwanjokolo-RM) on a charge of attempt to commit an unnatural offence contrary to section 155 of the Penal Code, Cap. 16. The particulars of the offence were that at midnight of 26th November 2014, in the lockup room of the Namanyere Police Station in Nkasi District, he attempted to have carnal knowledge of one Fulgence s/o Mwanakatwe against the order of nature. In his very brief decision, the trial magistrate (A.B. Mwanjokolo— RM) determined that the prosecution had proved beyond reasonable doubt that the appellant, had attempted to commit the unnatural offence as charged. He convicted the appellant and sentenced him to serve twenty years in prison. The appellant's first appeal was heard by the High Court at Sumbawanga (Sambo, J.). In dismissing the first appeal, the learned Judge relied on the weight of the evidence of the eye-witnesses and concluded that the appellant committed the offence. In this second appeal the appellant preferred eight grounds to fault the dismissal of his appeal by the first appellate court. When the appeal was called for hearing on the 7th November 2019, the appellant appeared in person and placed reliance on his grounds of appeal. The learned Senior State Attorney Mr. Fadhili Mwandoloma and learned State Attorney Ms. Safi Kashinde Amani, appeared for the Respondent DPP. Ms. Amani informed us that she was supporting the appeal on the ground that the record of appeal suffers from several procedural improprieties, which vitiates the entire proceedings of the trial and first appellate High Court. The first fatal defect according to Ms. Amani, appears on page 3 of the record of appeal where the charge of attempt to commit unnatural offence for which the appellant was supposedly convicted for; was not read out to the appellant as is mandatorily required by section 228 (1) of the Criminal Procedure Act, Cap. 20 R.E. 2002 (the CPA). Failure to read out the charge, she submitted, makes the entire proceedings in the trial district court and in the first appellate court nullity. The relevant section 228(1) of the CPA states: "228. -(1) The substance of the charge shall be stated to the accused person by the

court, and he sh a ll be asked whether he adm its o r denies the truth o f the charge . " Moving on to the second fatal defect, Ms. Amani referred us to the evidences of prosecution witnesses appearing on pages 7 to 9 of the 'i record of appeal. These witnesses, were not examined upon oath or 3 affirmation. This was in contravention of what section 198(1) of the CPA which provides: "198.-(1) Every w itness in a crim inal cause o r m atter shall, subject to the provisions o f any other w ritten law to the contrary, be exam ined upon oath o r affirm ation in accordance with the provisions o f the Oaths and Statutory D eclarations A ct. " Ms. Amani also referred to the position this Court has taken in JUMA ISMAIL & ROLACOS COSMAS V. R., CRIMINAL APPEAL NO. 501 OF 2015 and ELIKO SIKUJUA & JANUARY JUMA V. Rv CRIMINAL APPEAL NO. 367 OF 2015 (both unreported) concerning the consequences which must befall the evidence of witnesses who were not examined upon oath or affirmation. In urging us to nullify the proceedings of the two courts below the learned State Attorney specifically sought the support of a legal i position staked in ELIKO SIKUJUA & JANUARY JUMA V. R. (supra), where the Court reiterated that: "This Court has, tim e w ithout number, taken the stance that where the testim ony o f a w itness is taken w ithout oath o r affirm ation, the resultant account from the w itness is not worth the nam e: 'Evidence', and that the sam e can only be discarded (see, fo r instance, unreported cases in Crim inal Appeal No. 10 o f 2008-G odi K a se n e g e ia Vs The R e p u b lic; Crim inal Appeal No. 54 o f 2008-M inja S /gore Vs The R e p u b lic; Crim inal Appeal No. 300 o f 2008-M em bi S te y a n i Vs The R e p u b lic; Crim inal Appeal No. 284 o f 2008-A thum ani B a k a ri Vs The R e p u b lic; and Crim inal Appeal No. 264 o f 2010-A n th o n y M w ita a n d Tw o O th e rs Vs The R e p u b lic ." Standing by the above authorities, the learned State Attorney urged Ff us to find that because the witnesses subject of this appeal was not t' examined upon oath or affirmation, the record of appeal before us lacks any evidence to convict the appellant. The third defect which Ms. Amani pointed out to us, is inherent in the Judgment of the trial court appearing on page 12 of the record of appeal.' This judgment, she submitted, is defective in so far as it does not contain the point or points for determination, the decision thereon and the reasons for the decision is mandatorily required of valid judgments under section 312 (1) of the CPA. In light of the above defects, Ms. Amani urged us to resort to the Court's power of revision under section 4(2) of the Appellate Jurisdiction Act Cap 141 R.E. 2002 (the AJA) and quash all the proceedings of the two courts below. Because the appellant has been in prison from 8/12/2014 to the date of hearing of this appeal (7/11/2019), she urged us to set the appellant free. When called in to reply, the appellant could only but support the submissions of the learned State Attorney. On our part, we agree with Ms. Amani that this appeal has merit in light of the fata! procedural irregularities she has outlined. The duty of the trial subordinate courts to read out to the accused persons substance of the charge, and to require him to state whether he admits or denies the truth of the charge is mandatory under section 228

- (1) of the CPA which states: "228. -(1) The substance o f the charge sh a ll be stated to the accused person by the court, and he sh a ll be asked w hether he adm its o r denies the truth o f the charge." The defect of failure to state the substance of the charge to the appellant when his trial began on 8/12/2014, is very apparent on the face 6 of page 3 of the record of appeal. The record only shows the appellant's apparent response of nSio kw e ll' ("Not true)

with nothing to show if the substance of the charge was read out to the appellant by the trial court. It is also not clear whether the appellant was asked if he admitted or denied the truth of the charge of attempt to commit unnatural offence that was read out. We can only but agree with Ms. Amani that the mandatory provisions of section 228 (1) of the CPA were not complied with. This defect alone vitiates all the subsequent proceedings in the trial and first appellate courts. The learned State Attorney is also correct in pointing out that evidences of all the prosecution witnesses were recorded without oath or affirmation thereby contravening section 198 (1) of the CPA. The record shows the following: "PW1- Fulgence s/o Mwanakatwe, ftpa, Isale, peasant, 28yrsf C h ris tia n . X X D o f P W 1 by PP PW 2-Joseph Mwanafyale, Kyusa, Nam ansi village, peasant, 55 yrs, C h ris tia n . XXD o f PW 2 by PP PW III-Viela s/o Bundala, Sukuma, M aji ya moto, Peasant, 35 yrs, C h ris tia n . XXD o f PW III by PP PW IV- F6868 D /C Kuleba o f CRIME NKASI XXD o f PW IV by PP." [Emphasis added]. As it is clear from above excerpts from the proceedings, the trial magistrate recorded religion without indicating whether these witnesses were examined upon oath or affirmation. It seems clear to us, recording of the religion of a witness does not meet the threshold examination upon oath or affirmation required under section 198 (1) of the CPA. Religion is, but an indication of type of oath or affirmation a witness of a given religion can take. The Oaths and Affirmations Rules, GN No. 125 of 1967 (made under section 8 of the Oaths and Statutory Declarations Act, Cap 34 R.E.

- 2002) has prescribed distinct types of oaths for witnesses who are Christians; and Affirmations for witnesses who are Muslims, Hindus or Pagans testifying in courts other than in the Primary Court: "1. Oath by a Christian: A Christian shall, subject to the provisions of paragraph 4, be required either to hold the New Testam ent in h is rig h t hand o r to hold the rig h t hand uplifted and in either case to repeat the follow ing: "I sw e a r th a t w h a t I s h a ll s ta te s h a ll b e th e tru th , th e w h o le tru th a n d n o th in g b u t th e tru th ; so h e lp m e G od".
2. Affirm ation by a Moslem : A Moslem sh a ll be required to repeat the follow ing: "W alla hi\ B illa h i, Ta "A lla h ": J so le m n ly a ffirm in th e p re se n ce o f th e A lm ig h ty G o d th a t w h a t I s h a ll s ta te s h a ll b e th e tru th , th e w h o le tru th a n d n o th in g b u t the tru th "
3. Affirm ation by a Hindu: A Hindu sh a ll be required to repeat the follow ing: "I so le m n ly a ffirm in th e p re se n ce o f th e A lm ig h ty G o d th a t w h a t I s h a ll s ta te s h a ll b e th e tru th > th e w h o le tru th a n d n o th in g b u t th e tru th ",
4. Affirm ation by pagans, persons objecting to m aking an oath, o r persons professing any faith other than the Christian, Moslem o r Hindu faith: 9 "I so le m n ly a ffirm th a t w h a t I s h a ll s ta te s h a ll b e th e tru th , th e w h o le tru th a n d n o th in g b u t the tru th ". At very least the trial magistrate should have indicated that the witnesses were either "sworn" for Christians; or "Affirmed" for Muslims or Hindu. We next move onto to the "judgment" of the trial court which convicted the appellant and sentenced him to serve twenty (20) years imprisonment which appears on page 12 of the record of appeal: PP I pray fo r the date o f

judgment. Sgd A.B, Mwanjokolo—RM 08/12/2014 The accused person stand charged with the offence referred to as attempt to commit unnatural offence c/s 155 of the Penal Code [Cap. 16 R.E. 2002]. 10 According to the evidence before this (sic) it is clear that the accused person committed (sic) the offence although he is only trying to beat about the bush. In his defence, he has actually stated nothing and it seems he is a habitual offender even the way he defends his case. According to the caution statement tendered in this court, the accused confessed himself to have committed the crime. In this matter, the prosecution side proved the case beyond reasonable doubt Therefore, the accused person is found and guilty (sic) and convicted as charged. Sgd A.B, Mwanjokolo—RM 08/12/2014" We agree with the learned State Attorney what the trial court purports to be the judgment, falls short of the mandatory conditions set by section 312 (1) of the CPA which states: "312.-(1) Every judgment under the provisions of section 311 shall, except as otherwise expressly provided by this Act, be written by or reduced to writing under the personal direction and superintendence of the presiding judge or magistrate in the language of the court and shall contain the points or points in dispute, the decision thereon and the reasons for the decision, and shall be dated and signed by the presiding officer as of the date on which it is pronounced in open court. "[Emphasis added], We agree with Ms. Amani that the judgment of the trial magistrate was shallow, to say the least. It did not contain points for determination, the decision thereon and lacked any reasons for the decision, as provided * under Section 312 (1) of the CPA. To that extent, that judgment denied the appellant his right to a fair trial in respect of not being informed of evidential basis for his conviction for the attempt to commit unnatural offence. As a result of the foregoing fatal procedural irregularities, this appeal calls for our intervention by exercising our power of revision under section 4(2) of the AJA. We quash all the proceedings in the trial and first appellate courts. We also set aside the conviction and sentence which the first appellate court had confirmed. We agree with Ms. Amani that having already served five out of twenty years in prison, a new trial shall not serve the best interests of justice. In the result, we shall allow this appeal and set the appellant free unless if otherwise lawfully held. DATED at MBEYA this 8th day of November 2019. I. H. JUMA CHIEF JUSTICE R. E. S. MZIRAY JUSTICE OF APPEAL R. K. MKUYE JUSTICE OF APPEAL The Judgment delivered on this 8th day of November, 2019 in the presence of the Appellant in person, unrepresented and Mr. Ofmedy Mtenga learned State Attorney for the respondent is hereby certified as a true copy of the original. Y A.H. MSUMI DEPUTY REGISTRAR COURT OF APPEAL 13

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