IN THE COURT OF APPEAL OF TANZANIA
AT MBEYA

(CORAM: LILA, J.A., KITUSI, J.A., And MASHAKA, J.A.)

CRIMINAL APPEAL NO. 412 OF 2020

JOAKIM MWASAKASANGA ..... APPELLANT

VERSUS

DANIEL KAMALI ..... 1ST RESPONDENT

PHILIMON MWAKAJILA ..... 2ND RESPONDENT

SADICK ANGOLILE ..... 3RD RESPONDENT

ASAJILE ANYASIME ..... 4TH RESPONDENT

SAMWEL DAVID ..... 5TH RESPONDENT

(Appeal from the decision of the High Court of Tanzania at Mbeya)

(Mongella J.)

dated the 3rd day of August, 2020
in
PC Criminal Appeal No. 188 of 2019

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JUDGMENT OF THE COURT

17th & 24thFebruary, 2023.

KITUSI, J.A.:

The appellant has demonstrated an unmatched zeal in prosecuting this case. At Mwanjelwa Primary Court where he started, the appellant preferred, against the respondents, a charge consisting of two counts. The first count was Intimidation contrary to section 89 B (1) (b) of the Penal Code, alleging that the respondents intimidated the appellant with the view of compelling him to sub divide and share his piece of land. The second count was

malicious damage to property preferred under section 326 of the Penal Code. In this connection it was alleged that the respondents maliciously cut down the appellant's plantain trees worth Tshs. 75,000/=.

The trial Primary Court acquitted the respondents being satisfied that the appellant did not lead sufficient evidence to prove the charge. The appeal preferred by the appellant to the District Court was also unsuccessful, the court taking the view that the alleged words of threat were uttered in a public meeting attended by many villagers. On the authority of **Jackson Mwakatobe v. Republic** [1990] T.L.R 17 it held that even if the respondents were present at the meeting their mere presence at the scene of crime did not suffice to implicate them with the offence.

The appellant further appealed to the High Court where he raised three grounds for consideration. The first ground which alleged that the second count of malicious damage to property was defective, was upheld by the High Court. The High Court's finding was that malicious damage to property under section 326 of the Penal Code has several heads under several subsections, so there is no offence under section 326 of the Penal Code without a subsection.

The other two grounds sought to assail the decision of the two lower courts for concluding that the offences had not been proved beyond reasonable doubt. The learned judge agreed with the reasons of the two courts below and confirmed the respondents' acquittal.

Still relentless, the appellant has appealed to the Court on two grounds that were certified by the High Court as points of law for our determination. However, both grounds essentially fault the High Court for not ordering a retrial on the defective charge.

At the hearing before us the parties appeared in persons unrepresented. The appellant did not address us on the merit of the grounds of appeal but called upon us to consider their legal basis and proceed to allow the appeal and order a retrial. The respondents, though all present, spoke through the third respondent whose submissions they all associated themselves with. The third respondent submitted that it is the appellant who had the duty to move for an amendment of the charge which he himself prosecuted.

Before deliberating on this point, it is apt to reflect on the decision of the learned High Court Judge on it. The learned judge held that she would not order a retrial because:-

"The charge in this case was prepared by the police department at Kiwira. The appellant prosecuted the case basing on this defective charge, which he is now challenging before this Court. In my view however, he should have prayed for the same to be amended before the case was determined. Under the circumstances I cannot order for the matter to be tried de novo with respect to the second offence because doing that shall be according the prosecution a chance to rectify its mistakes, something which is not sanctioned under the law. See: ***Fatehali Manji v. The Republic*** *(1996) E.A. 343".*

Our task is to determine whether the decision not to order a retrial on the above reasoning is correct in law or not. Apart from raising the point, the appellant has not, as earlier intimated, placed any material before us for our consideration. The respondents have just wondered why the appellant would blame the defect in the charge on anybody else but himself.

To begin with, the scenario that has unfolded in this appeal is out of the ordinary. There are two ways of drawing a charge under the Primary Courts Criminal Procedure Code, Third Schedule to the Magistrates' Courts

Act Cap 11, (the Code). We shall reproduce Section 21(1) (a) and (b) as well as 21(2):-

> *"Where:–*
>
> *a) a magistrate issues process under section 8; or*
>
> *b) any person is brought before a court under arrest, the magistrate shall enter the fact in the registers of the court and, in the case of any offence in respect of which primary courts have jurisdiction, open a case file and, unless a written charge is signed and presented by a police officer, draw up a charge with such particulars as are reasonably necessary to identify the offence or offences, including the law and the section or other division thereof, under which the accused person is charged.*
>
> *(2) Every charge shall be brought in the name of the Republic acting on the complaint of the complainant who shall also be named".*

In this case the charge was drawn up by the police, obviously acting on a complaint that was received from the appellant. However, it is the appellant who was cited in the case all the way from the Primary Court to the Court as the prosecutor of the case and the appeals he instituted

subsequently. If the charge was defective, the prosecutor had powers to apply for amendment under section 22 of the Code, but he did not.

Normally it is the accused who would raise the complaint of a defect in the charge, be it during trial or on appeal. Courts have dealt with such complaints in two ways depending on the circumstances of each case. One, by sustaining the complaint where they take the view that the accused will be prejudiced by the defect. See the case of **Antidius Augustine v. Republic**, Criminal Appeal No. 89 of 2017 (unreported). The other way is by treating the defect as curable and inconsequential where they are satisfied that it does not occasion a miscarriage of justice, or prejudice the accused. The latter is a more contemporary position of the law, but always depending on the circumstances. See the case of **Abubakari Msafiri v. Republic**, Criminal Appeal No. 378 of 2017 (unreported).

Therefore, the answer to the point of law raised by the High Court for our consideration, and which is the main ground of appeal, namely whether it was correct for the court not to order a retrial, will always depend on the circumstance of each case. In this case as we earlier observed, the complaint of defect in the charge is being raised by the person who prosecuted the case. This in our view, is as novel as it is bewildering. Either the appellant is

shooting at his own feet or shifting goal posts, and we think the latter is the case.

In our view, where the prosecutor is the one who wants to benefit from his own wrong, after the respondents have been cleared by the trial court and by the first appellate court, ordering a retrial will be highly prejudicial to the respondents and it will occasion a serious miscarriage of justice. The case of **Fatehal Manji v. Republic** [1966] E.A 343 cited by the learned High Court judge provides for key considerations to be had before ordering a retrial, paramount of them being to guard against providing the prosecution with an opportunity to rectify their own errors.

In the present case the appellant is not only the architect of the defects in the charge, but he is the one who has raised the point at the second appeal, and wants to benefit from it by subjecting the respondents to yet another trial of the same charges. If we allow this it will amount to allowing the appellant to turn from a prosecutor to a persecutor. But we also ask, retrial of which charge? This is because as we stated above citing the two cases, the charge is either defective and incurable or it is defective but curable. In the instant case the judge did not find the defect curable and proceeded to acquit the respondents. There will therefore be no charge

which the court may retry. In addition, as the learned judge observed, ordering a retrial in the odd circumstances of this case will be going against the settled law in **Fatehal Manji** (supra).

For the foregoing reasons, we find the appeal completely devoid of merit and dismiss it.

DATED at **MBEYA** this 23rd day of February, 2023.

S. A. LILA
JUSTICE OF APPEAL

I. P. KITUSI
JUSTICE OF APPEAL

L. L. MASHAKA
JUSTICE OF APPEAL

The Judgment delivered this 24th day of February, 2023 in the presence of the Appellant and Respondents in person is hereby certified as a true copy of the original.

D. R. LYIMO
DEPUTY REGISTRAR
COURT OF APPEAL