IN THE COURT OF APPEAL OF TANZANIA

AT SHINYANGA

(CORAM: MWARIJA, J.A., KITUSI, J.A., And MGEYEKWA, J.A.)

CRIMINAL APPEAL NO. 45 OF 2018

THE DIRECTOR OF PUBLIC PROSECUTIONS ..... APPELLANT

VERSUS

CHACHA NYAMUHANGA ..... RESPONDENT

(Appeal from judgment of the High Court of Tanzania

at Shinyanga)

(Kibella, J.)

dated the 20th day of November, 2017

in

Criminal Session Case No. 34 of 2015

JUDGMENT OF THE COURT

3rd & 20th July, 2023

KITUSI, J.A.:

The respondent Chacha Nyamuhanga was charged with murder contrary to sections 196 and 197 of the Penal Code. It was alleged that on 3rd December, 2014 at about 09.00 hours at Salunda area within Bariadi District in Simiyu Region, the respondent murdered one Masungwa Hauwa, which allegations he denied. The charge cited sections 196 and 197 of the Penal Code Cap 16 R.E 2012. That citation is the centre of the arguments in this appeal.

In a bid to prove the charge against the respondent, the prosecution called four witnesses. In a nutshell the alleged murder took place in broad daylight according to Simon Lesa (PW1) a neighbour who at 8.00 a.m., saw one man chasing a woman. When the woman stumbled and fell down, the man caught up with her and produced a knife with which he stabbed her. PW1 ran to the scene with the view of assisting the woman under attack, but the assailant took to his heels heading towards a dispensary. PW1 gave chase and the assailant ran into that dispensary known as Maduhu's Dispensary and entered into one of the rooms and locked himself in. However, PW1 broke into the room and apprehended the man. Meanwhile, many people had by now gathered at the scene and it turned out that the respondent herein was the assailant and the woman he was chasing was his wife. PW1 said he could identify the assailant and the victim because he was the neighbour of the woman's mother. She later died in hospital as a result of the stab wounds.

There were also two sets of evidence of confession to support the prosecution case, one allegedly made by the respondent to the police,

exhibit P3, and another made by him before Kezia Jerad Manyama (PW4), a justice of the peace, which was admitted as exhibit P4.

In defence, the respondent did not deny chasing and stabbing the deceased, but he narrated a long story suggesting that she had provoked him into doing what he did. In his judgment, the learned Judge of the High Court alluded to that tacit admission by the respondent at page 111 of the record. However, in the course of deliberation, it pleased the learned trial judge to raise an issue which finally determined the case before him otherwise than by consideration of the evidence. We reproduce the relevant part:-

> *"Having carefully considered the evidence as well as submissions from both sides, before I proceed determining the issues whether the accused person killed the deceased and whether he did so with malice aforethought, I have found that, according to the charge, the accused person in this case is charged with the offence of Murder c/ss 196 and 197 of the Penal Code [Cap 16 R.E. 2012]. The issue is whether or not in this country [there] exists such law R.E. 2012. I have tried my level best tracing whether or not there is*

Penal Code [Cap. 16 R.E. 2012] in existence but I have ended in rain".

On that basis, the learned Judge found the respondent not guilty and acquitted him because the charge against him had been laid under a non-existent law.

The Director of Public Prosecution (DPP) appeals against that decision on two grounds.

1. *THAT, the trial judge grossly misdirected himself by acquitting the accused person for non-existing citation of law without considering other evidence.*

2. *THAT the trial judge erred in law and fact by acquitting the accused person, while there was enough evidence and the case was proved beyond reasonable doubt.*

At the hearing of the appeal the respondent did not enter appearance. Two weeks earlier, we had ordered that service on him be by way publication in one issue each of Mwananchi and Habari Leo newspapers. At the resumed hearing, Mr. Shaban Mwegole, learned Senior State Attorney for the appellant informed us that getting a space for publication in Habari Leo newspaper, had proved difficulty. He

prayed for our indulgence under rule 4(2) (b) of the Tanzania Court of Appeal Rules, 2009 (the Rules) to dispense with the requirement of making the second publication in Habari Leo newspaper and in the interest of justice proceed with the hearing. Mr. Audax Theonest Constantine, learned advocate, appeared for the respondent, and he did not object to that scheme.

We think the uncontested prayer to proceeded with hearing makes sense and it is in line with rule 4 (2) (b) of the Rules which stipulates: -

> *"4.-(2) Where it is necessary to make an order for the purpose of:-*
>
> *(a) NA*
>
> *(b) better meeting the ends of justice;*
>
> *The Court may, on application or on its won motion, give directions as to the procedure to be adopted or make any other order which it considers necessary."*

Since notice of hearing has been served by publication in one issue of Mwananchi newspaper, we treated that notice as being sufficient and we dispensed with the requirement of making another publication in Habari Leo newspaper, so that in the interest of justice, hearing proceeded instead of adjourning again this old appeal.

Mr. Mwegole abandoned the second ground of appeal and addressed us on the first ground. He submitted that the offence of murder under sections 196 and 197 of the Penal Code is well known even if the charge sheet wrongly cited Cap 16 R.E. 2012 which is non-existent. He conceded that there is no R.E. 2012, as pointed out by the learned trial judge, but he argued that the wrong reference to R.E 2012, which he said was a mere typing error, did not prejudice the respondent who pleaded to the charge and eventually mounted his defence.

In addition, the learned Senior State Attorney submitted that the irregularity was curable under section 388 of the Criminal Procedure Act, Cap 20 (the CPA). He invited us to take the position we took in the case of **Jamal Ally @ Salum v. Republic,** Criminal Appeal No. 52 of 2017 (unreported).

On the way forward, Mr. Mwegole prayed that we should quash the judgment set aside the order that set the respondent at liberty. He prayed for an order that a fresh judgment be composed by another judge.

Once again, Mr. Constantine did not oppose the submissions made by Mr. Mwigole. He supported the learned Senior State Attorney's

submission that the issue that was raised by the learned judge, apart from the fact that he did not afford the parties a hearing, was trivial and did not justify the decision he arrived at. The learned counsel submitted that if the judge had not ordered an amendment to the charge, which he had a duty to do, then he should have treated the defect as minor and curable under section 388 of the CPA as submitted by Mr. Mwigole.

With respect, the learned trial judge made a mountain out of a molehill, without being solicited. The bottom line, in our view, is that the wording and substance of sections 196 and 197 of the Penal Code Cap. 16 have remained the same in the old as well as revised editions, so it should not have occurred to the learned judge that the reference to "Penal Code Cap 16 P.E. 2012" affected the root and substance of the charge. After all, section 12 (2) of the Interpretation of Laws Act Cap. 1 provides that:-

> *"2) A reference in a written law to a provision of a written law shall be construed as a reference to such provision as may be amended."*

We go along with the submissions of learned counsel for both the appellant and respondent, that in determining the issue such as the instant, the standard consideration is whether the accused (in this case

respondent) was prejudiced. In the case of **Jamal Ally Salum** (supra) the Court distinguished the facts of that case from those in **Musa Mwaikunda v. Republic** [2006] TLR 387, holding that in the latter case the appellant was prejudiced because the particulars of the offence did not sufficiently disclose the nature of the offence charged.

In this case, like it was in **Jamal Ally @ Salum** (supra), the particulars of the offence supplied sufficient details of the offence to enable the respondent appreciate the nature and seriousness of the allegations against him.

Since, in our view, there was no suggestion that there exists a revised edition to the Penal Code that has changed the provisions of sections 196 and 197, the learned judge should have treated the reference to R.E 2012 as a mere slip that was innocuous.

We are more perturbed that even without considering the evidence, the learned judge went ahead and acquitted the respondent. We agree with the learned submissions of counsel that the learned judge slipped into a gross error. For those reasons, we proceed to quash the judgment and set aside the order of acquittal. We order the record

be remitted to the High Court where a fresh judgment should be composed by another judge.

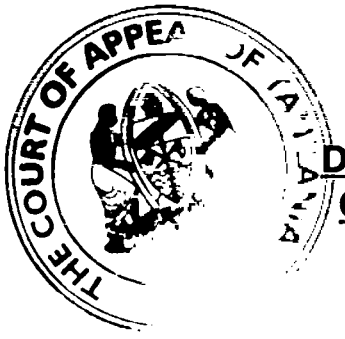
DATED at **SHINYANGA** this 19th day of July, 2023.

A. G. MWARIJA
JUSTICE OF APPEAL

I. P. KITUSI
JUSTICE OF APPEAL

A. Z. MGEYEKWA
JUSTICE OF APPEAL

The Judgment delivered this 20th day of July, 2023 in the presence of Mr. Louis Boniface, learned State Attorney for the Appellant/Republic and Mr. Audax Constantine, learned Counsel for the Respondent is hereby certified as a true copy of the original.



R. W. CHAUNGU
DEPUTY REGISTRAR
COURT OF APPEAL