IN THE COURT OF APPEAL

AT NAIROBI

(Coram: A. M. AKIWUMI P. K. TUNOI A. B. SHAH

CRIMINAL APPEAL 47 OF 1995

BETWEEN

ISAAC OMAMBIA …….....……APPELLANT

AND

REPUBLIC…….....……RESPONDENT

(Appeal from a judgment of the High Court of Kenya at Nairobi (Justice v. v. Patel) dated 10th February, 1995

IN

H. C. CR. A. NO. 718 OF 1994)

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JUDGMENT OF THE COURT

The appeal before us is a second appeal from the decision of the High Court in its appellate jurisdiction, dismissing the appeal to it by the appellant against his conviction by the learned resident magistrate on the charge of indecent assault. The particulars of the charge which in accordance with the provisions of S.137 (a) (iii) of the Criminal Procedure code, should be set out in ordinary language, were that on the day in question, the appellant unlawfully and indecently assaulted the complainant "by touching her private parts". At the trial that was adduced to establish the charge was, and which was accepted by the learned magistrate, not that the appellant had touched the private parts of the complainant as alleged, but rather, what had not been alleged in the particulars of the charge, namely, that the appellant had not only pushed his hand under the blouse of the complainant and touched her bottom, but has also pressed his exposed penis between her buttocks.

It is interesting to note that when the complainant made her report to the police she had exaggerated matters as her own evidence would later show, and had alleged that the appellant had attempted to rape her. The police, however, had after carrying out their investigations into the complaint, charged the appellant not with attempted rape but with the lesser offence of indecent assault with the particulars of the charge as already mentioned, which it can safely be assumed, must have been based on what the complainant had told them. However, what was testified to at the trial, and which was accepted by the learned magistrate, was, though amounting to the offence of indecent assault, quite different as already shown, in its particulars, from those contained in the charge. These particulars that the appellant touched the private parts of the complainant mean and can mean nothing else, than that the appellant touched with

his hand the "private parts" of the complainant which, to give the well known and ordinary meaning of that phrase, means the genitalia of the complainant and to no other part of her body, or as defined in the Shorter Oxford English Dictionary, the "pudenda" or "external genital organs".

Inspite of the glaring and substantial inconsistencies between the particulars alleged and those established, and without the charge having been amended to substitute the particulars alleged therein, with what had been established in evidence, the learned magistrate proceeded on 17th June, 1995, to convict the appellant as charged which included the particulars of the offence as alleged in the charge, but which had not been alluded to all, in the evidence.

In this regard, it is pertinent to draw attention to the following provisions of S. 134 of the Criminal Procedure Code which makes particulars of a charge an integral part of the charge:

> "Every charge or information shall contain, and shall be sufficient if it 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".

The appellant appealed against his conviction to the High Court on the general ground that the conviction was against the weight of evidence. However, at the hearing of the appeal, the learned judge of the High Court permitted a further ground, this time, one on a point of law, to be argued by counsel for the appellant namely, that the evidence adduced at the trial which the learned magistrate accepted, did not establish the particulars of the charge against the appellant. But before going any further, certain telltale circumstances must be noted. During the hearing of the appeal, the learned judge received only lukewarm assistance from counsel appearing for the Republic. After submissions had been made by counsel for the appellant, Mrs Oduor, State Counsel, who was then appearing for the Republic, informed the learned judge that she did not support the conviction on the ground that the learned magistrate had not given any reason for disregarding the evidence of the defence which was a denial of the evidence given by the prosecution. The next day, she told the learned judge that she had upon reflection, changed her mind and wished to make submissions in support of the conviction. The hearing was then adjourned until 21st December, 1994, but on that date, Mrs Oduor was replaced by her senior colleague, Mr Metho, Senior Principal State Counsel. After two subsequent adjournments, the appeal was fixed for hearing on 10th February, 1995, and on that date, the learned judge was once again, informed by Mr Metho that a yet more senior colleague in the person of Mr Etyang, the Assistant Deputy Public prosecutor himself, would appear and argue the appeal for the Republic. Sad to say, Mr Etyang did not appear and at 3 p.m, the learned judge could wait no longer and proceeded with the hearing of the appeal without the benefit of Mr Etyang's contribution. We have taken the trouble to set down these maters which are culled from the record of appeal before us, and which to us, seem to indicate an apparent lack of conviction by the Republic in the decision of the learned magistrate. This attitude was also to be shown in the hearing of the present appeal.

Having analysed the evidence that was presented to the learned magistrate, the learned judge came to the same conclusions on the facts as the learned magistrate had reached, but as this is a second appeal to us, we do not have the jurisdiction to deal with that aspect of the matter. With respect to the point of law raised that the charge had not been proved against the appellant since it s particulars were not established by the evidence adduced at the trial, the learned judge contented himself with the following sweeping and fallacious sentences:

> "it is surprising that such a submission is ever made. The complainant's evidence indeed is full of reference to her private parts.
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> It would have been wrong had the court below acquitted the appellant on the face of the overwhelming evidence against him. The conviction is upheld".

What is surprising is that the learned judge did not seem to know what the phrase "private parts" means. What he seems to be saying was that the particulars alleged in the charge were the same as that given in

evidence at the trial because in that evidence, the complainant had said that it was her "private parts" that had been touched with the appellant's penis. With respect, this was not at all so. Nowhere did the complainant refer to her private parts as such, in her evidence. She talked about her buttocks and not her private parts. Secondly, in view of the clear meaning of "private parts" as already shown, the learned judge misdirected himself in law in holding the buttocks of the complainant, the only parts of her body that she had mentioned in her evidence at the trial, as her "private parts" and thereby, concluding that what had been set out as the particulars of the charge had been established. We cannot, having regard to the summary and confident manner in which the learned judge dismissed this point of law, attribute this clear error on his part, solely to his lack of understanding of the phrase "private parts". He had then, naturally, not found it necessary to consider the legal issue whether the charge of which particulars are an integral part, had been proved as required by law, where the particulars contained therein, are different from those established at the trial.

This legal issue is the main ground on which the appellant has now appealed to this court against the dismissal of his appeal by the learned judge of the High Court. The same lukewarm attitude shown by the Republic during the hearing of the appeal before the learned judge of the High Court, was also exhibited before us. Though conceding that nothing could be done about it, counsel for the respondent, none the less, expressed his misgivings about the findings of fact by the subordinate and superior courts. On the legal issue raised on behalf of the appellant, counsel for the Republic, we think, because of his lack of faith in the evidence that was accepted by the subordinate and superior courts, merely submitted without reference to any specific legal text or authority, that the appeal should be dismissed because there would be no miscarriage of justice done to the appellant where, as in the present appeal, particulars other than those contained in the charge, but amounting to the offence charged, have been established .

We have therefore had to consider this legal issue without much assistance from both counsel appearing before us. In the case of State of Uganda v Wagara (1964) E. A. 366, at 368, Undo Udoma, Chief Justice of Uganda, commenting on the fact that the evidence led at the trial disclosed particulars other than those alleged in the charge stated:

> "In the absence of any amendment, the prosecution is bound by the particulars in the charge."

In the case of Furo v Uganda 1967 E. A. 632, the same Chief Justice when dealing with the issue whether the trial magistrate could rely on the facts established at the trial which were different from the particulars alleged in the charge, observed with conviction as follows:

"The above passage of the learned trial magistrate's judgment is a misdirection in law, because that was not the case put before him by the prosecution. The magistrate was not entitled to make a new case other than the case put before him by the prosecution; because an accused person is entitled tot be told in the charge what case he has to meet.

Had that been the case of the prosecution then their duty was to have said so in the particulars of the charge …..on the other hand, the magistrate having heard the evidence and noted the drift in the case, two courses were open to him. In the first place it was competent for him to have caused the charge to be amended in that respect in the exercise of his powers under S. 213 of the Criminal Procedure Code".

The corresponding provisions of s. 213 of the Uganda Criminal Procedure Code is the same as s. 214 of our Criminal Procedure Code. The material part of this section is subsection (1) which is as follows:

> "214. (1) Where, at any stage of trial before the close of the case for the prosecution, it appears to the court that the charge is defective, either in substance or in form, 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: provided that -
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> (i) Where a charge is so altered, the court shall thereupon call upon the accused person to plead to the altered charge;

(ii) Where a charge is altered under this subsection the 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 the last-mentioned event, the prosecution shall have the right to re-examine the witness on matters arising out of further cross-examination.

(2) Variance between the charge and the evidence adduced in support of it with respect to the time at which the alleged offence was committed is not material and the charge need not be amended for the variance if it is proved that the proceedings were in fact instituted within the time (if any) limited by law for the institution thereof.

(3) Where an alteration of a charge is made under sub-section and there is a variance between the charge and the evidence as described in subsection (2), the court shall, if it is of the opinion that the accused has been thereby misled or deceived, adjourn the trial for such period as may be reasonably necessary."

Since, as it is obviously clear, and there is no evidence to show that the learned magistrate was of a different view, that the phrase "private parts" does not mean those parts of the body of the complainant that the learned magistrate found had been indecently assaulted by the appellant, the learned magistrate misdirected herself in law in finding the appellant guilty of indecent assault on the evidence adduced before her which was different from the facts alleged in the charge. The attempt by the learned judge of the High Court to save the situation by giving his erroneous meaning to the phrase "private parts" only makes matters worse.

But we must now consider whether, notwithstanding the fact that the particulars established at the trial were different from those contained in the charge but which none the less, amounted to the offence charged, the conviction of the appellant should be upheld as no substantial miscarriage of justice has occurred. In this regard, various matters should be taken into account. Firstly, the learned magistrate failed to amend the charge which she would have done unless she did not know the meaning of the phrase "private parts". The prosecution too, if it did not wish to be bound by the particulars in the charge, should have sought an appropriate amendment to the charge. In the absence of any amendment, the prosecution was bound by the particulars of the charge. Indeed, according to the elaborate provisions of s. 214 of the Criminal Procedure Code, the trial magistrate is not only empowered to make the necessary amendments, but also in such a case, to grant and adjournment for the benefit of the accused person. With this background, we may now consider s. 382 of the Criminal Procedure Code which is in the following terms-

"382. Subject to the provisions hereinbefore contained , no finding, sentence or order passed by a court of competent jurisdiction shall be reversed or altered on appeal or revision on account of an error, omission or irregularity in the complaint, summons, warrant, charge, proclamation, order, judgment or other proceedings before or during the trial or in any inquiry or other proceedings under this Code, unless the error, omission or irregularity has occasioned a failure of justice.

Provided that in determinating whether an error, omission or irregularity has occasioned a failure of justice the court shall have regard to the question whether the objection could and should have been raised at an earlier stage in the proceedings."

In our view, the objection to the charge could have been raised at the trial. The discrepancy was so glaring that the trial magistrate herself, if not the prosecution, should have raised it and taken action under s.214 of the Criminal Procedure Code and the failure of the appellant to do so should in the peculiar circumstances of the case, not be visited upon him. It will be remembered that the first exaggerated report that the complainant made to the police was that the appellant had attempted to rape her. The police on their part, only charged the appellant with the lesser offence of indecent assault namely, by "touching", which without any particularization, can only be by hand, the "private parts" of the complainant, and which facts they must have obtained from the complainant. At the trial itself, evidence of different particulars both in direction and means were given.

In the case of Mwasya v Republic (1967) E. A. 345, the effect of s. 382 of our Criminal Procedure Code was considered and the High Court consisting of Rudd and Trevelyan JJ, held that even though the charge was defective, it was not of such an irregularity or error a shad occasioned a failure of justice under s. 382. In that case, having come to the conclusion that upon the facts, the appellant therein, was guilty of an offence under s. 367 (e) of the Penal Code with respect to counterfeit currency notes, nevertheless, felt:

'There is , however, a difficulty in upholding the conviction of the appellant in respect of any of the notes in as much as the particulars of the charge did not properly set out the particulars of an offence under s. 367 (e) …The charge and particulars reflect a hotchpotch of paras. (a) and (e) of the section and it can be said that the charge and particulars might have been valid , if far from artistic, as a charge under s. 367 (a) if that paragraph had been referred to. Yet the facts constituted an offence under para. (e) rather than para. (a). the conviction, however, was under para. (e). A defective charge, however, does not necessarily render a conviction unsustainable … The defect is not fatal to the conviction if the case falls within the provisions of s. 382 of the Criminal Procedure Code….."

The judges then went on to consider the proviso to s. 382 and pointed out that no objection to the charge had been made by the appellant who was unrepresented in the proceedings, before the matter came before them, but whilst this excused to a large extent,his failure to object to the charges which if he had done, would have led to a curative amendment of the charge:

> "in point of fact it was clear from an early stage that the notes in question fall within the paragraph. This was never a contested issue during the trial and on the facts and circumstances of the case we find it impossible to hold that any failure of justice occurred."

An important factor which made the judges hold that there had been no failure in the Mwasya case (supra) is that a crucial issue of fact was "never a contested issue during the trial". In the present appeal the issues of facts were hotly contested not only by way of cross examination of the complainant and her witnesses but also by way of evidence given by the appellant and his witnesses one of whom was a Preacher. In the glaring and peculiar circumstances of the present appeal, it was also the duty of the learned magistrate who could, and who should, have raised the objection to the charge and her failure to do so, has in the context of the particular facts and circumstances of the present appeal, occasioned a failure justice. A further point worth noting is that in the Mwasya case (supra), the defect in the particulars related to the technical matter of a wrong reference to the paragraph of a section of the Penal Code. It was not like in the present appeal, where there was a serious discrepancy on substantial matters of facts between what was contained in the charge and what was led in the evidence at the trial.

We have considered s. 361 (5) of the Criminal Procedure Code which provides that this court may:

"……notwithstanding that it may be of the opinion that the point raised in the appeal might be decided in favour of the appellant, dismiss the appeal if it considers that no substantial miscarriage of justice has in fact occurred."

And have come to the conclusion that in view of glaring misdirections that we have already alluded to, and the fact that the wrong and summary decision of the learned judge of the High Court in dismissing the point of law raised before him appear to have been designed merely to vindicate the conviction of the learned magistrate, we ourselves, would also be seen in the peculiar circumstances of this appeal, and condoning a substantial miscarriage of justice if we dismiss the appeal. We will not do so.

We accordingly allow the appeal of the appellant, quash the conviction and set aside the sentence imposed on him, and order that the fine imposed on the appellant. If paid, be refunded to him.

Dated and delivered at Nairobi this 11th day of August, 1995.

A. M. AKIWUMI

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JUDGE OF APPEAL

P. K. TUNOI

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JUDGE OF APPEAL

A. B. SHAH

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JUDGE OF APPEAL