THE UNITED REPUBLIC OF TANZANIA

JUDICIARY

IN THE HIGH COURT OF TANZANIA

IRINGA DISTRICT REGISTRY

AT IRINGA

CRIMINAL REVISION NO. 01 OF 2022.

(Arising from Criminal Case No. 11 of 2022, in the District Court of Ludewa District, at Ludewa).

JOHN SEVERINI CHARLE ..... APPLICANT

VERSUS;

REPUBLIC..... RESPONDENT

JUDGMENT

8th & 13th September, 2022.

UTAMWA, J:

This is a judgment on a revisional matter prompted by this court *suo motu*. Following alerting information from the media, this court (through the Judge in-charge of the High Court Iringa Zone), called for the record of the Criminal Case No. 11 of 2022 (The Original case), in the District Court

of Ludewa District, at Ludewa (The trial court) for inspection. The mission for this court in taking that course was to examine the record of such case for purposes of satisfying itself as to the correctness, legality or propriety of the finding, sentence and order recorded or passed, and as to the regularity of the proceedings of such trial. This court has such revisional powers; see section 372(1) of the Criminal Procedure Act, Cap. 20 RE 2022 (Henceforth the CPA).

Upon the inspection of the record of the original case, it was revealed that, before the trial court, one John Severini Chale was charged with a single count for the offence of exercise of witchcraft contrary to "section 3(a) and 5(1) of the Witchcraft Act, Cap. 18 R.E 2022." The John Severini Chale pleaded not guilty before the trial court. Nonetheless, upon a full trial, he was, on the 29th August, 2022, convicted of such offence and sentenced to serve in prison for 5 years. This was through the judgment of the trial court delivered on that said date (hereinafter called the impugned judgment). In fact, the calling of the record of the original case was resorted to upon this court satisfying itself that, the said John Severini Chale (Hereinafter called the convict) had not filed any notice of appeal for purposes of appealing to this court against the impugned judgment as required by section 361(1) of the CPA.

Following the above mentioned inspection of the record, the Judge in-charge of this court directed the Deputy Registrar (vide the Judges Inspection Note dated 1st September, 2021 and forming part of this record) to open the present revisional proceedings *suo moto*. The aim for this step

was to give room for this court to examine some legal issues in relation to the original case, including the following:

a. Whether the charge sheet was proper in law.

b. Depending on the answer to the first issue, whether the charge could safely base the conviction without causing any injustice.

c. Whether the sentence imposed against the accused was legally justified.

d. Depending on the answers to the three preceding issues, which orders should this court make under the circumstances of the case?

This court opted to hear this revisional matter *inter-partes* as per section 374 of the CPA. It thus, gave notice of the hearing to the parties. At the oral hearing of the matter, which said hearing was conducted vide virtual court (video conferencing), Mr. Basilius Namkambe, learned Senior State Attorney (the SSA) entered appearance physically to represent the respondent Republic. On the other side, the convict appeared in person and unrepresented while in Ludewa Prison where he is serving his sentence.

When the matter was called upon for hearing, and upon the court notifying the parties of its intention of these proceedings, the convict was given the right to begin in addressing this court. He submitted that, he was not contented by the proceedings before the trial court. This was because, he had been beaten by police officers that is why he confessed to have

committed the charged offence. He further stated that, on the day of trial he was not mentally fit due to the beatings.

On his part, the learned SSA for the respondent Republic, submitted lengthily, but with focus. Regarding the first court issue, he submitted that, the convict was charged with the offence of exercising witchcraft contrary to sections 3(a) and 5(1) of Cap. 18 R.E 2022. Nonetheless, the said section 3(a) in fact, does not exist in our laws. Cap. 18 R.E 2022 is also non-existent. The Revised Edition for 2022 did not affect Cap. 18. The Act was lastly revised in 2002. The charge at issue was thus, according to the learned SSA, defective for those reasons.

The learned SSA for the respondent further contended that, the above highlighted defect in the charge sheet could be cured by the particulars of the offence. This is because, if a defective charge does not prejudice the accused, it becomes curable under section 388(1) of the CPA. Nonetheless, in the matter at hand the particulars of the offence did not show which acts of witchcraft had been committed by the convict. The convict did not thus, understand the charge against him. The particulars of the offence did not therefore, cure the defect in the statement of offence. That meant that, the convict was prejudiced. The learned SSA referred this court to the decision of the Court of Appeal of Tanzania (The CAT) in the case of **Jumanne Mondelo v. Republic, Criminal Appeal No. 10 of 2018, [2020] TZCA 1798** to cement the position of the law he highlighted above. He thus, submitted that, the charge sheet at issue was incurably defective.

With regard to the second court issue, the learned SSA proposed a negative answer to it on the same reasons used to answer the first issue negatively. He thus, concluded that, the charge could not legally base the conviction in the case at hand.

On the third issue, the learned SSA submitted that, since the first and second issues had been answered negatively, then the third issue follows suit. He thus, submitted that, the sentence imposed against the convict was improper in law.

Concerning the fourth and last court issue, the learned SSA argued that, he read the evidence of the original case. He was thus, of the view that, even if the charge under discussion could be proper, the prosecution's evidence on record (based on only two witnesses) was weak to the extent that it could not base any conviction. PW.1 (Hekima Anthony Chale) for instance, did not mention any act which showed that the convict practiced witchcraft. Moreover, the evidence of PW.2 (Alanus Mbunda), the Justice of Peace who recorded the convict's extra-judicial statement (the purported confession), did not show as to how the convict reached to him (The Justice of Peace). The prosecution evidence did not also mention the police officer who took the convict to the justice of peace. The circumstances of taking the convict to the Justice of peace were also not explained in the prosecution evidence. The evidence by the justice of peace was thus, doubtful.

The learned SSA further argued that, the purported victim of the crime in the matter under consideration was alleged to be mentally ill due

to the witchcraft acts of the convict. This was in accordance with the evidence of of PW.1. Nonetheless, she was taken to a hospital, but no mental illness was detected. It was thus, improper to take the convict to court.

Owing to the above reasons, the learned SSA for the respondent urged this court to nullify the entire proceedings of the trial court, its impugned judgment and all orders. He also urged for the immediate release of the convict from prison, unless there is another lawful cause for keeping him there.

Additionally, the learned SSA made submissions on the background of the law on witchcraft. He contended that, the history of witchcraft is that, it has bothered our society especially during the colonial era. People could thus, be isolated from the society on witchcraft beliefs. The colonial laws were thus, made to discourage witchcraft. Nevertheless, the Witchcraft Act, Cap. 18, was among the laws which were discouraged by the Nyalali Commission. In fact, the commission recommended for a repeal of such legislation, but it is still in place.

The learned SSA thus, opined that, the society need to be educated on proper thinking related to witchcraft. To him, poverty and witchcraft go together. The government should thus, fight witchcraft as it fights poverty.

The convict did not make any rejoinder submissions upon hearing the lengthy submissions by the learned SSA, which said submissions were essentially in his (the convict) favour.

When probed by the court, the learned SSA submitted that, the word "superstitions" which appeared in the particulars of offence for the charge sheet in the matter at hand, is a different thing from the term "witchcraft." Furthermore, the necessary particulars for charging a person under section 5(1) of Cap. 18 are not reflected in the charge sheet itself, hence the incurable defect in the charge. He added that, section 5(1) of Cap. 18 provides for the sentence of not less than seven (7) years imprisonment, but the trial court sentenced the accused to serve in prison for five (5) years only. This was contrary to the law. The trial court thus, also misdirected itself in sentencing the convict.

I have considered the law, the records and submissions by both parties. In determining this matter, I will examine the court issues one after another.

Regarding the first issue (*of whether the charge sheet was proper in law),* I am of the view that, it is incumbent to firstly reproduce its pertinent parts (especially the statement of the offence and the particulars of the offence) for the sake of readymade reference, they are couched thus:

> **"...STATEMENT OF OFFENCE**
>
> EXERCISE OF WITCHCRAFT: contrary to section 3(a) and 5(1) of the Witchcraft Act [Cap. 18 R.E 2022].
>
> **PARTICULARS OF OFFENCE**
>
> JOHN S/O SEVELINI CHALE on 1st day of FEBRUARY, 2022 at IWELA village within Ludewa Disctrict in Njombe region, unlawfully did acts that showed you had superstitions powerst (*sic*) to VEDIANA D/O ANTONY CHALE..."

Now, due to the contents of the charge sheet quoted above, it is clear, as contended by the learned SSA that, the convict was charged with exercise of witchcraft contrary to "sections 3(a) and 5(1) of the Witchcraft Act, Cap. 18 R.E 2022." Nonetheless, according to the history of our written laws, the said Act, like many other legislation of this land, was lastly revised in 2002; see THE UNITED REPUBLIC OF TANZANIA, LAWS OF TANZANIA, THE REVISED EDITION (RE) 2002. This Edition comprised of twenty-one volumes made up of ten volumes of Principal Legislation, ten volumes of Subsidiary Legislation and an Index volume of the Chapters, titles and numbers of the Acts in existence as at 31st July, 2002. The said Edition was published and printed by **Messrs Juta & Co Ltd** supported by various helping hands including the office of the Chief Parliamentary Draftsman [All these information are available in the PREFEX to the Edition, dated 31st July, 2002 and endorsed by A.J. Chenge (MP), the then Attorney-General].

History further shows that, Cap. 18 was later amended by Section 35 of the Written Laws (Miscellaneous Amendments) Act, No. 3 of 2008 and Section 13 of the Written Laws (Miscellaneous Amendments) Act, No. 3 of 2011. Nonetheless, both amending Acts affected neither section 3 nor section 5(1) nor section 5(2) of Cap. 18. Research also shows that, Cap. 18 was not among the legislation which were revised in 2022; see the Laws Revision (Specific Laws) Notice, 2022 (Government Notice No. 461 of 2022) which lists only 15 pieces of legislation subjected to that year's revision, and which did not list Cap. 18. Further, Cap. 18 (as amended from time to time as shown above) does not contain any section 3(a). Instead, it envelopes sub-sections (i) – (v) only vide the RE. 2002. Each of the sub-

section creates different circumstances of committing offences under Cap. 18.

In fact, even if it is presumed (without deciding) that, citing section 3(a) was a typographical error, and that, the drafter of the charge sheet had in mind section 3(i) of the Act, that presumption would not make the error good since the wording of the this section does not tally with the particular of the offence in the charge sheet as it will be pointed out later.

Owing to the reasons shown above, I agree with the learned SSA that, the "Statement of the offence" for the charge sheet under discussion was based on wrong citation or non-existing provisions of the law. This irregularity therefore, rendered the charge sheet defective.

Furthermore, I agree with the learned SSA that, in law, defects in the statement of offence for a charge sheet may be cured by its adequate particulars of the offence in opportune circumstances. Such antidote is based on section 388 of the CPA. These statutory provisions essentially save an irregular finding, sentence or order made or passed by a court of competent jurisdiction from being reversed or altered on appeal or revision on account of any error, omission or irregularity in the complaint, summons, warrant, charge, proclamation, order, judgment or in any inquiry or other proceedings under the CPA, unless the court (on appeal or revision) is satisfied that such error, omission or irregularity has in fact occasioned a failure of justice, in which case the court may order a retrial or make such other order as it may consider just and equitable

The sub-issue at this juncture is thus, *whether the defects in the "Statement of the Offence" for the charge sheet under discussion (mentioned above) were cured by its "Particulars of the Offence."* In my settled opinion, the circumstances of the case attract a negative answer to this sub-issue as rightly suggested by the learned SSA in his submissions. The proposal by the learned SSA was essentially based on the single ground that, the particulars of the charge did not mention the acts of witchcraft which the convict had allegedly committed. In fact, I totally agree with him.

My reasons for agreeing with the learned SSA's views just highlighted above, are based on the wording of the provisions under which the convict was charged. Certainly, this opinion is based on the earlier mentioned presumption (without deciding) that, when the drafter of the charge sheet cited the non-existent section 3(a) of Cap. 18 had in mind the existing section 3(i) of the same Act. It is further notable that the convict was also charged under section 5(1) of the same Cap. 18 which is essentially a sentencing section. I opt to paste the two sections for the sake of a swift reference. The provisions of section 3(i) read thus:

> **"3: Exercise of witchcraft, possession and supply of instruments of witchcraft, and advice or threats, use of witchcraft, an offence;**
>
> (i); Any person who, by his statements or actions represents himself to have the power of witchcraft commits an offence under this Act."

As to the provisions of section 5(1), they are enacted in the following wording:

> **"5: Penalty;**

(1); Any person who commits an offence under this Act with intent to cause death, disease, injury, or misfortune to any community, class of persons, person, or animal, or to cause injury to any property shall be liable to imprisonment not less than seven years."

Owing to the wording of those two relevant sections in the matter at hand, one would expect the following particulars to feature in the charge sheet under discussion.

a. That, as long as the charge alleged that the convict did acts (as differentiated from making statements), then there had to be mentioned specific acts allegedly done by the convict, which said acts might have amounted to his self-representation as having the powers of witchcraft, as required by section 3(i) of the Act.

b. That, the acts which had to be mentioned in the particulars of the offence, had to tally with the definition of the term "witchcraft" provided under section 2 of Cap. 18, i.e. including *sorcery, enchantment, bewitching, the use of instrument of witchcraft, the purported exercise of any occult power and the purported possession of any occult knowledge.* This definition was also underscored by the CAT in the case of **Kagambo s/o Bashasha v. Republic, Criminal Appeal No. 591 of 2017, CAT at Mwanza** (unreported).

c. That, the particulars of the charge ought to have also shown that the said acts allegedly committed by the convict, were so committed with an intent specified in the Act, which include the following: to cause death, or disease or injury, or misfortune to

the alleged victim of the crime (i.e. Vediana d/o Antony Chale in the present case), as required by section 5(1). Indeed, had the convict been charged under section 3(i) and 5(2) of Cap. 18, it would not be necessary to include the intention of the alleged acts as per the wording of section 5(2) itself. It was also held by this court in the case of **Machunguru Kyoga and another v. The United Republic [1965] 1 EA 477** (HCT) that, a charge under section 3(i) and 5(1) of Cap. 18 must show the intent of such acts allegedly committed by the accused, but such intent is not necessary when the accused is charged under sections 3(i) and 5(2) of Cap. 18.

It must be born in mind that, the phrase "instrument of witchcraft" mentioned under the definition of the term "witchcraft" shown above also has its special meaning under the said section 2 of the Cap. 18. That phrase (*instrument of witchcraft*) means, and I reproduce its definition for an expedited orientation:

> "instrument of witchcraft" means anything which is used or intended to be used or is commonly used, or which is represented or generally believed to possess the power, to prevent or delay any person from doing any act which he may lawfully do, or to compel any person to do any act which he may lawfully refrain from doing, or to discover the person guilty of any alleged crime or other act of which complaint is made, or to cause death, injury or disease to any person or damage to any property, or to put any person in fear, or by supernatural means to produce any natural phenomena, and includes charms and medicines commonly used for any of the purposes aforesaid."

The definition just quoted above was also underlined by this court in the cases of **Jumapili Masanja v. The Republic, Criminal Appeal No. 204**

of 2020, High Court of Tanzania (HCT), at Mwanza (unreported) and **Ntizili Chaeji v. Republic [1979] LRT n. 32.** In the **Ntinzili case**, this court further held that, an instrument is an "instrument of witchcraft" provided it is used or intended to be used as such even if it is not commonly so used or generally believed to be nefariously potent - Scientific identification of such instrument is not necessary. In deciding the **Ntinzili case** (supra) this court followed its decisions in **Thomas Bangili and others v. R. (1969) H.C.D. n. 246** and **Rex v. Balagula Lutamba, (1938) 1 TLR (R) 50.** It also relied upon the holding of the erstwhile Court of Appeal in the case of **Saraigy Kotutu v. Rex (1951) 1, 8 E.A.C.A, 158**, which said case originated in a Tanganyika by then.

However, in the matter at hand, the above listed important particulars of the charge sheet at issue, which said particulars in fact, constitute the key ingredients of the offence under discussion, were not disclosed in the "particulars of the offence" for the charge.

Moreover, according to the above quoted particulars of the offence in the charge sheet at issue, it is shown that the convict "unlawfully did the acts." But, the term "unlawfully" is not among the ingredients of the offence according to the provisions under which the convict was charged. In fact this term is confusing since it also suggests that, some witchcraft acts can be "lawfully" performed and some are prohibited by the law, hence "unlawfully" performed. Nonetheless, such suggestion was not intended by Cap. 18.

Again, the particulars of the offence in the charge at issue, did not mention any allegation of exercising witchcraft against the convict. Instead, the particulars only alleged that his acts showed that he had "superstition powers." Nonetheless, the term "superstition" is not included in the definition of "witchcraft" under section 2 of the Act as shown earlier. The Cambridge Advanced Learner's Dictionary, 3rd Edition, 401, Cambridge University Press, New York, 2008, defines the term "superstition" as a belief which is not based on human reason or scientific knowledge, but is connected with old ideas about magic. It follows thus, that, the convict could not be charged with a mere belief (superstition) which is not even defined by the law itself. Indeed, as correctly submitted by the learned SSA for the respondent, there is a great distinction between the two terms; "superstition" on one hand and "witchcraft" as defined by Cap. 18 on the other. The appellant was therefore, charged with an act which does not constitute any crime under our laws, let alone under Cap. 18.

In fact, the irregularities discussed above, also prejudiced the convict and rendered the charge at issue incurably defective. The CAT held in the case of **Jackson Venant v. The Republic, Criminal Appeal No. 118 of 2018, [2018] TZCA 187 CAT at Bukoba,** that, a charge sheet which prejudices an accused is incurably defective and cannot be made good under section 388 of the CPA. Such kind of a charge also deprives the accused of his right to fair trial. The CAT in that case further made a useful guidance on the significance and requirements of a charge sheet. It observed thus, and I reproduce the pertinent passage for a trouble-free reference, at page 8-9;

> "We need to emphasize that, in any Criminal trial, a charge is an important aspect of the trial as it gives an opportunity to the accused to understand in his own language the allegations which are sought to be made against him by the prosecution. It is thus important that the law and the section of the law against which the offence is said to have been committed must be mentioned and stated clearly in a charge. The charge therefore must tell the accused precisely and concisely as possible the offence and the matters in which he stands charged."

The necessity for citing proper section of law in a charge sheet was also underscored in the case of **Issa Charles v. The Republic, Criminal Appeal No. 234 of 2016, [2018] TZCA 76, CAT at Iringa, Joseph Paul @ Miwela v. The Republic, Criminal Appeal No. 379 of 2016 CAT at Iringa** (unreported).

In the matter at hand, there is yet another serious irregularity related to citation of the sentencing section in the charge sheet. As shown above, the convict was presumably charged under sections 3(i) and 5(1) of Cap. 18. I observed earlier that, in charging an accused under section 5(1) being a sentencing section, the particulars of the offence for the charge must disclose the intention of the acts allegedly committed by the accused; see also the **Machungulu Case** (supra). I also observed that, a charge under any sub-section of section 3 and section 5(2) need not show any intention of such acts of the accused. Now, since the convict in the case at hand was presumably charged under section 3(i) and 5(1), but no intention of his alleged acts was disclosed, the charge remained with a serious ambiguity since it was not clear as contrary to which section [between sections 5(1) and 5(2) of Cap. 18] the convict was charged, hence a grave confusion on his part.

The ambiguity in the charge sheet in relation to the citation of the sentencing sections was a serious irregularity in law. In the **Elisha Mussa v. Republic, Criminal Appeal No. 282 of 2016, CAT at Tabora** (unreported) the CAT highlighted the significance of citing a proper sentencing provision in a charge sheet. It observed that, an accused person is entitled to know the specific sentence applicable in case he would be found guilty. Such proper sentencing provisions keeps him (the accused) informed of the nature of sentence to be imposed upon him in case he will be convicted of the offence charged. The requirement assists the accused not to take his case lightly, but more seriously, hence properly arrange his defence. The CAT further observed that, citing a wrong sentencing provisions in a charge sheet thus, cannot be considered as giving a fair trial to the accused. In deciding the **Elisha Mussa Case** (supra), the CAT followed its previous decision in the case of **Swalehe Ally v. Republic, Criminal Appeal No. 119 of 2016** (unreported). The CAT (in the **Elisha Mussa case -** supra) therefore, quashed the proceedings of both the trial District Court and this Court for the defect in citing the proper sentencing section in the charge sheet.

Indeed, the emphasis for a proper citation of the provisions of law in a charge sheet is due to the important role played by a charge in a criminal trial. The aim of a charge sheet is indeed, to inform the accused of the substance, essence and particulars of the offence he is charged with; see the reasoned observations of **Othman J.** (as he then was) in **Justin Nyali and another v. Republic, HC Criminal Appeal No. 37 of 2006, at Arusha** (at page 38).

It must further be eminent that, the right to fair trial mentioned above is fundamental and is protected under article 113(6)(a) of the Constitution of the United Republic of Tanzania, 1977. The CAT also held in the case of **Kabula d/o Luhende v. Republic, Criminal Appeal No. 281 of 2014, CAT, at Tabora** (unreported) that, the right to fair trial is one of the cornerstones of any just society and is an important aspect of the right which enables effective functioning of the administration of justice. It follows thus, that, no court in this land is entitled to impede such right.

The charge sheet under consideration therefore, offended the provisions of section 132 of the CPA. These provisions guide that, every charge or information shall contain, and shall be sufficient if it contains, a statement of the specific offence or offences with which the accused person is charged, together with such particulars as may be necessary for giving reasonable information as to the nature of the offence charged.

Due to the above reasons, I agree with the learned SSA for the respondent that, the charge sheet at hand was incurably defective for prejudicing the convict. No wonder he himself submitted before this court that, he was not contented by the proceedings before the trial court. I accordingly answer the first court issue negatively that, the charge sheet at issue was actually, improper in law.

Concerning the second court issue, I hasten to agree with the contentions by the learned SSA narrated earlier. Indeed, an improper charge sheet which is incurably defective and which prejudiced an accused,

cannot in law, be capable of basing any conviction. The second issue is therefore, also negatively answered that, the charge at issue could not safely base the conviction without causing injustice.

In relation to the third issue, I am again, in accord with the learned SSA's arguments. Certainly, an improper charge sheet which is incurably defective, and which prejudices an accused, and which cannot base any conviction as I have just held above, cannot also justify any punishment against an accused. It follows thus, that the answers to the first and second issue compel this court to answer the third issue negatively. Besides, the minimum sentence under section 5(1) of Cap. 18 is 7 years imprisonment as correctly contended by the learned SSA upon being prompted by this court. The trial court therefore, misdirected itself in sentencing the convict to 5 years imprisonment even though that was seemingly in his favour. In fact, the minimum sentence of 5 years imprisonment is applicable to a person charged and convicted under any sub-section of section 3 of Cap. 18 together with section 5(2) of the Act. However, the convict in this matter was not charged under such section 5(2) so as to justify the sentence of 5 years imprisonment.

The trend demonstrated by the trial court in sentencing the convict clearly explains the extent of confusions caused by the charge sheet at issue as discussed earlier. Now, if the trial court itself was affected by the confusion, it cannot be imagined that the convict was spared by the said confusion. This particular view therefore, also enhances the finding I made earlier that the convict was actually, prejudiced by the charge sheet.

Owing to the reasons shown above, the sentence imposed against the convict was unlawful. This is irrespective of the impression that it was in his favour since it was a lesser penalty than the one prescribed by the law. Certainly, a court of law has no jurisdiction to give a favour to a convict by imposing a lesser punishment than the one fixed by the law. Ultimately, I answer the third issue negatively that, the sentence imposed against the accused was legally unjustified.

I will now consider the fourth and last court issue in relation to the kinds of orders which this court should make under the circumstances of the case at hand. Certainly, upon answering the preceding issues in the manner shown above, and as rightly contended by the learned SSA for the respondent, this court is enjoined to declare the proceedings of the trial court a nullity, quash them together with the conviction. This court is also enjoined to make an order for setting aside both the resultant judgment and sentence against the convict.

A sub-issue which arises at this juncture is *whether under the circumstances of the case at hand, this court can order for any re-trial of the convict.* The law is clear and trite on the factors to be considered by an appellate court before it orders or it refrains from making an order for retrial. In the case of **Kaunguza s/o Machemba v. Republic, Criminal Appeal No. 157B of 2013, at Tabora** (unreported at page 8 of the typed version of the Judgment) following the case of **Fatehali Manji v. R [1966] EA 343,** the CAT guided thus, and I quote it for an expedient reference;

> "...in General a retrial will be ordered only when the original trial was illegal or defective; it will not be ordered where the conviction is set aside because of insufficiency of evidence or for the purpose of enabling the prosecution to fill up gaps in its evidence at the first trial; even where a conviction is vitiated by a mistake of the trial court for which the prosecution is not to blame, it does not necessarily follow that a retrial should be ordered; each case must depend on its particular facts and its circumstances and an order for retrial should only be made where the interests of justice require it, and should not be ordered where it is likely to cause an injustice to the accused person..."

In my settled opinion, the circumstances prevailing in the matter at hand, necessitates a negative answer to the sub-issue just posed above. This is so because, the respondent (the prosecution side) through the learned SSA conceded that the irregularities discussed above were fatal to the proceedings. Indeed, the learned SSA went further and submitted that, he also doubts if the evidence on record could support the charge even if the charge was proper. It is therefore considered that, ordering for a retrial in the present case will amount to enabling the prosecution to fill up gaps in its evidence. That course will also prejudice the convict who has now served the unlawful sentence in prison for 10 days. An order for retrial will thus, be against the guidance by the CAT in the **Kaunguza case** (supra), hence improper in law. It is more so because, under the common law doctrine of *stare decisis* which also applies in our legal system, precedents of the CAT, as the highest court in the country, bind this court and courts subordinate to it; see the decision by a Full Bench of the CAT in the case of **Jumuiya ya Wafanyakazi Tanzania v. Kiwanda Cha Uchapishaji cha Taifa [1988] TLR. 146.**

Having observed as above, I answer the sub-issue posed above negatively that, under the circumstances of the case at hand, this court cannot order for any re-trial of the convict.

I have also considered with keen interest, the additional submissions advanced by the learned SSA on the goodness or otherwise of our witchcraft law, i. e. Cap. 18. The generality of such submissions amounted to a kind of discontentment. Actually, though this is not an opportune forum for determining whether this undisputedly longstanding piece of legislation is still good law, his submissions were not absolutely redundant or superfluous. I take them as an alert or a wake-up bell to the stakeholders of criminal justice including the law makers themselves for them to consider engaging in a research in view of deciding whether the law is still workable.

In my view, there are various factors which alert the course just envisaged above; they include the following: The submissions by the learned SSA themselves constitute a significant whistle. Another alerting signal from the bar was notable in the **Kagambo case** (supra). In that case, an issue was *whether killing a person due to provocation based on belief of witchcraft was good defence*. Upon the appellant's counsel being prompted by the CAT if witchcraft can easily be proved, he stated that it is not. This view from a skilled legal mind essentially supports the above discussed whistle blown by the learned SSA.

It is also common knowledge that, a long period of time has lapsed since Cap. 18 was enacted. It was indeed, enacted back in 1928; see THE UNITED REPUBLIC OF TANZANIA, LAWS OF TANZANIA, THE RE 2002 (Published by **Juta & Co Ltd**) considered previously. The Act is therefore, about to celebrate its century's birthday. A number of development and changes might have thus, taken place between the enactment of Cap. 18

to date. Such changes include the modern technology of this 21st century and the globalisation which essentially necessitate interdependence between nations. Such changes thus, may therefore, call for a fresh look to Cap. 18 upon a proper research being conducted.

Other alerting factors are as follows: the practice in this land, shows that, the courts do hesitate to take matters related to witchcraft as real or actual phenomenon. It has, for instance, been held in a number of cases that, a belief in witchcraft is not a defence to murder, but in order for the said defence to be available, in exceptional circumstances, the commission of the offence must come as a shock; see the **Kagambo Case** (supra) following **John Ndunguru Rudowiki v. Republic, [1991] TLR 102.** In deciding the **Kagambo case**, the CAT also followed its previous decision in **Kasongi Yabisa v. The Republic [1995] TLR 28.** The **Kasongi case,** in fact, further held that, to constitute a defence in a charge of murder the belief in witchcraft must be founded on some physical and not metaphysical acts.

Moreover, in the case of **Mwasegile Samuli v. Makanika Katatula [1980] TLR 152** in which a primary court magistrate sought and relied upon the opinion of a witchdoctor in deciding a civil case that was before him for trial, this court made a stern rebuke against that course. In so doing this court (Samatta, J. as he then was), at page 153-154 made these remarks which I also reproduce lengthily to let him speak for himself;

> "...It is apparent from the record of the case that the magistrate was going to treat the witchdoctor as an expert in terms of r. 10 (3)(a) of the Magistrates' Courts (Rules of Evidence in Primary Courts) Regulations,

1964, and his word as conclusive on the outcome of the case. I cannot approve that approach. With respect to the primary court magistrate, I am happy to say that I am not a convert to an opinion that witchcraft is a science. I know of no statute, judgment or law book in which that primitive practice has been recognised as a science. A witchdoctor cannot, therefore, be treated as an expert for the purpose of the application of the rule I mentioned a moment ago, or for the purpose of the application of s. 47(1) of the Evidence Act, 1967. To ensure that the law continues to command the uncritical obedience of the man on the UDA omnibus the witchdoctor must never be treated as an equal of a medical doctor, chemist, physicist, biologist or engineer. To treat a witchdoctor as an equal of such experts would plainly defeat the intention behind the enactment of the Witchcraft Ordinance-to discourage, if not to bring to an end, the belief in potency of witchcraft. Be that as it may, it was wrong in law for the primary court magistrate to have delegated the task of deciding the truthfulness or otherwise of the appellant's witchcraft accusation against the respondent to a witchdoctor. Unless authorised by law to do so, a judicial tribunal cannot delegate its task. As a general rule, a judicial function, unlike an administrative function, can be performed only by the tribunal which is entrusted with the task of exercising the function. It would be disastrous, in my view, if the law were different...In my settled view the irregularities were so grave as to vitiate the proceedings before the primary court. It cannot be said, in my judgment, that the case was tried, leave alone properly tried, by the primary court. What, then, is to be done now? I think the case should be remitted to the primary court for a retrial. Accordingly, I allow the appeal, set aside decisions of both courts below and order that the case be tried de novo by another magistrate of competent jurisdiction sitting with a new set of assessors."

The observations highlighted in the precedents cited above tell all about the apparent negative attitude of higher courts of this land against beliefs on witchcraft by members of the society and some judicial officers in the lower courts.

Nonetheless, there is also an interesting observation by this court (Kimicha J. as he then was) in the case of **Thomas Bangili and Samike Maduhu v. R [1969] HCD n.246** (decided on 28/6/69) which seemingly

speaks differently from the previously cited precedents. In that case, four accused persons had been convicted of three offences under the Witchcraft Ordinance (Cap. 18). They were traditional doctors who diagnosed illnesses by use of spirits and a "talking gourd." They also dispensed medicines and other objects to cure those illnesses, or to counteract the harmful effects of witchcraft. In deciding the appeal this court remarked thus, and I quote the observations extensively for the sake of an adequate understanding of the intended comments by the Court:

> "Witchcraft has existed in our society from time immemorial and its practice has all the time been unpopular. Witches have been subjected to public executions, tortures, had their property confiscated by the tribe and were ostracized and treated with contempt. The Legislature was therefore right in crystallising this natural abhorrence to witchcraft in to a punitive Ordinance. **But at the same time it is common knowledge that our society has also from time immemorial enjoyed the experience and honest services of native doctors who dealt with all the different diseases known to our society from ordinary fevers to leprosy, lunacy, epilepsy and sterility. We have our general practitioners and specialists.** These attribute the cause of diseases either to natural causes or to witchcraft and they are expected to cure their patients accordingly. As is with our medical practitioners' they have to diagnose their patients before giving them treatment. The medical practitioner does this by examining the patient and by listening to his explanation of his ailment. Very often X-ray examinations and complicated pathological tests are necessary before deciding on a course of treatment. **Our native doctors do not have X-rays and pathological laboratories and being aware of this limitation they have overcome this handicap by using all sorts of devices loosely called fortune telling or possession of what is known in sophisticated societies "as sixth sense" or a spirit in native parlance. Some of these physicians are famed for their accurate diagnosis and people travel for many miles to consult them. I must hasten to add that the word "spirit" is also commonly used to mean invisible beings that are capable of being under the control of some persons, invariably witches, and they can be used by their masters in causing death or injury to persons and property. I think these are the spirits which have been covered by the provisions of the Ordinance. The Legislature enacted the**

Witchcraft Ordinance because it was aware of its existence and of its harmful effect on society but it is my view that the Ordinance was not intended against those who either diagnosed or cured witchcraft spells. It is also my view that diagnosing or curing witchcraft spells is not synonymous with practicing witchcraft...." (Bold emphasis is provided).

Authors of different legal and non-legal works have also made some alerting comments on witchcraft practices. **Onesmus K. Mutungi**, for example, in his book of "The Legal Aspects of Witchcraft in East Africa: With Particular Reference to Kenya" East African Literature Bureau, Nairobi, 1977, discusses on Witchcraft Laws in East Africa including our own Cap. 18. The author highlights challenges against the law by remarking (at page 33) that, it is not enough to have "good laws" (whatever that may mean) without the corresponding judicial officials who are committed to applying those laws to the practical problems of a give society. He adds that, judicial officials who are worth their salt should not apply immutable legal rules to practical day-to-day social problems, especially when the local conditions call for a different approach, if not a modification of the written law. At page 60-61, **Mutungi** also expresses a view that, in both old African customs and the current statutory laws on witchcraft, there is a danger (with slight differences) in establishing that a person punished is actually a witch though the sentences are severe.

In my opinion therefore, **Mutungi** (supra) basically alerts judicial officers to apply the law on witchcraft carefully to avoid the dangers it may cause to a given society.

On his part, **Lawrence E. Y. Mbogoni**, in his book titled "Human Sacrifice and the Supernatural in African History," Mkuki na Nyota

(Publishers), Dar es Salaam, 2013 also comments on some aspects of witchcraft. At page 238 he attempted to answer a question of "*what puts witchcraft into people's minds.*" He quoted the views of Dr. Patrick Ndeka, (a Kenyan-born psychiatrist trained in United Kingdom and who treated witchcraft cases and lectured occasionally on the topic at the University of Nairobi). Such views were given by Dr. Ndeka in an interview in 2003-2004. According to **Mbogoni,** it was Dr. Ndeka's views that, and I reproduce the pertinent passage for ease of reference:

> "...witchcraft is a reaction. It is the by-product of a tragic event, the secondary effect of some misfortune, like a ripple from a pebble thrown in to a pond. It's a reaction that triggers other things, other activities...it is a cycle. A vicious cycle. A 'cycle-cycle'...it's a process and a practice. It starts with a tragic event, **which leads to the suspicion of witchcraft, then to a search for someone to blame.**" (Bold emphasis is provided).

In my considered view, Dr. Ndeka's view tried to suggest that, witchcraft is essentially based on mere suspicion which ends up by searching for a person to blame, though such person may not actually, deserve the blameworthiness. If this view is true, then beliefs in witchcraft may cause injustice, hence a need for research on the propriety of the law on witchcraft.

Owing to the above reasons, I am of the view that, all the above highlighted factors, contribute to the alert that, something need to be done in relation to Cap. 18 as observed by the learned SSA. This view is also supported by **Mutungi** (supra at page 100) in discussion the "Future of Witchcraft." He remarks thus, and I reproduce the comments for a painless perusal;

> "Whether or not witchcraft practices and the fear thereof have any future is a debatable subject depending upon a number of indeterminate

variables. To some, witchcraft beliefs and fears originate from lack of education and are a reflection of pre-scientific society. The survey and empirical evidence, however, show that education of whatever description, can never be a panacea for witchcraft beliefs and fears. Africans with fairly good formal education, even up to university level, have been exploited by the witchcraft phenomena; football matches of international status have either been abandoned or temporarily postponed for fear of witchcraft."

Mutungi (supra, at page 103-104) further challenged the East Africa statutes on witchcraft and court decisions for various bottlenecks. He used the following words which I also replicate for a better survey;

"That witchcraft is a complicated phenomenon that makes little sense if divorced from the context of the culture and background of those that are haunted by the fears therein, is conceded. But the complications seem to be further enhanced by the contradictory stance taken by both the legislation and court decisions on the matter. This cannot be unduly stressed. What logic is there in any good law to stipulate (expressly or tacitly) that one must stand idle and permit one's assailant to harm or even kill one without lifting a finger in self-defence? This is the effect of the relevant East Africa statutes which, while acknowledging that witchcraft, like a pistol, can kill, prohibit its use as a weapon in self-defence. Which good law denies the existence of the very subject matter that it is supposed to regulate, but at the same time concedes that notwithstanding its non-existence, the phenomenon can kill? The cloud of doubt cast upon the entire field of witchcraft by these statutory provisions is long overdue for root-and-branch reform. A law that fails to take into account the social ethos of the community it is supposed to guide, risks being ignored and hence, remaining a dead letter, incapable of inducing change. It is, of course, arguable that law should be progressive and guide society to higher aspirations. But such an argument has its limits. If law maintains a pace too far ahead of the community's developmental or social tenets then the people become servants of the law rather than the law serving societal needs and dictates. The problem seems to lie in the imposition of a law, originally designed for a different culture, upon what have been labelled as "pre-scientific" societies. And independent African governments do not seem to have had either the time, or the necessary concern, to review the field and harmonize the law with the social realities. As observed elsewhere, the culture and beliefs of Africa's indigenous peoples should be accorded the necessary legal recognition and respect (by at least independent Africa) until such time as the

> majority of the ordinary, native Africans, living in the rural as well as the urban areas, grow out of their beliefs and fears in witchcraft. Western civilization did not stop executing witches until the literate and major portion of its members stopped believing in the witches' capacity to harm..."

My views are that, according to the quotations just displayed above, **Mutungi,** *inter alia,* wonders as to why the laws in East Africa (including ours) recognise the existence of witchcraft and guide its practices, but yet the same law and courts pretend not to recognise when it comes to real life, especially in relation to the aspect of self-defence discussed earlier. The author also underlines the need for a debate on whether the law on witchcraft should be changed. He further underlines the necessity for the law to cope with development of the society it guides. These views by the author therefore, also cements the need for the research envisaged previously.

Despite all the above factors which suggest that the research mentioned above is significant, my concerted opinion is that, since Cap. 18 is still in force, the proper procedure set by the law must be observed in dispensing criminal justice under that law. The trial court in the matter at hand therefore, had the duty to observe it, before it convicted it reached into the impugned judgment.

Having made the above observations on the additional submissions by the learned SSA I revert back to the primary purpose of the present revision.

Now, owing to the reason I adduced in answering the four court issues and the sub-issue which arose in the course of doing so, and in

exercise of the revisional powers of this court under sections 372(1) and 373 of the CPA, I make the following orders: I accordingly nullify the proceedings of the trial court regarding the original case. I quash them together with the conviction. Its impugned judgement and the resultant sentence of 7 years imprisonment against the convict are also set aside. I will not order for any retrial of the convict. It is further ordered that, the convict, **John Severini Chale** shall be released forthwith from the prison, unless held for any other lawful cause. It is so ordered.

JHK UTAMWA
JUDGE
12/09/2022

13/09/2022.

CORAM; JHK. Utamwa, J.

Applicant: present in person (By virtual court while in Ludewa District court).

Respondent; Mr. B. Namkambe, SSA (present physically).

BC; Gloria, M.

Court; judgment delivered in the presence of the convict, John Severini Chale (by virtual court while in Ludewa District Court) and Mr. Bacilius Namkambe, learned SSA for the respondent, this 13th September, 2022.

JHK UTAMWA
JUDGE
13/09/2022.